The role of government agents in ensuring effective human rights protection

Seminar organised under the Slovak chairmanship
of the Committee of Ministers of the Council of Europe

Bratislava, 3-4 April 2008

COUNCIL OF EUROPE CONSEIL DE L'EUROPE

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Foreword

The Council of Europe Seminar on the role of government agents in ensuring effective human rights protection took place in Bratislava on 3 and 4 April 2008 during the Slovak chairmanship of the Council of Europe's Committee of Ministers.

The "respect for and promotion of core values: human rights, rule of law and democracy" arose as one of the main priorities of this chairmanship, in the line with the priorities identified during the Council of Europe's Third Summit of Heads of State and Government, held in Warsaw in 2005.

Organised by the Legal and Human Rights Capacity Building Division of the Council of Europe, this Seminar gathered representatives from Government agent offices from Council of Europe member states. It was chaired by Mr Emil Kuchár, Ambassador of the Slovak Republic to the Council of Europe.

Specific presentations from outstanding government agents were made on the four specific themes of this seminar:

- The role of the government agent in representing the member state before the European Court of Human Rights.
- The responsibility of the government agent in ensuring compatibility of legislation and practice with the standards of the European Convention on Human Rights.
- The contribution of the government agent in the execution of Court judgments.
- The government agent's role in mainstreaming the Court's requirements and case-law into the daily practice of all state bodies, notably through publication and dissemination.

The proceedings of this Seminar were co-ordinated by Mr Vincent Coussirat-Coustère, Professor of Public Law in the University of Lille II (France). They consist of a compilation of all the speeches held during the Seminar, including a summary of the issues and proposals presented during the discussions. They also contain the conclusions of the Seminar. ★

Opening session

Mr Jean-Paul Costa

President of the European Court of Human Rights

Minister,
Deputy Secretary General of the Council of Europe,
Ladies and gentlemen,

Firstly, I should like to express my heartfelt thanks to the Slovakian authorities for their warm welcome, which lives up to their reputation for hospitality.

I am delighted to be here in Bratislava, particularly as this is my first visit to your beautiful country. My discovery of Slovakia will not be confined to the capital, however, for I shall be travelling to Kosice later today at the Constitutional Court's invitation. Last year our Court hosted a sizeable delegation from the Constitutional Court of Slovakia, with which we have already developed a close relationship; we shall build on it further over the next two days. Owing to these meetings with the Constitutional Court, I shall unfortunately be unable to be present for the whole of the seminar, for which I apologise.

Slovakia has been chairing the Committee of Ministers of the Council of Europe for the last five months. This seminar will be one of the highlights of its chairmanship. In this connection, allow me to congratulate the Directorate General of Human Rights and Legal Affairs of the Council of Europe and the Government Agent of Slovakia, Ms Marica Pirošíková, for having the excellent idea of organising it.

I had the privilege of hosting the Slovakian Prime Minister, Mr Robert Fico, at the European Court of Human Rights on 21 January; his visit reflected his commitment to the human rights protection machinery established in Strasbourg.

The priorities identified by the Slovakian chairmanship from the outset attest to Slovakia's desire to make human rights protection a central focus. As President of the Court, which is the keystone of the European protection system, I am delighted.

The Court places great importance on the role of government agents in ensuring effective human rights protection. As you all you know, we hold meetings with government agents every couple of years; I believe these meetings, which you all attend, have proven very useful. They are organised in a spirit of respect for two fundamental principles: the Court's independence, and its impartiality, given that the bulk of the disputes it has to settle are between individual applicants and states, which are themselves represented by their agents.

Such meetings are important. They afford the Court an opportunity to explain some of the problems it may face on a one-off or ongoing basis, and allow government representatives, who defend their state's point of view within the procedural framework established by the European Convention to voice their concerns and mention any obstacles they may encounter in their day-to-day work.

I shall not go back in detail over the comments I made at the meeting for government agents on 5 November, which many of you attended. In any event, a number of changes have been effected at your request since that meeting, particularly regarding the time limits now set for submitting your pleadings. Likewise, the Court's Internet site has been improved in the light of the observations made to us at the last meeting of agents to the Court. This clearly shows that we take such meetings seriously.

I would like to say that the Court is well aware of the lead role played by government agents. We understand the difficulties you may face. Needless to say, the growing number of applications has a direct impact on your workload, since it increases the amount of communication with defendant governments. This means you have to respond to more applications and answer more questions from the Court, even though you may not always have enough staff to keep up with the level of growth. With the assistance of the Department for the Execution of Judgments, you also have to tell the Committee of Ministers what has been, or is being, done to execute the Court's judgments, which are binding under Article 46 of the Convention.

Today I should like to clarify a number of issues that, in my view, are becoming increasingly significant:

- Firstly, the considerable growth in the number of applications for interim measures the Court has to deal with, which involve you in turn;
- Secondly, the issue of friendly settlements, which are always to be encouraged;
- Lastly, your more general role in consolidating the Court's authority, *inter alia* through the execution of judgments and legislative amendments.

Interim measures

Firstly, the number of interim measures applications submitted under Rule 39 of the Rules of Court has grown considerably over the last two years. In 2006, the Court in its entirety dealt with 444 applications. This figure rose to 867 in 2007, representing an increase of almost 100% (95.27%). The figures speak for themselves. For your information, the four countries most affected at present are the United Kingdom, France, the Netherlands and Sweden. Moreover, the figures do not include applications rejected because they fall outside the scope of Rule 39; I acknowledge that some applicants fail to interpret Rule 39 correctly, either out of ignorance or sometimes deliberately.

The Court now receives such applications on a daily basis. Most, but not all, of these cases concern foreigners or asylum seekers who maintain that they would be subjected to torture or inhuman or degrading treatment if they were sent back to their countries. The Court must therefore take a decision very quickly, for the time-limits are short and in some cases the impact of sending an asylum seeker back could be very serious, if not irreversible.

What is causing this very rapid increase? At least to some extent, it no doubt stems from the 2005 decision in the case of *Mamatkulov and Askarov v. Turkey*[1]. This Grand Chamber judgment, in which, for the first time, the Court found against a state for failing to comply with a measure indicated under Rule 39 of the Rules of Court, undoubtedly gave the provision added effect. Moreover, it was in line with a shift in international case-law generally, including that of the International Court of Justice.

Irrespective of the causes, one thing is certain: as government agents, you serve as a vital interface between the Court and the competent national departments when it comes to ensuring that the interim measure requested is applied.

I know that arrangements have been put in place, within both the Court Registry and your own departments, to ensure the smooth and, above all, speedy communication of measures requested by the Court; thank you for this. Efficient co-operation is essential in dealing with such requests, which are often urgent.

In this type of case, day-to-day communication between the Registry and the government agent in question must be as flexible as possible, for speed is of the essence. I know that your role as go-bet weens in such cases is not a straightforward one, and that you often have the task of making administrative departments other than your own understand that the expulsion of a given individual is to be avoided. You succeed in doing so most of the time, which is of the utmost importance. I am aware, however, that such requests also overload your own depart-

1. *Mamatkulov and Askarov v. Turkey*, [GC], nos. 46827/99 and 46951/99, 4 February 2005.

ments. Incidentally, some states have recently requested an in-depth review of the procedure, an idea of which I am wholly in favour.

Friendly settlements

The second aspect I wish to emphasise is the significant role you play in facilitating the conclusion of friendly settlements.

Such settlements can take place at any stage in proceedings. The Court endeavours to promote them by making itself available to the parties, in accordance with the text of the Convention, but is aware of the crucial role you play in this connection. It falls to you to persuade your national authorities that a friendly settlement would be the most fitting solution in a given case; no doubt this is not always easy. You should realise that you can always count on the Court's support with a view to reaching such settlements. Moreover, they are encouraged by the Group of Wise Persons.

Execution of judgments and legislative amendments

The third and last aspect of your work I wish to emphasise today is that it does not cease the day the judgment is given.

During the enforcement phase, you actively facilitate the decision's implementation at national level.

In the course of my official visits, I have observed that, once a judgment has been given, particularly where general measures have to be adopted, it is the government agent who endeavours either to alert national courts to the need to modify their case-law so as to make it consistent with ours, or to persuade the legislature to amend a law deemed incompatible with the European Convention on Human Rights.

Your role then takes on its full significance; while in Strasbourg you are regarded solely as lawyers for the governments, in your own countries you are sometimes seen as lawyers for the Court. You thereby demonstrate once again that, as I said in November, you are officers – in the noble sense – of the law, and of the European justice system, just like the lawyers and non-governmental organisations whose task it is to defend or assist applicants.

In addition to the cases you defend, you have to study our Court's judgments closely with a view to proposing any necessary amendments to national legislation if it turns out that, in Strasbourg, similar texts have been deemed incompatible with the Convention and have given rise to a judgment against a country other than your own.

As you know, the authority of our Court's judgments is limited, being confined to the case at issue; they do not apply erga omnes, since only the state in question is bound by the decision given, at least in legal terms.

This means, for example, that once the Court has given a judgment against a state and the latter has then modified its system, legislation amended in the light of the Court's case-law will coexist within the states parties to the Convention with other, similar legislation that has yet to be amended, which will continue to be applied in accordance with a system deemed incompatible with the Convention. This situation is fortunately becoming less common, of course, with many states realising that it is advisable to anticipate a probable judgment against them by our Court.

Incidentally, it is often thanks to your influence that things "get back to normal". In enabling your states to avoid possible judgments against them by Strasbourg, you simultaneously boost the authority of our judgments. I would like to thank you for playing this role, on which I place particular importance since it also reduces the number of applications and thus frees up the Court.

The Court cannot overlook the fact that the network of government agents provides it with regular partners who play a further role in addition to being parties to the proceedings. Accordingly, for several months we have been organising study visits to the Court Registry to give you a chance to get to know us, so that we can work together more effectively. As well as enhancing your understanding of our requirements, these visits afford us an opportunity to put forward our point of view. I know they are greatly appreciated by both yourselves and Registry staff.

Ladies and gentlemen, it is true that the Court must not favour one party over another, and its case-law has established principles designed to protect applicants' rights, particularly with a view to ensuring that they are not placed under an impossible burden of proof. It must, however, develop relationships that promote the cause that has brought us all here today: effective protection of human rights in Europe, to borrow the extremely well-chosen title of this seminar.

As government agents utterly loyal to your national authorities, you will also understand our institution's judicial role and the need, for example, for equality of arms – in the procedural sense – between an applicant to the Court and the respondent state. You show virtue in this respect, since you reconcile the state's interests with the need for the rule of law. You are thereby applying the fundamental rule on which both international law and the European Convention on Human Rights are based: *Pacta sunt servanda*. It is not an easy role, but a crucial one.

Thank you very much. ★

Mr Štefan Harabin

Deputy Prime Minister and Minister for Justice of the Slovak Republic

Ladies and gentlemen,

It is an honour for me to speak to you in opening our joint seminar on the role of government agents in ensuring effective human rights protection, which is organised under Slovak chairmanship of the Committee of Ministers of the Council of Europe. Let me warmly welcome not only all the government agents of the member states of the Council of Europe but first of all the esteemed guests – Mr Jean-Paul Costa, President of the European Court of Human Rights; Ms Maud de Boer-Buquicchio, Deputy Secretary General of the Council of Europe, all participating personnel of the Secretariat of the Council of Europe, and particularly, Ambassador Emil Kuchár, Chairman of the Committee of Ministers' Deputies of the Council of Europe and Permanent Representative of the Slovak Republic at the Council of Europe, who chairs this seminar. In addition, I would first of all like to thank the Directorate General of Human Rights and Legal Affairs of the Council of Europe for its assistance and co-operation in organising this seminar, especially for its precious advice and experience.

A redress of consequences of the violation of rights stipulated in the Convention for the Protection of Human Rights and Fundamental Freedoms of 1950 is, undoubtedly, closely associated with the execution itself of judgments of this international judicial body. In this respect, it is amoral and inexcusable that a successful applicant has to wait a couple of years for the execution of a judgment. Therefore, at the domestic level, it is inevitable to ensure the timely and effective execution of judgments of the European Court of Human Rights. With the seriousness of this process grows equally the insubstitutability and significance of the role of government agents who are best familiar with a specific case, just in the part of the proceedings after the judgments of the European Court of Human Rights are brought, and the same in their execution. This event is therefore targeted to a discussion on both the role of the government agents in representing the member states of the Council of Europe before the European Court of Human Rights, and, particularly, on their contribution to the execution of Court's judgments. I am confident that this seminar will provide you with precious ideas on how to strengthen and improve the position of government agents in ensuring the harmonisation of domestic laws and practice with the standards comprised in the Convention for the Protection of Human Rights and Fundamental Freedoms. Moreover, it will bring the opportunity to become acquainted

with the experience of government agents of individual states in observing the judgments of the European Court of Human Rights, and in executing them.

First, I should like to touch the issue of ending a dispute between the parties amicably. There is no doubt that one of the material instruments for respecting human rights and fundamental freedoms is the option of a redress for torts. This closely relates to both the issue of a subsequent redress for infringements determined by the European Court of Human Rights in scope of the execution of judgments, and the opportunity to reach a friendly settlement with the applicant where state itself arrives at the conclusion that the application is not clearly ill-founded, and there are relevant reasons to proceed in this way. I appreciate this possibility since I believe that should the rights of a person were violated indeed it is a question of legal and democratic maturity of the state to make efforts to resolve this situation as soon as possible so that applicant need not wait a number of years for judgment being pronounced in his favour, and consequently for the execution of such a judgment. The Slovak Republic has chosen a procedure whereby a friendly settlement with the applicant on its behalf is made by the government agent with the approval of the Minister of Justice. This means that the agent asks the Minister of Justice for his approval of such a procedure before notifying the European Court of Human Rights of their will and readiness to resolve a specific case by a friendly settlement. The agent also asks the Minister of Justice for his approval of specific conditions of a friendly settlement. I come from the conviction that it is neither just nor fair to dispute against the applicant whose rights were clearly violated and, therefore, I am inclined towards this solution especially in the cases where the violation of an applicant's rights has already been determined by some of domestic bodies, in particular, the Constitutional Court, and where the case does not raise any substantial issues which the European Court of Human Rights should respond and thus give guidance on how to resolve them on the domestic level.

This is the reason why the Slovak Republic would proceed to make a friendly settlement in such cases where applicants allege the violation of the right to a fair hearing within a reasonable time after a violation of their right has previously been determined by the Constitutional Court, which granted them just satisfaction the amount of which is, from the aspect of the European Court of Human Rights' case-law, clearly unreasonably low. These are, in my opinion, the cases expressly suitable for making a friendly settlement. An advantage of such a procedure is, *inter alia*, the possibility of reducing the applicant's costs and expenses in the proceedings, mainly the cost of legal representation and translation of the observations presented in the proceedings into one of the official languages of the Council of Europe that should be reimbursed by the Slovak Republic by virtue of legal costs in the event of detrimental judgment. The Slovak Republic would opt for another procedure only if conditions of the friendly settlement, as stipulated in the decla-

ration proposed by the European Court of Human Rights, were expressly unacceptable to it; for instance, if the proposed amount seemed to be extremely high with regard to the circumstances of the case. If the applicant did not agree with the proposed friendly settlement then the Slovak Republic would proceed to the newly established opportunity to end the dispute based on the unilateral declaration by the government whereby the latter recognises the violation of applicant's rights and undertakes to pay the applicant a sum of just satisfaction. As a result of the said procedure, there has recently been an increase in the number of cases where the European Court of Human Rights has acknowledged, by its decision, a friendly settlement between the applicants and the government, after having made sure that the friendly settlement achieved was based on the respect for human rights as defined in the Convention for Protection of Human Rights and Fundamental Freedoms and its Protocols, and has decided on the striking out of applications from its case list of. In 2007, 24 cases were so ended in respect of the Slovak Republic, compared to 4 cases in 2006. Besides, last year, additional 9 cases were ended based on the unilateral declaration of the government. Also in some of cases where the European Court of Human Rights has delivered a judgment detrimental to the state concerned, the possibility of making a friendly settlement in the matter of just satisfaction remains still open provided that the European Court of Human Rights has not determined on it yet and adjourned it. In relation to the Slovak Republic, however, such cases are not numerous.

As we all know, execution of judgments of the European Court of Human Rights may not be mistaken for the payment of awarded just satisfaction only. In scope of this process, the states take general and individual measures as required by the Committee of Ministers of the Council of Europe, and which may differ in form, depending on which articles of the Convention for Protection of Human Rights and Fundamental Freedoms have been violated. The process of execution is complicated, and it should be, therefore, co-ordinated on the domestic level. In this respect, I highly appreciate the adoption of the Recommendation of March 2007 on effective domestic remedies to accelerate the execution of judgments of the European Court of Human Rights, which should be an important guidance and useful instrument for the member states of the Council of Europe. This crucial legal instrument provides the member states with the recommendation to appoint a co-ordinator for the execution of judgments on the national level. The co-ordinator would be in contact with competent domestic bodies responsible for individual phases of the execution process. The co-ordinator should be authorised to get relevant information, to work with the bodies issuing decisions in the course of the execution process and, if necessary, to perform or initiate the appropriate measures to accelerate the execution process.

In the Slovak Republic, the role of such a co-ordinator is played by the government agent before the European Court of Human Rights. The government

agent, in compliance with his/her status and within his/her terms of reference, ensures and supervises the due execution of decisions of the European Court of Human Rights. For this purpose, principally in co-operation with the Ministry of Foreign Affairs, he/she informs the Committee of Ministers of the Council of Europe of the completion of judgments and decisions of the European Court of Human Rights and of the developments in the law of human rights and freedoms in the Slovak Republic. The agent participates at the meetings of the Committee of Ministers' Deputies of the Council of Europe, which permits him/her to follow the course of the execution of judgments immediately, not only in relation to the Slovak Republic but to other countries as well, and thus to better understand the attitudes and requirements of the Committee in connection with execution of judgments, and equally to be inspired by the measures to be adopted by other countries, aimed at judgment execution. Moreover, the agent discusses directly, on bilateral level, with the personnel of the Department for the Execution of Judgments in the Secretariat General of the Council of Europe. The experience of the Slovak Republic is that by using this procedure, the biggest effectiveness in respect of execution of judgments of the European Court of Human Rights has so far been achieved.

At domestic level, the agent who is, because of his/her position, familiar in detail with the specific case and has best knowledge of the case-law of the European Court of Human Rights and the developments therein, should play a more important role in the preparation and adoption of the legislative instruments concerning human rights and fundamental freedoms. Therefore, in the Slovak Republic, it is considered as advantage for the agent to be a part of the Ministry of Justice, which is the author and presenter of a large portion of laws. Thus, the agent can, even in the process of creation of law, present his/her opinion of the wording from the point of view of observing the guarantees anchored in the Convention for Protection of Human Rights and Fundamental Freedoms and made by the case-law of the European Court of Human Rights. The target is to ensure the harmonisation of adopted laws with the above-mentioned material and binding international instruments, and not only to avoid judgments detrimental to the Slovak Republic, but first of all to provide as effective and as general adherence to the human rights and fundamental freedoms as possible.

Naturally, the wording itself of a law, no matter how much in harmony with international guarantees, is not sufficient. It must be linked to such application by the domestic bodies that would equally respect the established case-law of the European Court of Human Rights. For this purpose, it is necessary to ensure that domestic bodies of law application first know and secondly respect this case-law. In this context, the extended information on judgments of the European Court of Human Rights becomes more significant. Therefore, in scope of execution of a specific judgment in the Slovak Republic, the latter is translated into the Slovak

language and through minister's or agent's letter the judgment is distributed to the domestic bodies concerned, in particular to the courts. The domestic bodies must also, however, be acquainted with judgments against other states, since they also may, with regard to the interpretation powers of judgments of the European Court of Human Rights, affect the Slovak application practice. In the Slovak Republic, the general information on the case-law of the European Court of Human Rights is also provided through publication of judgments in the journal for judicial practice named "The Judicial Revue" (*Justičná revue*) the publisher of which is the Ministry of Justice. This journal publishes the Slovak translations of all the judgments and selected decisions against the Slovak Republic, as well as the Slovak translations of selected judgments against other states.

All the translations are made by the Ministry of Justice staff, the judgments and decisions against the Slovak Republic are performed by the Office of the Agent of the Slovak Republic before the European Court of Human Rights, and selection of the most significant decisions is made by the government agent. This journal is distributed to all the courts in the Slovak Republic and equally available to any and all of the barristers, public prosecutors and other legal professions, including the public at large. Further, to the extension of the case-law of the European Court of Human Rights, it is desirable, in my opinion, to use the knowledge and expertise of the government agent as much as possible. This is why in the Slovak Republic, the government agent not only assists in organising many training courses for judges, public prosecutors and barristers, and leads such raining courses, but based on my decision the government agent also participates at regular meetings of the presidents of district and regional courts. At the meetings, the government agent can inform on the latest case-law of the European Court of Human Rights that must be respected without delay, and he/she can also point out to some defects in the judicial practice, and he/she equally can respond immediately to the questions concerning the issues of human rights and fundamental freedoms protection.

The Slovak experience is a result of more than fifteen-year period during which the Slovak Republic has been a contracting party to the Convention for Protection of Human Rights. In many countries, however, there is a much longer experience. Even this event should contribute to an exchange of knowledge amongst the government agents of particular member states of the Council of Europe, namely in the area of representation before the European Court of Human Rights and in the area of execution of the Court's judgments. the function of the government agent before the european court of Human Rights is not easy. I therefore deeply esteem the work of all of you performing this function, as well as the work of our guests from the European Court of Human Rights, Secretariat General of the Council of Europe, and others who have considerably con-

tributed to streamlining the operations focused to ensure the observance of human rights and fundamental freedoms, the sphere I myself consider very important.

Thank you. ★

Ms Maud De Boer-Buquicchio

Deputy Secretary General of the Council of Europe

Ladies and gentlemen,

It is a great pleasure to welcome you on behalf of the Council of Europe. I should first like to congratulate and thank the Ministry of Justice of Slovakia – and you personally, Minister – for the initiative to host this seminar on the role of government agents in ensuring effective human rights protection in Bratislava during the Slovak chairmanship of the Council of Europe's Committee of Ministers.

From the outset, I should like to welcome the fact that the Slovak authorities have identified "Respect for and promotion of core values: human rights, rule of law and democracy" as one of the main priorities of the Slovak chairmanship of the Committee of Ministers. Respect for, and promotion of, the core values of the Council of Europe is not only the backdrop against which this seminar is taking place, but falls also within the priorities set out at the Council of Europe's Third Summit of the Heads of State and Government, which was held in Warsaw in 2005.

We cannot stress enough that respect for human rights starts at the national level. This is the principle of subsidiary enshrined in the European Convention on Human Rights. In the light of this subsidiary character of the supervision mechanism set up by the Convention, the Committee of Ministers has since 2000 recommended to member states to intensify their efforts to implement the European Convention on Human Rights at the domestic level and improve the national mechanisms allowing speedy execution of the judgments of the Court.

This was also the message of the Ministerial Conference in Rome in 2000, which marked the 50th anniversary of the Convention. Ministers asked to pay increased attention to the need to consolidate the European system of protection

of human rights and to guarantee the long-term effectiveness of the Convention system. One of the most visible signs of the stress put on the system is the Court's extremely heavy case-load, with some 103 000 pending applications. Admittedly, not all of them are "real" applications. But even if we reduce this number by a quarter, we still have over 75 000 applications pending. That is too many to make the system work effectively. The increase in the number of applications and the time required for many remedial actions also places the Committee of Ministers under much pressure. There is no doubt that a full application of the principle of subsidiarity is therefore key to avoid a complete paralysis of the system.

Against this background, we are gathered today to look at the role of government agents in ensuring effective human rights protection. This seminar is a continuation of the line begun with the previous meetings of government agents organised in Vilnius in 1999 and in The Hague in 2003, meetings in which member states benefited from the exchange of experience and good practices.

Government agents contribute at least in four essential respects in ensuring effective human rights protection, both at the national and the European level.

First, they are responsible for representing and defending member states before the European Court of Human Rights. This is a more complex task than it might appear at first.

Their pleadings must of course take into account the underlying principles of the Convention and the relevant case-law of the Strasbourg Court. Agents have also the responsibility to duly inform the Court about relevant domestic law and practice: in this way, they can contribute to the quality of the Court's judgments. In addition, Agents have a certain interest in ensuring that their governments intervene in cases against other countries. Finally, they can also use their discretion and persuasive authority at home to facilitate the work of the Court in Strasbourg, for example by providing consistent efforts to reach friendly settlements in clone and repetitive cases.

Should there be cases where the envisaged position of their government is clearly untenable in view of the Court's established case-law, Agents should use strong persuasive skills to convince national authorities that such cases are not to be pursued at all costs. In other words, government agents should not only be agents of the state in Strasbourg, but also agents of the Convention system in their capitals. I wish to recall that Protocol No. 14 provides for a simplified procedure for manifestly ill-founded cases, in particular repetitive cases.

The agent's unique expertise on the Convention should be recognised, where appropriate by providing an adequate standing within the national legal system. That expertise should be relied upon by other national authorities, which should act in close co-operation with the agent, be it in the framework of the Court's proceedings or the execution of the Court's judgments.

Second, because of their thorough knowledge of the case-law of the Strasbourg Court, government agents can naturally play the role of "legal watchdogs", and warn national authorities of important developments in the case-law of the Court which might have an impact on domestic legal systems. The agents are also well placed to identify trends in the applications or to detect practices which may reveal a nascent or very real structural problem, and can promote the adoption of corrective measures at an earlier stage. In some member states, the agents play an active role in verifying the compatibility of draft laws, existing laws and practice with the Convention and the case-law of the European Court of Human Rights, and in ensuring that appropriate steps are taken to bring legislation and practice in line with Convention standards. This way, the agents contribute not only to preventing human rights violations, but also to limiting the number of applications to the Court, in particular series of cases resulting from the same problem of incompatibility.

Third, government agents play an important role in the framework of the execution of the Court's judgments. The agent is in many situations the national authority who is the best placed to initiate and co-ordinate the adoption of different measures which may be required at the national level. The importance of co-ordinating the adoption of different measures has been emphasised by the Committee of Ministers in its recent recommendation. It is also worth noting that in some cases the agent actively contributes to the establishment and operation of smooth domestic procedures for the full and rapid execution of the Court's judgments. It must, however, be noted that pleading cases before the Court and ensuring execution of judgments are two very different things, and they both demand a lot of resources. This seminar is a good opportunity to discuss whether agents' offices would need reinforcement if they are to perform both these tasks successfully.

As to the adoption of general measures, a government agent may play an important role in persuading the government to initiate and support draft laws aimed at preventing further violations of a similar nature. Making efforts to speed up the legislative process and providing effective remedies both for the future and possible violations already committed are important contributions to resolve the issue of clone and repetitive cases, which is a serious problem for the Court. Throughout the legislative process, a government agent can also advise on the consistency of the proposals with the requirements of the Convention and inform national authorities of solutions found in other Council of Europe member states which have been faced with similar problems.

Government agents are also very well equipped to deal with the issue of individual measures, since they have a detailed knowledge of the specific circumstances of the case that forms the subject of the judgment and can immediately envisage solutions to remedy the particular problem faced by the applicant. They

are well placed to provide applicants and competent authorities with advice on this issue.

In addition, when the source of the violation is related to a practice inconsistent with the Convention, the agent's personal involvement can be decisive in putting an end to the violation. Our experience in working with government agent' s offices, especially when it comes to co-operation activities for the judiciary or law-enforcement authorities, shows that the agent plays a primary role in promoting a better understanding of the requirements of the Convention within the national legal system and in prompting the necessary changes in mentalities and practice.

Finally, a government agent can play a key role in ensuring a broad dissemination of the Convention standards among all state bodies. The agents' extensive and up-to-date knowledge of the case-law of the Court and of the Committee of Ministers' requirements puts them in an ideal position to actively promote such dissemination. A government agent could, for instance, contribute to selecting Court judgments which might have an impact on the domestic legal system, and in particular mobilise other national stakeholders, which can raise awareness of Convention standards. In fact, such stakeholders are manifold: they include associations of judges, prosecutors and lawyers, law journals and official journals, human rights institutions, universities and NGOs, as well as training institutions for legal professionals. The government agent cannot of course be expected to disseminate Convention standards him- or herself, but he or she can certainly encourage others to do so.

The Committee of Ministers also called for rapid translation and dissemination of the decisions and resolutions adopted by the Committee of Ministers in the context of the execution supervision. here too, a government agent may play an important role.

Today's seminar will provide the opportunity to look at the ways the agent can contribute towards all these processes. I would like to stress that a broad dissemination of Convention standards is a prerequisite for ensuring that such standards are known and applied by national authorities, in line with the subsidiarity principle enshrined in the Convention.

Ladies and gentlemen, everything I have said is motivated by the key objective for this meeting, namely to discuss issues of practical relevance for Government Agents, with relevance to their roles, resources and status. The way in which the debate is organised aims at a free exchange of views and the active participation of all present. I encourage all of you to take full advantage of this format. We believe that the effective exchange of information is a vital element in making the system function more effectively. The results of your exchange of views will benefit the Convention system as a whole, and help to improve and reinforce the protection of human rights of our citizens. ★

Theme I

The role of the government agent in representing the member state before the European Court of Human Rights

Moderator: Mr Arto Kosonen, government agent of Finland

Ms Marica Pirošíková

Government agent of the Slovak Republic

Ladies and gentlemen, dear colleagues,

First of all, on behalf of the organisers I should like to thank you for accepting the Deputy Prime Minister and Minister for Justice of the Slovak Republic's invitation to attend this event held under the Slovakian chairmanship of the Committee of Ministers of the Council of Europe. We have had the great privilege of hearing contributions during the seminar from Ms Maud De Boer-Buquicchio, Deputy Secretary General of the Council of Europe, Mr Jean-Paul Costa, President of the European Court of Human Rights, and Mr Štefan Harabin, Deputy Prime Minister and Minister for Justice of the Slovak Republic. I would also like to thank Mr Emil Kuchár, Chair of the Committee of Ministers' Deputies of the Council of Europe, Ambassador Extraordinary and Plenipotentiary and Permanent Representative of the Slovak Republic to the Council of Europe, for chairing the seminar, along with the various speakers and moderators. I would particularly like to thank Ms Hanne Juncher, Head of the Legal and Human Rights Capacity Building Division, Ms Clementina Barbaró, Head of Unit in the Legal and Human Rights Capacity Building Division, and the Secretariat of the Directorate General of Human Rights and Legal Affairs for their valuable co-operation and assistance in organising this event.

My contribution concerns the role of government agents in representing member states before the European Court of Human Rights (referred to hereafter as "the Court"). In this connection, I would like to share the experience I have

gained in nearly eight years working at the office of the government agent, and to draw your attention to some of the problems we have faced and our efforts to try and resolve them. I shall also make a number of comments on the role of government agents in upholding human rights.

I would like to begin with some general observations on the agent's position and duties in the Slovak Republic, the legal basis for his or her work being the regulations adopted by government order. Under those regulations, the Ministry of Justice represents the Slovak Republic in dealings with the Court through an agent who represents and defends the Republic's interests before the latter; at the same time, however, he or she ensures and supervises the proper execution of the Court's decisions, keeps the Committee of Ministers of the Council of Europe informed – in co-operation with the Ministry of Foreign Affairs – about the execution of those decisions and submits proposals to the Minister for Justice for measures aimed at stamping out recurrent violations of the Convention. By the end of March each year, the agent drafts an activity report, which the Minister for Justice then submits to the Government of the Slovak Republic and the Slovakian National Council Committee on Human Rights, Nationalities and the Status of Women.

I shall now move on to the first aspect I wish to address: obtaining information from national authorities in connection with proceedings before the Court. I started working at the agent's office in 2000. Compared with previous years, there was a significant increase in the number of applications notified to the Government of the Slovak Republic that year. At the time, there were two lawyers in the office as well as the agent, it was difficult to find translators into English, we had only a single Internet connection, and Slovakian authors wrote only rarely about issues relating to the Court; above all, however, in our early communication with the national authorities, which we had asked to comment on the applications and to forward files to us, we realised that their understanding of the Court's proceedings and case-law was minimal, even though the Convention had direct effect within our legal system. Accordingly, we went to see numerous court presidents in person or straight to the judges with jurisdiction over the cases to which the applications related; the level of co-operation improved considerably once we had provided them with more information. We also realised that, given their linguistic handicap (not understanding the Court's official languages) and the complex nature of the subject, they needed to be educated about the latter and supplied with documentation of a kind to aid their understanding.

In conjunction with non-governmental organisations, we then set up a project entitled "Training for judges and legal trainees in the case-law of the European Court of Human Rights", which ran from August 2001 to November 2002. In August 2001, during the initial preparation phase, we produced two publications and had them printed; they were then distributed to seminar par-

ticipants and other interested people. The first contained the current Slovakian version of the Convention, the Slovakian translation of a number of key provisions of the Rules of Court and a short presentation of the admissibility criteria and the applications filed against the Slovak Republic. The second set out the Court's case-law in relation to Articles 3, 5, 6 and 10 and Article 1 of Protocol No. 1. The publications were drafted by staff of the agent's office. During the next phase of the project, nine seminars were held for judges and legal trainees from all over Slovakia. At the seminars, we taught participants how to interpret the applicable national provisions in accordance with the Court's case-law, providing them with Slovakian versions of its landmark decisions. Our discussions with them also generated suggestions for legislative amendments, which we passed on to the relevant directorates within the Ministry of Justice. Some participants subsequently forwarded to us decisions of theirs referring directly to the Court's case-law; others contacted us to request more detailed information about the Court's decisions.

We continue to organise regular seminars for judges, senior court officers, prosecutors and lawyers. Demand has increased considerably following the introduction on 1 January 2002 of a new domestic remedy enabling individuals to appeal to the Constitutional Court on the grounds that, *inter alia*, their rights guaranteed under the Convention have been violated in proceedings before the authorities. Should the Constitutional Courts allow such an appeal, ruling that a final decision, measure or other action has violated an individual's rights or freedoms, it will set aside the decision, measure or action in question. The Constitutional Court may also dismiss the case pending fresh proceedings, rule out proceedings for the violation of fundamental rights or freedoms or, where this is possible, order the perpetrator to restore the situation prior to a violation of fundamental rights or freedoms. It may also grant the applicant reasonable pecuniary compensation.

The Court's case-law is no longer an unfamiliar concept in Slovakia; the seminars give rise to animated discussions on the interpretation of human rights.

In conjunction with the Judicial Academy, the Slovakian Chamber of Lawyers and non-governmental organisations, over the last two years we have set up training projects financed from European Social Fund allocations; as part of these projects, we have published a 570-page volume entitled *Commentaries on selected articles of the Convention for the Protection of Human Rights and Fundamental Freedoms*, distributed to seminar participants free of charge. The Convention articles included in this volume were selected and interpreted in the light of topics discussed during the seminars; it also highlights decisions of the Court that are particularly relevant to the Slovakian legal system. The commentaries on the respective articles, which include an interpretation of key principles and legal reasoning, are not based solely on the Court's decisions, but also sup-

plemented by the relevant national case-law, particularly that of the Constitutional Court.

Based on our experience, I have to say that the organisation of regular seminars for judges and prosecutors has helped to bring about a significant improvement in the length of time taken by the latter and the quality of the information they forward at our request with a view to preparing the Slovak Republic's defence. This gives us enough time to draft a memorial in Slovakian, which we then submit for comment to all the bodies involved and the relevant directorates within the Ministry of Justice; this is particularly important during periods in which the Court notifies the government of a considerable number of applications at the same time, which has been a frequent occurrence in recent years. Further to the Court's meeting with government agents in November 2007, I would like to know whether the Court, when notifying your countries of applications, now takes into account the complexity of the case in setting the deadline for submitting the memorial, or whether it continues to allow the same amount of time for both simple and more complicated cases. In this connection, I was interested in the comments made by some agents during the meeting with the Court, to the effect that it had not met their requests to have the deadline for submitting memorials extended. I have to say that our office has never had such problems, although we request an extension only in exceptional cases. I would also like to know whether the law in your respective countries expressly entitles the agent to be advised of confidential information, and how such information is forwarded to the Court. Your experiences might be helpful with a view to making the necessary legislative amendments in the Slovak Republic. We have the following questions: should agents be subject to security checks that may last several months and impede their ability to meet the deadlines for filing memorials in respect of applications notified just after they have taken up office, or, on the contrary, should their right to be advised of confidential information connected with proceedings before the Court be stipulated directly by law as an integral part of their position? Who should decide at national level on the range of relevant documents submitted to the Court? How should such information then be submitted to the Court? By diplomatic bag? In addition, the Slovak Republic does not yet have any experience of implementing interim measures. I would therefore like to hear about any practical problems you have faced in relation to decisions on such measures and the action taken to resolve situations arising from them.

The second point I wish to address relates to friendly settlements and unilateral declarations. Firstly, I would like to say that I agree with Ms Sally Dollé, Section Registrar of the Court, who emphasised the key role played by agents in this respect at the meeting with government agents in November 2007. Friendly settlements should be regarded as the best way to settle cases raising "simple"

issues under the Convention, since they save a great deal of time and public money, as well as avoiding stigmatisation of the government in question in the event that the Court finds a violation. In the Slovak Republic, the agent starts negotiating a friendly settlement after obtaining prior consent from the Minister for Justice. The cases that generally give rise to a friendly settlement are those in which the applicants allege a violation of their right to a hearing within a reasonable time, following a Constitutional Court decision on the issue of what constitutes a reasonable time. The Constitutional Court's decision is disputed either in respect of the amount of reasonable pecuniary compensation awarded, or on the grounds that it has not granted such satisfaction. In such cases, we start negotiating a friendly settlement if the compensation awarded to the applicant by the Constitutional Court was manifestly inappropriate in the light of the Court's established precedents. In this regard, the Court helps us considerably in brokering a friendly settlement; in most cases, applicants are prepared to reach a friendly settlement on the strength of statements forwarded by the Court, even though they may have demanded multiple amounts in their applications. There are also cases, however, in which applicants refuse to negotiate a friendly settlement on the strength of the statement forwarded by the Court. In such instances, in accordance with a prior opinion from the Minister for Justice, we attempt to settle the case by means of a unilateral declaration by the government, in which we acknowledge that the applicant's rights have been violated and state that we are prepared to pay him or her a certain sum as just satisfaction. There are also applications alleging more than one violation, whereas the unilateral declaration is confined to the complaint relating to an obvious violation of the Convention. In such cases, the Court declares the first complaint inadmissible on the grounds that it is clearly ill-founded or inconsistent with the Convention, and strikes the second one off the list on the strength of a unilateral declaration by the government.

The third point I wish to address concerns the role of government agents to the Court in respect of cases brought against other states. An agent may be involved in one of two ways. Firstly, an application may be filed against another Contracting Party by a national of the state in question. Secondly, agents may be involved in helping to resolve issues bearing a direct or potential relation to applications filed against the states they represent in proceedings before the Court; they may be able to provide the Court with additional information about the issues involved so as to help it assess the case. It is primarily the second type of case that represents additional work for agents, who can nevertheless be of considerable help in resolving key issues faced by the Court. For the aforementioned reasons, the Slovak Republic has intervened in the cases of *Scordino v. Italy* and *Apicella*[2], *Cocchiarella*[3], *Mostacciuolo (1)*[4], *Mostacciuolo (2)*[5], *Musci*[6], *Riccardi Pizzati*[7], *Procaccini*[8] and *Zullo*[9] *v. Italy*, which related to the amount of just sat-

isfaction to be awarded in the event of a violation of the right to a hearing within a reasonable time, and more specifically the setting of criteria serving as a basis for the Court to determine the amount of non-pecuniary damage arising from such a violation, and the extent to which the Court had the power to assess and supersede the national court's discretionary power by determining the amount of non-pecuniary damage. The Slovak Republic also intervened in the case of *Sejdović v. Italy*[10], concerning the violation of Article 6 of the Convention in the event of a criminal conviction *in absentia*; the case of *Stoll v. Switzerland*[11], concerning the violation of Article 10 of the Convention in relation to the criminal conviction of a journalist for publishing extracts from a confidential professional document drawn up in a diplomatic context; the case of *Ramzy v. the Netherlands*, relating to a departure from the Court's established precedents in respect of the expulsion of foreigners suspected of helping to organise terrorist attacks; and the case of *Soffer v. the Czech Republic*[12], concerning the applicability of the "civil component" of Article 6 of the Convention to proceedings before the Constitutional Court.

Lastly, I would like to make a few remarks aimed at establishing whether government agents are there to defend the state or to uphold human rights, or both. Since I started working at the agent's office, I have been asked whether I find it frustrating to draft memorials defending the government against people who have had their human rights violated. In many cases, it is not pleasant for government agents to have to defend the state's position before the Court; provided their work is not confined to representing the government before the Court, however, they can have a considerable impact on respect for human rights at national level.

Incidentally, I would like to point out that, given the large number of decisions, even we government agents – who deal with the Court's case-law every day – have difficulty finding our bearings and keeping abreast of developments in it. At the same time, some members of the legal profession in a number of Council of Europe states do not master the Court's official languages well enough

2. *Apicella v. Italie*, [GC], No. 64890/01, 29 March 2006.
3. *Cocchiarella v. Italy*, [GC], No. 64886/01, 29 March 2006.
4. *Giuseppe Mostacciuolo v. Italy (No. 1)*, [GC], No. 64705/01, 29 March 2006.
5. *Giuseppe Mostacciuolo v. Italy (No. 2)*, [GC], No. 65102/01, 29 March 2006.
6. *Musci v. Italy*, No. 64699/01, [GC], 29 March 2006.
7. *Riccardi Pizzati v. Italy*, [GC], No. 62361/00, 29 March 2006.
8. *Procaccini v. Italy*, No. 31631/96, 30 March 2000.
9. *Zullo Ernestina v. Italy*, [GC], No. 64897/01, 29 March 2006.
10. *Sejdovic v. Italy*, [GC], No. 56581/00, 1 March 2006.
11. *Stoll v. Switzerland*, [GC], No. 69698/01, 10 December 2007.
12. *Soffer v. The Czech Republic*, No. 31419/04, 8 November 2007.

to understand its decisions published on the Internet, while those in countries having had several decades of socialist rule also need to be educated about certain aspects relating to respect for human rights. Many Council of Europe states have not yet managed to overcome objective factors causing judicial proceedings to exceed a reasonable time; this also leaves judges little time for in-depth study of the Court's case-law.

In the light of these observations, I am of the view that agents and their staff should pass on their knowledge by proposing legislative amendments, running seminars and issuing publications.

When agents are notified of an application, or at least that a judgment has been given against another state, they may realise that legislative amendments are necessary. At the same time, their experience enables them to provide the competent legislative authorities with information about the amendments needed in order to bring the law into line with the Court's case-law. Their links with agents from other states enable them to find out how similar problems have been resolved in other countries, which may serve as a model. I would like here to thank those of you who have helped me in this way and to assure you that our office will do the same.

In some cases, no legislative amendments are necessary and the national authorities simply have to modify their case-law. In such situations, it can be very helpful to hold seminars during which the government agent or his or her colleagues alert participants to the relevant case-law of the Court. It has also been helpful to hold seminars for lawyers, aimed first and foremost at reducing the still-alarming number of applications that clearly fail to meet the admissibility criteria and identifying ways of interpreting the applicable legal rules in accordance with the relevant case-law of the Court as soon as a case comes before the national authorities. Incidentally, I cannot see any drawback to agents and their colleagues communicating basic information to applicants, particularly as regards the running of proceedings before the Court.

The production of publications is another means of drawing attention to the problems associated with the application of the Convention at national level, and of making legal professionals and the general public aware of the complex issues surrounding proceedings before the Court.

Agents play a key role in protecting human rights when it comes to remedying the consequences of violations as part of the execution of the Court's judgments. It is they who know the details of a case, and they can quickly identify the general and individual measures that need to be adopted in order to execute the judgment. In the Slovak Republic, the agent ensures and supervises the proper execution of the Court's judgments, submits reports to the Committee of Ministers of the Council of Europe on the general and individual measures taken in the Slovak Republic in connection with their execution, and prepares the necessary

documents with a view to the adoption of final resolutions on terminating the supervision of such execution. Since 2003, I have regularly taken part – along with a number of my staff – in meetings of the Committee of Ministers' Deputies of the Council of Europe and bilateral negotiations with the Council of Europe Secretariat. Participation in such meetings and bilateral negotiations helps to give the government agent responsible for executing the Court's decisions at national level a clear idea of what is expected of the state during the execution phase.

As I have already said, in the Slovak Republic the agent drafts an activity report by the end of March each year, which the Minister for Justice submits to the government and the Slovakian National Council Committee on Human Rights, Nationalities and the Status of Women. In addition to outlining his or her activities during the previous year and providing statistical data on applications filed against the Slovak Republic, the agent highlights important decisions by the Court and indicates the situation with regard to the execution of judgments, as well as suggesting possible solutions at national level. The report is subsequently published on the Government Office and Ministry of Justice websites, featuring *inter alia* brief descriptions of judgments against the Slovak Republic handed down by the Court the previous year. It also gives the agent an opportunity to discuss problematic issues highlighting shortcomings in terms of respect for human rights at national level.

As I do not wish to exceed the time-limit I have been allocated, so as to leave enough time for discussion, I shall simply make a few final observations. The role of government agents is a very difficult one, given the associated responsibilities and the problems they face in their day-to-day work, especially if they do not wish the latter to be confined to the task of defending the government before the Court, but also to encompass the goal of improving the situation with regard to respect for human rights. On many occasions, co-operation with a number of you has filled me with fresh energy and inspiration, for which I am very grateful. I hope that this seminar on the role of government agents in ensuring effective protection of human rights will give us an opportunity both to pool our experience and to further our mutual co-operation.

Thank you very much for your attention. ★

Mr Vit Schorm

Government agent of the Czech Republic

My role having been simplified by my Slovakian colleague's valuable contribution, I shall largely reinforce what she has just said. Before doing so, however, I would like to endorse the many thank yous she has already addressed to various deserving people, and to add our colleague Marica Pirošíková herself to the list; she was no doubt instrumental in arranging this meeting in Bratislava, on the banks of the Danube.

But let us get to the very heart of our topic, which is the role of government agents in proceedings before the Strasbourg Court.

Firstly, the status of the Agent of the Czech Government appears to be fairly similar to that of my Slovakian counterpart. The agent is also part of the Ministry of Justice, and also submits regular reports to ministers regarding the country's situation before the Strasbourg Court and the execution of the Court's judgments. Other than this, the agent operates relatively independently,[13] and rarely receives instructions from the government or the Minister of Justice.

Secondly, the government agent's office has to communicate with the authorities that examined the case referred to in an application filed with the Court on which the government has to comment.

We consequently approach the ministries, other administrative authorities or courts involved in the case or able to help shed light on the facts and practices contested in the application, with a view to consulting the relevant files and requesting opinions. Such co-operation with the authorities concerned is governed by a 2001 Act; a legislative act was found to be necessary at the time in order to overcome the courts' occasional refusals to co-operate in the examination of each case notified by the Court. Notwithstanding a law requiring each authority to respond and give its opinion at the agent's request, the replies are highly variable in quality. This no doubt reflects the authors' knowledge of the Convention as well as their willingness to co-operate.

My Slovakian colleague focused mainly on her work in issuing publications and training members of the national legal service, thereby improving their understanding of the standards laid down in the Convention so that they are better able to respond to the agent's requests. Indeed, agents and their teams in those countries that became parties to the Convention only after 1990 appear to have a natural inclination towards such activities. The staff of the agent's office them-

13. The word "autonomously" was preferred during the discussion following the contribution.

selves deliver almost all the human rights courses run by the Czech Republic's Judicial Academy. One of the challenges we face is to overcome a degree of passivity among participants, who are often content just to listen.

Nevertheless, the question arises as to the extent to which judges have to comment on a case they have previously examined in the course of their judicial duties. The law provides that the agent must approach the head of the jurisdiction concerned, which is supposed to be a body within the National Courts Administration. This rule does not remove all ambiguity, however; the heads of each jurisdiction are also judges, and even if they themselves were actually to comment on their judicial colleagues' methods, this activity would still remain on the fringes of the exercise of judicial power. A jurisdiction's response cannot, therefore, be expected to shed light on every aspect of the facts and the law applicable to them under the Convention. On the other hand, our Constitutional Court has set up a specialised analysis unit within its registry; the staff of this unit respond not only to requests from the government agent, but also – and above all – to questions raised by the constitutional judges themselves; as a result, the quality of the information it provides to both the agent and the constitutional judges has improved a great deal over the last few years. Such units have also been set up within the country's other two supreme courts.

A separate issue concerns the extent to which the government agent can influence the progress of a pending case referred to in the notified application. The continued independence of the judiciary is a sacrosanct rule; no one can really speed up the snail's pace at which judges proceed, for example, which conveys a somewhat woeful image. Can the agent actively suggest that an administrative authority rectify a potential source of violations of the Convention, however? The fact is that anything the state, represented by its agent, does at the domestic level – albeit legitimate and approved by the Court – to influence the outcome of a pending case is likely to upset the applicant, who would already have been hoping to win his or her case, provoke a reaction and arouse suspicions of abuses of power.

I do not have a great deal to add about the issue of processing confidential information, other than to mention the practical direction from the President of the Court on written pleadings, which provides that secret documents should be filed with the Court by registered post. This does not really resolve the problem at national level in respect of the legislation on the protection of confidential information. The question also arises as to whether the legislation allows protected information to be made available to the Court, that is, to judges and registry staff, given that the latter are clearly not included among the persons to whom such information can legally be disclosed. That said, I have never had to deal with this type of problem in my six years as an agent.

My experience of the interim measures indicated under Rule 39 of the Rules of Court is confined to two cases, both relating to foreigners threatened with expulsion. In the first case, the measure was not ordered. The Government was first asked to provide information about the applicant's situation and the likelihood he would be expelled; the Government promptly complied, and the Court subsequently decided not to make any further demands. In the second case, the measure was ordered immediately, without any prior request for information about the applicant's situation. It subsequently turned out, however, that the applicant, who had written the word "Help!" three times at the end of his application, had left the Czech Republic of his own accord, in a Mercedes moreover, without being deported by the police.

The agent's office has developed an extremely constructive co-operative relationship with the Interior Ministry department responsible for immigration and asylum policy. This department has been advised of the Court's interpretation as set out in the judgment in the case of *Mamatkulov and Askarov v. Turkey*[14], and has adhered to it each time I have had to respond to a 7 p.m. telephone call from the Court informing me that an interim measure was in the air. We join forces as soon as the director of the department receives my call, even though the details provided by the Court must then be communicated in writing. The question naturally arises as to whether every administrative or judicial authority would respond as co-operatively as the Interior Ministry department in charge of foreigners, which does not exactly have an extremely benevolent reputation. In any event, I can say that we would always proceed in the same fashion; with the judgment in the case of *Mamatkulov and Askarov v. Turkey*[15] at our fingertips, we would alert all concerned to the danger of a gratuitous violation of Article 34 of the Convention, for which anyone contesting the Court's authority would automatically be held responsible.

Thirdly, negotiations with a view to a friendly settlement are always an interesting topic, with some variation in the approaches adopted. On the one hand, I agree in principle with the suggestion made at one of our previous meetings that regulations be drafted on government agents to the Strasbourg Court, covering *inter alia* the ethical issues surrounding the action taken by agents with a view to reaching friendly settlements with applicants. On the other hand, it seems to me that there is nothing stopping agents from negotiating directly with applicants, without being under the constant (or omnipresent) watch of the Court Registry.

It is important to bear in mind that the Registry is not always as active as the parties might be entitled to expect in the light of Article 38 §1.b of the Conven-

14. *Mamatkulov and Askarov v. Turkey*, [GC], nos. 46827/99 and 46951/99, 4 February 2005.
15. *See supra 14.*

tion. There is a fairly obvious explanation as to why, in the vast majority of cases, the Registry simply proposes a joint written declaration, specifying a figure, to the parties. Where such a declaration is submitted, we do not normally discuss it in private. Moreover, we have never tried to force applicants to accept such proposals by exerting unlawful or undue pressure. In any event, the applicants themselves have to confirm to the Court that they have accepted the solution negotiated; we have always agreed that they will write to the Court enclosing a copy of the parties' joint declaration.

Lastly, although I am by no means unconditionally in favour of conducting private negotiations whenever the opportunity arises, I believe negotiation is allowed; after all, friendly settlements reflect more or less active negotiations between the parties. More active, or even proactive, negotiations may seem unusual or atypical in a state governed by the rule of law, but that state is a party to proceedings, the parties are on a relatively equal footing, the proceedings have not been lost in advance, and the state does not necessarily have to be on the defensive in every respect. I would even go so far as to say that applicants, unlike the state, sometimes tend to abuse the fact that agents are part of the state's hierarchical structure; it is consequently possible to report them to their superiors or even to lay a criminal complaint about their work, so as to force them to adopt a particular position before the Court, either during the proceedings or in the context of friendly negotiations.

Fourthly, to date we have intervened little in cases against other states, under either the first or second paragraph of Article 36 of the Convention.

As regards intervention in cases in which the applicant is a Czech national, we often reserve the right to intervene, but very rarely do so in the end; surprisingly, when this does happen it is not solely for the purpose of assisting the applicant. In fact, we have intervened in just one case in which the Court applied Article 29 §3 of the Convention, back when the respondent government was not yet allowed to respond to the applicant's submissions; our written intervention, consisting of questions rather than statements, afforded additional opportunities for the parties to comment on certain points on which we felt insufficient light had been shed.

As regards intervention in other cases, we have been guided by whether or not issues similar to those raised by the application exist in our legal system. It is difficult to take a decision within the time-limit stipulated by the Rules of Court, however, notwithstanding the fact that the Court has made considerable efforts recently to inform the general public of pending cases that have just been notified.

Nevertheless, I would like to know whether colleagues have criteria they use as a basis for deciding whether to intervene in either of the scenarios provided for under Article 36 of the Convention.

Fifthly, over the past year we have been working with a law firm on the state's defence in a series of sensitive cases concerning the regulation of tenancy relationships, which bear some resemblance to the leading case of *Hutten-Czapska v. Poland*. The government decided that the Ministry of Justice should hire a law firm for these cases, even though the government agent had never previously relied on such assistance. A call for tenders was issued, and one of the two firms that showed an interest in such a government contract was selected. The law firm has less experience of Convention law than the government agent's team, however, meaning that its draft initial submissions on the admissibility and merits of the applications had to be substantially rewritten by the agent's office. Naturally, such assistance costs the state many times more than its total annual expenditure on the agent's office; this shows that we play a valuable role.

I would consequently like to find out more about the practices of states that entrust law firms with the task of preparing submissions, or even representing them at hearings before the Court. It may be the case, however, that the situation differs between central and eastern Europe, on the one hand, and the United Kingdom or the Netherlands, on the other.

Lastly, it has been difficult to ensure positive perceptions of the government agent's work in the media and society at large. Indeed, the agent's work brings him or her into conflict with applicants, who sometimes find support in the media thanks to a well-publicised sorry tale. In addition, journalists see the agent's work simply as a series of cases lost by the state, owing to their habit of focusing solely on bad news, their lack of understanding of how the Strasbourg organs operate and their inability to discern the large number of complaints declared inadmissible by the committees or in decisions on admissibility, or even hidden in chamber or Grand Chamber judgments. Where the agent is successful before the Court, this also means the failure of a claim that may be interesting or even audacious, and thus attractive.

Nevertheless, are there ways the government agent's image can be improved?

Dear colleagues, I hope I have sparked reactions that will fuel the discussion scheduled to start at this point on the first major theme of our seminar. Thank you for your attention. ★

Discussion

Mr Jakub Wołąsiewicz (Poland)

The agent operates independently and does not take instructions from the government except at his or her own request. Nevertheless, the agent cannot be responsible for upholding human rights, since his or her primary responsibility is to defend the state before the Court. Regulations defining agents' role should be drawn up, for they cannot simply be regarded as lawyers; on principle, what is needed is a kind of charter setting out their rights and obligations before the Court.

Communication with the Registry is crucial to concluding friendly settlements. When it comes to cases identical to a previous case involving another state, the Registry's comments enable the agent to propose a reasonable settlement; in other cases, the Registry's observations on the agent's proposals make it possible to reach a compromise.

Mr João Manuel Da Silva Miguel (Portugal)

My contribution concerns an issue that, in my view, needs to be addressed prior to any discussion of this initial theme, namely the very idea, or concept, of government agents.

The Convention does not mention government agents, who are referred to only in Rule 35 of the Rules of Court.

There is no international paradigm in respect of the agent's role. It is an area in which each state has the power to adopt the rules it considers most appropriate to the goal pursued.

Some states do not even have any rules on the selection, appointment, rights and duties of agents; others, however, have adopted regulations stipulating the government agent's powers, rights and duties.

There is thus a range of different situations and solutions, but the aim is the same: to represent the state before the European Court of Human Rights.

Any discussion of agents' task of representing governments before the Court must therefore define that task. The two presentations by our colleagues, whom I would like to thank, showed that agents do have a role to play. In my view, therefore, we need to clarify the nature of that "role", including their powers, rights and duties, which should be set out in specific regulations on government agents.

Mr Vit Schörm talked about agents' independence in the exercise of their functions. I would prefer to talk about autonomy, a word that has the same

meaning but avoids any confusion with a guarantee specific to judges. In any event, the key is to grant agents certain guarantees in the exercise of their functions: agents are lawyers for the state, but they are more than just lawyers, since as representatives of a Contracting Party they must respect certain boundaries but must also enjoy a degree of freedom of conscience in performing their duties.

Regulations on agents – encompassing all of these principles – would, in my view, also enhance the Court's authority.

In this connection, the Council of Europe – through the Steering Committee on Human Rights – could study the existing legal rules pertaining to government agents and, at the very least, develop harmonised "minimum standards" that agents ought to enjoy in the exercise of their functions.

These are my thoughts and suggestions on the subject.

Mr Slavoljub Caric (Serbia)

I would like to expose briefly the situation in my country concerning the status and work of the government agent.

The Republic of Serbia ratified the European Convention on Human Rights in March 2004. Four years from then, we have possibility to cope with very different cases and problems.

The status of the government agent has been regulated by the Decree on the Agent. The role of the agent implies diversified functions.

Namely, the agent has a role to protect the interest of the state before the European Court of Human Rights and to represent the country before this Court. In performing this function the agent prepares the written observations and takes part in the oral hearings (he participated in the oral hearing in the case *Markovic v. Italy*, as an third party).

The Court has brought 16 judgments in respect of the Republic of Serbia since March 2004, which are the subject of supervision by the Committee of Ministers pursuant to Article 46 of the Convention. Some of these judgments have not become final yet, in two cases a Relinquishment of Jurisdiction to the Grand Chamber was made pursuant to Article 43 of the Convention, whereas the judgments have become final in ten cases.

The Decree on the Agent prescribes that the agent takes care of the enforcement of the adopted judgments. It means that the agent translates and organises the dissemination of judgments and supervises the implementation of individual and general measures as well.

As for the dissemination, all the judgments were published in the Official Bulletin of the Republic of Serbia and on the website of the Office of the Agent after they had been translated. In addition, a wide distribution of the judgments to the

courts has been arranged, as well as the round tables related to different issues about the enforcement of judgments. The Office of the Agent also published a book containing the judgments adopted against Serbia as well.

As for the payment of damages and costs of the proceedings, it is important to point out that all the amounts awarded by the judgments of the European Court had been paid before the judgments became final, in all the cases where it had been estimated that there would be no Relinquishment to the Grand Chamber. The amount of just satisfaction awarded by the Court varied from €1 000 to €15 000.

As for the individual measures, the judgments adopted so far could be classified by the type of violations established by the Court. The largest number of judgments relates to a violation of the principle of a trial within reasonable time. In such cases, it is most frequently expected that the proceedings before the domestic court would be completed with the final judgment and the final judgments of the domestic courts would be enforced. In some cases, such as family matters, where a violation of Article 8 of the Convention had also been established, in connection with Articles 6 paragraph 1 and 13 of the Convention (there are three such judgments), the Committee of Ministers expects particular attention in conducting the proceedings in the instant cases aimed to protect the interests of children.

In the field of family matters, a non-enforcement of the final judgment has a specific weight, due to unfavourable consequences for the applicants. This might be most obvious in the case of *Tomić v. Serbia*[16] where the domestic court had been trying in vain, within the period from 18 March 2005 to 14 March 2007, to enforce the judgment awarding the custody of a child to the mother, which in the meantime, the father of the child abused to put out of force the enforcement title in a separate suit.

Bearing in mind the above-mentioned finding of the Court, the applicant still has the right to request a reopening of the proceedings within the prescribed term pursuant to Article 422 paragraph 1 item 10 of the Law on Civil Procedure. This is also found out by the decision number 11 of the Committee of Ministers of the Council of Europe, brought at the human rights meeting held on 5 December 2007, stating that the adoption of the final resolution in this case by the Council of Europe's Committee of Ministers is postponed in order to monitor the events in relation to a possible request. Otherwise, pursuant to the resolution of the Committee of Ministers of 19 January 2000, the Republic of Serbia stipulates an option that a proceedings is re-opened after the judgment by the European Court of Human Rights in a civil and a criminal proceedings, whereas the Law on Criminal Procedure prescribing this matter has not come into force yet.

16. *Tomić v. Serbia*, No. 25959/06, 26 June 2007.

The second group of cases relates to a violation of the right to freedom of expression for conviction for defamation. In such cases, in addition to dissemination and the payment of damage, in respect of individual measures, a re-opening of the proceedings may also be expected, and from the general aspect it is the best to comply with the instructions specified in the Resolution of the Parliamentary Assembly of the Council of Europe – Towards decriminalisation of defamation of 4 October 2007.

Besides, the first judgment against the Republic of Serbia concerned a violation of the right to the presumption of innocence guaranteed by Article 6 paragraph 2 of the Convention and in that particular case the Committee of Ministers was satisfied with a wide dissemination of the judgment and the payment of the costs of the proceedings before the judgment became final. Accordingly, this case was struck off the list of cases discussed by the Committee of Ministers. Other cases are still on the agenda of the Committee.

As for the general measures, the main problem comes down to the provision of effective remedy to respect the right to a trial within reasonable time.

In this respect I would like to underline the judgment adopted by the Court in the case of *V.A.M.*[17], wherein, as the second judgment adopted against Serbia, the Court noticed this problem.

The agent has a very prominent role in the conducting of the negotiation concerning the friendly settlement. He has concluded the friendly settlement in 5 cases until this moment. However, as a precondition for the conclusion of a friendly settlement it is necessary to obtain the permission of the body whose act provokes the procedure before the Court. It is sometimes very difficult to establish which body is the responsible one because there are several judicial instances that could be involved in the proceedings.

The Decree on the Agent does not stipulate the right of the state to intervene. In this sense the agent follows the criteria established in Article 36 of the Convention as well as the importance of the issue at stake for the Republic of Serbia and the number of persons affected by the same issue. Until this moment the agent has intervened in four cases.

In the *Markovic v. Italy*[18] case the problem relates to the theory of political acts. In that case the agent pointed out that the adoption of the theory of political acts may considerably limit the scope of the law implementation in the sphere of access and efficiency of legal remedies as guaranteed by the Convention.

Apart from that, the doctrine of political questions would, by its very nature, justify an exemption from judicial control of the acts made in foreign policy im-

17. *V.A.M. v. Serbia*, No. 39177/05, 13 March 2007.
18. *Markovic and others v. Italy*, [GC], No. 1398/03, 14 December 2006.

plementation based on the so called *raison d'État*, which might make it almost impossible to execute and protect human rights.

In the case of *Gajic v. Germany* the main issue relates to the problem of violation of human rights on the territory of the Serbian province – Kosovo and Metohija. Other two cases where the Agent intervened are still pending and relate to the consequences of the dissolution of the former Yugoslavia.

Finally, the agent participates in the work of the CDDH, the DH-PR and Working Group A under the scope of the DH-PR.

Ms Radica Lazareska-Gerovska ("the former Yugoslav Republic of Macedonia")

In the Republic of Macedonia, the government agent does not have the status of an autonomous body, but that function is carried out within the frameworks of the Ministry of Justice.

In 2001 the Government adopted a Decision on the determination of the position of the government agent of the Republic of Macedonia in the European Court of Human Rights procedure. According to it, the government agent of the Republic of Macedonia is appointed from among the State Counsellors of the Ministry of Justice, under the Law on Civil Servants. Practising his function, the government agent provides general co-operation of the Republic of Macedonia bodies with the Court and with the other bodies of the Council of Europe in cases when the Republic of Macedonia is a party to a dispute before the Court, prepares defence and directly represents the Republic of Macedonia in the Court procedure, mediates in contacts between the Court and the domestic courts, the administrative bodies and the other bodies of Republic of Macedonia, and undertakes other actions connected with the protection of human rights within the framework of the Council of Europe.

The government agent acts on behalf of the Republic of Macedonia and is obligated to represent its interests in the Court procedure. The government agent undertakes all legal actions according to the general policy of the Republic of Macedonia, and upon his request or upon the initiative of the Parliament of the Republic of Macedonia, the President of the Republic of Macedonia, the Government of the Republic of Macedonia and the Minister of Justice of the Republic of Macedonia, the government agent obtains general instruction about the way of representing the Republic of Macedonia interests.

In each case the Republic of Macedonia is a party to the Court procedure, in the preparation of the defence and in the representation of the Republic of Macedonia, the government agent may engage lawyers, counsellors and other distinguished experts in different legal fields.

In practising his function, the government agent is directly authorised to investigate all court and administrative cases, as well as all other documentation of domestic bodies, regardless of their confidentiality, as well as to look for additional information, explanation and opinions.

In line with the above, it is clear that the government agent does not have an independent role, but is completely dependent on the Government of the Republic of Macedonia. That means that a decision on friendly settlement may not be taken by the agent himself, but it requires a decision taken by the government which also approves the amount.

The payment of the just satisfaction is also made exclusively on basis of a government decision, which means that the agent himself is not in a position to order the Ministry of Finance to pay the adjudicated sum.

In view of interim measures, the Republic of Macedonia does not have a large experience as it has had only 4 interim measures – prohibition for expulsion of foreigners. They were transmitted via fax by the Court, and the government agent further conveyed the information to the corresponding authorities by phone. However, additional written notification to them followed.

As to the government agent's access to confidential information, in the Republic of Macedonia he has unrestricted access to all data irrespective of their confidentiality.

Mr Ferdinand Trauttmansdorff (Austria)

National case-law serves as an effective lever with a view to improving the application of the Convention at domestic level and thereby preventing disputes before the Court. From this perspective, it is essential that national constitutional courts orient their case-law in the light of that of the European Court.

Mr Derek Walton (United Kingdom)[19]

Both speakers raised the question of criteria before deciding whether to seek to intervene as a third party. The United Kingdom's policy is not to intervene simply because the applicant is British. However we do consider intervening where the issue at stake is important to us. In such cases we consider in particular whether it would be helpful to draw the Court's attention to the importance that the case has to us by intervening and supporting the responding governments' case. Alternatively, we may consider intervening in order to advance arguments that might not otherwise be advanced by the parties to the case.

19. The opinions expressed are personal and do not reflect those of the British Government.

We were also asked about our experience in the use of law firms for assisting the government in defending cases in Strasbourg. We regularly use lawyers from outside government to assist us in drafting observations and appearing at oral hearings. With the large number of cases involved in the United Kingdom, this is a matter of practical necessity.

Others, including the President of the Court, have mentioned the difficulty posed by the increase in the number of Rule 39 indications made by the Court in recent months. This gives rise to great difficulties both in terms of practice and principle. The large number of Rule 39 indications made against the United Kingdom has in particular very serious practical implications for the administration of the immigration policy in particular. Furthermore, we are concerned that the Court is going too far in principle in its use of Rule 39. In particular we are concerned about the application of broad judicial policies to whole categories of cases, such as Tamils that we seek to return to Sri Lanka. The absence of individual consideration of particular circumstances in each case is not helpful and gives rise to a risk that Rule 39 may be applied in cases which are clearly inadmissible either because there are domestic remedies still to be exhausted or because they are manifestly ill-founded on their facts. Furthermore, we have been concerned by the Court's application, on its own motion, of Rule 39 in a small number of cases involving Kenya. In those cases Rule 39 was applied on the basis of the "current security situation in Kenya" although no application to the Court on that ground had been received. We have raised these matters with the Court.

Mr Francesco Crisafulli (Italy)

I agree that the agent's role should be clearly defined under domestic law and that agents should enjoy a degree of freedom or autonomy (perhaps not outright "independence" in the sense in which the word is used to refer to the judiciary) in the exercise of their functions, strategic decisions and so on. I do not think there is any room for European standardisation, however, for the various national constitutional and legal systems are too different. I doubt, therefore, whether it is really possible to draw up regulations on agents, as Mr Schörm and a number of speakers have suggested, or to incorporate such regulations into a common legal model.

As regards friendly settlements, which Ms Pirošiková discussed, I have to say that it is sometimes impossible to evaluate the Court Registry's proposals without knowing, on the one hand, the criteria applied by the Court in order to calculate just satisfaction (which should yield a scale for assessing the amount the state saves by agreeing to a friendly settlement) and, on the other hand, the calculation criteria used by the Registry itself in order to make its proposal

(which should shed light on the underlying rationale). It is not uncommon, therefore, for an agent not to know what the suggested sum is based on; on a number of occasions, we have found that the sum calculated by the Court in its judgment under Article 41 has turned out to be lower than the sum previously proposed by the Registry for a friendly settlement.

Mr Hans-Joseph Behrens (Germany)

As far as third-party intervention is concerned, it is Germany's practice not to intervene as the state of which the applicant is a national (Article 36 §1 ECHR), other than in exceptional circumstances. On the other hand, consideration is given to third-party intervention under Article 36 §2 where a case's outcome may affect national legislation.

As for outside assistance, the agent does not use the services of law firms. In respect of cases referred to the Grand Chamber or particularly complex cases, however, academics are occasionally asked to give their opinions or to review the defence submissions.

Ms Inger Kalmerborn (Sweden)

It follows from internal rules of the Ministry for Foreign Affairs that it is the Director General for Legal Affairs of the Ministry who is the government agent. A few other civil servants at the Ministry have been appointed by the Minister for Foreign Affairs to act as agents in individual cases.

There are some rules decided by the Director General concerning the handling of cases within the Ministry. There is no particular statute concerning the agent's co-operation with the courts and the administrative authorities. This does not present any particular difficulty in practice. In each case there is close co-operation between the agent's office and other Ministries concerned, which request the necessary information, including the case-files, from the authorities and the courts. Decisions on which position to assume in the proceedings before the Court are agreed upon by the agent and the other Ministries concerned, which usually follow the advice given by the agent.

The agent has a vast experience of requests from the Court for interim measures in aliens cases. Requests concerning failed asylum seekers are transmitted to the Migration Board which decides to stay the execution of an expulsion decision pursuant to a provision in the Aliens Act.

As regards friendly settlements, it is the agent who negotiates and concludes the agreement with the applicant or his or her representative. The other Minis-

tries involved have the last word concerning the maximum amount that can be agreed upon.

The primary role of the agent to defend the state is accompanied by a role to promote human rights. This is done, for example, by providing training, delivering speeches and giving information on the Convention and the Court's case-law both within and outside the Government Offices.

Ms Deniz Akçay (Turkey)

Turkey has considerable experience of the interim measures provided for under Rule 39 of the Rules of Court, both before and since the *Mamatkulov* judgment. Whenever the authorities have been informed in time, we have complied with the requests made by the Court (or the Commission prior to Protocol No. 11).

Bearing in mind the large number of such requests for the suspension of expulsions and the considerable efforts each request for an interim measure necessitates on the part of national authorities, however, we are of the view that such measures should be notified by one of the Court's senior lawyers as early as possible, and coupled with a specific, detailed investigation.

Ms Anne-Françoise Tissier (France)

It is neither necessary nor even advisable to provide agents with regulations designed to secure their autonomy – if not independence – *vis-à-vis* national authorities. Agents must stick to their role as legal advisers, who must not express a position contrary to that of their principals.

France rarely engages in third-party intervention under Article 36 §1 of the Convention. As for third-party intervention under Article 36 §2, consideration has to be given to the matter, and the implications of such intervention assessed. Intervention by more than one third party may in fact be regarded as beneficial for both the Court and the states, prompting the Court to respond in its judgment to several states in relation to the same issue; at the same time, however, the question arises as to whether the Court judgment may have effects on a state engaging in third-party intervention, which may not be the outcome it was seeking.

Ms Monika Mijić (Bosnia and Herzegovina)

The agent's position is governed by an administrative decision by the government, giving him or her a degree of autonomy within the Ministry for Human Rights and Refugees. This autonomy is an advantage insofar as it allows the agent

to communicate directly with the government and the European Court. Agents' work is somewhat solitary, however, since they do not really have any colleagues at national level; accordingly, they ought to meet more often at the international level to discuss issues connected with their role and pool their experiences. As for the agent's relationship with national authorities, Mr Crisafulli's image of a mother with her children illustrates it well: it is a relationship characterised by protection and criticism.

Bosnia and Herzegovina has some experience of the interim measures provided for under Rule 39 of the Rules of Court in respect of an expulsion; the national authorities questioned the scope of these measures "indicated" by the Court, which the agent had to convince them were mandatory.

As regards third-party intervention on the basis of the applicant's nationality (Article 36 §1 ECHR), our rule is to intervene only in cases of general interest to Bosnia and Herzegovina or where a case's outcome may have an impact on a significant number of our nationals.

Mr Vladimir Grosu (Moldova)

In addition to the specific prerogatives assigned to the agent, the fact that he or she is appointed by the government confers a symbolic authority that simplifies the exercise of his or her functions; being regarded as the state's representative before the European Court, the agent consequently has direct access to all Moldovan public authorities.

In the course of proceedings before the Court, the agent may exercise his or her right of initiative with a view to securing a favourable outcome for the state; examples include proposing a friendly settlement to the applicant or submitting a unilateral declaration to the Court in which the state acknowledges a violation or undertakes to rectify it. The agent naturally has a duty to keep national authorities informed of the progress of cases, so that arrangements can be made for the judgment to be executed and just satisfaction paid where necessary.

Ms Isabelle Niedslispacher (Belgium)

As regards the issue of regulations on government agents, I am of the view that the agent's position is that of a lawyer: no more, no less. Like a lawyer, the agent has a duty to tender advice. The client can decide whether or not to take it, but the agent's sole responsibility is to provide expert advice in the light of the Court's case-law at the time the opinion is given. Should that case-law change, the agent will explain it to the authorities when the time comes to prepare the defence or execute the judgment.

While it may sometimes be difficult for agents to understand the Court's case-law or the judgment or to explain these to the authorities, they can make use of their links with other agents and/or the execution department.

One of the few causes of problems is no doubt the fact that a particular authority may not listen to the agent, but in many cases such a situation is totally unrelated to the issue of regulations.

Third-party intervention under Article 36 §2 is a worthwhile option, but it can be difficult to make the most of it. Where agents are approached directly by other states parties, they have only inadequate or belated information about the details of a case in which they might consider intervening.

Mr Frank Schürmann (Switzerland)

In many respects, the possibility of intervention available to third parties under Article 36 §2 of the Convention is a valuable, worthwhile way of participating in proceedings before the Court and thereby contributing to the "proper administration of justice". In practice, however, relatively little use is made of that possibility; in my experience, this is often quite simply because agents do not have the time to identify cases that might lend themselves to such intervention or to organise it where appropriate.

As far as Swiss cases are concerned, third-party intervention (by two member states) has taken place in only one instance so far (*Stoll* case[20]). In the opposite direction, Switzerland has never intervened under Article 36 § 2 to date.

All the same, I am of the view that, notwithstanding the practical difficulties, agents ought to endeavour to make greater use of this possibility. I was very interested in the criteria applied in the United Kingdom, as outlined by Derek Walton earlier; they might also be relevant to other states.

Mr Ignacio Blasco Lozano (Spain)

The issue of government agents' independence must be placed within the national context specific to each state. Where the agent is regarded as a government adviser, as is the case in Spain, the need for independence is not felt, since such independence is naturally inherent to the agent's very position. It is not appropriate, therefore, to seek to harmonise national regulations on agents *vis-à-vis* the idea of independence.

Moreover, the agent's technical role as an adviser means that he or she is not afflicted by the schizophrenia sometimes mentioned; the agent is not torn

20. *Stoll v. Switzerland*, [GC], No. 69698/01, 10 December 2007.

between his or her role in defending the government and an additional role in upholding human rights. Even at the stage of executing the judgment, when the agent's role is more one of upholding the Court's solution, he or she continues to advise the national authorities. ★

Theme II

The responsibility of the government agent in ensuring compatibility of legislation and practice with the standards of the European Convention on Human Rights

Moderator: Mr Arto Kosonen, government agent of Finland

Mr Yuriy Zaytsev

Government agent of Ukraine

On 23 February 2006 the Ukrainian Parliament passed the *Act on the Execution of Judgments and Decisions and the Application of the Case-Law of the European Court of Human Rights*, setting out procedures for ensuring that national legislation and practice are compatible with the norms laid down in the European Convention on Human Rights (the Convention); accordingly,[21] it stipulates the actions to be taken by government authorities.[22]

It should be noted that the Act was received fairly favourably by the European institutions; two years after it was passed, however, one is entitled to ask about the practical impact of its implementation. This is the aspect on which I wish to focus in my contribution.

I would like to say a few words about the Act. In particular, it stands out from other legislative texts in that Parliament had to put it to the vote twice. The first attempt, in 2001, failed; having been passed by Parliament, the law was vetoed by the President. Key amendments were made in 2005, the most significant one being the inclusion of the main provisions set out in the five fundamental recommendations of the Committee of Ministers of the Council of Europe.

21. http://www.multitran.ru/c/m.exe?t=37172_4_2.
22. http://www.multitran.ru/c/m.exe?t=688738_4_2.

These were not "cosmetic changes"; the amendment was genuinely a matter of principle. As one of the bill's authors, I can confirm this: let us take the example of the drafting of the provisions on procedures for ensuring the compatibility of national legislation and practice with the norms set out in the Convention.

Firstly, I would like to discuss the Act's main provisions in relation to checking compatibility.

Section 19 stipulates that the compatibility of all bills must be checked, as must that of draft regulations submitted for government registration. The Act provides for such checks to be conducted by means of special legal appraisals. The findings of these appraisals give rise to specific conclusions.

Where no appraisal is carried out, or the conclusion reached is that the act in question is incompatible with the requirements of the Convention, the government may refuse to register it.

The compatibility of existing legislation and acts with the Convention is checked reasonably frequently, particularly in fields such as police work, criminal proceedings and imprisonment.

The findings of such checks are submitted to Cabinet, along with proposals to amend existing legislation.

I shall now say a few words about the practical application of these provisions, starting with the institutional aspect. With a view to the Act's implementation, a Ukrainian Government resolution[23] stipulated that it was up to the Ministry of Justice, as an institution, to review compatibility with the Convention.

In turn, the Ministry of Justice issued an order assigning such appraisals to a specialised department whose staff have an in-depth knowledge of the Convention and the European Court's case-law. To this end, an appraisals department was set up within the office of the government agent to the European Court of Human Rights.

The order also stipulated that each appraisal must give rise to official conclusions on the compatibility of bills or regulations with the Convention. In order to rule out any chance that a particular act might enter into force without the aforementioned conclusions being issued, the government amended the Cabinet regulation and government order on the registration of regulatory acts. The amendments provided that such conclusions were a prerequisite for the entry into force of such acts.

Having resolved the institutional issues, however, the next main problem was the model's implementation. At least two key difficulties had to be resolved in order to address it.

Unfortunately, the fact is that regulatory acts – that is, acts issued by ministries and local bodies – constitute the greatest hazard when it comes to potential

23. http://www.multitran.ru/c/m.exe?t=153255_4_2.

violations of the Convention and human rights violations in general. Accordingly, the procedure for government registration of such acts was introduced back in 1992. Such acts are registered by the appropriate department within the Ministry of Justice.

It must be said that thousands of acts are submitted for government registration every year, many of which do not come within the scope of the Convention. A "filter mechanism" consequently needs to be set up so as to exempt those acts outside the Convention's scope from the requirement for an appraisal of their compatibility with the Convention.

In order to set up such a mechanism, however, there is a need for specialists with an in-depth knowledge of the Convention and the European Court's case-law to monitor each stage in the preparation and entry into force of the texts in question.

Therein lies the other major problem: Ukrainian ministries and local bodies do not have any specialists at this level at present. Their lawyers normally deal with problems of a different nature. Many of them do not have an in-depth knowledge of the European Court's case-law, and are consequently not in a position to anticipate the various everyday situations in which violations of the Convention may occur.

It was crucial, therefore, to develop an effective "filtering mechanism" that did not necessitate the involvement of a large number of Convention experts. Otherwise, the whole appraisal system would have been paralysed; it should be pointed out here that the government agent's entire appraisal department comprises just nine staff.

Against this background, we have developed a scientific method of implementing appraisals, based on two components: one structural and the other semantic.

The structural component consists of an algorithm providing for the review of draft regulatory acts on the basis of a test of their compatibility with the Convention. It may be outlined as follows: firstly, the act's author states whether or not it comes within the scope of the Convention. If it does, the regulatory act is sent to the government agent's office for appraisal; if it does not, it is submitted directly for government registration, with a note to the effect that it does not come within the scope of the Convention. Even in the latter scenario, however, a check is undertaken: if the Ministry of Justice registrar finds that the act is in fact relevant to the Convention, notwithstanding the note, he or she submits it for appraisal on his or her own initiative. Authors who attempt to avoid having their regulatory acts appraised thereby run the risk of missing the deadline for registration.

Nevertheless, as has already been mentioned, there is an obvious flaw in the procedure: the lack of knowledge and experience of the Court's case-law. In-

service training is undoubtedly the way to remedy that deficiency, and development[24] of such training is a priority. Education is far too lengthy a process, however, so we have opted for a stopgap solution.

The above method of implementing appraisals has been approved by the government agent as an official document. It includes lists of areas and everyday situations liable to give rise to violations of the Convention. These lists are based on the articles of the Convention, and incorporate as much of the Court's case-law as possible.

For example, the list under Article 3 includes the phrase "deadline for filing the medical report" as an identifier of possible violations: in the case of *Nevmerzhitsky v. Ukraine*[25], the Court found a violation of Article 38 ECHR on the grounds that the applicant's medical report was not submitted to the Court; it had been destroyed because the deadline for filing such documents had expired.

The index of potential violations contains 345 such identifiers; given that the Convention is "living law", the list is open-ended.

All interested parties have a copy of this auxiliary index; both the author of a regulatory act and the government registrar can simply consult it in relation to any matter covered by the draft regulatory act in question and submit the latter for appraisal. Where at least one issue listed in the index is identified, the regulatory act is submitted for appraisal.

Yet in practice, 18 months after the mechanism was introduced, the authors of such acts still consult the government agent's office even during the preparatory phase. This enables them to bring their acts into line with the Convention before an appraisal is even conducted.

This method has proven effective in practice, enabling us to process some 1100 bills and regulatory acts last year and more than 300 so far this year.

By appraising all draft regulatory acts coming within the scope of the Convention, it is also possible to identify priorities when it comes to reviewing existing legislation on a reasonably frequent basis.

Where the appraisal of a draft highlights certain flaws in existing regulatory acts bearing a systemic link to that draft, the acts in question must also be appraised. For example, the appraisal of the directive on inmates' correspondence highlighted flaws in the Code for the Enforcement of Criminal Sanctions, resulting in the drafting of a bill making the relevant amendments to the Code.

As I have just said, the aforementioned system for appraising compatibility with the Convention applies to all acts, including bills drafted by the executive; on the other hand, it is not mandatory for bills drafted by members of Parlia-

24. http://www.multitran.ru/c/m.exe?t=54271_4_2.
25. *Nevmerjitski v. Ukraine*, No. 54825/00, 12 December 2005

ment. We hope, however, that this problem too will soon be resolved. Firstly, it is becoming increasingly common for MPs to submit their bills for appraisal, for they understand the importance of this procedure; secondly, it is to be hoped that the passing of the Act on Legislative Instruments will make such appraisals mandatory for all those involved in the legislation process.

Ukraine also makes systematic efforts to amend existing legislation in the light of the European Court's judgments, in accordance with national legislation.

Under the aforementioned Act on the Execution of Judgments and Decisions and the Application of the Case-Law of the European Court of Human Rights, the government agent submits proposals to Cabinet regarding the steps to be taken to prevent further violations, including legislative amendments.

These proposals, set out in an official document, are considered by senior government officials, who then give instructions to the relevant ministries together with specific deadlines for their implementation. Ongoing supervision is undertaken by government officials.

The European Court's decisions in cases against countries other than Ukraine also gives rise to amendments to domestic legislation. In such instances, a bill is drawn up by the government agent's staff at the Ministry of Justice's request, with the involvement of other interested government departments. In the wake of the decision in the *Baranowski v. Poland*[26] case, for example, we set in motion the drafting of a bill amending the Code of Criminal Procedure because we identified a similar problem that might eventually lead to a finding of a violation of Article 5 of the Convention.

Appeals by Ukrainian citizens to the Ministry of Justice and other government bodies are a key factor in detecting violations. Such applications arrive in the government agent's office; where evidence is found of a violation or potential violation of the Convention, they are dealt with appropriately, either in relation to the specific case in question or more generally in some instances.

For example, some national courts make it difficult for prisoners to obtain the evidence in their criminal files that they need in order to submit an application to the European Court. In response to such complaints, the government agent began by sending court officials explanatory memoranda about Article 34 of the Convention, asking them to provide the required documentation; we then set up a working group to draft the necessary amendments to Ukrainian legislation.

The most complicated issue, however, is probably that of improving national administrative and judicial practice.

To a large extent, administrative practices can no doubt be improved by bringing ministerial acts into line with the Convention. But what is to be done

26. *Baranowski v. Poland*, No. 28358/95, 28 March 2000.

about the so-called "human factor", or in other words arbitrary decisions by officials?

We hope to resolve some aspects of this problem – at least in the area we see as most important, that is, the length of preliminary police investigations and court proceedings and the time taken to execute judgments – by passing the bill on individuals' right to lodge applications with national courts concerning violations of reasonable time-limits.

The bill clearly provides that a judge's finding of such a violation will serve as a basis for launching a disciplinary inquiry; the perpetrator may be held legally responsible.

In my view, however, wider dissemination of information on all the European Court's decisions – without exception – in cases against Ukraine, to both officials and the general public, is the most effective tool for combating violations.

In accordance with the Execution Act, therefore, the government agent sends information about each of the Court's judgments against Ukraine to all the public bodies concerned and to the Ombudsman. I also have the summary of each decision published in the government journal, which is not only circulated within public institutions but also distributed to the general public. A full translation of the text of each decision is published in the Official Bulletin of Ukraine (*Ofitsiyni Visnyk*). *Inter alia,* these publications allow members of civil society to take action to address specific problems that may strike a deep chord within society at large.

In some cases, the scale and frequency of such problems mean that every official in a particular area needs to be made aware of the European Court's position.

Following the recent decision in the case of *Kucheruk v. Ukraine*, for example, the government agent sent the management of the State Department for the Enforcement of Criminal Sentences (the Ukrainian prison service) an explanatory memorandum concerning the prohibition on the use of excessive force against inmates by prison staff. The explanatory memorandum was coupled with instructions that it be brought to every prison officer's attention, and that the government agent be supplied with a detailed report on the appropriate steps taken in each prison.

It is well-known, however, that national courts play the most decisive role in ensuring the application of the Convention's provisions within the domestic legal system. Accordingly, my country desperately needs to see domestic judges move closer to the values of the Convention, first and foremost by changing their mentality.

Dozens of seminars on the Convention and the Court's case-law are held in Ukraine. One major project consists of in-service training for a standing group of appeal court judges, one from each region; moreover, it is being implemented

with support from the Council of Europe, in particular, and the active involvement of the government agent. It has been running for three years, and has already been effective in ensuring the application of the Convention. A course on the Convention and the European Court's case-law has been included in the curricula for the Judicial Academy, the Prosecutors Academy and the Bar School.

We are developing computer packages to help national courts apply the Court's case-law. As already mentioned, analyses of the Court's decisions concerning Ukraine are published in specialised legal journals, while the Court's judgments concerning other states are published in a specialised quarterly review produced by a non-governmental legal organisation. As the editor of that review, the government agent selects the decisions to be translated, bearing in mind the needs of Ukrainian legal practice.

In my view, however, the most significant motivating factor for judges will be the inclusion of the following short sentence in Section 17 of the Execution Act: "In their deliberations, courts shall apply the Convention and the case-law of the Court as a source of law".

It is my hope that the enshrinement of the Convention's values in domestic case-law, based on the rule of law and respect for human rights, will be the logical outcome of the steps being taken by Ukraine's various national institutions. ★

Mr Derek Walton

Government agent of the United Kingdom[27]

Before we look at specific measures to ensure compliance, I'd like to say a few words about responsibility for implementing the Convention.

Article 1 of the Convention provides that: "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention". This shows that the primary responsibility is on the Government of the state. It is a matter for the internal organisation of the state as to how it chooses to discharge this responsibility. The Government Agent is

27. The opinions expressed are personal and do not reflect those of the British Government.

likely to have a role because this makes sense in practical terms rather than because of any obligation under the Convention.

In particular the Agent may have a direct role in ensuring compliance, e.g. Strasbourg-proofing new legislation themselves. Or he or she may have an indirect role, e.g. ensuring that robust systems are in place to ensure compliance throughout Government.

In the United Kingdom, we have operated both systems at different times. Until 2000, the Government Agent often played a direct role in ensuring compliance with the Convention. However in 2000, our Human Rights Act came into force and responsibility for ensuring compliance was decentralised.

I will draw on that experience to examine the main aspects of arrangements for ensuring compliance with the Convention. In particular, I will look at how we ensure compliance with the Convention of (a) new legislation; (b) new practice and policy; and (c) existing law and practice.

New legislation

It is clearly important that there are effective systems for ensuring that new legislation complies with Convention. The Executive and the Legislature both have a role to play.

The Executive

It is within the Executive that the choice between a decentralised system and a centralised one is most stark. In the United Kingdom, before the Human Rights Act, we had a fairly centralised system. Relatively few people within Government had a detailed working knowledge of the Convention. The Government Agent and his team were among them and so, naturally, draft laws were often sent to us for checking. But this was not an ideal arrangement. The quantity of legislation made it impractical for the Government Agent to scrutinise all draft laws. Not only did we not have sufficient resources, but we also lacked the technical expertise in many of the areas in which the United Kingdom legislates that is needed for an in-depth analysis of compatibility. Furthermore, separating the scrutinising of laws from the policy development within the lead department increases the risk of tension between the Agent and the department promoting the law, who may have very different aims.

Since the Human Rights Act, we have had a decentralised system within the United Kingdom. Departments now have the primary responsibility for ensuring compliance of new laws with the Convention. Section 19 of the Act is the key provision. It provides that, when a Minister presents a draft law to Parliament, he or she must certify whether the law will comply with the Convention. In addition to this obligation, there is also a procedural requirement for a more de-

tailed memorandum identifying the rights engaged by the draft law and explaining why the law will be consistent with those rights. Of course, this requires careful scrutiny within the lead department before a law is proposed. Since the Minister is personally responsible for certifying compliance, he or she will ensure that he has good advice and that his department has sufficient lawyers, with the necessary expertise in Convention law, to provide that advice. As a result, lawyers across Government have had to develop expertise in human rights alongside their other areas of specialisation. This is a more efficient arrangement overall as they are now in a position to understand both areas of law concerned. It also means that human rights considerations can be integrated in policy development at an earlier stage; and it avoids any risk of tension with the Agent. As a result, it is now very rare for my office to be involved in Strasbourg proofing.

The Legislature

Parliament also has a distinct role to play. When a Minister says that his or her draft law complies with the Convention, Parliament does not simply take the Minister's word for it. A Joint Committee on Human Rights was established in 2001. It rigorously scrutinises all new draft legislation and it reports to Parliament on matters which it believes require attention while a draft law is progressing through Parliament.

New policy or practice

Checking the compliance of new practice or policy with the Convention is a matter mainly for the Executive (the Legislature has no obvious role here). Again the choice is, in principle, between a centralised or a decentralised system. But in practice, as least in a country like the United Kingdom, there are simply too many policies and practices for a centralised system to work effectively. Decentralisation is essential.

For this reason the Human Rights Act (Section 6) made it unlawful for a public authority to act incompatibly with the Convention. This again puts the duty to comply directly on the departments responsible for policy. As with section 19, the effect is to require them to acquire the necessary expertise to ensure they fulfil their legal duty. Again, there is only a minimal role for the Agent.

Existing law and practice

Ensuring compliance with the Convention is more difficult when it comes to existing law and practice. Here the choice is between carrying out a systematic

review of all existing law and practice or relying on a system of 'trigger points' at which to review particular laws and practices.

A systematic approach might perhaps be appropriate when a state first becomes bound by the Convention. As a long-standing party to the Convention, that is not the case for the United Kingdom and we have not carried out a systematic review of all existing law and practice. Instead, we rely on a system of trigger points to assess the compliance of existing arrangements. So what trigger points do we use?

Cases before national courts

A number of important tools were introduced by Human Rights Act to ensure that, when a matter comes before a Court, the Court is equipped to ensure that the Convention is complied with. Among these tools is Section 3, which allows a court to interpret existing legislation compatibly with the Convention. This provides the courts with a means of bringing an existing law, which would not otherwise comply with the Convention, into line. So, in one case, a provision excluding evidence of prior sexual behaviour at a rape trial was interpreted so as not to exclude evidence necessary to provide for a fair trial.

Another important tool introduced by the Act was Section 4. It may not always be possible to interpret an existing law compatibly with the Convention under section 3. If so, the Court may declare the provision in question to be incompatible with the Convention under section 4. So in another case, the Court decided that it could not, on any reading, interpret the word *female* in English marriage law to include a person who has changed gender. Since this put the law in breach of the Convention as interpreted by the Strasbourg Court in *Goodwin v. the United Kingdom*[28], the national court declared the law to be incompatible with the Convention.

The effect of a declaration of incompatibility is not, however, to strike the law down. Instead it falls to the Executive to take the action necessary to bring the impugned law into compliance. This may be achieved through a fast-track amendment procedure (Section 10 of the Act), which allows a Minister to issue a remedial order to correct an incompatibility found by national court or by Strasbourg. Alternatively, and in practice more frequently, primary legislation is used to achieve the same result.

Cases before the Strasbourg Court

The starting point here is Article 46 (1) of the Convention, under which the High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties. There is of course a specific mechanism

28. *Christine Goodwin v. United Kingdom*, [GC], No. 28957/95, 11 July 2002.

provided for in the Convention to supervise execution of judgments. In accordance with Article 46 (2) the final judgment of the Court is to be transmitted to the Committee of Ministers, which is to supervise its execution. The Government Agent has a role to play in this process; but that is the subject of another session.

Judgments of the Strasbourg Court against other states

Judgments against other states are, of course, not directly binding on non-parties to the case. Judgments are given a particular legal and factual context that may not easily be transposable to situations in other states. But such judgments may well be of help in interpreting Convention obligations to third states. In the United Kingdom, public authorities are under an express statutory duty to act in compliance with the Convention. So how should they keep track of developments in the Court's case-law that may assist a state in understanding its obligations?

One option is to take a systematic approach. The United Kingdom's Ministry of Justice does this. It produces a regular information note highlighting significant developments in the Court's case-law that it circulates to human rights contacts in all Government departments. This helps departments to identify developments that may be of significance to them.

Another option is to take a more ad hoc approach. We also do this in the United Kingdom. Specific cases may be drawn to a particular department's attention for action.

The judiciary also need to keep abreast of Strasbourg developments given the powers that they have to interpret legislation compatibly with the Convention and to make declarations of incompatibility where this is not possible.

Conclusion

The United Kingdom's experience has been that the best way to ensure compliance with the Convention is to mainstream human rights issues so that all Government departments take human rights fully into account when elaborating their policies and laws. This is what works for us.

This means the government agent has a less prominent role to play in day-to-day compliance issues than might otherwise be the case. But he or she nonetheless has an essential role to play in developing robust systems (such as the Human Rights Act) to ensure that the system works effectively.

The government agent also has an ongoing role in helping departments to understand the Strasbourg system, the implications of the court's judgments and as a source of information and advice.

So I have taken 20 minutes to say what I could perhaps have said in two sentences: the government agent does not necessarily have a direct responsibility for ensuring compliance with the Convention but he or she can play a very useful role in helping the government discharge its responsibility to comply. The nature of that role, though, will differ in different systems. ★

Discussion

Mr Răzvan Horațiu Radu (Romania)

The compatibility of bills with the European Convention already has to be checked under Romanian law. Article 20 *et seq.* of the Constitution provide for the incorporation of international treaties into domestic law and their primacy over national legislation; in addition, the Constitutional Court has the power to assess laws – both before and after they are promulgated – in respect of fundamental rights. In practice, this assessment exercise is now part and parcel of the legislative drafting process; Romania has some experience in this area owing to a 2000 Act which established the principle in relation to European Union law and the treaties.

It has also become common practice to bring legislation and administrative practices into line with judgments of the European Court; examples include amendments to the Criminal Code articles on defamation, amendments to the legislation on custody of children and extraordinary appeals, and the Ministry of Justice circular on inmates' correspondence.

Mr Lipot Höltzl (Hungary)

Derek Walton's presentation defined the focus of our discussion: should the compatibility of existing domestic law – legislation and administrative practices – be systematically reviewed on a regular basis, or solely in response to judgments delivered by the Court?

As far as Hungary is concerned, systematic reviews were conducted *ex ante*, that is, prior to the signature and ratification of the European Convention; this was the "compatibility exercise" asked of new Council of Europe member states. Since Hungary became a Contracting Party, it has no longer been able to conduct such comprehensive reviews on a regular basis, owing to a lack of human and budgetary resources. At the government agent's request, however, domestic law

is reviewed both where the Court finds against Hungary, in which case it is a matter of taking the necessary general steps to comply with the judgment, and where the reasoning given for judgments against other states appears to warrant amendments to domestic law so as to make it more compatible with the Convention.

Mr Frank Schürmann (Switzerland)

I should like to draw your attention to a difficulty we sometimes face when it comes to assisting and advising the offices responsible for drafting new legislation. Increasingly, we are unable to give a clear indication as to whether or not a particular solution is compatible with the requirements of the Court's case-law. Using traffic lights as a metaphor, it is – fortunately – unusual for the light to be red, that is, where the suggested solution is clearly incompatible with the Convention. In some cases, we can give the green light – this too is a positive sign, of course. More and more often, however, the light is orange: that is, the Court's case-law does not yield clear enough conclusions. In such cases, we must simply raise our remaining doubts and warn the competent authorities that there may be a problem under the Convention. The situation is far from satisfactory; where our doubts stem from the Court's case-law itself, it detracts from the latter's authority. To borrow the image used by Ms Mijič earlier, when she compared the agent's role to that of a mother (who defends her child before the Court, but must also criticise him or her afterwards if the Court finds a violation): it is as though the mother were saying to her child: "maybe you shouldn't do that, but I'm not quite sure". It goes without saying that such a plea is unconvincing.

Ms Deniz Akçay (Turkey)

The compatibility of national legislation and practices with the requirements of the Convention and the Court's case-law is reviewed according to a different framework in each legal system, depending on how centralised or autonomous the latter is. In Turkey, the compatibility of bills is systematically reviewed by the relevant parliamentary committees as part of the process of applying to join the European Union. Such monitoring is particularly important in the wake of the amendment of the Turkish Constitution; the new last paragraph of Article 90 provides for the primacy of international human rights conventions over national law.

Where the agent's views are sought as part of such checks, his or her opinion on compatibility is bound to be hypothetical, since he or she cannot commit the European Court, which may take an entirely different view of the law in question.

The key to this exercise, however, is to ensure that there is an awareness of the need to check, at a particular point, whether bills are compatible with the Convention.

Ms Radica Lazareska-Gerovska ("the former Yugoslav Republic of Macedonia")

In the Republic of Macedonia the compatibility of national legislation with ECHR standards is ensured in two ways.

As regards the existing legislation, the compatibility was evaluated by an inter-agency working group, set up at the moment of signing the Convention(1995). The evaluation process went on for two years whereby a large number of laws were harmonised, so that at the moment of ratification in 1997, it was assessed that the Republic of Macedonia legislation was in line with the European Convention on Human Rights.

As to the new legislation drafted, there is no centralised system which would assess each draft law from the aspect of its harmonisation with the European Convention on Human Rights and its case-law, but it is left to each drafter of the proposal. Given the fact that in the Republic of Macedonia the agent is in the Ministry of Justice, he has an insight into the legal texts proposed by the Ministry, but he may only point to the government that certain draft law may be problematic from the aspect of the European Convention on Human Rights, which is not binding for the legislator. In the information communicated to the government in relation to the judgments adopted against the Republic of Macedonia, the government agent also indicates the problematic legislation, pointing in which direction it should be changed, which is also not binding for the drafter.

Given that an inter-agency body for human rights has already been set up within the Government of the Republic of Macedonia, it is being considered to expand its competences in this direction also (to follow the compatibility).

However, we are aware that it is very hard to ensure compatibility with the European Convention on Human Rights, given the high dynamic of work of the Court.

Mr Ignacio Blasco Lozano (Spain)

The decentralised system referred to by the British government agent is far preferable to any other, more centralised type of system. A centralised system runs two risks: firstly, there may be an attempt systematically to review – as a preventive measure – the compatibility of all bills with the requirements of the Convention, which is unlikely to be feasible; secondly, the stage may be set for an

intractable conflict between the Constitution and the Convention, both of which clearly rank higher than the prospective legislation but whose hierarchical relationship is controversial.

It is better for the ordinary courts to review compatibility after the event, although this depends on the position treaties occupy within the national legal system.

Ms Inger Kalmerborn (Sweden)

The government agent is an important player – but not the only player – in checking the compatibility of bills with the Convention; Sweden has a hybrid system, which is neither fully centralised nor completely decentralised.

The agent is asked to give his or her opinion on bills, but they are then submitted to the Legislative Council, comprising three judges from the Supreme Court and the Supreme Administrative Court, which also checks their compatibility with the Convention. Insofar as the Council's opinion is not binding – although it is generally followed – bills are again reviewed by the government, including the agent's office, before being forwarded to Parliament.

The difficulties encountered in the course of such reviews relate, firstly, to the bills' technical content – in respect of taxation, for example – which may be beyond the technical expertise of the agent's staff, and, secondly, to the complexity of the issues raised; this may mean that the agent can give an opinion only subject to provisos, in which case he or she must say so and accept responsibility.

Naturally, such problems may be alleviated by training ministry officials in Convention law, thereby helping to ensure better-quality bills.

Sweden does not review the compatibility of existing legislation on an ongoing basis; such reviews are conducted only on an ad hoc basis in the light of the Court's judgments and developments in its case-law.

Mr Jeroen Schokkenbroek (Council of Europe)

A number of government agents have just said that it can be difficult to state reliably whether a bill is compatible with the Convention and its judicial interpretation. An additional avenue worth considering in such cases would be to approach the Council of Europe for help; it is not the latter's role to comment on compatibility, of course, but it can provide assistance in the form of an evaluation by an independent expert. This would give national authorities a second opinion, the conclusions of which could be compared with those of national lawyers.

Ms Mai Hion (Estonia)

It would be invaluable to have Council of Europe experts' opinions on bills; as my Hungarian colleague emphasised, checking compatibility is a fairly difficult exercise. Such checks must be carried out, however; they play a useful preventive role, for instance by keeping Parliament fully informed of the requirements deriving from the European Convention. Nevertheless, a bill's compatibility is not 100% certain, since one also has to reckon with internal decisions and the role of the ministry responsible for drafting the bill; the part played by the government agent in this process is one of providing answers to the questions he or she is asked. Owing to a lack of human resources, however, the agent cannot check the compatibility of every bill. To a large extent, therefore, such checks of compatibility rely on the work of national courts in ensuring that existing legislation complies with the Convention.

Mr Jakub Wołąsiewicz (Poland)

Reviewing bills' compatibility with the Convention and the associated case-law is a delicate matter. How can a Council of Europe appraisal or the agent's opinion be put to the best possible use when ministerial authorities do not have to act upon either of them?

As far as checking the compatibility of existing legislation is concerned, there are situations involving structural violations against which the agent is powerless; this is the case where the violation stems not from the law – which, therefore, does not need to be changed – but from judicial practice. Accordingly, I am convinced that there is a need for dialogue between the European Court and national supreme courts.

One question remains: where the same situation exists in the law of several states and the Court finds against one of them, does its judgment have an impact on the others, placing them under an obligation to amend their legislation as a preventive measure to make it compatible with the Convention?

Mr Francesco Crisafulli (Italy)

I wonder what the real purpose of Recommendation (2004) 5 of the Committee of Ministers is, as it seems to me that the true aim is not to check the compatibility of bills with the Convention, but to ensure regular checks of existing legislation.

Either way, I note that the recommendation ends up giving the Convention supra-legislative status, akin to constitutional status, which may cause difficul-

ties for some legal systems (particularly dualist systems). In Italy, for example, we have long had a real problem when it comes to reconciling centralised monitoring of laws' constitutionality (for which the Constitutional Court has exclusive competence) with the possibility of diffuse (or decentralised) monitoring of laws' compatibility with the Convention, undertaken by the ordinary courts (in respect of substantive aspects or legitimacy). Personally, I am of the view that systematic monitoring of existing legislation, in the light of the Convention and the associated case-law, would be impossible in Italy, both for the practical reasons mentioned by a number of speakers and for constitutional reasons. Recently, in the wake of two judgments by our Constitutional Court, which I shall have an opportunity to discuss in my presentation, the situation has been as follows: the ordinary court is under an obligation, as far as possible, to interpret Italian legislation in a manner consistent with the Convention, as interpreted by the European Court; should this prove impossible, it must raise the issue of the law's constitutional legitimacy before the Constitutional Court; the Constitutional Court will then decide the matter in the light of Article 117 of the Constitution (which requires the legislature to legislate in accordance with the state's international obligations), with due regard to the Strasbourg case-law.

All the same, when it comes to assessing – on a preliminary basis, or in any event in the absence of a Court judgment directly challenging the validity of a particular piece of legislation – a bill or Act's compatibility with the Convention, major problems may indeed arise. It is true that the Court's case-law is founded on principles, but judicial solutions often apply to a particular case; this is the nature of the system, for the judge's material application of the concepts developed – such as fair balance and proportionality – depends on the circumstances of each case. When the agent (or any other lawyer) is asked to comment on a bill's compatibility with the requirements of the Convention, therefore, he or she can only give an opinion tinged with uncertainty. The agent shares this discomfort, however, with all those seeking answers in the Court's judgments, including both national judges and Council of Europe experts (whose contribution is certainly valuable, but by no means resolves all the issues). Accordingly, the agent should not be concerned if his or her opinion is subsequently contradicted by a development in European case-law or even a departure from existing precedents: in such cases, mistakes are in the nature of things, and neither the Convention nor the Court can expect other-worldly perfection of the states. The system for the protection of fundamental rights established by the Convention is there precisely to offset the inevitable imperfection of the solutions opted for at national level.

Ms Anne-Françoise Tissier (France)

In theory, it falls to the ministry responsible for each bill to review its compatibility with the Convention. As a result, the agent is consulted primarily in relation to slightly tricky issues, the answer to which is rarely obvious, especially given that, as the Italian and Swiss agents have emphasised, reviews are conducted at a particular point well before the Court has to give any ruling. It is consequently frustrating for the requesting ministry to receive an answer lacking conviction, and for the agent to be subsequently contradicted by the Court. It is thus with little enthusiasm that the agent reviews the compatibility of national legislation with the Convention.

Mr João Manuel Da Silva Miguel (Portugal)

The Portuguese system is similar to the French and Italian systems; the government agent's opinion is requested where the ministry responsible for the bill considers it necessary. The problem is consequently that his or her opinion is sought in relation to the most complex, unclear issues; this is compounded by the fact that the opinion given is based on existing case-law, and is consequently valid only for a limited period.

In addition, it must be borne in mind that in many cases the law is well made, but its interpretation and application by the national courts are censured by the European Court; in such situations relating to the law in practice – for example, the issue of the proper balance between the right to one's reputation and freedom of the press – any opinion the agent may have given, or might give, is inconclusive when it comes to checking the compatibility of domestic law with the Convention.

Mr Vit A. Schorm (Czech Republic)

There is no definitive answer to the question raised by the Polish government agent. A finding against one state will clearly have indirect repercussions on other states whose domestic legal systems exhibit the same features – as a result of actions or omissions – as those censured by the Court; nevertheless, the other states, which will no doubt be interested in the Court's judgment, are under no legal obligation to comply with it. While these other states may wish to align themselves with the solution identified by the Court, as a preventive measure, it is therefore up to them how they choose to do so; this choice has to be available to them so that they can make allowances for the requirements of their legal systems. Not being the state found against, which has to comply with the judgment,

they are under the lesser obligation of ensuring that their system is compatible with judicial interpretation. They are bound by the "precedent" set rather than the final judgment, and do not have to take exactly the same measures as those adopted, with the Committee of Ministers' approval, by the state in question. Following the *Kudła* judgment, for example, the Czech Republic chose to adopt a different remedy (comprising both preventive and compensatory components) from that implemented by Poland; the Court subsequently deemed this remedy to be partially consistent with the requirements of its case-law (the compensatory component was ruled to be effective, while the preventive component was not), bearing in mind that both the Polish and Czech solutions comply with Article 13 of the Convention.

Mr Jean-Laurent Ravera (Monaco)

It cannot be denied that the Court's case-law sometimes generates uncertainties that government agents have to deal with in their task of assessing the compatibility of domestic law with the requirements of the Convention. Although these uncertainties may expose the agent to the frustration of having to give an ambiguous opinion or subsequently being contradicted by the Court, they are very important and are part and parcel of a dynamic "democratic society" always open to change.

Ms Marica Pirošíková (Slovak Republic)

National legislation can also be brought into line with the Convention through the intervention of a constitutional court responsible for ensuring compliance with international obligations having direct effect. This is the case with the Constitutional Court of Slovakia, whose interpretation of the Convention – with which the legislature has to comply – is sometimes stricter than that of the European Court. ★

Summary of day one

Mr Arto Kosonen

Government agent of Finland

In their role in representing the states before the European Court, agents may wish to be subject to regulations setting out their specific responsibilities. Adopting such an approach in isolation, however, is likely to launch an endless debate on the degree of independence – or merely autonomy – enjoyed by agents *vis-à-vis* their national authorities. Given the range of views aired by agents themselves, it is important to take a flexible approach to the matter.

Agents would undoubtedly like to have more opportunities for dialogue with one another, in relation to both their respective experiences and the progress of pending proceedings; this was clear from the opinions voiced in relation to third-party intervention. Consideration must therefore be given to the form such exchanges could take.

It is also clear that some agents regard themselves as being responsible for defending their national authorities before the Court, but are more reluctant to see themselves as being responsible for upholding human rights. Agents' professional practice transcends this opposition in a number of respects, however, since it is designed to assist the Court in its task of administering European justice: the implementation of interim measures, proposals for friendly settlements, and the submission of unilateral declarations are undoubtedly all examples of situations in which the government agent seeks to ensure the administration of balanced justice.

Under Article 1 of the Convention, the states parties have to bring their domestic law into line with the Convention. Should every possible effort be made to ensure that national legislation and practice are compatible with the Convention, however? In any event, answers to this question vary, with pragmatic approaches coexisting alongside more systematic approaches.

There is no doubt that the compatibility of existing legislation is a complex issue. On the one hand, incompatibility may stem not from the very text of the legislation, but rather from its practical application, about which there is little

the agent can do; on the other hand, the agent does not have the time or human resources to review the compatibility of existing domestic law as a preventive measure. The matter will consequently come to the fore as the result of a finding against the state in question. While it is bound up with the wider issues surrounding the execution of judgments, it is a separate issue in that it involves persuading national authorities of the need for general measures; it seems more fitting to attempt such persuasion by friendly means – interpersonal relationships, visits, written reminders and so on – rather than simply asserting one's authority. Nevertheless, the question has arisen as to the liability of the national public body responsible for the violation found.

The task of assessing the compatibility of bills is no easier. The opinion given by the agent is confined to a text at the draft stage, and does not of course relate to its future application, which may give rise to differing interpretations and developments modifying the scope or meaning of the law. Moreover, the agent's opinion is based on the legal situation under the Convention at a particular moment in time; the agent must therefore incorporate the possibility of a development in the Court's case-law or even a departure from existing precedents, which naturally does not enhance the clarity of his or her opinion or make it straightforward to implement. In addition, some agents find that their task is made more arduous by the fact that, in reviewing bills' compatibility with the Convention, they have to endeavour to balance the state's obligations to the Council of Europe with those it has to the European Union. ★

Theme III

The contribution of the government agent to the execution of judgments of the European Court of Human Rights

Moderator: Ms Anne-Françoise Tissier, government agent of France

Ms Deniz Akçay

Co-agent of the Government of Turkey

I should like to note from the outset that there is no definition of the government agents' role, or even a substantive reference to it, in the Convention, the Rules of Court or the Committee of Ministers' rules on the execution of judgments of the Court. The matter was not discussed in the process of drafting Protocols No. 11 and No. 14.

While this approach is perfectly understandable from an international public law perspective, it has to be said that separate bodies have recently been set up within some monitoring mechanisms to act as co-ordinators or points of contact for national authorities. Article 15 of the Convention for the Prevention of Torture clearly calls for each state to designate an authority to receive notifications from the Committee. It also invites governments to notify it of any liaison officers they may appoint.

Many agreements on criminal co-operation also provide for the designation of national authorities to act as liaison officers.

Even monitoring mechanisms unrelated to conventions or agreements, such as the European Commission against Racism and Intolerance, also have provision for national liaison officers.

The fact that there is no reference to a government agent or national authority in the system established by the Convention in 1950 may be put down to a fundamental assumption – indeed, a fundamental gamble – on the part of its au-

thors, who believed that the Convention's supervision mechanism was more likely to be concerned with intergovernmental applications, and that in any event few applications would come before the Court once the Commission had dealt with them.

A more interesting question, of course, is why no thought was subsequently given to defining the role of government agents in the process of drafting Protocols Nos 11 and 14, when we knew that the initial gamble had failed to come off owing to the rapid rise in the number of individual applications.

Why was this? Perhaps a certain momentum had built up; after all, why add a separate, "visible" new element after more than 50 years, when the focus was on restructuring the system around a single, more efficient Court?

There is another reason too, however: institutional practices had become ingrained in 50 years of operation. By and large, it was regarded as preferable for each national legal system to have the freedom to select or appoint its own agent, with the result that there was no uniformity as to the ministries responsible for recruiting or appointing agents; in addition, agents were not in it for the long haul, with many of them holding the post pending another appointment. Let us be honest: being an agent did not, and still does not, constitute a clearly defined career path in every state.

Although new Council of Europe member states have opted to appoint agents and set up agent's offices, therefore, this has not become standard practice.

As far as "collective" relations with the Court are concerned, there is no structured, collective communication with it other than the biennial meetings with the Registry and members of the Court.

As for the Committee of Ministers, I remember a proposal for regular meetings of agents in their capacity as execution officers. Incidentally, a more elaborate version of this proposal called for meetings of agents to be held for the purpose of supervising execution.

These proposals were not followed up, however. Unless a specific appointment was made, the position of agent was an abstract concept prior to Recommendation 2008 (2), and in most instances this is still the case; in any event, there is no clear definition of agents' role.

Notwithstanding the fact that there are no uniform rules or, in particular, common professional standards, the supervision of the execution of judgments has grown phenomenally over the last 20 years.

Execution has now become an "art" comparable to that of defending states before the Court, with its own principles and objectives.

Incidentally, the concept of execution of judgments itself is mentioned only in a single, short article of the Convention. It should be borne in mind that Article 41 of the Convention, on "just satisfaction", encroaches on the execution process somewhat by accepting from the outset that "the internal law of the High

Contracting Party" may allow "only partial reparation to be made" for the consequences of a violation.

In the view of the Convention's authors, therefore, the execution of judgments was already a secondary concept, confined to any general measures that might be necessary.

Only Recommendation 2008 (2) on efficient domestic capacity for rapid execution of judgments of the European Court of Human Rights ventures to identify a national authority responsible for playing at least a co-ordination role in supervising the execution of the Court's judgments.

This authority may be the agent, but does not necessarily have to be, since the term "agent" is never used; instead, the term "co-ordinator" refers to an authority whose role may be analogous to that of the agent.

Given the wide variety of national practices, the recommendation did not go as far as specifying the agent as this authority; as a rule, the nature of the duties expected or advocated by the recommendation may, however, be said to coincide more or less with those of agents.

What specific role is, or would be, played by an agent-like authority able to help speed up the process? Are we pushing on doors that are already open? Lastly, while it is true that the recommendation's expectations of this agent-like authority are no doubt important, the latter's role – let us be realistic – is not critical.

In short, the recommendation asks the co-ordinator to:

- acquire relevant information,
- liaise with persons or bodies responsible at the national level for deciding on the measures necessary to execute the judgment,
- and, if need be, take or initiate relevant measures to accelerate the execution process.

Although important, these three expectations are not critical, and will prove even less adequate where more serious problems arise, necessitating political decisions either at the highest level of government or in conjunction with government decision-making by national parliaments. In my view, it is ridiculous to think that these three "tasks" will make an agent the *deus ex machina* of full and rapid execution.

The recommendation gets it right, however: it is the member state's responsibility to:

- ensure the existence of mechanisms for effective dialogue and transmission of information between the co-ordinator and the Committee of Ministers,
- take the necessary steps to ensure that all judgments are executed,
- develop effective synergies between the different authorities,
- identify as early as possible the measures required for this purpose,
- prepare action plans,

- take steps to inform the various players in the execution process,
- disseminate the vade-mecum concerning execution of judgments of the Court,
- as appropriate, keep their parliaments informed of the situation concerning execution,
- where required by a "significant persistent" problem, ensure that all necessary action is taken at the highest political level if need be.

In terms of the tasks to be performed, and above all the obligations and responsibilities to be taken on, the role of the focal point – described as a "co-ordinator" assigned a number of tasks which, albeit important, are fairly administrative in nature – clearly bears no relation to the other, more general responsibilities falling to the contracting state.

Nevertheless, the system outlined in the recommendation does not place any restrictions per se on a specific state that might wish to assign some or all of the other responsibilities listed in Recommendation 2008(2) to its focal point, co-ordinator or, better still, agent.

At the same time, it is – perhaps – important not to lose sight of the fact that agents' role in the execution process is not the same as that they perform before the Court, where, with all the information obtained from their authorities to hand, they argue as qualified lawyers for a ruling of inadmissibility or a finding that no violation has occurred.

The execution phase is extremely sensitive, in that the finding of a violation comes between the agent and the authorities. In a way, the judgment thereby turns the government agent into the Committee of Ministers' agent as well.

In this new scenario, the agent has to convince the authorities to take measures at odds with their position, which in some cases he or she may even have argued as the government's agent before the Court.

This is particularly obvious where the Court highlights systemic problems necessitating legislative or constitutional amendments, regulatory, administrative or educational measures, or – more serious still – both.

In other instances, it can be difficult to adopt individual measures insofar as it may be necessary to reopen court cases in which a final judgment has been handed down. Alternatively, it may be necessary to reopen situations that might call into question the gains made by a third party.

In relatively straightforward cases that do not give rise to objections, therefore, a judgment's execution may be sped up by means of rapid communication with the authorities concerned, under the agent's supervision.

In the event of structural problems, however, agents may be in an awkward position: firstly, agents themselves must be convinced of the need for the measures to be suggested to the authorities. There is always a moment of inner struggle – resulting from the law of inertia in the face of a finding of a violation –

against the outcome one has fought long and hard to avoid. It is difficult to "convert" to upholding the Court's judgment when one has previously defended – for several years in some cases – contentions and arguments that the Court rejects one by one in its judgment.

Naturally, objections may also be raised by the authorities, for the judgment represents a challenge that they too must overcome via the execution process.

In terms of the responsibilities outlined in the recommendation – irrespective of the co-ordinator's official title, for it may be assumed that the agent will be at least a co-ordinator – it should be possible to envisage a more active, and above all more practical, role for agents.

As regards the technical aspects of such intervention or initiatives (translations, dissemination and so on), we have of course heard, and will continue to hear, about a number of variations based on people's positive or less positive experiences. Nor do I wish to dwell on the idea of systematising our responsibilities, which could not be more unlikely given the very wide range of rules to which agents are subject.

There is, however, one aspect I believe we all need to think about: the ability to anticipate at an early stage, as far as possible, those judgments that will prove difficult to execute.

Every application goes through different stages. There is a point, however, at which we may already sense that the Court will find a violation; it may have done so in similar cases, the decision on admissibility may contain statements that presage such an outcome, or, lastly, we ourselves may be aware of a structural problem inherent in the law.

In all of these scenarios, I believe we ought to be in a position to indicate to our authorities the measures that a violation might necessitate.

The new set-up outlined in Recommendation (2008) 2 has given a higher profile to the role of the government agent (or the co-ordinator or national authority responsible for execution, for that matter), both before and after a finding of a violation, conferring duties and responsibilities; it is up to the agent to explore whether or not these powers are clearly defined, and to experiment far more actively where they have been assigned to him or her.

There is also every reason to continue on this path, vis-à-vis the Committee of Ministers and the Secretariat staff responsible for supervising execution as well as national authorities, so as to tread on sure ground and avoid misunderstandings that might arise at a late stage.

Another step I regard as essential in some cases is to vary the range of execution procedures by disseminating appropriate information to members of the national legal service and civil servants and providing in-service training for the staff of authorities involved in the execution process, without confining ourselves to the measure specifically required in execution of the judgment. It is not

a matter of dispersing resources: on the contrary, it is a concerted strategy geared to raising the awareness of all those within the national machinery on an ongoing basis.

I would like to close with a suggestion: in the wake of the new recommendation, it strikes me as appropriate to consider holding regular meetings between government agents and the Secretariat staff responsible for execution, along the lines of the biennial meetings with the Court. Such meetings would enable agents – without referring to individual cases, on the same basis as the meetings with the Court, moreover – to raise any problems they may encounter in respect of execution and discuss various aspects of execution in general with the Secretariat staff responsible for supervising judgments. ★

Mr Francesco Crisafulli

Co-agent of the Government of Italy

When I arrived in Strasbourg in May 2000, I – just like my predecessor, whose deputy I was – wore two quite distinct hats: that of the Delegation's legal adviser, which I put on to attend the Committee of Ministers' human rights meetings; and that of co-agent, which I respectfully removed in the courtroom to plead before the European Court of Human Rights. Each of these hats linked me to a different chain of command: one involving the Permanent Representative, and the other the agent. It is true that both chains of command were headed by the same entity: the Italian Government, represented, moreover, by the same Ministry of Foreign Affairs, to which both diplomatic officers and the government agent's office are attached. There was nevertheless a clear distinction between them, which was not without practical implications.

I virtually had a free hand in my role as agent: the highly technical nature of the task of defending the government before the Court left me a great deal of room for manoeuvre, particularly given that in Italy the management structure within the agent's office has always been purely formal and theoretical. In practice, its three members (agent, co-agent and deputy co-agent) have always been on a largely equal footing, giving one another considerable freedom in dealing with cases, in a spirit of both co-operation and independence that is very typical

of the judicial system (from which the co-agent and deputy co-agent have traditionally been appointed), where the only kind of hierarchy accepted is one based on experience. Incidentally, all the work relating to the European Court of Human Rights is assigned to the two co-agents based in Strasbourg, while the titular agent concentrates on his or her other duties, including proceedings before the Luxembourg Tribunal and Court.

At the Committee of Ministers' human rights meetings, on the other hand, I represented (on behalf of the Permanent Representative and in my capacity as legal adviser) both the complex political hierarchy of the Ministry of Foreign Affairs, which speaks for the government on the international stage but is often unfamiliar with violations found by the Court and the obligations that may derive from such judgments, and the Ministry's no less complex relationships with the other ministries, administrative departments and authorities that are generally responsible for the measures to be taken in execution of the judgment, but in some cases have little sense of the European and international dimension of their tasks. I was subject to more constraints when wearing this hat. In fact, my work as a legal adviser was largely that of a liaison officer: presenting to the Deputies any information received from the capital, which then had to be confirmed in writing (giving rise to legitimate doubts as to the point of this solemn yet needlessly long and impractical procedure, which resulted in an overhaul of these working methods); taking note of the Secretariat's comments and requests; relaying these comments and requests to the relevant ministries; and awaiting further information.

The purely administrative nature of my position as legal adviser, the more rigid supervisory structure, the primarily "ministerial" approach taken to execution matters and the international political factors that sometimes influenced the latter all impeded more incisive, proactive measures on the legal adviser's part, theoretically prevented any direct contact with non-ministerial authorities and relegated the adviser to the sidelines of the execution process. Although legal advisers felt able to take their action further on some occasions, this came down largely to individual initiative, personal standing and experience, the relative latitude and various special relationships that may be afforded by membership of the judiciary, especially in dealings with the courts, and a certain "Mediterranean" flexibility that accommodates the odd departure from rules and procedures. On the whole, however, especially at the beginning, such initiatives were greeted with polite interest – albeit condescending at times – and their results were less than impressive.

Things have changed since then.

Some of you may remember the plea I myself made at the meeting of government agents in The Hague, organised by the Dutch chairmanship in December 2003. I argued that agents should participate directly in the human rights meet-

ings and have greater, more direct involvement in the judgment execution process; I also argued for a review of the agent's position within the institutional structure of our states (a review I regarded – and still regard – as being closely bound up with agents' influence on the implementation of judgments, and thus of the Convention itself). Needless to say, I am under no illusion that I helped spark the changes we have been seeing for some time, but I do flatter myself that I at least predicted them.

It is a fact that more and more member states have appointed specially qualified legal experts to their representations; some of these experts also hold the post of co-agent. Other countries have adopted the practice of sending agents or their staff to Strasbourg for the human rights meetings, either to take part directly or to provide technical assistance to the diplomats responsible for presenting the government's position, at least for those meetings in which particularly sensitive cases concerning the state in question are under discussion. Lastly, it appears to be becoming increasingly common for agents or their staff to be assigned the task of conducting evaluations and bilateral discussions in conjunction with the Secretariat with a view to resolving the various problems that may arise in the course of an execution procedure.

These developments in states' practice have not been confined to a purely domestic framework; indeed, they reflect a change in the attitude and practice of the Council of Europe organs. I cannot say which of these gradual changes started first or whether there is a causal link between them – and if so, I could not say which was the cause and which the effect. I note, however, that as well as coinciding chronologically, these changes appear to be related and interdependent. In this connection, I feel it is necessary – and only fair – to add that similar changes have been taking place within the Execution Department: a greater focus on legal and technical aspects of the execution of judgments and the need to avoid making them a pretext for general political stances or pressure; a growing willingness to listen to the delegations and engage in open, transparent bilateral dialogue; the considerable care taken to ensure that judgments and the information about national law supplied by the defendant state are analysed scrupulously by both sides; in short, a pragmatic commitment to the practical outcome of the exercise and a genuine awareness of its inherent limitations. For my part, I welcome this approach and am delighted to see it continue.

The Committee of Ministers' "new" working methods, drawn up at the Norwegian chairmanship's behest nearly four years ago, no doubt represent an important stage in this overall development; they are still subject to verification, evaluation and, where necessary, minor adjustments by the successive chairmanships. These new methods have made the human rights meetings a great deal more productive. In particular, they put an end to the pantomime whereby each case was called by name, even if there was nothing about it that warranted

discussion, just so that a delegation could drone out a string of information which was impossible to retain (and had to be reconfirmed in writing in any case) or declare, with numerous circumlocutions, that it had nothing to say (which is generally done more quickly in silence). However, they also promoted the bilateral communication between the Secretariat and the delegations I alluded to earlier; insofar as they enriched the content of the human rights meetings and made them more technical in nature, they also encouraged the states to send their agents or specialised legal advisers – who were either permanently based in Strasbourg or came from the capital – to them.

The Norwegian initiative was part of a process of reforming and streamlining the procedure for supervising the execution of judgments; a more efficient procedure was widely seen as a prerequisite for ensuring the long-term operation of the entire Convention system. Specialists never overlooked or underestimated the importance of executing judgments and bringing national legal systems into line with the requirements of the Convention, as gradually revealed by the Court's case-law. It was particularly in the light of the declaration adopted in Rome on 4 November 2000 by the ministerial conference held as part of the celebrations marking the Convention's 50th anniversary (a major event, which was already mentioned in the course of yesterday's proceedings), however, that the issue of execution of judgments really took on, in the minds of all those involved in the mechanism for protecting fundamental rights, the crucial importance we now place on it. Since then, member governments, the Committee of Ministers, the PACE and, last but not least, the Court itself (which, increasingly often, is gradually overcoming the restraint it has always shown in respect of execution and including paragraphs devoted wholly and specifically to the application of Article 46 in its judgments, alongside those relating to the application of Article 41) have made resolute efforts – each within its own particular sphere – to improve execution procedures and mechanisms, sustained by a day-to-day awareness of their importance with a view to ensuring effective protection of fundamental rights in Europe and "rescuing" the Court from drowning under the rising tide of applications.

Right from the earliest stages of this wide-ranging reform, it became obvious that the execution of judgments (notwithstanding all that is specific, distinctive and individual about this operation) was closely bound up with efforts to prevent violations, resolve systemic problems and develop domestic remedies: in short, to bring domestic law into line with the requirements of the Convention, as part of a circle (vicious or virtuous as the case may be) centred on a commitment to respect and guarantee human rights, extending to all aspects of the principle of subsidiarity and embracing the "constitutional" dimension of Convention law. I think the broader concept of "execution" may thus be said to include certain measures – such as verifying the compatibility of laws and bills, advocated by Rec

(2004) 5 of the Committee of Ministers – which, without being directly related to the implementation of a specific judgment, nevertheless anticipate general measures that may one day prove necessary, when – sooner or later – the application of flawed legislation has given rise to a finding of a violation.

The practical developments I mentioned earlier, coupled with the wide-ranging process of reflection I have just outlined, recently led to the adoption of Rec (2008) 2 on efficient domestic capacity for rapid execution of judgments of the European Court of Human Rights. Deniz Akçay has spoken at length on the subject, and I endorse her comprehensive, relevant analysis.

It is true that the recommendation does not expressly mention agents, that it contains few details conducive to a precise definition of the co-ordinator's role and that it assigns the co-ordinator only incidental tasks. Those who, like myself, were involved in the preliminary work are aware of the extent to which this undeniable element of "uncertainty", or perhaps reticence, was a product of both the considerable variation in our respective constitutional and legal systems and the no less considerable variation in our countries' mentalities and cultures, geography and demographics and political and institutional traditions and practices, in short, the constraints Ms Akçay mentioned earlier. The need to respect these specific national features while carving out a path that is both accessible and practicable for all, yet also able to take us forward rather than locking us into a loop with no way out and no prospect of progress, was a major challenge for the experts responsible for drafting the text of the recommendation. They rose to it, and in my view the recommendation, notwithstanding all its limitations, is evidence of their success; they took a sizeable step in what I regard as the right direction: giving agents a central role in the execution process.

It strikes me as absolutely self-evident that the government agent's involvement enhances the judgment execution process; in my view, we have a practical illustration of this before our very eyes, which is worth all the arguments in the world. I have already sung the Execution Department's praises, and do not wish to detract from its members' personal merits at this point; I am sure, however, that they have been spurred on, stimulated and encouraged in their work by the Director General, Philippe Boillat, whose wealth of professional experience stems – as if by chance – from his long and brilliant career as the Swiss Government's agent. Watching the way he operates and deals with the problems raised by the execution of judgments, one cannot help but see the signs of a long-standing familiarity with the task of representing the state before the Court on a daily basis, and the intimate, detailed knowledge of the Strasbourg case-law that goes with that. Do we need convincing any further? Just think how often each of us, when examining a new application and starting to sketch out our defence, imagines the implications the various possible outcomes of the proceedings might have in terms of execution, and bases his or her arguments and the order of his

or her conclusions (main or subsidiary) on these prognoses, in an attempt to avoid at least the finding that would give rise to the most significant individual or general measures. It is clear that the agent, who will often have anticipated the requirements of the execution process before the judgment has even been given, is undoubtedly the most appropriate person to interpret the stipulations deriving from the decision once it has been handed down.

For my part, therefore, I have no hesitation in advocating an interpretation of Rec (2008) 2 that places the greatest possible emphasis, at national level, on the role and position of both the "co-ordinator" and the agent, on the understanding that these two players in the execution process may either be one and the same, subject to certain conditions, or remain distinct.

As you know, Italy has had some difficulties in relation to the execution of judgments, for instance in bringing its domestic law into line with the Convention and ensuring the effective exercise of the responsibilities deriving from the subsidiarity principle. It would take us off on a tangent to analyse them here; suffice it to say that these difficulties were – and still are, insofar as they may still be ongoing – the result of various factors: both the dualist approach to international public law and a certain lack of training in international human rights law among legal professionals (particularly civil servants and members of the national legal service); the position assigned to treaties (and the Convention in particular) in the constitutional system of sources of law, which is not always clearly defined by doctrine and case-law, along with a number of distinctive features of the Italian political and parliamentary process; and the fact that rights under the Convention have almost completely superseded constitutional rights, coupled with differences between the European Court's interpretation and that of national courts (including the Constitutional Court), as well as a degree of rigidity in the domestic legal system.

Since the ministerial session of May 2004, which represented a crucial stage in the process of reforming the European system for protection of fundamental rights, and thanks to the 2005 amendment of Article 117 of the Constitution (although in actual fact the reasons for the latter were politically unconnected to a desire to ensure better protection for rights under the Convention), Italy has embarked on a process that has already yielded significant results; it is to be hoped that it will serve as a starting point for positive changes in the area under discussion.

Chronologically speaking, the first – and perhaps most spectacular – new developments arose in the parliamentary system. They resulted partly from the steps the PACE has started to take in respect of the execution of judgments, beginning with Resolution 1226 (2000), and in particular the "kick-start" represented by Resolution 1411 (2004) and its threat to make use of Rule 8 of the Rules of Procedure, as well as from the active role played by the Italian parliamentary

delegation and its then chairperson, Mr Azzolini, following the latter text's adoption.

Indeed, Mr Azzolini initiated a bill (which subsequently became Act No. 12 of 2006, known as the "Azzolini Law") which amended the 1988 Act concerning the organisation of the Prime Minister's office by inserting a new provision on execution of the Court's judgments. I shall return to it in more detail in a moment, but I would first like to paint a quick picture of the other measures taken by Italy.

Back in 2005, before the Azzolini Bill had even finally been passed, the Presidents of both Chambers had sent the chairpersons of the respective parliamentary standing committees two letters announcing that judgments of the European Court against Italy would systematically be forwarded and recommending that they be taken into account both in the context of examination of bills and with a view to any other initiative covered by Parliament's constitutional powers. The Chamber of Deputies' legal department was also asked to produce a quarterly publication summarising and explaining all the judgments handed down by the Court against Italy. This publication is aimed primarily at elected representatives and parliamentary officials, and serves as a reference with a view to ensuring that the Court's case-law is taken appropriately into account in the exercise of parliamentary functions, particularly in respect of legislation. Lastly, a special file on bills' "compatibility with the Convention" (similar to those put together for some years now on "compatibility with the Convention" and "compatibility with Community law") is now systematically included in the material parliamentary departments supply to the standing committees responsible for examining bills.

In my view, these various measures effectively address – at least in theory – the requirements set out in Committee of Ministers Rec (2004) 5 as regards the preventive verification of the compatibility of bills with the Convention.

Other initiatives went hand in hand with those I have just mentioned:

- a centralised payment system under the authority of the Ministry of Economic Affairs and Finance, designed to simplify and speed up the payment of just satisfaction, and the introduction of an arrangement whereby sums paid by the state can be recovered from local or autonomous bodies, so that those authorities and officials whose actions are directly implicated in the finding of a violation do not escape accountability;
- more training for members of the national legal service (since 2006); further developments are expected, following the establishment of a legal service training college;
- two judgments of the Constitutional Court (Nos 348 and 349 of 2007) which, on the basis of the amended text of Article 117 of the Constitution (requiring the central and regional legislatures to comply with Community law and in-

ternational treaties), set aside legislative provisions (relating to compensation for compulsory purchase or illegal

- dispossession by the authorities) that the European Court had deemed contrary to Article 1 of Protocol No. 1; over and above their specific subject-matter, these judgments are extremely important in terms of the more general incorporation of the Convention and its case-law into domestic law (I talked about this briefly in an earlier contribution and shall not go back over it).

Coming back to the Azzolini Law, this is the wording of the new provision inserted into the Act on the organisation of the Prime Minister's Office:

"The Prime Minister, either directly or by delegating a minister:

…

a-bis) shall promote the fulfilment of the government's responsibilities arising from judgments of the European Court of Human Rights in respect of the Italian State; shall immediately communicate the said judgments to the Chambers so that they can be examined by the competent parliamentary standing committees, and submit an annual report to Parliament on the position as regards the execution of the said judgments".

To a large extent, this provision is modelled on that (set out in the preceding paragraph) relating to Community law, particularly as regards the consequences of judgments of the CJEC. This development is politically significant, since for the first time an analogy – if not an equivalence – is implicitly established between EU law, which has been fully acknowledged within the Italian legal system for decades, and Convention law, which, by contrast, is struggling to be incorporated.

Another interesting aspect is the fact that this new task is assigned to the Prime Minister rather than the Minister for Foreign Affairs: given that, within the constitutional system, the Prime Minister is responsible for overseeing and co-ordinating the government's activities and ensuring the consistency of the executive's policies, this decision implicitly makes the implementation of the Court's judgments a central focus of political activity.

A comparison between the Azzolini Law and Rec (2008) 2 highlights some obvious similarities.

For instance, in my view the fact that the task of "promoting" the execution of the Court's judgments is assigned to the Prime Minister, either in person or through a delegated minister, is wholly consistent with the suggestion that the role of "co-ordinator" be assigned to an individual or body with the powers and authority mentioned, in particular, in points 1, 5 and 10 of the recommendation. I would even go so far as to say that it reflects a desire –voiced by some delegations during the preliminary work, but not unanimously approved in the end – to have the text require co-ordination "at a high political level" or "at the highest political level".

The recommendation and the Azzolini Law are also consistent with one another in that they provide for Parliament to be kept informed; point 9 of the recommendation envisages this as a possibility where necessary ("as appropriate"), while the national law stipulates that it is a task the Prime Minister must perform monthly in the case of information about new final judgments, and annually in the case of the report on the position as regards the execution of judgments; an initial report to the Italian Parliament was submitted in 2007, and the 2008 report is being prepared. This part of the Act must be read in conjunction with the initiatives of the President of the Chamber of Deputies and the President of the Senate, which I mentioned earlier.

As for the specific theme under discussion today, on the other hand, it is true that the government agent is not mentioned in either the Act or the order of the Prime Minister laying down practical rules with a view to its implementation. In fact, the latter refers to "prior liaison with the Permanent Delegation of Italy to the Council of Europe" (Section 1 § 3) and "links with the Delegation" (Section 1 §5), in relation to – respectively – the communication of judgments to the relevant authorities with a view to commencing "the procedure of implementing the obligations arising from the said judgments, in accordance with Articles 41 and 46 of the Convention" and the promotion of friendly settlements. This phrasing, albeit imprecise, has been unreservedly interpreted as referring to the co-agent's office, located within the Permanent Delegation, which in practice is now directly and systematically involved in the aforementioned activities, as well as in preparing the annual report to Parliament.

Looking at the various tasks of the "co-ordinator" mentioned in point 1 of the recommendation, the first two are primarily technical in nature; the third, however, is not. Depending on the specific features of different legal systems, it may be that the power to "take or initiate relevant measures to accelerate" the execution process is confined to those in a particular position of authority, which may not necessarily be the case for the agent.

More generally, among the various suggestions the Committee of Ministers has made to the contracting states by adopting the text in question, some can easily be regarded as tasks assigned to agents, while others call for the involvement of an individual or body vested with both institutional and political authority. Agents could no doubt be given responsibility for the measures listed under points 3, 4, 7 and 8, for instance, without any need to alter their status. On the other hand, it is already more debatable whether, given the existing state of affairs and their status in most of our countries, agents can "facilitate the adoption of any useful measures to develop effective synergies between relevant actors in the execution process at the national level either generally or in response to a specific judgment and [...] identify their respective competences" (point 5 of the recommendation). As for preparing action plans, "if possible including an indicative

timetable", it strikes me that this is a task necessitating the ability to anticipate or decide on the adoption of measures that may come within the purview of different authorities (such as certain individual measures or general measures entailing the adoption of regulations), autonomous entities (such as regions or *Länder*) or even constitutional organs (where, for example, the judgment requires legislative amendments for which parliamentary procedure must be followed). In my view, therefore, the preparation of action plans inevitably calls for the involvement of authorities enjoying institutional and political power enabling them to anticipate or even determine – at least partially – the operational decisions to be made, the time needed to implement them, possible ways of influencing the course and duration of constitutional procedures and so on. It seems to me quite plain, therefore, that a high-level political and institutional authority must be involved.

Even so, such involvement does not always suffice: it is not unusual, in fact, for the execution of a judgment of the Court to necessitate the adoption of a court decision (an individual measure or a general departure from existing precedents), which by definition cannot be subject to any influence on the part of other government authorities. This is a major problem; we are all aware, I think, of the contradiction – one we have all come up against, and which is inherent to the system – between the concepts of separation of powers and the autonomy and independence of the judiciary, on the one hand, and the responsibility, on the other hand, that international law and practice place on the government for acts or omissions that, in some cases, are part of the judicial function and consequently cannot be imputed to the government, and which the latter cannot rectify without infringing on the court's prerogatives. This is too vast and far-reaching an issue, however, for us to be able to address it here.[29]

How, then, can an enhanced status for agents – which I believe to be an implicit aim of Rec (2008) 2 – be reconciled with the wide variety of tasks the Committee of Ministers suggests that the member states perform as part of the execution process? In practice, two different approaches may be identified.

The first – adopted, I believe, by some of our states, although they are still in the minority – involves assigning the role of agent to a public figure enjoying democratic legitimacy who is part of the government team (such as a minister, deputy minister or state secretary). This solution, whereby the task of conducting technical and legal analysis of execution issues is merged with that of developing and implementing the necessary political will to take the required measures, has the advantage of reducing the number of handovers and simplifying the process by concentrating it in the hands of a single institutional figure. This ought to make execution easier and faster, at least in theory. It also has a number of evident disadvantages, however. Firstly, the agent's role is directly linked to – and spectacularly dependent on – the uncertainties of the political process and

governmental upheavals: the agent thereby becomes the spokesperson for a majority, *a* government, instead of *the* government (or rather, the state) in his or her objective function of representing the state internationally as a continuous constitutional entity over and above changes in political direction. Secondly, bearing in mind the need to find a single individual who both possesses certain technical skills and enjoys political and democratic legitimacy, it may give rise to constraints that are difficult to cope with, especially for small countries. Thirdly, combining the two roles in a single individual would impoverish the dialectical confrontation – albeit difficult at times, but so very constructive – between the dual perspectives of legal analysis and political sensitivity. Lastly, there is a danger that a member of the government may be too busy with other urgent problems and end up delegating all the tasks relating to the European Convention to colleagues with a greater or lesser degree of expertise, rather than taking a personal interest in them, thereby reducing his or her contribution to a mere façade and nullifying many of the benefits of this solution.

The second approach – adopted by a majority of our states – involves assigning the role of agent (and possibly that of co-agent) to one or more civil servants who are part of a particular ministry's administrative structure in one way or another, while giving a member of the government (no doubt the minister in question) political responsibility for execution. This is more or less the solution adopted in Italy.[30] The agent – or rather the co-agents, in practice – thereby continues to act in a technical consultancy capacity, but deals with a high-level political figure (the Prime Minister or delegated minister) who is expressly in charge of promoting measures to execute judgments; the latter thus has specific

29. I shall simply note that an initial step might be to change our vocabulary by replacing the term "government" with the word "state", which more clearly expresses the wider concept we are really talking about; this concept encompasses all those authorities, bodies and entities that are part of the state's power structure in various ways, which may be implicated in the cause of a violation and the corresponding obligation to rectify it. Reference could thus be made to "the state's responsibility", "the state agent" and so on. I shall also take this opportunity to note in passing that the autonomy and independence of the judiciary are not the only principles whose nature, basis, aims and limitations ought to be reviewed with a view to harmonising them with the European system for the protection of fundamental rights in its current form. Indeed, the very principles on which the democratic system is founded, and even the premise of democratic and constitutional legitimacy (the Kelsenian Grundnorm), are challenged by the supremacy of a body of rules – themselves deriving from a decision-making process that is not inherently "democratic", the permanence of which detracts from the sovereign will of peoples, as do any modifications to it – laid down as an a priori that determines the "validity" (under the Convention) of legislative and indeed constitutional decisions. The concept of "popular sovereignty", quite apart from that of "national sovereignty", is clearly called into question by the Convention system.

30. The Azzolini Law is a recent development, however, and there is still time for the odd adjustment.

responsibility in this area and a duty to liaise with Parliament (which in turn has the power to direct the government's actions and exercise political supervision).

This type of arrangement remedies certain shortcomings that may be identified in the other model, as I have just said, but it is hardly innovative and by no means resolves the associated difficulties, especially in "big" countries, or those whose institutional, bureaucratic and cultural traditions impede, or totally prevent, direct contact between agents and their political interfaces. In Italy, for example, it would be impossible for me to explain a problem or possible solution directly to the Prime Minister or the delegated minister without going through (and being "filtered" by) the office responsible for tasks connected with the judgment execution process under the order implementing the Azzolini Law (the Department of Legal and Legislative Affairs within the Prime Minister's Office); in turn, the latter presumably has to go through the Prime Minister's Private Office or the General Secretary. In the best-case scenario, this clearly delays communication and hence action; in the worst-case scenario, the issue or possible solutions may be presented to politicians in a manner that fails to reflect the agent's phrasing, or may not even reach them at all.

For my part, I have a different vision of what ought to be the agent's position.

It is true that agents are their countries' lawyers before both the Court and the Committee of Ministers during the execution phase. Yet their role is that of a representative of the state rather than the spokesperson of a particular government (I have already explained why the latter view of agents strikes me as inappropriate). This is not all, however: agents are also bound by professional ethics which, being based on the fundamental principles set out in the Preamble to the Convention and Article 1, require them to defend their countries in the higher interest (common to all contracting states) of the mechanism for the protection of fundamental rights. They thereby act as officers of European justice and focus primarily on arguing for their national legal systems – both in the legislation enacted and in the enforcement of that legislation – to be brought into line with the Convention.

Even at the stage of pleadings before the Court, the agent's position differs significantly, therefore, from that of private lawyers, whose freedom reflects the right of those they represent to defend themselves by all legal means, yet at the same time is also limited by respect for that right, which confines it to strategic and technical choices. Agents must be able to enjoy a different kind of freedom: the freedom to identify in all conscience the point of equilibrium between defending a legal system that claims to respect human rights, on the one hand, and effective protection of those rights as defined by the Convention and its case-law, on the other. They must therefore fully understand the facts of the case brought before the Court (in particular by obtaining all relevant information), take on board the defendant state's obligation to co-operate with the Court, and "nego-

tiate" with their own authorities – with an appropriate degree of autonomy – the "tenable" position the State is to adopt before the European Court.[31]

Agents' autonomy is a more pressing requirement at the execution stage, however.

Agents must be able to take on, with the proper degree of autonomy, the role of interface between national authorities and the Committee of Ministers. In respect of the Committee of Ministers (and in their contacts with the Secretariat, which represent a crucial stage in the technical preparations for meetings), agents must be careful to identify in precise detail the real requirements deriving from the judgment and oppose any demands going beyond the individual and general measures that are actually necessary; indeed, discussion must remain within the boundaries inherent to the nature and purpose of the exercise, without excesses aimed at turning supervision of the execution process into an opportunity to impose general policy decisions in a particular area on the contracting states, since this would overstep the specific obligations laid down in Article 46 of the Convention. At the same time, however, agents must also be able to exert a certain influence on national decision-makers so as to encourage them to take the measures that are actually necessary and overcome the resistance that may – for often understandable reasons, relating for example to the pressure of public opinion or attachment to certain legal or cultural traditions, whose flaws we find it difficult to see – sometimes impede the execution process.

In order to perform the latter task effectively, agents must be able to exert a moral and, to some extent, "political" authority that is not derived solely from their personal and professional standing (although it goes without saying that these aspects are still crucial), but also based on their official status and institutional position.

I am not, of course, suggesting that agents be granted any kind of direct power to take the relevant decisions: this would be an anomaly in terms of both their role within the Convention system and the structure of our constitutional systems, based on the fundamental principles of democracy and separation of powers. Accordingly, I would have reservations about a solution whereby the agent's duties were assigned to a member of the government. At the same time, I do not think that the position of mere ministerial civil servants (irrespective of their level) suffices to enable agents to develop the full potential of their role. Rather, what I have in mind is a middle road in between these two scenarios: agents who can serve as the main direct point of contact for decision-makers, approach the latter without going through intermediaries, be consulted regularly in the course of the execution process (and even, outside this rigorous frame-

31. Yet without expressing positions contrary to those of their governments, as Ms Tissier has pointed out.

work, in connection with any activity aimed at modifying the legal system which might affect its compatibility with the Convention), discuss with them – from a relatively autonomous position – the whys and wherefores of execution and the proposed measures, help resolve problems and, to some extent, freely assert their views and exert "political" pressure (in the broad sense) in support of the required measures.

I am convinced that this would be very useful whenever the required execution measures are executive (regardless of whether they involve the exercise of government prerogatives in the true sense or administrative authorities' functions) or legislative in nature. A different problem clearly arises where the implementation of the Court's judgment calls for a court decision. In such cases – which are by no means rare – we must be realistic and show a degree of humility. It is not a question of undermining the foundations of these very principles, in the name of human rights and the rule of law, by trying to diminish the scope of the autonomy and independence of the judiciary. It should be made clear that bringing a domestic court decision into line with the requirements of a judgment of the Court (and, more generally, bringing national case-law into line with the standards laid down by the European Court) inevitably involves lengthy, patient efforts to train and educate judges and prosecutors, persuasion and the deliberate, spontaneous agreement of the courts; there can be no room for short-cuts whereby the executive (which is formally responsible before the international authority) has an influence over the judiciary (which bears fundamental responsibility and alone holds the key to the solution), without serious adverse effects on the principles of the rule of law and the Convention system's very credibility. Having said that in order to prevent any misunderstanding in this respect, I am nevertheless of the view that the type of agent I have in mind could play a significant role in persuading the courts, while fully respecting the judiciary's prerogatives.

In practical terms, therefore, what should be done to give form to my image of the "ideal" agent? My goal is not, of course, to provide you with a formula applicable to all our countries and constitutional systems. I can only suggest avenues to explore, drawn from Italy's experience in other areas that strike me as bearing some similarity to that under discussion.

In my view, the aim should be for agents to possess excellent professional and moral qualities; these qualities should not simply exist, but also be apparent from their professional background, careers and the importance of the posts previously held. In practical terms, I would say, for example, that agents should be selected from among lawyers who have held – or who possess the necessary qualities to hold – the highest judicial functions (in the Supreme Court, the Court of Cassation, the Constitutional Court or the State Council, for instance). Agents should also be formally nominated by a supreme authority embodying the nation

as a whole: they could, for example, be appointed by the head of state (as is often the case with high-ranking judges, for example). Prior to this formal nomination, various different authorities should be involved in designating the agent, so as to confer both the stamp of impartiality and a degree of indirect democratic legitimacy: with reference to Italian practice as regards the designation, for example, of what are commonly known as "independent authorities", I would envisage consultation between the presidents of the supreme courts (such as the Constitutional Court, the Court of Cassation or the State Council), and between the heads of representative organs (were we to adopt this approach in Italy, we would probably involve the presidents of the two Chambers of Parliament, following consultation with the leaders of the parliamentary groups), finally culminating in collective deliberations within the Cabinet, which would formalise the proposed nomination to be submitted for adoption by the head of state. Other procedures could also be envisaged, of course, such as consultation with relevant civil society groups (associations of legal professionals, NGOs and so on).

To my mind, agents having been appointed in this way would enjoy both a close relationship with democratic institutions and civil society and a degree of independence, as well as authority of their own not derived from their operational attachment to a ministry or executive organ. They would then be in a better position than civil servants (even high-level civil servants who are personally capable and respected) to make their voices heard – although, I repeat, without having the power to take operational decisions themselves – in those arenas in which the political process needed in order to comply with judgments of the Court is played out.

Thank you for your attention. ★

Discussion

Mr Jakub Wołąsiewicz (Poland)

I was invited by the organisers of the seminar to present the Polish experiences regarding matters related to the execution of judgments of the European Court of Human Rights in cases concerning Poland.

The aim of complaints proceedings before the European Court of Human Rights is to supervise the law and practice of states as regards to rights and freedoms protected by the Convention. If breach of those rights and freedoms is declared, the Court is issuing a judgment and execution proceeding begins. Time

to time, execution of the judgment is even more important than proceeding before the Court itself. The main purpose of execution of judgments, except redress on behalf of a claimant, is to identify the cause of breach. If this cause of breach is structural, then it is a clear sign to change wrong law or practice. Only such activity may block new breaches and, in consequence, new judgments. In Poland we came to those conclusions after 15 years.

On 17 May 2007 the Council of Ministers of Poland adopted the "Action Plan of the government for the implementation of the judgments of the European Court of Human Rights in respect of Poland" (*Program Działań Rządu w sprawie wykonywania wyroków Europejskiego Trybunału Praw Człowieka wobec Rzeczypospolitej Polskiej*).

The elaboration of the Action Plan was proposed by the Government Agent before the European Court of Human Rights. In this respect, he took into account conclusions drawn from the Report on his activities in 2001 – 2005. In those conclusions the Government Agent identified the most important areas which in view of the Court's case-law in respect of Poland required taking general measures.

This initiative was approved by the Minister for Foreign Affairs who presented it to the Council of Ministers in February 2006.

Bearing in mind that the execution of the Court's judgments falls within the competence of various Ministers, the Government Agent proposed the establishment of a special inter-ministerial Task Force acting at the Minister of Foreign Affairs which was to be charged with the preparation of proposals for the Action Plan. The initiative was endorsed by the Council of Ministers and the Task Force started its operation in August 2006 upon the Ordinance of the Minister for Foreign Affairs.

The experts appointed by 14 Ministers (for Construction Issues, National Education, Finance, Economy, Maritime Economy, Science and Higher Education, Labour and Social Policy, Agriculture and Rural Development, State Treasury, Justice, Interior and Administration, Foreign Affairs, Transport and Health) participated in the Task Force. Their works were supported also by the General Solicitor of the State Treasury (*Prokuratoria Generalna Skarbu Państwa*), State Electoral Commission and Central Board of the Prison Service.

The draft Action Plan was presented by the Task Force to the Council of Ministers in November 2006. After additional inter-ministerial consultations it was approved by the Council of Ministers on 17 May 2007.

The proposals of actions included in the Action Plan aim at increasing the efficiency of the execution of the Court's judgments in respect of Poland and preventing new violations of the Convention by Poland. Thus, the implementation of the Action Plan will contribute to respect for human rights and rule of law in Poland.

The Action Plan contains proposals of legislative reforms, improvement of practice of application of law and regular dissemination of the Court's case-law among the society, judges, prosecutors, administrative organs and other public officials. The Action Plan focuses on such areas as:

- rules governing the application and prolongation of detention on remand;
- prevention of the protraction of judicial and administrative proceedings and increasing the effectiveness of domestic remedies to complain about the length of the proceedings;
- extension of the access to a court (*e.g.* creation of procedures of appeal to a court in cases conducted by maritime and medical chambers, improving guarantees for persons benefiting from free legal aid or applying for exemption from court fees);
- prevention of censorship of correspondence of persons deprived of liberty addressed at the Court;
- increasing the effectiveness of the parental contacts with children ordered by courts;
- effective realisation of Bug river claims,
- introduction of mechanisms ensuring a proper balance between the interest of private owners of flats and those of tenants in the area of the state-controlled rent.

The Action Plan contains also some crucial provisions concerning the co-operation between the Minister for Foreign Affairs and other Ministers in respect of the proceedings before the Court and the execution of its judgments. In particular, the Action Plan envisages the establishment of permanent inter-ministerial Committee for matters concerning the European Court of Human Rights.

The Action Plan will serve as a basis for further actions aimed at improving Polish law and practice, as well as awareness raising of human rights. It gives an impetus for further works, including legislative reforms that would be undertaken by the relevant Ministers.

The Action Plan contains a follow-up mechanism. The respective tasks are being realised by the relevant Ministers within their competence. The Minister for Foreign Affairs assures assistance and information on the Court's case-law. Special role is played by the aforementioned Committee for matters concerning the European Court of Human Rights. The Committee is charged with preparation of reports on the implementation of the Action Plan. It may also propose solutions in case of difficulties in realising the Action Plan.

The first report was submitted to the Council of Ministers in November 2007.

According to this report, nine draft laws have been prepared in connection with various tasks envisaged in the Action Plan (some of them were introduced to the Parliament). Minister of Justice issued an ordinance which improved regulations concerning personal search of persons deprived of liberty (in connec-

tion with the Court's judgment in the case of *Iwańczuk v. Poland*). Works on a special Instruction on the procedures concerning the correspondence of persons deprived of liberty with the Court (and other international organs for human rights protection) are currently underway. An analysis of the possible reforms of administrative procedures has been commenced (*e.g.* local administration was asked for suggestions based on their experience).

Upon the request of the Ministry of Justice the presidents of the courts of appeal will start a regular supervision of the courts' practice concerning the prolongation of the detention on remand, granting free legal aid and execution of judicial decisions on parental contacts with children. Ministry of Justice has prepared a comprehensive analysis of the functioning of the 2004 Law on a complaint against violation of the party's right to have a case examined without undue delay in judicial proceedings. The conclusions of this analysis will serve as a basis for further actions in this field. Furthermore, issues concerning the case-law of the Court will be introduced to the curricula of training courses for judges and prosecutors within a newly established Centre for Training of Staff of Common Courts and Prosecution.

It is also worth underlining that certain actions suggested in the draft Action Plan by the Task Force were implemented even before its formal adoption, *e.g.* as regards the legislative reforms in the field of the state-controlled rent system.

On 19 July 2007 the Prime Minister established the interministerial Committee for matters concerning the European Court of Human Rights (*Zespół do spraw Europejskiego Trybunału Praw Człowieka*) as his advisory and consultative organ.

The demand to establish a permanent interministerial organ dealing on a regular basis with issues concerning the Convention for the Protection of Human Rights and Fundamental Freedoms as well as the case-law of the European Court of Human Rights, was formulated for the first time in the aforementioned Action Plan of the Government for the implementation of the judgments of the European Court of Human Rights in respect of Poland.

The Committee is tasked *inter alia* with:

- preparation of proposals of actions aiming at the execution of the Court's judgments in respect of Poland,
- analysing problems stemming from the applications communicated to the Government by the Court and formulating proposals of actions,
- issuing opinions concerning the compatibility with the Convention of the most important draft laws,
- monitoring the implementation of the Action Plan and submitting reports and proposals.

The Committee constitutes a platform for the exchange of information on the Court's case-law within the Government. It raises the awareness of the European Convention for Human Rights system within the Government administration.

The Committee is composed of experts of all Ministers, Chancellery of the Prime Minister and the General Solicitor of the State Treasury. It acts under the chairmanship of the Government Agent before the ECHR. At present, 42 experts have been appointed to participate in the Committee who represent various departments of all Ministries and the Chancellery of the Prime Minister.

The experts of the Committee provide assistance to the Government Agent and his staff in connection with the proceedings before the Court and the Committee of Ministers also on ad hoc basis, outside the meetings of the Committee.

The representatives of other administrative organs, courts or Ombudsman may also be invited at the meetings of the Committee *e.g.* to hold exchange of views. Working groups may be established within the Committee to deal with particular issues. So far three meetings of the Committee were held with the participation of the Council of Europe Commissioner for Human Rights, Polish Ombudsman and representatives of the Council of Europe Department for the execution of judgments of the ECHR. The Committee has also decided to include in its agenda the execution of the recent judgments of the Court.

Interim report of the Committee on the actions taken to execute the Court's judgments and to implement the Action Plan will be presented soon to the Council of Ministers.

Mr Chingiz Askarov (Azerbaijan)

Thanks to their status, the agent and his or her office can enter into direct contact with every national authority and have their say. The agent is appointed by the President of the Republic, and his or her office is attached to the President's Office; moreover, his or her financial autonomy is guaranteed as part of the state budget. This explains the agent's involvement in executing judgments of the Court from start to finish and preparing texts; the payment of just satisfaction is guaranteed under a specific budgetary heading.

Mr John Bakopoulos (Greece)

The role of the agent in the execution of European Court judgments against Greece is the one of a co-ordinator between competent ministers. The execution rests within the responsibility of the Government.

The office of the agent offers its assistance for the adoption of general measures so as to establish the harmonisation of internal legislation to the Conven-

tion. Thanks to his knowledge of the Court's case-law, the agent performs a consultative function to the Ministry of Justice in order to play a role in the preparation of drafts of law. His role is more active towards the administrative authorities because he can give specific instructions for the execution of a Court's judgment.

In many ways the experience and the knowledge of the Agent in the protection of human rights, according to the Court's case-law, is primary for the choice and the implementation of the appropriate general or individual measures. This central role can not only help the Court's mission in the human rights protection, reducing the workload of the Court, but it can also promote the supervisory work of the Committee of Ministers in monitoring the effective redress, as far as possible, of the effects of the violations found.

As to the contribution of the Government Agent in the execution of the Court's judgments, it is important to underline that his not only in contact with the competent authorities sharing his experience on matters of protection of human rights, but also gives concrete instructions to the latter, according to the findings of the Court.

But when it comes to the adoption of general legislative measures the initiative remains with the Ministry of Justice, while the advisory role of the Agent is always of a major importance. On the other hand where the nature of the case calls for the payment of a compensation as remedy for the violation found, it is the Agent's exclusive competence to give the order for the implementation of the specific judgment and the payment of the awarded sum.

Mr Arto Kosonen (Finland)

The execution of a judgment finding a violation is not made more difficult by the fact that the government agent has argued that no violation occurred; it does, however, reveal the agent in a new light as the upholder of the victim's rights. This does not differ fundamentally from the role agents play in preventing violations through the opinions they may give on the compatibility of domestic law with the Convention or in defending states before the Court, since both of these activities promote human rights.

Ms Isabelle Niedslispacher (Belgium)

The agent plays a very important role at the execution stage by advising national authorities on the action to be taken. This role is not at odds with that hitherto played as the state's representative before the Court.

The agent has advised the state on the defence strategy to be adopted prior to the judgment; where this strategy fails as the result of a departure from existing precedents or for any other reason, the agent has a duty to advise the state on the scope for appealing before the Grand Chamber or on measures to execute the judgment. This enables the state to avoid being found by the Committee of Ministers of the Council of Europe to have defaulted, not to mention any findings of similar violations.

The agent does not have to interpret the judgment alone, but can call on the Execution Department and/or request the Court's opinion via the Committee of Ministers.

Recommendation (2008) 2 on the agent's role in co-ordinating execution is not ambiguous, but flexible enough to ensure an optimum fit with the specific situation of each state while inviting it be as proactive as possible in this area.

Ms Deniz Akçay (Turkey)

According to some of our colleagues, government agents act to uphold human rights at the judgment execution stage, even though they have previously acted as the governments' lawyers.

I do not think these two aspects are contradictory, but not because the agent takes on the role of upholding human rights at the execution stage. The government is no ordinary "client"; in a democracy, moreover, the agent represents a legal system designed to guarantee individual rights and freedoms. This is exactly why, in my view, there is no contradiction between agents' role before the Court and the one they subsequently take on during the execution process. At this stage, agents are also expected to help ensure that the governments they represent can fulfil their obligations to comply with the Court's judgments; here too, there is a public interest to be upheld.

Ms Marica Pirošíková (Slovak Republic)

It is essential to prevent any problems arising in the process of executing a judgment. It is therefore in agents' best interests to initiate positive contacts with the Council of Europe Secretariat and to make use of any they may have within the Committee of Ministers. In the Slovak Republic, the agent ensures and supervises the proper execution of the Court's judgments, submits reports to the Committee of Ministers on the general and individual measures taken in the Slovak Republic in connection with their execution, and prepares the necessary documents with a view to the adoption of final resolutions on the termination of supervision of such execution. Since 2003, the agent and a number of staff mem-

bers have regularly taken part in meetings of the Committee of Ministers' Deputies of the Council of Europe and in bilateral negotiations with the Council of Europe Secretariat. The fact that the government agent responsible for execution of the Court's decisions at national level takes part in these meetings and in bilateral negotiations helps to clarify what is expected of the state during the execution phase.

Ms Geneviève Mayer (Council of Europe)

Recommendation (2008) 2 is a crucial means of improving and speeding up the execution of the Court's judgments. This is something on which we are all agreed. In practice, moreover, the recommendation is already starting to be implemented. I shall take the example of the direct bilateral contacts between the Department for the Execution of Judgments of the European Court of Human Rights, which relays messages from the Committee of Ministers, and government agents; these contacts have been stepped up since 2006, with the agreement of the member states' Permanent Representations to the Council of Europe, and indeed at their suggestion. Thanks to such contacts, information is received more quickly by both the Committee of Ministers and the authorities concerned in the respective capitals, and the various players in the process have a better understanding of the technical aspects of execution procedures. This has already yielded positive results, as shown by the increase in the number of cases closed in 2007 (+251%); this increase appears to be continuing as at early 2008.

It is not mandatory for government agents to attend the human rights meetings; this is left to national authorities' discretion. The practice has developed at the states' behest, and it is clear from today's discussions that agents themselves regard it in a positive light. To a large extent, experience shows that their attendance at the human rights meetings contributes to effective execution, particularly given that from 2008 the Committee of Ministers has agreed to reduce the frequency of its meetings (from 6 to 4 times a year) so as to allow the states and the Execution Department enough time between meetings to prepare and analyse information on the required measures.

In this connection, it should be noted that the smooth exchange of information is crucial in a number of respects. The Execution Department requests a great deal of information from national authorities during the initial stage of the execution process, that is, when a case is to be examined by the Committee of Ministers for the first time. The defendant state has to execute the Court's judgment, but can choose the method. The role played by the national authorities

concerned is vital with a view to getting the execution process off to a good start. Government agents can make a valuable contribution in this area.

The Execution Department is always available to national authorities to discuss the difficulties encountered at national level and explore ways of overcoming them, for instance through seminars or bilateral or multilateral round-table discussions such as those held in Strasbourg in 2006 and 2007 on the non-execution of domestic court decisions, which were attended by both governments and other national authorities.

In the light of the preceding discussions, it might be very helpful for government agents to organise a round-table discussion on such issues on their own initiative.

Mr Hans-Joseph Behrens (Germany)

The German government agent is attached to the Federal Ministry of Justice. Despite having no power over the *Länder*, the agent manages to get them to comply with the Court's judgments concerning them, largely thanks to the status associated with this position and the degree of respect for the Convention; the state's federal structure has not, therefore, caused any problems with execution to date. The Federal Parliament is a different matter; the government agent does not have to impose anything on it, but it is part and parcel of a democratic political system.

Mr Francesco Crisafulli (Italy)

The changes in the Convention system are such that they have no doubt undermined certain principles. National sovereignty is clearly weakened, but popular sovereignty probably is too. When it comes to the execution of judgments, the state having to honour its international obligations has no choice but to diminish the strength of its own principles: this is certainly true of political legitimacy and local autonomy, and perhaps even, to some extent, the independence of the judiciary. We must be careful, however, to ensure that adherence to the Convention does not have the effect of weakening the very principles it is based on, which form the Council of Europe's conceptual framework: democratic institutions and the rule of law.

Mr João Manuel Da Silva Miguel (Portugal)

Very briefly, I would like to thank the two speakers for their excellent presentations on this theme, and to join Ms Mayer in emphasising the value added by the agent's involvement in the execution of the Court's judgments.

Agents' experience and knowledge of case-law and the national legal system (especially in the case of those who have previously been judges) place them in the best position to oversee execution.

As regards my national experience, I have to say that the Portuguese agent is guided primarily by the goal of being proactive, given that there is no law stipulating his or her tasks in this area; this goal also derives from the role judges play in the execution of court decisions at the domestic level.

Mr Răzvan Horațiu Radu (Romania)

Romania's record in relation to the execution of the Court's judgments can now be evaluated, since it covers a period of more than 10 years. It has a positive record, and the adoption of general measures deriving from the country's obligation to comply with judgments is now regarded as a natural legislative development. A few cases have arisen, however, in which the execution of a judgment has been troublesome because the Court had not given sufficient, or sufficiently clear, reasons for its decisions; the adoption of general measures has thus been made more difficult where Romania has found that the Court's brief rebuttal of its arguments does not contain specific enough indications as to what needs to be done.

Ms Inger Kalmerborn (Sweden)

As far as the execution of judgments against Sweden is concerned, domestic law does not identify the agent as the co-ordinator of this process, except in relation to the payment of just satisfaction; the agent does, however, have a natural role to play.

The agent is involved in the adoption of general execution measures but, being attached to the Ministry of Foreign Affairs, is not in the front line when it comes to drafting bills; on the other hand, it naturally falls to the agent to disseminate judgments to the authorities concerned. As for individual measures, the agent does not have any experience of national execution procedures. The payment of just satisfaction is overseen by the Ministry of Finance, in accordance with a government decision stipulating that the costs are to be borne by the ministry responsible for the violation found by the Court.

The idea of meetings between agents and the Council of Europe Secretariat's Execution Department with a view to facilitating the execution of judgments is an interesting one, which ought to be given further consideration.

Ms Suela Meneri (Albania)

A bill on the execution of the Court's judgments against Albania is being prepared by the government agent at the Minister for Justice's request. The main aim of this initiative is to show the Committee of Ministers and the European Court the extent to which Albania regards the proper, speedy execution of judgments as crucial. There are also other, purely domestic goals, however. It is thought that a law on execution will overcome a certain reluctance and make it possible to obtain the active support of key domestic institutions, be they independent (the Constitutional Court) or autonomous (municipalities). It will also make life easier for the government agent; action taken under the law on execution will be regarded as reflecting obligations deriving from the law rather than the agent's personal views.

For the time being, the agent plays a more limited role in the execution process. The agent's office is responsible for translating the judgment and identifying any problems pertaining to its execution; he or she then obtains various opinions, including that of the authority whose activities led to the violation found by the Court, with a view to preparing Cabinet decisions in execution of the judgment. Lastly, the agent advises national authorities on the need to take general measures in execution of the Court's judgments and to inform the Committee of Ministers.

Ms Monika Mijić (Bosnia and Herzegovina)

The execution of judgments must naturally be in the agent's hands; having represented the state before the Court, the agent has a better knowledge of the case than other national authorities and knows which authorities to approach with a view to ensuring proper execution. From this perspective, there is no paradox in the fact that, having defended the state, the agent is then involved in the Committee of Ministers' supervision of the execution of judgments; on the contrary, the contacts the agent makes with the Execution Department in this connection are very useful. However, the extreme importance agents place on this aspect of their work means that they risk having to spend more time on it than on preparing the state's defence before the Court. ★

Theme IV

The Government Agent's role in mainstreaming the Court's requirements and case-law into the daily practice of all State bodies, notably through publication and dissemination

Moderator: Ms Anne-Françoise Tissier, government agent of France

Mr Frank Schürmann

Government agent of Switzerland

Introduction

Firstly, I should like to express my heartfelt thanks to the authorities of the Slovak Republic for their warm welcome and flawless organisation of this seminar.

For the final theme of our seminar, Ms Niedlisbacher and I have tried to share the task somewhat: as a member of the Committee of Experts for the Improvement of Procedures for the Protection of Human Rights (DH-PR), my colleague is no doubt the person best placed to talk to you about the relevant recommendation (Rec (2002) 13) and its implementation in the member states, and more specifically in her own country.

For my part, I intend to discuss a number of more general points relating to the practical difficulties associated with the implementation of this recommendation; I too shall refer to my own country's practice.

Report of the Group of Wise Persons and the Court's opinion on it

In its report, the Group of Wise Persons addressed the subject under the heading, "Enhancing the authority of the Court's case-law in the states parties". The dissemination of the Court's case-law and – to quote the report – "recognition of its authority above and beyond the judgment's binding effect on the parties would no doubt be important elements in ensuring the effectiveness of the Convention's judicial control mechanism" (§66). The Group considered that national judicial and administrative institutions should be able to have access to the case-law of the Court in their respective language, which would assist them in identifying any judgments which might be relevant to deciding the cases before them (§71).

The Court, in its April 2007 opinion on the Wise Persons' report, fully endorsed these comments and suggestions, making particular reference to the Grand Chamber judgment in the *Scordino v. Italy* case[32]. It said in that judgment, in connection with Article 46 of the Convention, that domestic courts must be able to apply the European case-law directly and that their knowledge of that case-law had to be facilitated by the state in question.

Major problems and potential solutions

As you know, the DH-PR has undertaken a detailed review of the implementation of Rec (2002) 13. Ms Niedlisbacher will speak about this shortly at greater length. As regards the publication and dissemination of case-law, the Committee concluded in 2006 that – and I quote – "implementation of the recommendation is generally satisfactory." This conclusion suggests that significant efforts have been made, but that there is still more to be done.

Further progress in this area is hampered by a number of difficulties, however. In my opinion, there are four major problems. The question arises as to the extent to which national authorities, and particularly the agent, can help to overcome them:

Mass of information

The first difficulty relates to the mass of information. [Too much information kills information.] In 2007, the Court handed down 1 735 judgments and more than 27 000 rulings of inadmissibility, which can also make a substantial contribution to the interpretation of the Convention. Although the recommendation is confined to the Court's case-law, the Committee of Ministers' practice in ap-

32. *Scordino v. Italy (No. 1),* [GC], No. 36813/97, §239, ECHR 2006, 29 March 2006.

plication of Article 46 should also be mentioned here. The general measures adopted by a state in execution of the Court's judgments may be of significance to other states parties, particularly their legislatures. In this connection, the publication of the Committee of Ministers' first annual report on supervision of the execution of judgments can only be welcomed, for it has filled a major gap.

The mass of information is particularly problematic in respect of judgments concerning other states. Each state must identify, among an ever-growing number of judgments, those of relevance to it. A well-known example involving Belgium and Switzerland relates to the receipt of the *Cubber v. Belgium*[33] judgment, concerning Article 5 §3 of the Convention. Referring directly to this judgment, the Swiss Federal Tribunal modified its case-law, which tolerated the personal union between the criminal trial judge and the judge ordering pre-trial detention. Things were fairly simple back then, however: the Court's judgment dates from 1984, a year in which it handed down just 15 judgments on the merits; all of them were naturally published in its official Report of Judgments and Decisions.

The question arises as to who is supposed to sort through the information, and how. There are clearly a number of options. I shall simply mention the following, which strike me as particularly relevant:

- In a February 2008 working document submitted to the Parliamentary Assembly, Professor Lawson suggested that the Court itself, or possibly the Commissioner, draw up a very short annual list of "must read judgments" that any lawyer – or, one might add, judge – ought to have read. This list should be supplemented by annual "specialised lists", which should also be short, in specific areas such as law relating to aliens or criminal procedure. The idea of limited lists might also reduce translation costs – an issue I shall return to shortly.
- Secondly, I would like to mention the manuals produced by the Council of Europe, thanks to successful intergovernmental collaboration and, I hasten to add, the work of the secretariats of the respective committees of experts. In a sense, these handbooks already contain specialised lists of the Court's judgments. The *Manual on human rights and the environment* is an excellent example of the benefits of having a summary of the case-law in a specific area. Other such manuals, on hate speech and the wearing of religious symbols in public areas, are about to be published; still others may be envisaged in the future. Once again, translating these texts would significantly increase the extent to which national authorities take them on board.
- A third option would be to ensure the regular dissemination of the Court's case-law by national authorities, and the agent's office in particular, for in-

33. *Cubber v. Belgium*, No. 9186/80, 26 October 1984.

stance in the form of an annotated summary. In my country, we have hitherto forwarded judgments and key rulings relating to Switzerland to the federal and cantonal authorities, indicating any action that needs to be taken. From now on, we intend to go one step further: from 2008, the plan is to draw up a list, four times a year, of key judgments of the Court – concerning Switzerland or other states – with a brief description of the judgment and an indication as to the repercussions it may have on the domestic legal system. This information will be disseminated widely, in French and German.

Language issue

This brings us to a second major difficulty: the language issue. It is not new, and nor has it been resolved. Once again, it is primarily judgments concerning other states that call for our attention. In its opinion on the Wise Persons' Report, the Court emphasised that – and I quote – "the courts in every Contracting State must be aware of both the judgments handed down against that state and the most important judgments of the [...] Court. States should therefore ensure that these judgments are translated into the different national languages." The Court immediately adds that "the scale of the undertaking is substantial", and mentions co-operation between countries sharing a common language as one of the workable solutions that may be found. This is exactly the type of co-operation discussed in paragraph 8 of Rec (2002) 13.

One such project is about to come to fruition for German-speaking states: the German publisher Engel is about to release a collection of important judgments and decisions of the Court in German. At present, the project has the backing of the German, Liechtenstein and Swiss governments. The first part of volume I, covering the period from 1960 to 1998, is expected to be released in the next few weeks. The benefits of such a collection are obvious, even for Switzerland, which has the advantage of having French as one of its official languages.

Uncertainty about the interpretation of case-law

The starting point of Rec (2002) 13 and of the theme under discussion today is the idea that the Strasbourg Court hands down numerous important judgments that may have an effect on member states' domestic legal systems and that this case-law ought to be disseminated widely in the states. In practice, things are not so simple. This brings me to the third difficulty. When called upon to apply a line of decisions by the Court, national courts sometimes face the problem of interpreting the judgments in question. Government agents may find themselves in a similar position when they have to advise the legislature as to the measures to be taken in response to a judgment of the Court. In such situations, the agent's role and duty is to indicate any remaining doubts. In addition, in the context of their special relationship with the Court, agents may point out the

need for stable, clear and well reasoned case-law. In another working document submitted to the Parliamentary Assembly, Professor Sudre recently emphasised the need for such case-law so as to provide the states with a sound base for avoiding and redressing violations of the Convention.

Application of an established line of decisions

Lastly, this brings me to the fourth difficulty. Even where the case-law is clear, well established and translated into the national language, it has to be examined and applied. Once again, this is a delicate, complex issue of particular relevance to judgments that do not concern one's own country.

In my view, government agents can play only a limited role in this area. It is up to the supreme or constitutional courts to take the Court's case-law into account in handing down their judgments, thereby genuinely implementing the *corpus iuris strasburgensis*. In this way, the highest national courts can also do a great deal to help educate lower national courts and other authorities. It may be added, in this connection, that regular publication of *national* courts' practices in relation to the ECHR might help to make *lower* courts aware of the Strasbourg case-law.

Closing remarks

In conclusion, ladies and gentlemen, dear colleagues, I would like to make the general comment that it is still both possible and necessary to improve the recommendation's implementation, and that government agents have a role to play in this process. The practical form their role takes depends, to a large extent, on the situation in each State Party, particularly the existence of other means of communication and dissemination such as publication in scientific journals, or national human rights institutes. To give just one example, our Austrian neighbours are fortunate to have a publication, the "Newsletter", produced by the Human Rights Institute in Salzburg. This bimonthly journal publishes summaries of most of the Austrian cases, along with leading cases concerning other countries. Such a publication means the bulk of the work is already done.

Allow me to make one final comment: in my view, even more effective implementation of the recommendation is likely to add to the authority of the Court's case-law and, at the same time, strengthen the principle of subsidiarity, which is critical to the supervisory mechanism's future. Should this prove to be the case, that would be a positive outcome we could all welcome, notwithstanding the fact that better dissemination of the case-law will not necessarily help to reduce the Court's workload. ★

Ms Isabelle Niedlispacher

Co-agent of the Government of Belgium

My contribution also relates to the government agent's role in mainstreaming the Court's requirements and case-law into the daily practice of all state bodies, notably through publication and dissemination. I shall briefly outline the role and duties of the Belgian government agent, with whom I have been working for seven years now, as well as making a few general comments on the implementation of Recommendation (2002) 13 on the publication and dissemination in the member states of the text of the European Convention on Human Rights and of the case-law of the Court. I shall finish, if you don't mind, with a few suggestions for the future.

The Belgian government agent was appointed within the Federal Department (formerly Ministry) of Justice.

The agent is assisted by three lawyers, now co-agents, who take responsibility at national level for co-ordinating the government's submissions and publishing, disseminating and executing judgments.

The Court's case-law in relation to our state is systematically disseminated, almost immediately, to the authorities directly concerned, along with a commentary on the judgment and an indication from the agent as to any execution measures that might be necessary.

Until now, every judgment concerning Belgium has been published within three months in the three national languages – French, Dutch and German – on the Justice Department's website,[34] which also features a direct link to the Council of Europe's website.

In response to Recommendation (2002) 13 of the Committee of Ministers of the Council of Europe, asking that the Court's case-law be disseminated widely, we have now opted to put every judgment against our state on the Courts Department's Juridat site[35] straight away. The national and international case-law concerning our country is thereby centralised on a site with a higher profile than that of the Justice Department.

The keywords, summary and judgment in French are entered into the data base directly by the co-agent having followed the application since its notification.

34. http://www.just.fgov.be/adm./dr.homme/.
35. http://www.jure.juridat.just.fgov.be/.

In the case of less technical judgments, such as judgments relating to the length of proceedings, it is envisaged that only the summary will be translated into Dutch, but the matter has not yet been decided.

The advantage of this system lies in its speed and the accuracy of the information entered, since the co-agent – who follows the case from the time the application is notified until the Committee of Ministers' final resolution – bases his or her work on the summary of the judgment as it appears on the Court's website the day it is given; being drawn up by the Registry, the summary is bound to be of high quality.

The Court's case-law is also disseminated rapidly, but not systematically, via numerous private publications circulated very widely within the legal community, which comment on the Court's landmark decisions concerning any member state.

The Belgian authorities do not have any formal arrangement for the dissemination of case-law concerning third states, but numerous private publications (including the many publications on legal theory and periodicals such as the *Rechtskundig Weekblad*, the *Journal du droit international*, the *Journal de droit européen* and the quarterly *Revue des Droits de l'Homme*) translate those judgments that may have an effect on domestic law and publish them, together with substantial commentaries, as part of descriptions of the European Court's case-law.

Bearing in mind that the national courts have to take treaty law into account, all publications on legal theory and case-law help to disseminate the principles contained in the Convention and the Court's case-law.

Belgium does not have any formal agreements with other Council of Europe states on the translation and dissemination of the Court's case-law, since the latter gives its decisions in one of the country's national languages.

I shall now make a few general comments on the implementation in all Council of Europe member states of Recommendation (2002) 13 on the publication and dissemination in the member states of the text of the European Convention on Human Rights and of the case-law of the Court.

As part of its monitoring of the implementation of the aforementioned Recommendation, the Steering Committee for Human Rights has concluded that, generally speaking, the European Court's case-law involving the state in question is widely disseminated by national authorities via ministries of justice and/or foreign affairs, government agents, civil society groups, NGOs and specialised publishing houses.

The Council of Europe assists with the dissemination of the Court's case-law through its *information offices* in some member states.

The Court's case-law, which is generally summarised and translated into the national language(s) or at least disseminated in the Council of Europe's official

languages, is covered in manuals, handbooks and other publications, as is the Convention system.

According to the information received from member states, the address of the *Court's website* is widely disseminated and familiar to national authorities, which the states endeavour to provide with the necessary computer equipment to gain access to the case-law via the Internet.

Further efforts are still needed in this direction, however, particularly in Belgium.

Examples of good practice

A number of states have set up *electronic legal databases* to systematise legal information in different areas and facilitate rapid access to it. (Examples include Aspi in the Czech Republic, Finlex in Finland, Libert in Italy and Legifrance in France).

Some states have opened, or intend to open, *legal libraries* making digests and journals containing the case-law available to all and providing Internet access to the Court's website.

Many states (including Belgium, Denmark, Finland, Germany, Latvia and Poland) have *human rights institutes* that disseminate the latest developments in case-law, organise seminars for lawyers, judges and other legal professionals and specialise in research on human rights issues.

In a number of states (including Croatia, the Czech Republic, Germany, the Netherlands and the Slovak Republic), the government agent draws up an annual *report summarising the main European case-law* relating to the state in question and submits it to *Parliament and the ministers and/or other people concerned.*

Very few states (Belgium, Denmark and Switzerland) appear to send an *explanatory memorandum* with the judgments forwarded to those authorities directly involved in their execution. Yet such explanations can be useful in that they place the judgment in the context of the Court's case-law and may indicate the measures needed in order to prevent similar violations occurring.

The ministries and judicial organs of a number of our states (including Austria, Bosnia and Herzegovina, Bulgaria, France, Hungary, Russia and Turkey) publish *monthly legal bulletins* featuring translated summaries of the most important judgments in a given period.

Manuals and handbooks are published in the member states, and disseminated – in Croatia, for instance – to all courts, ministries, law faculties, the Bar and NGOs active in the human rights field.

The Ministry of Justice's website in Denmark and the Ankara Bar's website in Turkey explain the steps to be taken in order to bring a case before the Court, and provide application forms.

In Sweden, for example, the judiciary receives information bulletins featuring a selection of leading cases as well as *national decisions* applying, or referring to, the Convention.

Some deficiencies and suggestions for remedying them

Internet access appears to be restricted to higher courts in some states, and is still inadequate in many states. Those states in which such access is not yet available at all levels of the judiciary should be encouraged to provide the necessary equipment (the HUDOC CD-ROM, for example).

Among states sharing a common language, co-operation with a view to translating and disseminating the Court's case-law appears to be lacking or too limited in scope. Accordingly, states sharing the same national language are encouraged to consider the possibility of co-operating in order to publish digests of the Court's decisions or judgments in that language.

While the publication and dissemination of the Court's case-law relating to the state concerned appear to be fairly satisfactory, the same cannot be said of the case-law relating to third states. Member states should be encouraged to ensure the rapid dissemination of any relevant case-law concerning third states, together with an explanatory memorandum.

Some states appear to have few manuals or other publications in the national language(s) explaining the Convention system and the relevant case-law of the Court. Accordingly, member states are encouraged to work with the private sector with a view to publishing the practices of national courts applying the Convention and the Court's case-law.

I invite you to report any deficiencies you yourselves may have identified, or to give examples of good practice that might serve as a source of inspiration during the discussion we are about to have. ★

Discussion

Mr Ferdinand Trauttmansdorff (Austria)

The Court's case-law is disseminated primarily by three Austrian institutes active in the human rights field; they are university institutes indirectly financed by the state. The public thereby has access to information entered into data bases, such as that of the Human Rights Institute of the University of Salzburg. As for dissemination to administrative departments, the Chancellery's Intranet

network provides information on both European case-law and national case-law applying the Convention.

Mr João Manuel Da Silva Miguel (Portugal)

Rather than theorising agents' roles, it strikes me as important to describe the duties they perform and identify good practices introduced by the states.

First of all, I would like to focus on two aspects.

As far as national cases are concerned, judgments received from the Court are immediately sent to the Minister for Justice with a note asking that they be forwarded to the authorities concerned, where the latter are government bodies; where the case relates to the prosecuting authorities or the courts, a copy of the judgment is also sent to the Principal State Prosecutor's Office and the Judicial Service Commission so that they can take note of it and disseminate it.

Where appropriate, notices specifying procedures or measures to be adopted are sent to the authorities concerned.

The initial communication of the judgment to the Minister of Justice thereby triggers the procedure for paying the just satisfaction awarded. In fact, although the judgment is not yet final, the government has decided that it is reasonable to embark on this procedure immediately so as to avoid late payments. If, by chance, an application is lodged for referral to the Grand Chamber, the procedure is suspended pending the latter's decision.

The initial receipt of the judgment also triggers two other measures: firstly, the judgment is published on the Ministry of Justice's website[36] in the original language; secondly, judgments have been systematically translated into Portuguese since the beginning of the year.

In addition to the practices just mentioned, the Court's case-law is disseminated in three ways: firstly, the agent selects those judgments handed down by the Court the previous year that he or she regards as most significant in the light of current events or the relevance of the case-law; a summary of each judgment is drafted in Portuguese and published on two Internet sites; hard copies of the summaries are also printed and distributed to the courts and all the law faculty libraries free of charge. Secondly, in respect of criminal cases, a summary of the same significant case-law is published in a legal journal. Lastly, the Legal Service Training College organises two annual events that may be regarded as stemming from Recommendation (2004) 5 of the Committee of Ministers, of 12 May 2004: a series of three training sessions on the Convention and the Court's case-law for

36. http://www.gddc.pt/.

new judges and public prosecutors, and a more specialised seminar on the Court's case-law for judges, lawyers and other legal experts.

Lastly, the agent's annual report to the Minister for Justice suggests measures he or she feels ought to be taken in this area, including any legislative amendments that may be necessary.

These are the points I would like to present in relation to this specific aspect of our work.

Mr Jean-Laurent Ravera (Monaco)

In Monaco, the Court's case-law is disseminated in two main ways: summaries of the most important judgments are sent to the Ministry of Justice, and thematic analyses of the case-law calling for legislative amendments are sent to the ministries concerned.

In our experience, it can be difficult to identify which judgments are important, and dissemination should not be confined to such case-law; the contribution made by legal doctrine is overlooked, often because it is unfamiliar, whereas it could be a key feature of the teaching role assigned to the government agent.

Ms Hanne Juncher (Council of Europe)

The Directorate General of Human Rights and Legal Affairs assists with the dissemination of information on the Convention and of the Court's case-law. Its assistance already takes various forms, including both the translation of judgments significant to the living interpretation of the Convention and the publication of thematic summaries and practical manuals. The Council of Europe thereby helps to resolve some of the problems faced by national authorities in terms of cost, accurate data and updating of the available information on the European system for the protection of human rights.

Member states were encouraged to invest in the regular dissemination of relevant case-law among the legal community, preferably on-line, as a means of increasing the capacity of the national judiciaries to implement the Convention.

A wide selection of training tools and materials on the Convention have been developed under the Council of Europe's European Programme for Human Rights Education for Legal Professionals (the "HELP" Programme). This includes full curricula, lectures/presentations, case studies and moot courts, glossaries, and e-learning courses. They are all available free of charge and in multiple languages on the HELP website: http://www.coe.int/help/.

Ms Marica Pirošíková (Slovak Republic)

The translation of judgments is not the only problem that arises in respect of the dissemination of the Court's case-law; the others relate mainly to interpreting judgments and ascertaining their precise scope, and thus their impact on domestic law. The dissemination of information on the Court's case-law consequently calls for projects to be set up, possibly in conjunction with NGOs, with a view to providing training for the judicial professions. In Slovakia, we organise regular seminars for judges, senior court officers, public prosecutors and lawyers. For the last two years, for example, we have set up training projects in conjunction with the Judicial Academy, the Slovak Chamber of Lawyers and NGOs, funded by allocations from the European Social Fund; my 570-page volume entitled *Comments on Selected Articles of the Convention for the Protection of Human Rights and Fundamental Freedoms* was published and distributed to seminar participants free of charge. The interpretation and selection of the Convention articles included in this volume are geared to the topics addressed during the seminars; it also highlights those decisions of the Court that are of significance to the Slovakian legal system. The comments on each article, which include interpretations of major principles and legal reasoning, are based on the Court's decisions and supplemented with the relevant case-law of national courts, particularly the Constitutional Court. As part of these projects, judges, public prosecutors and senior court officers also had the opportunity to take weekly two-hour classes in French or English, depending on their language skills, with the advanced classes focusing on legal terminology. The projects also included seminars on Community law, and some trainees visited the Court of Justice of the European Communities in Luxembourg and the European Court of Human Rights in Strasbourg.

Mr Francesco Crisafulli (Italy)

I should like to tell you about a very recent Italian initiative, which is still in progress.

Italy has a database of national case-law (particularly that of the Supreme Courts, along with some of that of the trial and appeal courts), which has a reputation for being extremely effective.

We are currently working on entering the Strasbourg case-law into the database (that of the CJEC is already included). The database focuses on what we call "*massime*", or "maxims", that is, significant extracts of judgments from which the legal principle(s) affirmed in the judgment may be deduced.

The main difficulty – apart from translation, of course – lies in the structure of the European Court's judgments; the facts of each case are often of crucial importance, making it difficult to extract principles.

Once this task has been completed, the Court's case-law will be easily accessible to all judges (free of charge) and lawyers (by paid subscription) in the same place as national case-law; this will simplify the research process considerably.

Mr Răzvan Horațiu Radu (Romania)

Thanks to his judicial background, the Romanian government agent has been able to try out a new way of disseminating information on the Court's case-law: by participating in discussion forums between judges, he has been able to keep colleagues better informed about judgments concerning Romania and, more generally, the judicial principles and rules identified by the European Court.

Mr Ignacio Blasco Lozano (Spain)

The end goal of the exercise of mainstreaming the Convention's requirements into the daily practice of state bodies is none other than to prevent the occurrence of violations of the rights guaranteed. Yet if such prevention is successful, is that necessarily an indication that the European Court's case-law has been duly incorporated into the domestic system? Such a link is uncertain, for the lower number of violations found may be put down to many other causes as well as the dissemination of the Court's case-law.

Ms Štefica Stažnik (Croatia)

The European Court's case-law is disseminated primarily to legal practitioners, the judiciary and lawyers attached to ministries. Up-to-date information on this case-law is provided as part of both initial and in-service training for judges and prosecutors; likewise, ministry lawyers are trained to take it into account in the drafting of bills and the implementation of existing legislation. Their somewhat informal relations with the government agent also help.

Ms Radica Lazareska-Gerovska ("the former Yugoslav Republic of Macedonia")

Within this topic first of all it was pointed to the importance to disseminate the wide and expert public with the ECHR case-law not only in view of the concrete states but also of the Court's general case-law, in view of other states.

To that aim, "the former Yugoslav Republic of Macedonia" practice regarding the dissemination of judgments relating to "the former Yugoslav Republic of Macedonia", their working out and communication to the corresponding bodies and institutions was stressed.

Specifically, judgments are translated into Macedonian and are posted on the Ministry of Justice web portal immediately following their adoption and prior to them becoming effective.

Also, detailed information is prepared which contains the decision by the Court on the violation of the European Convention by the domestic authorities, which is transmitted to the Government of "the former Yugoslav Republic of Macedonia". In case of systemic problems the Information also indicates what should be taken and which authority is required to do that.

Concomitantly, the processed judgment is also transmitted to all relevant domestic courts and authorities that had been contacted during the defence of the state. In case of a matter for which the procedure is still ongoing before the domestic courts, the related courts are pointed to the need to speed up the matter and to decide at their earliest convenience.

In case there is a request to repeat the procedure due to a decision by the Court (that is possible pursuant to the domestic legislation in all procedures – civil, criminal, administrative) information is transmitted to the competent domestic court indicating the measures that are to be taken by the court in the procedure, and which are determined by the Committee of Ministers that oversees the execution of the Court judgments.

Following the effectiveness of the Court judgment, new information is prepared for the Government which indicates that moment, so that the corresponding decision on the payment of the adjudicated funds for compensation may be taken.

An enormous problem for the judges is the language barrier, that is, the judges' lack of knowledge of English or French – the Council's official languages – which disables them to have a daily insight into the Convention case-law. They rely mostly on what will be translated and published in the country, which does not follow the Court's dynamics.

In "the former Yugoslav Republic of Macedonia" judges are trained for the application of the Convention case-law through the Academy for the Training of

Judges and Public Prosecutors. An initial training course is carried out for the candidates for judges (with special programmes for all articles of the Convention, moot court, etc.), while continued training has been created and is ongoing for the appointed judges (with a compulsory number of hours during the year). ★

Summary of day two

Ms Anne-Françoise Tissier

Government agent of France

All the seminar participants share the belief that the execution of judgments is an important aspect, but it is also clear that there is not merely a single model; to take the example of just satisfaction, there are states in which the cost is borne by the budget of the ministry whose activities caused the violation, as is the case in France, but the complexity of this solution may make it preferable to charge the cost to a single budget.

Depending on national traditions, legal and political approaches have varying degrees of input into the exercise of executing judgments, and the agent's role varies from one state to another. The legal approach tends to prevail, however; as an indication, within the French Permanent Delegation to the Council, the execution of judgments is now supervised by an administrative judge rather than a diplomat.

The necessary dissemination of the Court's case-law to judges and ministry lawyers is hampered by practical difficulties. It calls for the government agent to make a sustained, ongoing effort to sort through the mass of information on case-law. As for the recipients of the agent's selection, making time in one's day-to-day work to read dozens of pages of judgments is no easy task, and may not even be worthwhile. Other methods should be tried out, such as regular bulletins or memoranda highlighting the Court's answers to specific questions in particular areas of law; it would then be up to readers how they use the information received. There are other methods, however, some of which involve the Court itself; HUDOC could be reorganised so that it can by used by all legal professionals, not just human rights experts. ★

Concluding remarks

Mr Philippe Boillat

Director General of the Directorate General of Human Rights and Legal Affairs

Mr Chair, Madam Moderator, ladies and gentlemen, friends,

Firstly allow me to add my sincere thanks to the Slovak authorities for their offer to host this seminar focusing on the important part played by government agents in ensuring effective protection of human rights in Europe. Thank you to all those who helped organise it. Thank you also to all the participants for your many constructive comments, ideas and proposals.

I attach especial importance to these agent meetings. As you may know, I was myself a government agent for many years and I therefore have the greatest inbuilt respect for you and what you do.

You will readily appreciate that it is very difficult for me to sum up in just a few minutes everything that has been said over the last two days and do justice to the breadth and depth of the discussions. I make no claim to be able to do that and will not attempt to, so my remarks are not going to be "conclusions" as such. Rather I will concentrate on certain aspects of the discussions which I see as useful benchmarks in our reflections on the role of agents, which is a multifaceted one. The report of the seminar will be available soon and should provide you with a fuller picture of the issues raised in the last two days.

I will now try to highlight a few salient points concerning the four topics dealt with during the seminar, as possible areas for future discussion.

Government agents: their representative role before the Court

To look primarily at the role of Government agents in the Court's procedure – a role which the President of the Court, Mr Costa, described, and rightly so, as an eminent one – it is the complexity and diversity of their work as representatives of the member states which strikes one first of all. In that context the question was raised as to whether the agents needed to be given proper status, or at

least to have their duties and obligations harmonised. Some of you advocate leaving well alone. It needs to be borne in mind here that the European Convention on Human Rights makes no mention of agents and leaves countries total freedom to decide what agents' duties should be. Agents are in fact only mentioned in the Court's rules. The Agreement on Privileges and Immunities for Persons participating in Proceedings before the Court refers to "representatives or counsels to the parties" in such proceedings.

It is important to refer back to a question which was raised several times during the last two days: the rank of the government agent within a national administration, a question which, in my opinion, is not necessarily linked to the potential legal status of an agent. It seems to me that the end result of the discussions is that, while taking into account the great diversity of the administrative background of our member states, the high rank of an agent within a national structure would certainly boost the good execution of the tasks he/she has been given. Indeed, the fact that an agent enjoys a high position allowing him/her to have greater autonomy when taking decisions, makes it easier for him/her to have access to other administrative or judicial bodies and gives more weight to his/her opinions or to the influence he/she has on the administration and national legislation. As was said this morning "personal prestige is not enough!".

In the discussion about agents' duties, emphasis was put on the agent's duty to give pertinent intervention to the Court on national legislation and practice. There is no doubt that agents contribute in this way to the quality of the Court's judgments.

The conclusion of friendly settlements was mentioned on numerous occasions. According to the President of the Court, agents are asked to play a determining role in the outcome of such settlements, which are now promoted more actively than in the past by the Court.

Provisional measures, in accordance with Rule 39 of the Court's Rules, also require an active role on the part of the agent. It has been said that, in this case, the agent is an "essential interface" between the Court and the relevant national services. Following the judgment in the *Mamatkulov and Askarov v. Turkey*[37] case, the role of the agent has, of course, became even more important.

I now come to Article 36 of the Convention, both paragraphs 1 and 2. When must an agent intervene? When he/she is called upon to do so by other agents? And if he/she intervenes, on the basis of what criteria must this be done? Should one define these criteria, even informally and in a non binding way? It is up to you to give these questions some thought. I would like to mention, in this context, that the idea was put forward to create an informal network of agents.

37. *Mamatkulov and Askarov v. Turkey*, [GC], Nos 46827/99 and 46951/99, 4 February 2005.

It was also underlined that the task of a government agent is not to win the proceedings at all cost, but to serve the general interest. The role of an agent is often exclusively reduced to that of the applicant's opponent. Of course, nobody can deny that this is his/her primary mission, and an essential one. A government agent must, in all loyalty, find arguments so that his/her authority's case carries the day. But the arguments put forward must respect the case-law *acquis* as well as the fundamental principles, or a least take them into account. It is in the interest of the agent to do so if he/she wants to win over the Court. In fact, the agent's mission is both that of a lawyer for the state and that, in certain respects, of an official appointed by the state to assist international justice.

Responsibility of the agent for bringing national law and practice into line with the Convention

What is the agent's role in ensuring that national law and practice are in line with Convention standards? At all events, and whatever the possible role of government agents and their departments, a distinction must be drawn between, on the one hand, checking the conformity of draft legislation and, on the other, checking the conformity of existing law and practice. Checking the conformity of draft legislation – although complex – is in some respects easier as it is part of the legislative process. For checking on compatibility or conformity, several possibilities were mentioned. Should the approach be to set up specialist central-government departments, or specialist decentralised ones? Is the agent's responsibility here a direct or indirect one? Opinions differ but there does seem to be agreement that it requires specialist lawyers with detailed knowledge of the Court's case-law, and that they need to be involved in the legislative process from the very outset because it is easier to make allowance for the case-law constraints at the start of drafting than to tinker with the finalised piece of legislation. A further point is that while checks on draft legislation must be systematic, that obviously cannot apply to checks on current law and practice. In the latter case, checks will be ad hoc ones, performed in the light of a particular case-law development.

In this connection, the difficulty of giving a well-founded opinion was extensively stressed: to borrow a metaphor used this morning, are the lights at green, red or amber? In other words, can the person consulted say unreservedly that the piece of draft legislation is compatible with the case-law or incompatible with it, or, as is often the case, is it difficult to come down on one side or the other? Obviously there cannot be a totally firm and final reply every time, because the Court's case-law is constantly developing. As you know, the Court has taken the line that the Convention is a living instrument which must be interpreted in the

light of current circumstances. Equally the job of the person consulted is to give as informed an opinion as possible at the particular time.

One last particularly important point: it is quite clear that the effectiveness of checks on national law and practice heavily depends on acknowledgement of the erga omnes effect of the Court's judgments – acknowledgement, in other words, of *res judicata*. As far as possible, potential infringements of the Convention have to be anticipated and this involves dealing with all possible sources of them in national law and practice. A country's best protection perhaps lies primarily in prevention of national violations of the Convention. At any rate the principle of subsidiarity would really come into its own …

Agents' contributions to the execution of Court judgments

Here I should like to remind you that, among the measures mentioned in Committee of Ministers Recommendation (2008) 2 for reinforcing domestic execution of the Court's judgments, appointment of a co-ordinator for the execution of judgments at national level is of special importance. In the last two days' discussions it has been repeatedly observed that an agent is often best placed to initiate and co-ordinate the adoption of the various measures required at national level for executing a judgment. Various practices were mentioned for facilitating this, and in particular collective decision-making by an inter-ministerial committee or a specialist unit within a ministry.

Several participants underlined the benefit of having the agent participate in the execution of judgments, and in particular of having the agent attend meetings of the Committee of Ministers on supervision of judgments. The secretariat shares that view, though, needless to say, there is no obligation on countries to bring in the agent for such meetings and it is completely up to them whether they do so.

Some participants wondered how compatible the agent's key function of representing his/her authorities' position was with having the agent participate actively in execution of judgments. Some of you said, and I agree with you, that the contradiction is more apparent than real, as Article 46, paragraphs 1 and 2 is an integral part of the Convention. There is therefore no reason why the agent cannot, without loss of loyalty, devote as much time to proceedings before the Court as to execution of judgments.

Some of you commented that it might be wise to hold regular government agents' meetings with the department in charge of supervising execution of Court judgments. I think that is an excellent idea. However, I think that any move of that kind would have to come from the agents themselves.

Finally, whatever the model preferred by a state, the watchwords must be effectiveness and speed of execution.

Role of the agent in incorporation of Court guidelines and case-law

Nobody would disagree that publication of Convention standards and dissemination of them to national bodies are a basic and indeed indispensable requirement for improved knowledge of the Convention and the case-law and for their implementation at national level. In this context, a whole series of questions were asked. How should one deal with the mass of information available? Which judgments is one to select? Who should do the selection? Into which language should they be translated? To whom should they be issued? In all these matters the agent can play a key role, and particularly in deciding which of the Court's judgments is of main relevance and in enlisting the help of other bodies responsible for raising awareness of Convention standards at national level. The agent can also encourage and facilitate rapid translation and dissemination of decisions and interim or final resolutions adopted by the Committee of Ministers as part of its function of supervising the execution of judgments, as indicated in Recommendation (2008)2. The agent should do likewise in the case of memoranda on particular topics by the Department for the Execution of Judgments. The first annual report on implementation of the Court's judgments, which has just been published, should be a very important aid for them.

Numerous good practices have been mentioned: closer co-operation between states, in particular those which speak the same language, to facilitate the translation and dissemination of judgments; publication of digests, manuals or handbooks; producing explanatory notes to often complex judgments; co-operation between the private sector and NGOs; and, finally, making optimum use of Internet and computer tools in general.

One last point: professional training for judges, prosecutors and lawyers is essential for developing their ability to apply the Convention routinely in their everyday work. Clearly the agents have all the necessary qualifications and experience to play an active role in such training, drawing, in particular, on their in-depth knowledge of the relevant case-law, whether national or European. As has been pointed out, the Directorate General of Human Rights and Legal Affairs conducts a whole series of programmes in this area, in particular the HELP programme.

Mr Chair, ladies and gentlemen, friends,

This seminar has been an opportunity to consider a range of issues of practical relevance for agents. It has also been a chance to advance the exchange of experiences and good practices begun by the previous meetings of government agents, which were held in Prague in 1995, in Vilnius in 1999 and in the Hague in 2003. The seminar is also very much part of the current process concerning measures for preserving the long-term effectiveness of the European Court of

Human Rights, a process which began in Rome at the Ministerial Conference in 2000. As you know, full implementation of the Convention at national level and improving the impact of national mechanisms for speedy execution of the Court's judgments are and will remain Council of Europe priorities. As we have seen, government agents have a crucial role to play in the pursuit of these goals.

The Directorate General of Human Rights and Legal Affairs is ready, in so far as its responsibilities and capabilities allow, to assist you in what are demanding tasks. Assistance can take in organising special training sessions on the Convention for the lawyers on your staffs, providing written expert opinions at states' request on the compatibility of draft legislation, and circulating documentation on human rights. Special assistance with execution of Court judgments can also be given. We are more than happy to continue this co-operation with government agents, whether at high-level events such as this or through more informal regular contact, which I personally very much value.

I hope all of you privileged and fortunate enough to be here have a very enjoyable tour of Bratislava this afternoon. I wish you safe home and look forward to seeing you again soon. ★

Mr Emil Kuchár

Ambassador of the Slovak Republic to the Council of Europe

The proceedings of the Bratislava seminar are undoubtedly topical, and should continue to be so in the future. Indeed, government agents' concerns coincide with those of the Committee of Ministers and the Secretariat of the Council of Europe, as shown by the very recent publication of the first report on supervision of the execution of judgments of the Court; seminar participants should read it, for it will help to imbue them with the importance of their role and the need for honest co-operation between agents and the Execution Department, and to convince them that the difficulties they face are common to all the states parties to the Convention and their respective agents.

These are good reasons to push for regular contacts between government agents. This seminar is not the first, of course, but it has expressed a need for

more frequent professional exchanges. Perhaps a recommendation of the Committee of Ministers on regular meetings of government agents might constitute a welcome invitation, or at least echo the desires voiced by participants at this seminar. ★

Agenda

of the seminar

Thursday 3 April 2008

9.00 Registration of the participants

Opening. General remarks. Presentation of the objectives of the seminar

Chair: Mr **Emil Kuchár**, Ambassador Extraordinary and Plenipotentiary, Chairman of the Ministers' Deputies of the Council of Europe, Permanent Representative of the Slovak Republic to the Council of Europe

Moderator for the 1st day: Mr **Arto Kosonen**, government agent of Finland

Opening statements

9.30 Mr **Jean-Paul Costa**, President of the European Court of Human Rights

9.50 Mr **Štefan Harabin**, Deputy Prime Minister of the Government of the Slovak Republic and Minister of Justice of the Slovak Republic

10.10 Ms **Maud de Boer-Buquicchio**, Deputy Secretary General of the Council of Europe

10.30 Coffee break

Theme I: The role of the government agent in representing the member state before the European Court of Human Rights

11.00 Ms **Marica Pirošíková**, government agent of the Slovak Republic

11.20 Mr **Vit Schorm**, government agent of the Czech Republic

11.40 Discussion: sharing national experiences and best practice

13.00 Lunch

Theme II: The responsibility of the government agent in ensuring compatibility of legislation and practice with the standards of the European Convention on Human Rights

14.30 Mr **Yuriy Zaytsev**, government agent of Ukraine

14.50 Mr **Derek Walton**, government agent of the United Kingdom

15.10 Discussion: sharing national experiences and best practice

16.30 **Summary of day one**

Friday 4 April 2008

Chair: Mr **Emil Kuchár**, Ambassador Extraordinary and Plenipotentiary, Chairman of the Ministers' Deputies of the Council of Europe, Permanent Representative of the Slovak Republic to the Council of Europe

Moderator for the 2nd day:
Ms **Anne-Françoise Tissier**, government agent of France

Theme III: The contribution of the government agent to the execution of judgments of the European Court of Human Rights

9.00 Ms **Deniz Akçay**, Co-agent of the Government of Turkey, Chairperson of the Steering Committee for Human Rights

9.20 Mr **Francesco Crisafulli**, Co-agent of the Government of Italy

9.40 Discussion: sharing national experiences and best practice

11.00 Coffee break

Theme IV: The government agent's role in mainstreaming the Court's requirements and case-law into the daily practice of all state bodies, notably through publication and dissemination

11.20 Mr **Frank Schürmann**, government agent of Switzerland

11.40 Ms **Isabelle Niedlispacher**, Co-agent of the Government of Belgium

12.00 Discussion: sharing national experiences and best practice

13.00 **Summary of day two**

13.10 **Closing remarks and conclusions**

Mr **Philippe Boillat**, Director General of Human Rights and Legal Affairs of the Council of Europe

Mr **Emil Kuchár**, Ambassador Extraordinary and Plenipotentiary, Chairman of the Ministers' Deputies of the Council of Europe, Permanent Representative of the Slovak Republic to the Council of Europe

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Bratislava, 3-4 April 2008/Bratislava, 3-4 avril 2008

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