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STEERING COMMITTEE FOR HUMAN RIGHTS
(CDDH)

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**COMMITTEE OF EXPERTS ON THE REFORM OF THE COURT
(DH-GDR)**

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**Drafting Group "D" on the reform of the Court
(GT-GDR-D)**

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Draft Guide to Good Practice in respect of domestic remedies

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I. INTRODUCTION

1. Article 13 of the European Convention on Human Rights establishes the right to an effective remedy, stating that "everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity". This is one of the key provisions underlying the Convention's human rights protection system, along with the requirements of Article 1 on the obligation to respect human rights and Article 46 on the execution of judgments of the European Court of Human Rights.

2. By contributing to the resolution of allegations of violations of the Convention at domestic level, the right to an effective remedy plays a crucial part in the practical application of the principle of subsidiarity. The implementation of effective remedies for all arguable complaints of a violation of the Convention should permit a reduction in the Court's workload as a result, on the one hand, of the decreasing number of cases reaching it and, on the other, of the fact that the detailed treatment of the cases at national level would make their later examination by the Court easier[1]. Furthermore, providing for the retroactivity of new remedies, particularly those designed to deal with systemic or structural problems, helps to reduce the Court's workload by enabling applications pending before the Court to be resolved at national level.[2] In fact, whereas the Court will normally assess exhaustion of domestic remedies at the date of application, it may depart from this rule when taking note of the implementation of new effective remedies.[3] The right to an effective remedy also reflects the fundamental role of national judicial systems for the Convention system, where preventive measures have proved inadequate. In this respect, it should be noted that, in addition to the obligation to ascertain the existence of effective remedies in the light of the Court's case-law, States have the general obligation to solve the problems underlying violations found in the Court's judgments.[4]

3. Repetitive cases generally reveal a failure to implement effective domestic remedies where judgments given by the Court, particularly pilot judgments or judgments of principle, have given indications as to the general measures needed to avoid future violations. It is crucial that States execute Court judgments fully and rapidly. As the Court has noted, if States fail to provide effective remedies, "individuals will systematically be forced to refer to the Court in Strasbourg complaints that would otherwise … have to be addressed in the first place within the national legal system. In the long term the effective functioning, on both the national and international level, of the scheme of human rights protection set up by the Convention is liable to be weakened".[5]

4. It is also important that national courts and tribunals, when conducting proceedings and formulating judgments, be influenced by the principles of the Convention, with regard to the case law of the Court. This helps ensure that the domestic remedies are as effective as

[1] As noted in the Recommendation of the Committee of Ministers Rec(2004)6 on the improvement of domestic remedies.
[2] As noted in Recommendation CM/Rec(2010)3 on effective remedies for excessive length of proceedings.
[3] See, for example, *Icyer v. Turkey*, App. no. 18888/02, decision of 12/01/2006, paragraph 72; *Fakhretdinov v. Russia*, App. nos. 26716/09, 67576/09, 7698/10, 26716/09, 67576/09 and 7698/10, decision of 23/09/2010, paragraph 30; *Latak v. Poland,* App. no. 52070/08, decision of 12/10/2010.
[4] As noted in Recommendation Rec(2004)6 cited above.
[5] See *Kudła v. Poland*, App. no. 30210/96, judgment of 26 October 2000, paragraph 155.

possible in remedying violations of the Convention rights, and contributes to the dialogue between the Court and national judicial systems.[6]

5. The implementation of effective domestic remedies for violations of the Convention has been a long-standing concern of the Council of Europe, repeatedly considered a priority at the highest political level, notably at the high-level conferences on the future of the Court held in turn by the Swiss Chairmanship of the Committee of Ministers (Interlaken, Switzerland, 18 and 19 February 2010), the Turkish Chairmanship (Izmir, Turkey, 26 and 27 April 2011)[7] and the UK Chairmanship (Brighton, United Kingdom, 19 and 20 April 2012). The Declaration adopted at the Brighton Conference, for example, expressed in particular "the determination of the States Parties to ensure effective implementation of the Convention" by "considering the introduction if necessary of new domestic legal remedies, whether of a specific or general nature, for alleged violations of the rights and freedoms under the Convention", and also by "enabling and encouraging national courts and tribunals to take into account the relevant principles of the Convention, having regard to the case law of the Court, in conducting proceedings and formulating judgments; and in particular enabling litigants, within the appropriate parameters of national judicial procedure but without unnecessary impediments, to draw to the attention of national courts and tribunals any relevant provisions of the Convention and jurisprudence of the Court". Further to these two provisions, the Declaration invited the Committee of Ministers "to prepare a guide to good practice in respect of domestic remedies"[8]. Consequently, the Committee of Ministers instructed the Steering Committee for Human Rights (CDDH) to draw up this guide.[9]

6. The guide has two aims. The first is to identify the fundamental legal principles which apply to effective remedies, and the characteristics required for remedies in certain specific situations and general remedies to be effective. The second is to identify good practices which can provide a source of inspiration for other member States. These examples of good practices are not standard models, however. They may be suited only to certain legal systems and constitutional traditions.

7. Under Article 32 of the Convention, the Court has final jurisdiction to interpret and apply the Convention and its Protocols through its case-law. This case-law, particularly the Court's pilot judgments and judgments of principle, is therefore the main source for this guide. The interim and final resolutions adopted by the Committee of Ministers in connection with the execution of the Court's judgments also provide guidance on the necessary general measures and on good practices, as do the Committee of Ministers' annual reports on the supervision of the execution of Court judgments. The Committee of Ministers has also dealt with the right to an effective remedy in Recommendations Rec(2004)6 on the improvement of domestic remedies and CM/Rec(2010)3 on effective remedies for excessive length of proceedings, which was accompanied by a guide to good practice.

8. The guide is also based on the national reports on measures taken to implement relevant parts of the Interlaken and Izmir Declarations, which have been the subject of

[6] See also paragraph 12.c of the Brighton Declaration; this same rationale also underpins the proposal for a system of advisory opinions by the Court (paragraph 12.d of the Brighton Declaration).
[7] See the Izmir Declaration Follow-up Plan, section B. 1. a.
[8] See paragraph 9. f. ii. of the Brighton Declaration.
[9] See the decisions of the Committee of Ministers at its 122nd session, 23 May 2012, Item 2 – Securing the long-term effectiveness of the supervisory mechanism of the European Convention on Human Rights The initial work on the guide was carried out at two meetings of a select drafting group. It was then examined by the Committee of Experts on the Reform of the Court (DH-GDR) and the Steering Committee for Human Rights (CDDH) before being sent to the Committee of Ministers.

analysis and recommendations forming part of the CDDH's follow-up[10], and on any other relevant information passed on by the member States in the course of the preparation work for the guide. Work carried out by other Council of Europe bodies was also taken into account. In this connection, member States are encouraged to consult the European Commission for Democracy through Law (the Venice Commission) and the European Commission for the Efficiency of Justice (CEPEJ) where necessary, for guidance and assistance in making the necessary improvements to their domestic systems.

9. The guide should be translated where appropriate and distributed widely, particularly to the following bodies and persons:

- national and – for those that have powers in this area – regional legislative bodies;
- bodies responsible for proposing procedural or legislative reforms such as judicial councils, depending on the organisation of various national legal systems;
- judicial bodies, particularly the higher national courts;
- officials responsible for the administration of courts, including registrars and officials dealing with the execution or implementation of decisions and judgments;
- the relevant staff of government services responsible for the administration of justice, whether at national or regional level;
- the staff of other public services responsible for the non-judicial stages of the relevant procedures, particularly the police, the prosecuting authorities, the prison authorities or those in charge of any other place of detention, while taking account of specific national features.

II. GENERAL CHARACTERISTICS OF AN EFFECTIVE REMEDY

10. Article 13 of the Convention, which sets out the right to an effective remedy, imposes the following obligation on States parties:

> "Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

11. According to the Court's case-law, this provision has "close affinity" with Article 35 paragraph 1 of the Convention, whereby the Court may only deal with the matter after all domestic remedies have been exhausted insofar as "that rule is based on the assumption, reflected in Article 13 of the Convention […] that there is an effective remedy available in the domestic system in respect of the alleged breach".[11] However, "the only remedies which Article 35 paragraph 1 requires to be exhausted are those that relate to the breach alleged and are available and sufficient. The existence of such remedies must be sufficiently certain, not only in theory but also in practice".[12]

12. It should be further noted that Article 5 paragraph 4, which stipulates that everyone who is deprived of his or her liberty shall be entitled to institute proceedings before a court to verify compliance with the procedural and substantive requirements that are essential for the lawfulness of his or her deprivation of liberty, is a specific requirement in addition to the

[10] See the CDDH's report on the measures taken by the member States to implement relevant parts of the Interlaken and Izmir Declarations, document CDDH(2012) R76 Addendum I, of which the Committee of Ministers took note at its 1159th meeting (16 January 2013).

[11] See, for example, *McFarlane v. Ireland, App. no. 31333/06, judgment of the Grand Chamber of 10/09/2010, paragraph 107.*

[12] Ibidem.

general requirements of Article 13.[13] The scope of the obligations under this provision is set out in paragraphs 24-28. This is why the case-law cited concerns also Articles 5(3)-(5) and 35.

i. The meaning of "remedy" within Article 13

13. The Convention requires that a "remedy" be such as to allow the competent domestic authorities both to deal with the substance of the relevant Convention complaint and to grant appropriate relief.[14] A remedy is only effective if it is available and sufficient. It must be sufficiently certain not only in theory but also in practice,[15] and must be effective in practice as well as in law,[16] having regard to the individual circumstances of the case. Its effectiveness does not, however, depend on the certainty of a favourable outcome for the applicant.[17]

14. Article 13 does not require any particular form of remedy, States having a margin of discretion in how to comply with their obligation, but the nature of the right at stake has implications for the type of remedy the state is required to provide.[18] Even if a single remedy does not by itself entirely satisfy the requirements of Article 13, the aggregate of remedies provided for under domestic law may do so.[19] In assessing effectiveness, account must be taken not only of formal remedies available, but also of the general legal and political context in which they operate as well as the personal circumstances of the applicant.[20]

ii. The meaning of "national authority" within Article 13

15. The "national authority" referred to in Article 13 does not necessarily have to be a judicial authority, but if it is not, its powers and the guarantees which it affords are relevant in determining whether the remedy before it is effective.[21]

iii. The meaning of "violation" within Article 13

16. Article 13 does not require a domestic remedy in respect of any supposed grievance, no matter how unmeritorious; the claim of a violation must be an arguable one. The Court has not given a general definition of arguability. It has, however, indicated that "where an individual has an arguable claim to be the victim of a violation of the rights set forth in the Convention, he should have a remedy before a national authority in order both to have his claim decided and, if appropriate, to obtain redress".[22] The question of whether the claim is arguable should be determined in the light of the particular facts and the nature of the legal issue or issues raised. The Court follows various approaches to conclude that the grievances

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[13] See *Claes v. Belgium,* App. no. 43418/09, judgment of 10/01/2013, paragraph 123; *A and others v. the United Kingdom,* App. no. 3455/05, judgment of the Grand Chamber of 19/02/2009, paragraph 202.
[14] See *M.S.S. v. Belgium and Greece*, App. no. 30696/09, judgment of 21 January 2011, paragraph 288; *Halford v. U.K.*, App. no. 20605/92, judgment of 25 June 1997, paragraph 64.
[15] See *McFarlane v. Ireland*, App. no. 31333/06, 10.09.2010, paragraph 114; *Riccardi Pizzati v. Italy*, App. no. 62361/00, Grand Chamber judgment of 29 March 2006, paragraph 38.
[16] See *El-Masri v. the Former Yugoslav Republic of Macedonia*, App. no. 39630/09, 13.12.2012, paragraph 255; *Kudla v. Poland*, App. no. 30210/96, judgment of 26 October 2000, paragraph 152.
[17] See *Kudla v. Poland*, op. cit., paragraph 157.
[18] See *Budayeva & otrs v. Russia*, App. Nos. 15339/02 etc, judgment of 20 March 2008, paras. 190-191.
[19] See *De Souza Ribeiro v. France*, App. no. 22689/07, 13.12.2012, paragraph 79; *Kudla v. Poland*, op. cit., paragraph157.
[20] See *Dorđević v. Croatia*, App. no. 41526/10, 24.07.2012, paragraph 101; *Van Oosterwijck v. Belgium*, App. no. 7654/76, judgment of 6 November 1980, paras. 36-40.
[21] See *Kudla v. Poland*, op. cit., paragraph 157.
[22] See *Leander v. Sweden*, App. no. 9248/81, judgment of 26 March 1987, paragraph 77.

raised before it are not arguable under Article 13. It can note that the evidence presented by the applicants does not identify "any indication of a violation"[23] or refer to the considerations which led it to conclude that there had been no violation of the provision concerned, to consider that the grievance raised by the applicant was not "arguable".[24]

III. SPECIFIC CHARACTERISTICS OF REMEDIES IN RESPONSE TO CERTAIN PARTICULAR SITUATIONS

17. It is always the case that the scope of the obligation arising under Article 13 varies according to the nature of the complaint based on the Convention that is made by the applicant. This section thus deals with the characteristics that must be shown by a domestic remedy responding to certain specific situations, namely remedies for deprivation of liberty, investigations in the context of alleged violations of Articles 2 and 3 of the Convention, remedies against removal and remedies for non-execution of domestic court decisions. As regards effective remedies for excessive length of proceedings, one should refer to the relevant Recommendation CM/Rec(2010)3, accompanied by a guide to good practice.

A. Domestic remedies in respect of deprivation of liberty

18. The main purpose of Article 5 of the Convention is to protect persons from arbitrary or unjustified detention.[25] In order to determine whether someone has been "deprived of his liberty" within the meaning of Article 5, "the starting point must be his concrete situation and account must be taken of a whole range of criteria such as the type, duration, effects and manner of implementation of the measure in question".[26] The notion of deprivation of liberty contains both an objective element of a person's confinement in a particular restricted space for a non-negligible length of time, and a subjective element in that the person has not validly consented to the confinement in question.[27] Article 5 is therefore applicable in numerous situations, for example placement in a psychiatric or social care institution,[28] confinement in airport transit zones[29], questioning in a police station[30] or stops and searches by the police,[31] or house arrest.[32]

19. Domestic remedies in respect of deprivation of liberty must concern both the measure's lawfulness and the conditions of detention, including the way in which the person in detention is treated.

1) The lawfulness of deprivation of liberty

20. The procedural safeguards to which persons deprived of liberty must be entitled include the right, for persons arrested or detained on the grounds that they are suspected of having committed a criminal offence, to be brought before a judge promptly and to have their

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[23] See, for example, *Hüsniye Tekin v. Turkey,* App. no. 50971/99, judgment of 25/10/2005.
[24] See, for example, *Sevgin and Ince v. Turkey*, App no. 46262/99, judgment of 20/09/2005.
[25] See *McKay v. U.K.*, App. no. 543/03, Grand Chamber judgment of 3/10/2006, paragraph 30. For an extended analysis of the case-law related to Article 5 of the Convention, see the Guide on Article 5 published by the Research Division of the Court.
[26] See *Guzzardi v. Italy*, App. no. 7367/76, judgment of 6/11/1980, paragraph 92.
[27] See *Stanev v. Bulgaria*, App. no. 36760/06, Grand Chamber judgment of 17/01/2012, paragraph 117.
[28] See, for example, *Stanev v. Bulgaria* ; *Storck v. Germany*, App. no. 61603/00, judgment of 16/06/2005.
[29] See, for example, *Amuur v. France*, App. no. 19776/92, judgment of 25/06/1996.
[30] See, for example, *Creanga v. Romania*, App. no. 29226/03, Grand Chamber judgment of 23/02/2012.
[31] See, for example, *Foka v. Turkey*, App. no. 28940/95, judgment of 24/06/2008.
[32] See, for example, *Lavents v. Latvia*, App. no. 58442/00, judgment of 28/11/2002.

case heard within a reasonable time or to be released pending trial, as stipulated in Article 5 paragraph 3 of the Convention; the right for everyone who is held in detention to have lawfulness of detention speedily examined by a Court, as stipulated in Article 5, paragraph 4; and the right to compensation for unlawful detention, as stipulated in Article 5, paragraph 5.

i. The right, for persons arrested or detained on the grounds that they are suspected of having committed a criminal offence, to be brought before a judge promptly and to have their case heard within a reasonable time or to be released pending trial (Article 5, paragraph 3)

21. Article 5, paragraph 3 does not provide for any possible exceptions to the obligation to bring a person before a judge promptly after his or her arrest or detention.[33] Review must be automatic and cannot depend on an application being made by the detained person[34], so as to avoid situations in which persons subjected to ill-treatment might be incapable of lodging an application asking for a review of their detention; the same might also be true of other vulnerable categories of arrested persons, such as the mentally frail[35] or those who do not speak the language of the judge.[36] Judges must be impartial and independent.[37] They must hear the person brought before them before handing down their decision[38] and examine the merits of the application for review of detention.[39] If there are no reasons justifying the person's detention, the judge must be empowered to order his or her release.[40]

22. The second part of Article 5, paragraph 3 requires national courts to review the need to keep persons in detention with a view to guaranteeing their release if the circumstances no longer justify their deprivation of liberty. It is contrary to the safeguards set out in this provision more or less automatically to continue to hold a person in detention. The burden of proof cannot be reversed, and detainees cannot be obliged to prove that there are reasons for releasing them.[41]

Example of good practice

23. Armenian criminal law makes a distinction between detention during the investigation and detention during the trial. Unlike detention during the investigation, which is ordered and extended by a court decision each time for no more than two months and cannot exceed a certain period of time, no maximum detention period is prescribed during the trial. Once the trial court decides on the accused person's detention during the trial, it is not obliged to refer to that issue of its own motion thereafter. However, in accordance with Article 65 and 312 of the Criminal Code of Procedure, upon a motion of the defence the trial court can replace the detention with another measure of restraint. The Strasbourg Court has indicated that the possibility of lodging such motion may be considered as an effective remedy as far as an alleged violation of article 5 paragraph 3 is concerned[42].

[33] See *Bergmann v. Estonia*, App. no. 38241/04, judgment of 29/05/2008, paragraph 45.
[34] See *McKay v. U.K.*, paragraph 34.
[35] Ibid.
[36] See *Ladent v. Poland*, paragraph 74.
[37] See, for example, *Brincat v. Italy*, paragraph 21.
[38] See, for example, *Schiesser v. Switzerland*, paragraph 31.
[39] See *Krejčíř v. The Czech Republic*, paragraph 89.
[40] See *Assenov v. Bulgaria*, paragraph 146.
[41] See *Bykov v. Russia*, App. no. 4378/02, Grand Chamber judgment of 10/03/2009, paragraph 66.
[42] Voir *Martirosyan c. Arménie*, req. n° 23341/06, arrêt du 5 février 2013.

ii. The right to have lawfulness of detention speedily examined by a Court (Article 5, paragraph 4)

24. According to Article 5, paragraph 4 of the Convention, "everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful". Arrested or detained persons are entitled to request that a court review the procedural and substantive conditions necessary for their deprivation of liberty to be "lawful" within the meaning of Article 5, paragraph 1 of the Convention.[43] The possibility of applying for review must be offered as soon as the person concerned has been taken into custody and, if necessary, the offer must subsequently be repeated at reasonable intervals.[44] The court to which the person deprived of liberty must have access must be an independent judicial body.[45] If there is a second level of jurisdiction, it must in principle accord detainees the same guarantees on appeal as at first instance, inter alia, by ensuring that proceedings are conducted "speedily".[46]

25. Article 5, paragraph 4 contains special procedural safeguards that are distinct from those set out in Article 6, paragraph 1 of the Convention concerning the right to a fair trial. It constitutes a *lex specialis* to this latest provision,[47] as well as to the more general requirements of Article 13 concerning the right to an effective remedy.[48] The proceedings referred to in Article 5, paragraph 4 must be of a judicial nature and offer certain procedural safeguards appropriate to the nature of the deprivation of liberty in question.[49] A hearing is required in the case of a person whose detention falls within the ambit of Article 5 paragraph 1(c), covering pre-trial detention. The possibility for a detainee to be heard either in person or, where necessary, through some form of representation is a fundamental safeguard.[50] Article 5, paragraph 4 does not, however, require that a detained person be heard every time he or she appeals against a decision extending detention,[51] although there is a right to be heard at reasonable intervals.[52]

26. The proceedings must be adversarial and must always ensure "equality of arms" between the parties.[53] Persons who are entitled to initiate proceedings to have the lawfulness of their detention decided cannot make effective use of that right unless they are promptly and adequately informed of the reasons why they have been deprived of their liberty.[54] In the event of pre-trial detention, persons deprived of liberty must be given a genuine opportunity to challenge the elements underlying the accusations against them. This requirement means that the court has to hear witnesses.[55] It may also order that the detainee or their representative

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[43] See, for example, *Idalov v. Russia*, App. no. 5826/03, Grand Chamber judgment of 22/05/2012.
[44] See *Molotchko v. Ukraine*, App. no. 12275/10, judgment of 26/04/2012, paragraph 148 ; *Kurt v. Turkey*, judgment of 25/05/1998, paragraph 123.
[45] See *Stephens v. Malta (no. 1)*, App. no. 11956/07, judgment of 21/04/2009.
[46] See *Kucera v. Slovakia*, App. no. 48666/99, judgment of 17/07/2007, paragraph 107; *Smatana v. Czech Republic, App. No.*18642/04, 27/09/2007, paragraph 128, case wherein the Court applied the principle to a third level of jurisdiction, when examining the application for release pursuant to Article 5, paragraph 4.
[47] See *Claes v. Belgium*, paragraph 123.
[48] See *A. and others v. U.K., paragraph 202;Claes v. Belgium, paragraph 123.*
[49] See *Idalov v. Russia*, paragraph 161.
[50] Ibid.
[51] See *Saghinadze & otrs v. Georgia*, App. no. 18768/05, 27/05/2010, paragraph 150.
[52] See *Altinok v. Turkey*, App. no. 31610/08, judgment of 29/11/2011, paragraph 53; *Catal v. Turkey*, App. no. 26808/08, judgment of 17/07/2012, paragraph 33.
[53] See *A. and Others v. the United .Kingdom.*, paragraph 204.
[54] See *Van der Leer v. the Netherlands*, App. no. 11509/85, judgment of 21/02/1990, paragraph 28.
[55] See *Turcan and Turcan v. Moldova*, App. no. 39835/05, judgment of 23/10/2007, paragraphs 67-70.

be able to access those documents in the investigation file on which the prosecution is based.[56]

27. The Court has set out principles governing the oversight of the deprivation of liberty of a person of unsound mind.[57] In addition to the safeguards applicable to everyone deprived of his or her liberty, special procedural safeguards may in fact be necessary to protect those who, on account of their mental disorders, are not fully capable of acting for themselves.[58] An individual who has not been associated, either personally or through a representative, in the proceedings leading to the confinement has grounds to argue that the proceedings were in breach of Article 5 paragraph 4.[59] Confinement is also considered of inappropriate nature where the individual declared deprived of his or her legal capacity, has not been informed that a lawyer was appointed to represent him or her, and has never met with the lawyer.[60] For persons who are declared deprived of their legal capacity and can therefore not oversee their detention personally, an automatic judicial review must be required.[61] It is in fact crucial that the individual have access to a court and the possibility to be heard before a court personally or through a representative. The Court has stipulated that these principles are applicable both where detention has been authorised by a judicial authority and where the placement in a detention centre has been initiated by a private individual, namely the guardian of the person of unsound mind, and authorised by non-judicial authorities.[62] With regard to detention in the psychiatric ward of a prison, although the remedy may meet the requirements of Article 5 paragraph 4, the proceedings will be rendered ineffective if the review body refuses to visit the place of detention to ascertain whether it is of inappropriate nature, this being an essential condition for the detention to be lawful.[63]

28. Persons deprived of liberty must obtain a speedy judicial decision concerning the lawfulness of their detention and ordering its termination if it proves to be unlawful.[64] The promptness with which the court rules on the lawfulness of the detention can be assessed by reference to the period starting from the moment that the application for release was made and ending with the final determination of the legality of the applicant's detention.[65] In verifying whether the requirement of a speedy judicial decision has been met, factors comparable to those which play a role with respect to the requirement of trial within a reasonable time under Article 5, paragraph 3 and Article 6, paragraph 1 of the Convention may be taken into consideration, including the complexity of the proceedings, their conduct by the domestic authorities and by the applicant and what was at stake for the latter.[66]

Examples of good practice

29. Concerning placement and prolongation of detention in a deportation centre, the Court considered that the fact that the Estonian domestic courts prolong the person's detention every two months, assessing the feasibility of expulsion and the steps taken by the authorities to achieve it, provided an important procedural guarantee for the applicant. Indeed, the

[56] See *Korneykova v. Ukraine*, App. no. 39884/05, judgment of 19/01/2012, paragraph 68.
[57] See *Mihailovs v. Latvia*, App. no. 35939/10, 22/01/2013, paragraph 154; *Megyeri v. Germany*, App. no. 133770/88, judgment of 12/05/1992, paragraph 22.
[58] See *Claes v. Belgium*, App. no. 43418/09, judgment of 10/01/2013, paragraph 128.
[59] See *Winterwerp v. the Netherlands*, App no. 6301/73, judgment of 24/10/1979, paragraph 61.
[60] See *Beiere v. Latvia*, App. no. 30954/05, 29/11/2011, paragraph 52.
[61] See *Shtukaturov v. Russia*, App. no. 44009/05, judgment of 27/03/2008, paragraph 123.
[62] See *Mihailovs v. Latvia*, paragraph 155.
[63] See *Claes v. Belgium*, paragraphs 131-134.
[64] See *Idalov v. Russia*, paragraph 154.
[65] See *Sanchez-Reisse v. Switzerland*, App. no. 9862/82, judgment of 21/10/1986, paragraph 54.
[66] See *Mooren v. Germany*, App. no. 11364/03, Grand Chamber judgment of 9/07/2009, paragraph 106.

Obligation to Leave and Prohibition of Entry Act stipulated that if it was not possible to complete expulsion within forty-eight hours of the alien's arrest, the person could be placed in a deportation centre, subject to judicial authorisation, until their expulsion, but for no longer than two months. If it was impossible to enforce expulsion within that period, an administrative court shall extend the term of detention by up to two months at a time until expulsion is enforced or the alien is released. Furthermore, according to the Code of Administrative Court Procedure, an administrative judge shall grant and extend a permission to take an administrative measure, declare an administrative measure justified, or revoke a permission to take an administrative measure. These decisions can be appealed. It means that a remedy exists guaranteeing regular judicial review of the grounds of detention.[67]

30. In the context of the provisional arrest in Estonia of a person to be extradited, the Court considered that the review of the lawfulness of detention was incorporated in the decision by which the remand in custody for two months was ordered. The review of the lawfulness of the detention can further been seen as having been incorporated in the decision on the lawfulness of extradition on the basis of which the detention was extended. Despite the lack of a fixed time-limit in the latter judicial decision, the Court was satisfied that paragraph 447(7) of the Estonian Code of Criminal Procedure set one year as the maximum length of detention pending extradition. Had the domestic courts found that the extradition had become legally impossible or had the authorities been unable to conclude the extraction within one year from his arrest, the person would have been released. Thus the Court considered that the review of the lawfulness of the detention was in conformity with the requirements of Article 5 paragraph 4 of the Convention.[68]

31. In Romania, during trial, the competent judicial authority verifies *ex officio* every 60 days if the circumstances still justify the deprivation of liberty. If the competent judicial authority finds the detention to be unlawful or no longer necessary, it revokes the measure and orders immediate release. This judgment is subject to appeal on points of law, to be examined within 3 days of introduction. The Court has ruled that the review of the lawfulness of detention, as required by Article 5 § 4 of the Convention, is incorporated in the first instance judgment and the subsequent declaration of guilt, the legal establishment of the offense being sufficient to justify the continued detention of the applicant.[69] The verification of the legality of detention is considered effective if the court of first instance analyses it thoroughly and the appeal on points of law is an additional guarantee for this verification, its effectiveness not being affected by the duration of the examination of the appeal.[70]

iii. The right to compensation for unlawful detention (Article 5, paragraph 5)

32. According to Article 5, paragraph 5 of the Convention, "everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation". The right to compensation presupposes that a violation of one of the other paragraphs of Article 5 has been established by either a domestic authority or the Court itself.[71] It creates a direct and enforceable right to compensation before the national courts.[72] The right to redress must be ensured with a sufficient degree of certainty[73] and

[67] See *Dolinskiy v. Estonia*, App. no. 14160/08, decision of 02/02/2010.
[68] See *Taylor v. Estonia*, App. no. 37038/09, decision of 26/06/2012.
[69] See *Negoescu v. Romania*, App. no. 55450/00, decision of 17/03/2005.
[70] See *Lapusan v. Romania*, App. no. 29723/03, 3/06/2008, paragraphs 45-46, *Ceuta v. Romania*, App. no. 1136/05, decision of 6/11/2012, paragraph 25.
[71] See *N.C. v. Italy*, App. no. 24952/94, Grand Chamber judgment of 18/12/2002, paragraph 49.
[72] See *A. and others v. U.K.*, paragraph 229.
[73] See *Ciulla v. Italy*, App. no. 11152/84, judgment of 22/02/1989, paragraph 44.

redress must be possible both in theory[74] and in practice.[75] In order to amount to an effective remedy, an award of compensation for unlawful detention must not depend on the ultimate acquittal or exoneration of the detainee.[76] The national authorities must interpret and apply their national law without excessive formalism.[77] For example, although Article 5, paragraph 5 does not prohibit the Contracting States from making the award of compensation dependent upon the ability of the person concerned to show damage resulting from the breach, excessive formalism in requiring proof of non-pecuniary damage resulting from unlawful detention is incompatible with the right to redress.[78] The amount of compensation awarded cannot be considerably lower than that awarded by the Court in similar cases.[79] Finally, crediting a period of pre-trial detention towards a penalty does not amount to compensation as required by Article 5 paragraph 5.[80]

Examples of good practice

33. In Romania, Article 504 of the Code of Criminal Procedure provides for the right to compensation for illegal detention. According to this provision, the following persons are entitled to compensation: a person who has been convicted, in case of an acquittal; a person who was illegally deprived of liberty or whose liberty was unlawfully restricted; or a person who was deprived of liberty after expiration of the statutory limitation, amnesty or decriminalization of the offense. Deprivation or unlawful restriction of liberty should be established, where appropriate, by order of the prosecutor revoking the measure of deprivation or restriction of liberty, by order of the prosecutor terminating the criminal prosecution or by decision of the court revoking the measure of deprivation or restriction of liberty or by final judgment of acquittal or termination of the criminal proceedings. The Court has considered that this remedy is effective when there is an initial finding of unlawfulness of the detention, underlining that the Constitutional Court had considered that the provisions of the Code of Criminal Procedure should be interpreted as covering all forms of judicial error and that there was a tendency on the part of the courts to apply Articles 998 and 999 of the Civil Code on criminal responsibility and, directly, Article 5(4) of the Convention to fill the gaps in the Code of Criminal Procedure.[81] The Court did however note that it was not putting into question its previous observations on the ineffectiveness of this remedy where there had been no prior findings on the unlawfulness of detention.[82]

34. In Slovakia, the State Liability Act deals with claims for compensation for pecuniary and non-pecuniary damage caused by public authorities, including in the context of remand in custody. Claims for damages fall within the jurisdiction of the ordinary courts. Moreover, there is another procedure under Article 127 of the Constitution which may also result notably in an award of compensation in respect of damage due to a violation of the rights under Article 5 paragraphs 1 to 4 to the Convention. The Court has found that in certain circumstances, the combination of these two domestic legal provisions was compatible with the requirements of Article 5(5) of the Convention.[83]

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[74] See *Dubovik v. Ukraine*, App. no. 33210/07, judgment of 15/10/2009, paragraph 74.
[75] See *Chitayev and Chitayev v. Russia*, App. no. 59334/00, judgment of 18/01/2007.
[76] See *Nechiporuk and Yonkalo v. Ukraine*, App. no. 42310/04, judgment of 21/04/2011, paragraph 231.
[77] See *Houtman and Meeus v. Belgium*, App. no. 22945/07, judgment of 17/03/2009, paragraph 44.
[78] See *Danev v. Bulgaria*, App. no. 9411/05, judgment of 02/09/2010, paragraphs 34-35.
[79] See *Ganea v. Moldova*, App. no. 2474/06, judgment of 17/05/2011.
[80] See *Wloch v. Poland (2)*, App. no. 33475/08, judgment of 10/05/2011, § 32.
[81] See *Tomulet v. Romania*, App. no.1558/05, decision of 16/11/2010.
[82] See *Tomulet v. Romania*, *Ogică v. Romania*, App. no. 24708/03, 27/05/2010, paragraph 56; *Degeratu v. Romania*, App. no. 35104/02, 6/07/2010, paragraph 59.
[83] See *Loyka v. Slovakia*, App. no. 16502/09, decision of 9/10/2012.

iv. Unacknowledged detention

35. Unacknowledged detention of a person constitutes a particularly grave violation of Article 5 of the Convention.[84] It is incumbent on the authorities that detain an individual to account for his or her whereabouts. The Court considers that Article 5 must be seen as requiring the authorities "to take effective measures to safeguard against the risk of disappearance and to conduct a prompt effective investigation into an arguable claim that a person has been taken into custody and has not been seen since".[85] Moreover, "where the relatives of a person have an arguable claim that the latter has disappeared at the hands of the authorities, the notion of an effective remedy for the purposes of Article 13 entails, in addition to the payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of those responsible and including effective access for the relatives to the investigatory procedure". The Court considers that "seen in these terms, the requirements of Article 13 are broader than a Contracting State's obligation under Article 5 to conduct an effective investigation into the disappearance of a person who has been shown to be under their control and for whose welfare they are accordingly responsible".[86]

2) Remedies relating to alleged violations of Article 3 of the Convention in the context of deprivation of liberty

36. In order to appraise the effectiveness of remedies concerning allegations of violation of Article 3 of the Convention in the context of deprivation of liberty, which can relate to either unsatisfactory conditions of detention or the treatment of the person deprived of liberty, the Court has indicated that the question is whether the person can obtain direct and appropriate redress[87]; such redress must not consist merely of indirect protection of rights, which means that the remedy must be directly accessible to the detained person.[88] "The preventive and compensatory remedies must coexist and complement each other"[89], an exclusively compensatory remedy cannot be considered sufficient.

i. Preventive remedies

37. The Court considers that the optimum type of redress is rapid cessation of the violation of the right not to be subjected to inhuman or degrading treatment.[90] The remedy must be effective in practice, i.e. it must be capable of preventing the continuation of the alleged violation and of ensuring that the applicant's material conditions of detention will improve.[91] This principle is also applicable to conditions of confinement in a psychiatric ward.[92] More

[84] See, for example, *Aslakhanova and others v. Russia*, App. no. 2944/06, 50184/07, 332/08 and 42509/10, judgment of 18/12/2012, paragraph 132.
[85] See *Kurt v. Turkey*, judgment of 25/05/1998, paragraph 124.
[86] See *Kurt*, paragraph 140, *Er and others v. Turkey*, App. no. 23016/04, judgment of 31/07/2012, paragraph 111 and *Timurtas v. Turkey*, App. no. 23531/94, judgment of 13/06/2000, paragraph 111.
[87] See *Torreggiani and others v. Italy*, App. no. 43517/09, pilot judgment of 8.01.2013, paragraph50.
[88] See *Mandic and Jovic v. Slovenia*, App. nos. 5774/10 and 5985/10, judgment of 20.10.2011, paragraph 107. In this case, the Court noted that where a prisoner transfer request, on whatever grounds, particularly for reasons of prison overcrowding, can only be granted by the prison authorities, such a remedy is not directly accessible to the applicant and consequently cannot be considered effective.
[89] See *Ananyev and others v. Russia*, nos. 42525/07 and 60800/08, 10.01.2012, paragraph 98.
[90] See the case of *Torreggiani and others v. Italy*, paragraph 96.
[91] See cases *Torreggiani and others v. Italy*, paragraph 55 ; *Cenbauer v. Croatia* (decision), no. 73786/01, 5 February 2004 ; *Norbert Sikorski v. Poland*, no. 17599/05, paragraph 116, 22.10.2009 ; *Mandic and Jovic v. Slovenia*, paragraph 116.
[92] See *Parascineti v. Romania*, App. no. 32060/05, 13.03.2012, paragraph 38.

particularly, as regards the alleged violations of Article 3 of the Convention concerning lack of adequate care for a detainee suffering from a serious illness, the preventive remedy must ensure access to direct and timely relief.[93] The required speediness of such assistance depends on the nature of the health problem. It is much more stringent where there is a risk of death or irreparable damage to health.[94]

38. The question of the judicial nature of the remedy is not decisive. For instance, it has been noted that, under certain circumstances, administrative remedies may prove effective.[95] The authority responsible for processing the complaint should be competent to verify the alleged violations. The authority must be independent, such as the *Independent Monitoring Boards* in the United Kingdom or the Complaints Commission (*beklagcommissie*) in the Netherlands. The supervisory authority must also have the authority to investigate complaints, with the participation of the complainant, and to issue binding and enforceable decisions.[96]

39. Applicants must not bear an excessive burden of proof in compensation proceedings. They may be asked to produce readily accessible items of evidence, such as a detailed description of the conditions of detention, witness statements and replies from supervisory bodies. The authorities will then examine the allegations of ill-treatment. The procedural rules on examination of such a complaint must comply with the principle of fairness within the meaning of Article 6 of the Convention, and the cost of such proceedings must not place an excessive burden on the applicant where the claim is justified.[97] Concerning persons detained by the authorities, strong presumptions of fact will arise in respect of injuries and death occurring during such detention and the burden of proof may be regarded as resting on the authorities to provide a satisfactory and convincing explanation.[98]

40. Furthermore, in connection with disciplinary measures imposed on a prisoner, a remedy which cannot have timely effect is neither adequate nor effective and, in view of the major repercussions of detention in a disciplinary cell, an effective remedy must enable the prisoner to challenge both the form and the substance of, and therefore the reasons for, such a measure in court.[99] The appellant is entitled to a remedy against such a sanction before it has either been executed or come to an end[100], and consequently the remedy must have minimum guarantees as to promptness.[101]

Examples of good practice:

41. In Greece, the Penitentiary Code and the Criminal Code of Procedure provide various remedies allowing the detainee to lodge a complaint regarding his/her personal situation,[102]

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[93] See *Čuprakovs v. Latvia*, App. no. 8543/04, judgment of 18/12/2012, paragraph 50; *Kadikis v. Latvia*, App. no. 62393/00, judgment of 4 May 2006, paragraph 62; *Goginashvili v. Georgia*, App. no. 47729/08, judgment of 04/10/2011, paragraph 49.
[94] See *Čuprakovs v. Latvia,* paragraphs 53-55.
[95] See cases *Torreggiani and others v. Italy*, op. cit., paragraph51, and *Norbert Sikorski v. Poland*, App. no. 17599/05, 22.10.2009, paragraph 111.
[96] See aforementioned case of *Ananyev and others v. Russia*, paragraph 215-216.
[97] Ibid, paragraph 228.
[98] See e.g. *Salman v. Turkey*, App. no. 21986/93, Grand Chamber judgment of 27/06/00, paragraph 100.
[99] See the case of *Payet v. France*, App. no. 19606/08, 20.01.2011, paragraph 133.
[100] See *Keenan v. the United Kingdom*, App. no. 27229/95, 03/04/2001, paragraph 127.
[101] See e.g. *Plathey v. France*, App. nos. 48337/09 and 48337/09, 10.11.2011, paragraphs 75-76, case in which the Court found that existing remedies did not allow the intervention of a judge before the sanction began to take effect.
[102] See *Mathloom v. Greece*, App. no. 48883/07, 24/04/2012, paragraphs 48-50; *Tsivis v. Greece*, App. no. 11553/05, 6/12/2007, paragraph 19.

notably the alleged deterioration of his/her health due to a lack of medical care.[103] Article 572 of the Criminal Code of Procedure provides for referral to a prosecutor in charge of executing sentences and implementing security measures, who is required to visit the prison once a week. Furthermore, Articles 6 and 86 of the Penitentiary Code recognise the right of a detainee to seize the prison Council and lodge an appeal, where necessary, before the court in charge of executing sentences. The Court noted, however, that these remedies cannot address applicants' complaints in cases where the applicant is not complaining solely about his or her personal situation, but also claiming to have been personally affected by the prison's conditions, which concern general issues and affect all the detainees. [104]

42. In France, the effectiveness of remedies allowing decisions affecting detainees' Convention rights to be challenged depends on the possibility of submitting such decisions (such as solitary confinement, multiple transfers, repeated searches of detainees) to supervision by the administrative courts via an urgent procedure, followed, where appropriate, by reversal of the decision.[105]

43. In Romania, from June 2003, Government Emergency Ordinance no. 56/2003 introduced an appeal before the courts against any act of the prison authorities. The Ordinance was subsequently replaced by Law no. 275/2006. To the extent that a prisoner's claim concerned deficiencies in providing adequate care or adequate food, medical treatment, right to correspondence or other rights of detainees, the Court held that the complaint represents an effective domestic remedy.[106] This remedy was deemed effective even in a situation in which, at the date of the entry into force of the Ordinance, an application had already been pending with the Court. However, in the circumstances of the case, the gravity of the allegations made (lack of medical treatment and interference with the right to correspondence) were of such nature that they would require immediate action by the authorities. Moreover, the Court noted that this remedy was specifically designed to provide direct redress for such complaints, thus putting an end to a structural problem that existed in the national legal system before its adoption. The Court considered that it was in the applicant's interest to lodge a complaint with the courts under the newly introduced procedure when it became available, in order to allow the domestic authorities to put the situation right as swiftly as possible.[107] The Court reiterated, however, that for the general conditions of detention, in particular the alleged overcrowding, the detainees could not be required to have recourse to any remedy.[108]

44. In Serbia, concerning a complaint about the health care provided in detention, the Court considered that the applicant should have fully pursued the administrative mechanism, and thereafter made use of the judicial review procedure, as provided by the Enforcement of Criminal Sanctions Act 2005 and the Administrative Disputes Act 2009, highlighting the existence of relevant case-law of the competent domestic courts. In addition, the Court also recalled that a constitutional appeal should, in principle, also be considered as an effective

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[103] See *Nieciecki v. Greece*, App. no.11677/11, 4/12/2012, paragraphs 37-40.
[104] See *Nisiotis v. Greece*, App. no.34704/08, 10/02/2011, paragraph 29; *Samaras and others v. Greece*, App. no. 11463/09, 28/02 /2012, paragraph 48; *Mathloom v. Greece*, paragraph 49; *Nieciecki v. Greece,* paragraph 41.
[105] See *Khider v. France*, App. no. 39364/05, 9/07/2009, paragraph 140; *Alboreo v. France*, App. no. 51019/08, 20/01/2011, paragraph 185; *Payet v. France*, App. no. 19606/08, paragraph 122; *El Shennawy v. France*, App. no. 51246/08, 20/01/2011, paragraph 57.
[106] See *Dobri v. Romania*, App. no. 25153/04, 14/12/2012.
[107] See *Petrea v. Romania*, App. no. 4792/03, 29/04/2008, paragraph 35, *Zarafim v. Romania,* App. no. 24082/03, decision 13/03/2012, paragraph 35.
[108] See *Petrea v. Romania*, paragraph 37, *Măciucă v. Romania*, App. no. 25763/03, 26/05/2009, paragraph 19, *Brânduşe v. Romania,* App. no. 6586/03, 7/04/2009, paragraph 40, *Marian Stoicescu v. Romania*, App. no 12934/02, 16/07/2009, paragraph 19, *Leontiuc v. Romania*, App. no. 44302/10, 4/12/2012, paragraph 47.

domestic remedy in respect of all applications introduced against Serbia as of 7 August 2008; including also the instant complaint about health care in detention.[109]

ii. Compensatory remedies

45. Anyone who has undergone detention in violation of his or her dignity must be able to obtain compensation.[110] As indicated above, mere damages do not, however, provide an effective remedy in cases where the appellant is still in prison, to the extent that compensation makes no difference to his or her conditions of detention.[111]

46. If a compensatory appeal is to be considered effective under Article 13 of the Convention, it must both have a reasonable prospect of success and provide adequate redress.[112]

47. Case-law empowering the court to order the administration to pay pecuniary compensation must be an established, constant practice in order to be deemed to provide an effective remedy.[113] Excessive formalism on the part of the court can have the effect of depriving an action for damages against the state of its effectiveness. The fact that the courts require formal evidence of non-material damage can render a remedy ineffective.[114]

48. Even where a remedy does facilitate the award of compensation, it might not present reasonable chances of success, particularly where such award is conditional on the establishment of fault on the part of the authorities.[115] In the same way, a remedy might not be effective in cases where, even though the appellant can prove that the conditions of detention were not in conformity with applicable standards, the courts exonerate the state of all responsibility by declaring that the conditions of detention were caused not by shortcomings on the part of the authorities but rather by a structural problem, such as prison overcrowding or insufficient resources for the prison system.[116] Nor can the authorities rely upon the absence of a positive intention to humiliate or debase the prisoner as circumstances relieving them of their obligations.[117]

49. Compensation for the non-material damage must, in principle, be one of the available remedies.[118] The amount of compensation must be comparable to the amounts awarded by the

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[109] See *Nasković v. Serbia,* App. no. 15914/11, decision of 14/06/2011, paragraph 61.
[110] See the aforementioned case of *Torreggiani and others v. Italy*, paragraph 96.
[111] See paragraph 27, and in particular *Iliev and others v. Bulgaria*, App. no. 4473/02 and 34138/04, 10.02.2011, paragraph 55-56.
[112] See the aforementioned case of *Ananyev and others v. Russia*, paragraph 118.
[113] See the aforementioned case of *Torreggiani and others v. Italy*, paragraph 97.
[114] See the cases *Radkov v. Bulgaria*, App. no. 18382/05, 10.02.2011 and *Iovchev v. Bulgaria*, App. no. 41211/98, 02.02.2006 ; also *Georgiev v. Bulgaria*, App. no. 27241/02, decision of 18.05.2010, in which the Court recognised that the law provided compensation for damage suffered, which could therefore be considered as an effective remedy.
[115] See the aforementioned case of *Ananyev and others v. Russia*, paragraph 113; *Roman Karasev v. Russia*, App. no. 30251/03, paragraph 81-85; *Shilbergs v. Russia*, App. no. 20075/03, 17/12/2009 paragraph 71-79.
[116] See *Skorobogatykh v. Russia*, App. no. 4871/03, 22/12/2009 paragraph 17-18 and 31-32; *Artyomov v. Russia*, App. no. 14146/02, 27/05/2010 paragraph 16-18 and 111-112.
[117] See cases *Ananyev and others v. Russia*, paragraph 117; *Mamedova v. Russia*, paragraph 63.
[118] See *McGlinchey and others v. the United Kingdom*, App. no. 50390/99, 29.04.2003, paragraph62 ; *Poghosyan and Baghdasaryan v. Armenia*, App. no. 22999/06, 12.06.2012, paragraph47 ; *Stanev v. Bulgaria*, paragraph 218.

Court in similar cases, as a low level of compensation has the effect of rendering the remedy ineffective.[119]

50. The Court has held that if a reduction of sentence were to be applied as compensation for a breach of Article 3 of the Convention, the courts should recognise the violation in a sufficiently clear way and afford redress by reducing the sentence in an express and measurable manner.[120] Failing this, the reduction of sentence would not have the effect of depriving the person of his status as victim of the violation.[121] The Court has also pointed out that while an automatic mitigation of sentence on account of inhuman conditions of detention may be considered as a part of a wide array of general measures to be taken, it will not provide on its own a definitive solution to the existing problem of deficient remedies nor contribute, to a decisive extent, to eradication of genuine causes of overcrowding.[122]

Examples of good practice

51. The issue of the prison overcrowding in Poland has given rise to a series of rulings of principle.[123] In 2007, the Polish Supreme Court for the first time recognised a prisoner's right to bring proceedings against the state based on the Civil Code with a view to securing compensation for infringement of his fundamental rights caused by prison overcrowding and general conditions of detention. The Supreme Court reaffirmed this principle in 2010 and laid down additional guidelines on the manner in which civil courts should verify and assess the justification of restrictions of the legal minimum space in a cell. The Strasbourg Court consequently considered that the remedy allowing awards of compensation was effective.[124]

52. The Court has also held that the French compensatory remedy was accessible and adequate, since case-law developments had induced the domestic administrative courts to acknowledge that imprisonment in inappropriate conditions in a cell which did not respect the guaranteed standards was liable to give rise to an application for compensation.[125]

B. Investigations in the context of alleged violations of Articles 2 and 3 of the Convention

53. The Convention is intended to guarantee rights that are practical and effective, as opposed to theoretical or illusory.[126] From this perspective, combined with the general duty on the State under Article 1 of the Convention to "secure to everyone within [its] jurisdiction the rights and freedoms defined in [the] Convention", Articles 2 and 3 include procedural requirements. It is not enough that the authorities abstain from violation the provisions of the Convention, they must, when there is an arguable allegation of a violation of Articles 2 or 3, conduct an effective investigation capable of leading to the identification and punishment of

[119] See the aforementioned case *Shilbergs v. Russia,* in which the courts calculated the amount of compensation with reference to the degree of responsibility on the part of the authorities and their lack of financial resources.
[120] See *Ananyev and others v. Russia*, paragraph 225.
[121] See *Dzelili v. Germany*, App. no. 65745/01, judgment of 10.11.2005, paragraph 85.
[122] See *Ananyev and others v. Russia*, paragraph 226.
[123] See cases *Latak v. Poland* and *Lominski v. Poland*, App. nos. 52070/08 and 33502/09, decisions du 12.10.2010, subsequently to the pilot judgments given by the Court in the cases *Orchowski v. Poland* and *Norbert Sikorski v. Poland*, nos. 17885/04 and 17559/05, judgments of 22.10.2009.
[124] See *Latak v. Poland*, paragraph 80.
[125] See *Rhazali & otrs v. France*, App. no. 37568/09, decision of 10/04/2012; *Théron v. France*,App. no. 21706/10, 02/04/2013; *Lienhardt v. France*, App. no. 12139/10, decision of 13.09.2011.
[126] This principle has been constantly reaffirmed since the case of *Airey v. Ireland*, App. no. 6289/73, 9.10.1979, paragraph 24.

those responsible.[127] The aim of such an investigation is to ensure the effective application of domestic laws protecting the right to life and, in cases where the officials or organs of the State are involved, to ensure their accountability for deaths or treatment contrary to Article 3 occurring under their responsibility.[128]

54. The procedural obligation arising from Article 2 requires the authorities to act of their own motion, as soon as the matter has come to their attention; they cannot leave it to the initiative of the next-of-kin either to lodge a formal complaint or to take responsibility for the conduct of any investigative procedures.[129] As to Article 3, the procedural obligation arises when the allegations of the existence of prohibited treatment are "arguable".[130]

55. This obligation applies when the impugned facts are attributable to States, whether that be, for example, in the context of recourse to force by agents of the State, a detention,[131] operations to maintain order[132] or armed conflicts.[133] It applies also when "negligence attributable to State officials or bodies goes beyond an error of judgment or carelessness, in that the authorities in question, fully realising the likely consequences and disregarding the powers vested in them, have failed to take measures that have been necessary and sufficient to avert the risks to the victim's life".[134] The procedural obligation applies also when the impugned facts are attributable to private individuals, for example in the context of domestic violence[135] or medical errors; [136] the Court has confirmed that Articles 2 and 3 apply to individual relations.[137]

56. To be effective, the investigation must meet several requirements. The persons responsible must be independent of those involved in the events: this implies not only the absence of a hierarchical or institutional connection, but also independence in practical terms.[138] The investigation must be prompt and thorough, the authorities must always make a serious attempt to find out what happened and should not rely on hasty or ill-founded conclusions to close their investigation or to use as the basis of their decisions[139]. The authorities must take all the necessary steps to secure evidence concerning an incident,

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[127] See the judgment of principle in *McCann and others v. the United Kingdom*, App. no. 18984/91, 27.09.1995. More recently, see *Mosendz v. Ukraine*, App. no. 52013/08, 17.01.2013, paragraph 94, on the issue of the investigative obligation in the context of Article 2; see *Virabyan v. Armenia,* App. no. 40094/05, 02.10.2012, paragraph 161, on the issue of the investigative obligation in the context of Article 3.

[128] See *Al-Skeini and others v. the United Kingdom*, App. no. 55721/07, 07.07.2011, paragraph 163.

[129] See *Al-Skeini and others v. the United Kingdom*, paragraph 165 ; *Nihayet Arici and others v. Turkey*, App. no. 24604/04 et 16855/05, 23.10.2012, paragraph 159.

[130] See *Chiriţă v. Romania*, App. no.37147/02, decision of 6.09.2007.

[131] See for example *Carabulea v. Romania*, App. no.45661/99, 13.07.2010.

[132] See for example *Association "21 December 1989" and others v. Romania*, App. no.33810/07, 24.05.2011; *Giuliani and Gaggio v. Italia*, App. no.23458/02, judgment of the Grand Chamber of 24.03.2011.

[133] See for example *Isayeva v. Russia*, App. no. 57950/00, judgment of 24/02/2005, §§ 180 and 210; *Al-Skeini* and others v. the United Kingdom, § 164.

[134] See *Jasinskis v. Latvia*, App. no. 45744/08, judgment of 21/12/2010, paragraph 73; case concerning the death, whilst in police custody, of an injured deaf and mute individual from whom the police officers took away all means of communication and refused all medical assistance.

[135] See for example *C.A.S. and C.S. c. Romania*, App. no. 26692/05, 20.03.2012, concerning allegations of sexual violence commited by a private individual against their child.

[136] See *Silih v. Croatia*, Grand Chamber judgment of 9.04.2009, paragraph 154, concerning a death in hospital following an allergic reaction to a drug prescribed by the duty doctor.

[137] See for example *Osman v. the United Kingdom*, Grand Chamber judgment of 28.10.1998, a case in which a teacher had murdered the father of a pupil.

[138] See *Anca Mocanu and others v. Romania*, App. no. 10865/09, 45886/07 and 32431/08, judgment of 13.11.2012, paragraph 221; *Jasinskis v. Latvia*, paragraphs 74 à 81.

[139] See *El-Masri v. The former Yugoslav Republic of Macedonia*, App. no. 39630/09, 13/12/2012, paragraph 183; *Jasinskis v. Latvia, paragraph 79*.

including, inter alia, eyewitness testimony and forensic evidence, which should be secured by a thorough examination of the victim's state of health.[140] The investigation must be able to lead to the identification and punishment of those responsible, which is an obligation not of result but of means.[141] The victim should be able to participate effectively in the investigation[142] or his family must be associated with the procedure insofar as necessary for the protection of their legitimate interests.[143] Moreover, where that attack is racially motivated, the investigation should be pursued "with vigour and impartiality, having regard to the need to reassert continuously society's condemnation of racism".[144] Finally, it must be recalled that the obligation on States to undertake an effective investigation continues to apply even if the security conditions are difficult, including in the context of armed conflict.[145]

57. The Court has furthermore indicated that, in the context of allegations of violations of Articles 2 and 3 of the Convention, "Article 13 requires, in addition to the payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of those responsible, including effective access for the complainant to the investigation procedure". The Court considers that "the requirements of Article 13 are broader than a Contracting State's obligation to conduct an effective investigation" under Articles 2 and 3.[146]

58. When the investigation is ineffective, this ineffectiveness undermines the effectiveness of other remedies, including the possibility of bringing a civil action for damages [147] The Court in effect considers that in the absence of an effective investigation capable of leading to the identification and the punishment of those responsible, a request for compensation is theoretical and illusory.[148] In terms of medical negligence, an appeal before a civil court can however, alone or along with an appeal before a criminal court, determine the relevant liabilities and, where necessary, ensure the implementation of any appropriate civil sanctions, such as compensation for damages and the publication of judgments.[149] However, where medical liability is based on a medical error made by the individual in question, the effectiveness of the investigation is crucial for the possibility of a successful civil action. Hence, the Court emphasised the importance of the link between the liability of the doctor and the notion of risk concerning the practice of the profession to ensure a more effective remedy in terms of compensation for damages caused to patients.[150]

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[140] See *Timofejevi v. Latvia,* App. no. 45393/02, judgment of 11/12/2012, paragraphs 94 and 99, case wherein the Court namely noted that it seems rather unlikely that, during a forensic test lasting about ten minutes, a thorough examination of the applicant's state of health could have been made, and *Vovruško v. Latvia*, App. 11065/02, judgment of 11/12/2012, paragraphs 42-49, case wherein the forensic expert based his investigation solely on a medical report, without examining the applicant in person.
[141] See *Savitskyy v. Ukraine*, App. no. 38773/05, 26.07.2012, paragraph 99.
[142] See *El-Masri v. The former Yugoslav Republic of Macedonia*, paragraph 184.
[143] See *Seidova and others v. Bulgaria*, App. no. 310/04, 18.11.2010, paragraph 52.
[144] See *Menson v. the United-Kingdom*, App. no.47916/99, decision of 06/05/2003.
[145] See for example *Isayeva v. Russia*, App. no. 57950/00, judgment of 24/02/2005, §§ 180 and 210 ; *Al-Skeini* and others v. the United Kingdom, § 164.
[146] See for example, in the case of suspicious deaths, *Isayev and others v. Russia*, App. no. 43368/04, 21/06/2011 paragraphs 186-187 ; *Anguelova v. Bulgaria*, App. no. 38361/97, 13/06/2002 paragraph 161; *Mahmut Kaya v. Turkey*, App. no.22535/93, judgment of 28.03.2000, paragraph 107; and as regards allegations of ill-treatment, see, for example, *El-Masri v. The former Yugoslav Republic of Macedonia* above, paragraph 255; *Labita v. Italia*, App. no. 26772/95, 06/04/2000, paragraph 131.
[147] See *Isayev and others v. Russia* above, paragraph 189.
[148] See *El-Masri v. The former Yugoslav Republic of* Macedonia above, paragraph 261.
[149] See *Floarea Pop v. Romania*, App. no. 63101/00, 6/04/2010, paragraph 38.
[150] See *Eugenia Lazar v. Romania*, App. no. 32146/05, 16/02/2010, paragraphs 90-91.

Example of good practice

59. The Romanian legal system provides for an investigation to be carried out by the public prosecutor, who takes the decision whether or not to initiate a prosecution against the alleged perpetrators. If a decision to discontinue the criminal investigation is issued, there is the possibility under Article 278[1] of the Code of Criminal Procedure of appealing to a court which could, on examination of the provisions of the domestic law and the evidence, including witness statements and medical reports, direct that a prosecution or other investigatory measures be carried out. The Court has already established that such a remedy was effective within the meaning of the Convention[151]. Furthermore, a civil action under Articles 998 and 999 of the Civil Code can, where breach of the right to life was not intentional, result in the recognition of the breach of the procedural aspect of Articles 2 and 3, and appropriately remedy the damages suffered.[152]

C. Domestic remedies against removal

60. Article 13 of the Convention, combined with Article 2 and 3, requires that the person concerned have the right to a suspensive remedy for an arguable complaint that his/ her expulsion would expose him/ her to a real risk of treatment contrary to Article 3 of the Convention or a real risk of violation of their right to life as protected by Article 2 of the Convention.[153] The same principle applies equally to complaints under Article 4 of Protocol no. 4.[154]

61. By contrast, a remedy with suspensive effect is not normally required when another right of the Convention is invoked in combination with Article 13.

62. The effectiveness of a remedy also requires close attention by a national authority,[155] an independent and rigorous scrutiny of a claim that there exist substantial grounds for fearing a real risk of treatment contrary to Article 3[156] and particular promptness. The examination of the complaints based on Articles 2 and 3 of the Convention.[157]

63. The authorities must not, in practice, make the remedies ineffectual and therefore unavailable. That would be the case, for example, when a removal took place with undue haste. The Court has thus considered, in a case involving Article 13 in combination with Article 8 of the Convention, that the shortness of the delay between the applicant's seizing the court and the execution of the removal decision prevented, in practice, any examination of the applicant's arguments and thereby any possible suspension of the removal.[158] In the same way, the Court has considered that the expulsion of an applicant one working day after notification of the decision rejecting the asylum application had in practice deprived him of the possibility of introducing an appeal against the negative decision, even though such an appeal was in theory available.[159]

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[151] See *Ciubotaru v. Romania*, App. no. 33242/05, decision of 10/01/2012, paragraph 59; *Stoica v. Romania*, App. no. 42722/02, 4/03/2008, paragraphs 105-109 and *Chiriţă v. Romania*, App. no. 37147/02, 29/09/2009, paragraph 99.
[152] See *Floarea Pop v. Romania*, paragraph 47; *Csiki v. Romania*, App. no. 11273/05, 5/07/2011.
[153] See *De Souza Ribeiro v. France,* App. no. 22689/07, Grand Chamber judgment of 13.12.2012, paragraph 82.
[154] See *Conka v. Belgique,* App. no.51564/99, judgment of 5.02.2012, paragraph 81-84.
[155] See *Chamaïev & otrs v. Georgia & Russia*, App no. 36378/02, 12.04.2005, paragraph 448.
[156] See *Jabari v. Turquie*, App. no. 40035/98, judgment of 11.07.2000, paragraph 50.
[157] See *Chahal v. Royaume-Uni*, App. no.22414/93, paragraph 150-151.
[158] See *De Souza Ribeiro v. France* above, paragraph 95.
[159] See *Labsi v. Slovaquie*, App. no. 33809/08, 15.05.2012, paragraph 139.

64. The Court has in addition underlined the importance of guaranteeing to persons concerned by a removal measure the right to obtain information sufficient to allow them to have effective access to the procedures to be followed or information to access organisations offering legal advice;[160] the difficulties encountered may be aggravated by the issue of languages if no interpretation is provided during preparation of the asylum application.[161]

65. As regards accelerated asylum procedures, the Court has recognised that they may facilitate the treatment of clearly abusive or manifestly ill-founded applications and considered that the re-examination of an asylum application by a priority process does not deprive a detained non-national of an effective remedy *per se*, so long as an initial application had been subject to a full examination in the context of a normal asylum procedure.[162] When the priority process is applied for the initial application, however, and not in the context of a re-examination, this may cause inadequacies in the effectiveness of the remedy exercised. The combination of several circumstances[163] may thus put into question the accessibility in practice of such remedies, even if they are available in theory.

Examples of good practice

66. In France, the effectiveness of a remedy with full suspensive effect before the administrative courts against decisions on removal and the country of destination was recognised by the Court, deeming this a remedy which should be fully exhausted.[164]

67. In Switzerland, all asylum seekers may remain in the country until the proceedings of the federal migration office have ended. This office's decision can subsequently be appealed before the federal administrative court. This appeal in principle has suspensive effect as a remedy: the federal administrative court can reinstate the suspensive effect and is not bound by the withdrawal of suspensive effect by the federal migration office.[165]

68. In Sweden, matters concerning the right of aliens to enter and remain in Sweden are dealt with three instances: the Migration Board, the Migration Court and the Migration Court of Appeal. The applicants are entitled to be represented before these bodies by a lawyer appointed by the Migration Board. The entire proceedings have suspensive effect. Following the lodging of an appeal, the Migration Court of Appeal first decides whether leave to appeal should be granted, i.e. if there are special reasons for hearing the case or if the determination of the Migration Court of Appeal may be of importance as a precedent. If leave to appeal is granted, the Migration Court of Appeal will decide the case on the merits, it has full jurisdiction to examine the lawfulness of the appealed decision and the merits of the case. The Court considered that it constitutes an effective remedy.[166] In addition, the Migration Board may decide to re-examine the case where it may be assumed, on the basis of new circumstances, that there are impediments to enforcement of the deportation or expulsion order, and these circumstances could not have been invoked previously or the alien shows that he or she has a valid excuse for not having done so. The re-examination proceedings are

[160] See *Hirsi Jamaa & otrs v. Italy*, App. no. 27765/09, 23.02.2012, paragraph 20 ; *M.S.S. v. Belgium & Greece*, App. no. 30696/09, 21.01.2011, paragraphs 304 à 309.
[161] See *I.M. v. France*, App. no.9152/09, judgment of 2.02.2012, paragraph 145.
[162] See *Sultani v. France*, App. no.45223/05, judgment of 20.09.2007, paragraph 64-65.
[163] See *I.M. v. France*, paragraph 142.
[164] See *H.R. v. France*, App. no. 647809/09, judgment of 22/09/2011, paragraph 79; *R.N. v. France*, App. no. 49501/09, decision of 27/11/2011; *Mi. L. v. France*, App. no. 23473/11, decision of 11/09/2012, paragraph 34.
[165] See *Reza Sharifi v. Switzerland*, App. no. 69486/11, decision of 4/12/2012.
[166] See *Haji Hussein v. Sweden*, App. no. 18452/11, decision of 20/09/2011.

comprehensive and suspensive. The Court also considered that it constitutes an effective remedy.[167]

D. Remedies for non-execution of domestic court decisions

69. The effective right of access to a court, protected by Article 6 of the Convention, includes the right to have a court decision enforced without undue delay. An unreasonably long delay in the enforcement of a binding judgment may therefore violate Article 6. Unduly delayed execution of domestic court decisions may also violate the right to peaceful enjoyment of possessions under Article 1 of Protocol no. 1 to the Convention. The reasonableness of any delay is to be determined having regard to the complexity of the enforcement proceedings, the applicant's own behaviour and that of the competent authorities, and the amount and nature of the court award.[168]

70. Violations due to non-execution of domestic court decisions, in particular those against the State itself, are amongst the most frequent types found by the Court. Such violations are often due to underlying systemic or structural problems.[169] It is the State's obligation to ensure that final decisions against its organs, or entities or companies owned or controlled by the State, are enforced in compliance with Convention requirements. Lack of funds is not a reason that may justify inaction by the State. The State is responsible for the enforcement of final decisions if the factors impeding or blocking their full and timely enforcement are within its control.[170]

71. In such situations, the Court also finds violations of the right to an effective remedy under Article 13 of the Convention. The Court's pilot judgments or other judgments of principle addressing these issues thus provide extensive and authoritative guidance on the essential characteristics required of effective remedies for non-execution of domestic court decisions. Further guidance can be found in the various documents prepared in the context of the Committee of Ministers' supervision of execution of judgments.[171] It should also be recalled that this issue is closely related to that of effective remedies for excessive length of proceedings, on which the Committee of Ministers has previously addressed a recommendation to member States, accompanied by a Guide to Good Practice.[172]

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[167] See *A.I. and others v. Sweden*, App. no. 25399/11, decision of 9/10/2012.
[168] See, for example, *Yuriy Nikolayevich Ivanov v. Ukraine*, App. no. 40450/04, judgment of 15 October 2009 ("*Ivanov*"), paras. 51-53.
[169] According to the 5th Annual Report of the Committee of Ministers on supervision of the execution of judgments and decisions of the European Court of Human Rights, there were pending before the Committee of Ministers in 2011 cases or groups of cases involving important structural or complex problems in relation to non-execution of domestic court decisions in Azerbaijan, Bosnia and Herzegovina, Greece, Italy, Republic of Moldova, Russian Federation, Serbia and Ukraine. The Committee of Ministers has in recent years also addressed such problems in Albania, Croatia and Georgia.
[170] See, for example, *Ivanov*, paragraph 54.
[171] See the Conclusions of the Round Table on "Effective remedies against non-execution of delayed execution of domestic court decisions" (Strasbourg, 15-16 March 2010; doc. CM/Inf/DH(2010)15) and the Conclusions of the Round Table on "Non-enforcement of domestic courts decisions in member States: general measures to comply with European Court judgments" (Strasbourg, 21-22 June 2007; doc. CM/Inf/DH(2007)33); additional references appear below.
[172] See CM/Rec(2010)3.

i. Expeditory remedies

72. A remedy that expedites enforcement is to be preferred. The Court, drawing comparisons with its case-law on remedies for excessive length of proceedings,[173] has stated that "any domestic means to prevent a violation by ensuring timely enforcement is, in principle, of greatest value".[174] The State may not, however, tolerate a situation in which there is non-execution or unreasonable delay in the execution of domestic court decisions against State authorities, thereby compelling the successful party to proceedings to use such means. "[The] burden to comply with such a judgment lies primarily with the State authorities, which should use all means available in the domestic legal system in order to speed up the enforcement, thus preventing violations of the Convention".[175]

73. Given the connection between the two issues, one may draw parallels with the Committee of Ministers' Recommendation CM/Rec(2010)3 on effective remedies for excessive length of proceedings. By analogy, therefore, States should:

- take all necessary steps to ensure that domestic court decisions are executed within a reasonable time;
- ensure that mechanisms exist to identify judgments that risk not being executed in a timely manner, as well as the underlying causes, with a view also to preventing such violations of Article 6 in future;
- recognise that when an underlying systemic problem is causing non-enforcement of domestic court decisions, measures are required to address this problem, as well as its effects in individual cases;
- ensure that there are means to expedite execution of domestic court judgments that risks becoming excessively lengthy in order to prevent it from becoming so.

74. The Committee of Ministers' supervision of execution of Court judgments has highlighted certain specific aspects that may need addressing in order to ensure the effectiveness of expeditory remedies, such as the following:

- ensuring an adequate regulatory/ legislative framework;[176]
- ensuring sufficient budgetary resources to cover potential State liabilities;[177]
- developing the State's obligation to pay in case of delays, including through more coercive measures;[178]
- establishing effective liability of civil servants and other actors for non-enforcement;[179]

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[173] See, for example, *Scordino v. Italy (no. 1)*, App. no. 36813/97, Grand Chamber judgment of 29 March 2006, paragraph 183: "The best solution in absolute terms is indisputably, as in many spheres, prevention. The Court … has stated on many occasions that Article 6 paragraph 1 imposes on the Contracting States the duty to organise their judicial systems in such a way that their courts can meet … the obligation to hear cases within a reasonable time. Where the judicial system is deficient in this respect, a remedy designed to expedite the proceedings in order to prevent them from becoming excessively lengthy is the most effective solution. Such a remedy offers an undeniable advantage over a remedy affording only compensation since it also prevents a finding of successive violations in respect of the same set of proceedings and does not merely repair the breach a posteriori, as does a compensatory remedy of the type provided for under Italian law for example." See also Recommendation CM/Rec(2010)3 of the Committee of Ministers to member States on effective remedies for excessive length of proceedings, along with its accompanying Guide to Good Practice.

[174] See, for example, *Burdov v. Russia (no. 2)*, App. no. 33509/04, judgment of 15 January 2009, paragraph 98.

[175] Ibid.

[176] See, for example, doc. CM/Inf/DH(2010)22 concerning Bosnia and Herzegovina, CM/Inf/DH(200619rev3 concerning Russia, CM/Inf/DH(2010)25 concerning Serbia, CM/Inf/DH(2007)30 concerning Ukraine.

[177] See, for example, doc. CM/Inf/DH(2011)36 concerning Albania, CM/Inf/DH(2009)28 concerning Georgia, CM/Inf/DH(200619rev3 concerning Russia, SG/Inf/DH(2007)30 concerning Ukraine.

[178] See, for example, doc. CM/Inf/DH(200619rev3 concerning Russia, CM/Inf/DH(2007)30 concerning Ukraine.

- reinforcing the bailiff system;[180]
- ensuring the effectiveness of the constitutional complaint or other form of judicial remedy, where applicable (see also Section IV of the present document).[181]

75. Further guidance can be found in other relevant texts of the Committee of Ministers, as well as of the European Commission on the Efficiency of Justice (CEPEJ).[182]

ii. Compensatory remedies

76. Although an expeditory approach is to be preferred, the Court has accepted that States can also choose to introduce only a compensatory remedy, without that remedy being regarded as ineffective. The effectiveness of such a remedy depends on satisfaction of the following requirements:

- an action for compensation must be heard within a reasonable time;
- the compensation must be paid promptly and generally no later than six months from the date on which the decision awarding compensation becomes enforceable;
- the procedural rules governing an action for compensation must conform to the principle of fairness guaranteed by Article 6 of the Convention;
- the rules regarding legal costs must not place an excessive burden on litigants where their action is justified;
- the level of compensation must not be unreasonable in comparison with the awards made by the Court in similar cases.[183]

77. There is a strong but rebuttable presumption that excessively long proceedings will occasion non-pecuniary damage. This presumption is particularly strong in the event of excessive delay in enforcement by the State of a judgment delivered against it.[184]

78. The Committee of Ministers' supervision of execution of Court judgments has highlighted certain specific aspects that may need addressing in order to ensure the effectiveness also of compensatory remedies, notably that there be automatic indexation of and default interest on delayed payments.[185]

79. It can be noted that the Court will leave a wide margin of appreciation to the State to organise a domestic compensatory remedy "in a manner consistent with its own legal system and traditions and consonant with the standard of living in the country concerned".[186] In this respect, the Court has accepted, in relation to effective domestic compensatory remedies for length of proceedings, that "[it] will… be easier for the domestic courts to refer to the amounts awarded at domestic level for other types of damage … and rely on their innermost

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[179] See, for example, doc. CM/Inf/DH(2009)28 concerning Georgia, CM/Inf/DH(2007)30 concerning Ukraine.
[180] See, for example, doc. CM/Inf/DH(2011)36 concerning Albania, CM/Inf/DH(2009)28 concerning Georgia, CM/Inf/DH(200619rev3 concerning Russia, CM/Inf/DH(2010)25 concerning Serbia.
[181] See, for example, doc. CM/Inf/DH(2011)36 concerning Albania, CM/Inf/DH(200619rev3 concerning Russia, CM/Inf/DH(2010)25 concerning Serbia.
[182] See, in particular, Committee of Ministers' Recommendations to member States Rec(2003)16 on the execution of administrative and judicial decisions in the field of administrative law and Rec(2003)17 on enforcement, and the CEPEJ Guidelines for a better implementation of the existing Council of Europe Recommendation on enforcement (doc. CEPEJ(2009)11REV2).
[183] See *Ivanov*, paragraph 99.
[184] Ibid, paragraph 100.
[185]See, for example, doc. CM/Inf/DH(2009)28 concerning Georgia, CM/Inf/DH(200619rev3 concerning Russia, CM/Inf/DH(2007)30 concerning Ukraine.
[186] See *Ivanov*, paragraph 99.

conviction, even if that results in awards of amounts that are lower than those fixed by the Court in similar cases."[187]

Example of good practice

80. In Serbia, the Constitutional Court in 2012 brought its case-law into conformity with that of the Strasbourg Court so as to order the State to pay, from its own funds, the sums awarded in final judgments against a socially-owned company undergoing a process of restructuring/ insolvency proceedings. As a result, the Court found the constitutional appeal henceforth to be an effective remedy in such cases, having previously found otherwise.[188]

IV. GENERAL DOMESTIC REMEDIES

81. A general remedy, in the context of Article 13 of the Convention, is one intended to redress a violation of a Convention right or freedom by a public authority, without being limited in application to any particular factual or legal context. Although Article 13 obliges States to provide an effective remedy to "everyone" whose rights and freedoms are violated, it does not require that States Parties provide a general remedy as such.

82. The general principles applicable to the question of whether domestic remedies are effective from the perspective of Article 13 apply also to the effectiveness of general remedies.[189] In broad terms, this means that general remedies must be effective, sufficient and accessible (see further under Section II above).

83. It would appear possible to distinguish two broad types of general domestic remedies: on the one hand, constitutional complaints; and on the other, the possibility for individuals in certain States Parties to rely on the provisions of the Convention before any judge in the course of litigation.

84. A form of general remedy may be seen in the fact that the Convention may be pleaded as a source of applicable law before several or even all courts or tribunals for the determination of a case.[190] Such a system allows allegations of violation of Convention rights to be resolved at an early stage in proceedings, potentially without the need for appeal to higher courts on points of Convention law, whilst remaining subject to review, where necessary, by superior domestic courts. This system will be dealt with under section B.

85. It can be noted that even certain other domestic remedies of constitutional or legislative basis, whose effectiveness has been denied by the Court or on which the Court has not yet been able to pronounce, may nevertheless be capable of resolving certain complaints of violation.

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[187] See, for example, *Apicella v. Italy*, App. no. 64890/01, Grand Chamber judgment of 29 March 2006, paragraph 78.
[188] See *Marinković v. Serbia*, App. no. 5353/11, decision of 29 January 2013, para. 59.
[189] See, for example, *Sürmeli v. Germany*, App. no. 75529/01, Grand Chamber judgment of 8 June 2006, paras. 97-101.
[190] Remedies of this type exist in, for example, Ireland (European Convention on Human Rights Act 2003, Section 3; this remedy, before the Circuit and High Courts, is available when no other is, and to that extent may be considered subsidiary), The Netherlands (Article 6:162 of the Civil Code), Norway (Act on the Strengthening of the Position of Human Rights in Norwegian Law 1999, Section 3) the United Kingdom (Human Rights Act 1998, Section 8).

A. Constitutional complaints

86. In many member States, it is possible to apply to the national constitutional court for remedy of an allegation of violation of a right protected under the national constitution.[191] As well as providing an ultimate domestic level of recourse for determination of a complaint, this form of general remedy may also contribute to ensuring consistency in, or the development of, interpretation and application of protected rights at domestic level, with the overall result of more generally enhancing that protection. Through its rulings on individual cases that are subsequently the subject of applications to the Strasbourg Court, the constitutional court can engage directly in the judicial dialogue between the national and European levels. These two aspects – of providing remedies for and judicial examination at the highest domestic level of allegations of violations of Convention rights – contribute to effective operation of the principle of subsidiarity within the overall Convention system.

87. General remedies may also play an important role in providing an effective remedy in situations where no specific remedy exists, so as to satisfy the requirement under Article 13 of the Convention for provision of an effective remedy for "everyone whose rights and freedoms… are violated" (emphasis added). For example, some member States in effect have a constitutional complaint as their domestic remedy for alleged violations of the right to trial within a reasonable time (Article 6(1) of the Convention), on account of an exception to the otherwise applicable rule of exhaustion of other remedies.

88. Several member States' constitutions thus foresee some form of constitutional complaint (or appeal) procedure whereby an individual, and in some cases also legal persons,[192] may complain to the national constitutional court that an act or omission of a public authority has caused a violation of their rights as protected by the constitution. Such remedies are recognised as being effective in the sense of Article 13 of the Convention when the rights protected by the constitution explicitly include or correspond in substance to Convention rights. [193] The Court has stated that, "as regards legal systems which provide constitutional protection for fundamental human rights and freedoms,… it is incumbent on the aggrieved individual to test the extent of that protection."[194]

89. Restrictions on the legal scope of such a remedy may make it in certain circumstances ineffective under Article 13 of the Convention. For example, the Court has found that a constitutional court's review of individual complaints was ineffective where an alleged violation resulted not from the unconstitutionality of an applied legal provision, an issue that was within the constitutional court's jurisdiction, but from the erroneous application or interpretation of a provision whose content was not unconstitutional, which was outside it.[195]

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[191] As in, for example, Bosnia and Herzegovina, Croatia, Czech Republic, Germany, Latvia, Serbia, the Slovak Republic, Slovenia, Spain and Turkey. (A comparative study conducted for the European Commission for Democracy Through Law (Venice Commission) in 2008 found that "constitutional complaints and similar constitutional remedies" existed in Albania, Andorra, Austria ("partially"), Azerbaijan, Croatia, Czech Republic, Cyprus, the former Yugoslav Republic of Macedonia, Georgia, Germany, Hungary, Liechtenstein, Montenegro ("only in administrative matters"), Malta, Poland, Russia, Slovakia, Slovenia, Spain, Switzerland and Ukraine: see doc. CDL-JU(2008)026, 07/11/08.)

[192] As in, for example, Bosnia and Herzegovina, Czech Republic, Latvia, Russia, Slovakia, Slovenia and Turkey.

[193] In the case of *Apostol v. Georgia* (App. no. 40765/02, judgment of 28 November 2006), the Court noted that none of the relevant national constitutional provisions "sets forth guarantees against the non-enforcement of binding decisions which are *at least remotely comparable* to those developed in the Court's case-law" (italics added; para. 38).

[194] See, for example, *Vincic & otrs v. Serbia*, App. no. 44698/06 & otrs, judgment of 1 December 2009, para.51.

[195] See *Savics v. Latvia*, App. no. 17892/03, judgment of 27 November 2012, paras. 113-115; also *Dorota Szott-Medynska v. Poland*, App. no. 47414/99, admissibility decision of 9 October 2003.

Similarly, a constitutional complaint may be ineffective as a remedy under Article 35 of the Convention where it relates only to legislative provisions and not decisions of ordinary courts, when a complaint concerns the latter.[196]

90. Constitutional complaints are generally subsidiary: before bringing a constitutional complaint, an applicant must first have exhausted accessible, effective remedies available before courts of ordinary law. There may be exceptions to this rule, for instance when its application would cause serious and irreparable harm to the applicant,[197] or in particular types of complaint, such as of excessive length of proceedings before ordinary courts.[198]

91. The way in which the principle of subsidiarity is applied may, however, interfere with the effectiveness under Article 13 of the Convention of a constitutional complaint. For example, the Court has found that a domestic requirement first to exhaust a remedy consisting of an additional cassation appeal to the Supreme Court President, where that prior remedy was ineffective, was an obstacle to the accessibility of the constitutional complaint.[199] In another case, the Court found that a domestic requirement limiting the scope of the constitutional complaint to the points of law arguable before the Supreme Court (in this case, admissibility on statutory grounds) "resulted in an actual bar to examination of the applicant's substantive claims" by the constitutional court.[200] Where a constitutional court has discretion to admit a complaint on condition that the right has been "grossly violated" with "serious and irreparable consequences" for the applicant, with an absence of sufficient case-law on how these conditions were interpreted and applied, the constitutional complaint "[could not] be regarded with sufficient certainty as an effective remedy in the applicant's case".[201]

92. Generally speaking, to be considered an effective remedy, a constitutional complaint must be directly accessible by individuals. The Court has thus refused to consider, for example, the exceptional constitutional remedy available in Italy as an effective remedy, insofar as only the judge may seize the Constitutional Court, either *ex officio* or at the request of one of the parties: "in the Italian legal system an individual is not entitled to apply directly to the Constitutional Court for review of a law's constitutionality. Only a court trying the merits of a case has the right to make a reference to the Constitutional Court, either of its own motion or at the request of a party. Accordingly, such an application cannot be a remedy whose exhaustion is required under Article 35 of the Convention."[202]

93. It is essential that the remedy before the constitutional court guarantees effective decision-making. Where a court finds itself unable to reach a decision, whether because of a lack of safe-guards against deadlock or their failure, the consequence is to "[restrict] the essence of [the] right of access to a court… [and to deprive] an applicant of an effective right to have his constitutional appeal finally determined".[203]

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[196] See, for example, *Rolim Comercial, S.A. v. Portugal*, App. no. 16153/09, judgment of 16 April 2013.
[197] An exception of this broad type exists in, for example, Azerbaijan, Germany, Latvia, Slovenia.
[198] As in, for example, Croatia, Serbia.
[199] See *Ismayilov v. Azerbaijan*, App. no. 4439/04, judgment of 17 January 2008, paras. 39-40
[200] *Zborovsky v. Slovakia*, App. no. 14325/08, judgment of 23 October 2012, paras. 51-54
[201] See *Horvat v. Croatia*, App. no. 51585/99, judgment of 26 July 2001, paras. 41-44. (N.b. Croatian law was subsequently changed to allow constitutional complaints without prior exhaustion of other remedies in cases of excessive length of proceedings regardless of gravity of violation or its consequences: see *Slavicek v. Croatia*, App. no. 20862/02, admissibility decision of 4 July 2002.)
[202] See *Immobiliare Saffi v. Italy*, App. no. 22774/93, Grand Chamber judgment of 28 July 1999, para. 42. See also, for example, *I.R.S. v. Turkey*, App. no. 26338/95, 28 January 2003.
[203] See *Marini v. Albania*, App. no. 3738/02, judgment of 18 December 2007, paras. 119-123.

94. In order for the constitutional complaint procedure to constitute an effective remedy in the sense of Article 13 of the Convention, it must also provide effective redress for a violation. The constitutional court may therefore be equipped with a range of powers. These often include to declare the existence of a violation;[204] quash the impugned decision, measure or act;[205] where the violation is due to an omission, order the relevant authority to take the necessary action;[206] remit the case to the relevant authority for further proceedings, based on the findings of the constitutional court;[207] order payment of compensation;[208] and/ or order *restitutio in integrum*.[209]

95. These powers must exist not only in theory but be effective in practice. For example, a constitutional court's order to expedite proceedings must have a preventive effect on violations of the right to trial within a reasonable time by actually accelerating the proceedings.[210]

96. For example, a complaint concerning excessive length of proceedings to a constitutional court empowered not only to declare a violation but also to order that necessary action be taken, further violations abstained from and adequate financial compensation granted would be "an effective remedy in the sense that it is capable of both preventing the continuation of the alleged violation of the right… and of providing adequate redress for any violation that has already occurred".[211] On the other hand, where a constitutional court's powers are limited to a declaration of unconstitutionality and a request to the court concerned to expedite or conclude the proceedings, without the possibility of ordering specific acceleratory measures or awarding compensation, and where the actual impact of the request on subsequent proceedings is uncertain, a constitutional complaint may be ineffective.[212]

97. This does not mean, however, that where a constitutional court is empowered only to find a violation and nullify the impugned act, the constitutional complaint procedure is inevitably ineffective as a remedy under Article 13 of the Convention. A 'two-step' approach, whereby the complainant may request that the procedure in his / her case before the lower court be reopened or otherwise revised in accordance with the principles set out in the constitutional court judgment finding a violation, may constitute an effective remedy.[213] The 'aggregate' of remedies provided for under domestic law may amount to an effective remedy; as, for example, in the Slovak Republic, where individuals may be required to pursue a constitutional complaint, followed by an application for compensation under the Act on Liability for Damage Caused in the Context of Exercise of Public Authority.[214]

98. The requirement that the constitutional court be able to order appropriate individual relief is reflected in the distinction between 'abstract' constitutional complaints and 'specific' constitutional complaints. An 'abstract' complaint would not allow, for example, an

[204] As in, for example, Albania, Andorra, Armenia, Austria, Belgium, Bosnia and Herzegovina, Czech Republic, Germany, Latvia, Russia, Serbia, Slovakia, Slovenia.
[205] As in, for example, Albania, Andorra, Armenia, Austria, Belgium, Czech Republic, Germany, Serbia, Slovakia, Slovenia.
[206] As in, for example, Albania, Czech Republic, Serbia, Slovakia.
[207] As in, for example, Albania, Bosnia and Herzegovina, Czech Republic, Germany, Slovakia, Slovenia.
[208] As in, for example, Austria, Bosnia and Herzegovina, Slovakia.
[209] As in, for example, Slovakia.
[210] See, for example, *Vićanová v. Slovakia*, App. no. 3305/04, judgment of 18 December 2007.
[211] See *Andrasik & otrs v. Slovakia*, App. no. 57984/00 & otrs, admissibility decision of 22 October 2002.
[212] See *Sülmeni v. Germany*, App. no. 75529/01, Grand Chamber judgment of 8 June 2006, paras. 105-108; *Hartman v. Czech Republic*, App. no. 53341/99, judgment of 10 July 2003.
[213] See *Dorota Szott-Medynska v. Poland*, App. no. 47414/99, admissibility decision of 9 October 2003.
[214] See *Omasta v. Slovak Republic*, App. no. 40221/98, decision of 10 December 2002.

individual to challenge decisions made by courts or public authorities that directly affect their particular circumstances,[215] or would only entitle the Constitutional Court to review the constitutionality of laws in general terms and not allow it to quash or modify specific measures taken against an individual by the State.[216] A 'specific' complaint makes it possible to remedy violations of rights and freedoms committed by authorities or officials or, where the infringement of a right guaranteed by the Constitution is the result of an interference other than a decision, to prohibit the authority concerned from continuing to infringe the right and to order it to re-establish the status quo if that is possible.[217] Such a constitutional complaint also makes it possible to remedy violations resulting immediately and directly from an act or omission of a judicial body, regardless of the facts that had given rise to the proceedings; the abrogation of an unconstitutional law results in the annulment of all the final decisions made by the courts or public authorities on the basis of that law.[218]

Examples of good practice

99. The 'right to individual petition before the Constitutional Court' was introduced in the Turkish legal system following constitutional amendments of September 2010. The constitutional court started receiving applications under this provision as of 23 September 2012. The Court has found that there is no reason for it to say that this remedy does not, in principle, provide the possibility of appropriate redress for complaints under the Convention.[219]

B. Direct invocation of the provisions of the Convention in the course of ordinary remedy proceedings

100. In legal systems where the Convention has the status of domestic law, it is directly applicable by some or all courts in the course of ordinary legal proceedings. This allows persons claiming that their Convention rights had been violated by the act or omission of a public authority to seek a remedy before any domestic court or tribunal competent to address the case. This would, for instance, be the case in monist legal systems, in which the provisions of treaties and resolutions by organisations of international law, which may be binding on all persons by virtue of their substance, become binding upon publication. In some States Parties, the Convention also takes precedence over national law. In this type of system, self-executing treaty provisions such as Convention rights are immediately enforceable by the courts.

101. Such proceedings would be governed by the standard procedural rules. The relevant court or tribunal may be able to make any order within its powers to redress a violation, which may or may not include the power to award compensation;[220] alternatively, it may be limited to awarding compensation.[221] Insofar as the relevant court and tribunal did not have the power to strike down a law, its finding that a violation was due to a fundamental incompatibility between a law and a protected right would not have immediate consequences for the wider applicability of that law. A relevant court or tribunal may, however, be able to declare that the

[215] See, for example, *Apostol v. Georgia*, op. cit., para. 40.
[216] See, for example, *Vén v. Hungary*, App. no. 21495/93, Commission decision of 30 June 1993.
[217] See, for example, *Hartman v. Czech Republic*, App. no. 53341/99, judgment of 10 July 2003, para. 49; *Sürmeli v. Germany*, App. no. 75529/01, Grand Chamber judgment of 8 June 2006, para. 62.
[218] See, for example, *Riera Blume & otrs v. Spain*, App. no. 37680/97, admissibility decision of 9 March 1999; *Voggenreiter v. Germany*, App. no. 47169/99, judgment of 8 January 2004, para. 23.
[219] See, for example, *Hasan Uzun v. Turkey*, App. no. 10755/13, admissibility decision of 30 April 2013.
[220] As in, for example, the United Kingdom.
[221] As in, for example, Ireland.

law in question is incompatible with the protected right; this competence is usually limited to higher courts.[222]

102. As an illustration, in Norway, the Convention is incorporated into national law by the Act on the Strengthening of the Position of Human Rights in Norwegian Law of 21 May 1999 (Human Rights Act). Under Section 3 of this Act, provisions of incorporated human rights conventions shall prevail in the event of a conflict with provisions of national legislation. Convention provisions are directly applicable and may be invoked directly before all Norwegian courts. A court may consider whether a provision of national legislation is in conflict with a provision of a human rights convention in a case before it but is not competent to declare a provision of internal law is incompatible in general with human rights provisions.[223]

Examples of good practice

103. In France, the Convention has the status of higher law in accordance with Article 55 of the Constitution of 4 October 1958, which provides that "treaties or agreements duly ratified or approved shall, upon publication, prevail over Acts of Parliament, subject, with respect to each agreement or treaty, to its application by the other party". Any applicant may rely before an ordinary domestic court on the rights and freedoms set forth in the Convention, which are given direct effect. As a result, allegations of violation of Convention provisions must be invoked by the individual before domestic courts so as to permit the latter to prevent or, if necessary, to redress the claimed violation. The applicant is required to present their complaints concerning the Convention violation before the domestic judge. If not, the Court considers the application inadmissible for failure to exhaust domestic remedies.[224] This mechanism provides a very wide-ranging remedy to individuals, capable of being exercised in the course of any litigation. A similar system exists, for example, in Austria.[225]

104. In Sweden, a claim for damages for violation of Convention rights may be submitted to a district court and the case-law Supreme Court, along with the practice of the Chancellor of Justice, has established that there is a right to compensation for such violations. The Court has found that this combination of circumstances has established an effective remedy.[226]

[Point to be added concerning effective use by domestic courts of Strasbourg Court case-law and need to avoid unnecessary procedural obstacles]

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[222] As in, for example, Ireland, the United Kingdom.

[223] Under Article 93 of the Constitution of The Netherlands, international treaties become binding upon publication. Article 94 of the Constitution states that statutory regulations in force within the Kingdom will not be applicable if their application conflicts with the provisions of treaties that are binding on all persons. Domestic courts dealing with human rights issues do so in light of the Convention, looking not only into the decisions of the Court against The Netherlands, but reading into the provisions of the Convention the whole *acquis* of the Court: Convention rights should be interpreted in line with the Court's interpretation. Similar systems exist, for example, in Greece and Sweden.

[224] See, for example, *Segame SA v. France,* App. no. 4837/06, judgment of 7 June 2012, paras. 68 and 71; *A.S.P.A.S.& Lasgrezas* v. *France*, App. no. 29953/08, judgment of 22 September 2011, para. 59.

[225] See *Tauernfleisch Vertriebs GmbH et al v. Autria and 21 others applications*, App. no. 36855/06, decision of 12 March 2013, paragraphs 8, 9, 23 and 24.

[226] See *Berg v. Sweden*, App. no. 26427/06, decision of 29 November 2011; *Eriksson v. Sweden*, App. no. 60437/08, decision of 12 April 2012; *Eskilsson v. Sweden*, App. no. 14628/08, decision of 24 January 2012.