Strasbourg, 9 November 2009

DH-RE(2009)007 Addendum

STEERING COMMITTEE FOR HUMAN RIGHTS
(CDDH)

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COMMITTEE OF EXPERTS ON EFFECTIVE REMEDIES FOR EXCESSIVE LENGTH OF PROCEEDINGS
(DH-RE)

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Draft Recommendation on effective remedies for excessive length of proceedings

and

Draft Guide to Good Practice

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Draft Recommendation of the Committee of Ministers to member States on effective remedies for excessive length of proceedings

(as adopted by the DH-RE at its second meeting, 2-4 November 2009)

The Committee of Ministers, under the terms of Article 15.*b* of the Statute of the Council of Europe,

a. Recalling that the Heads of State and Government of the Council of Europe member states, meeting at the Third Council of Europe Summit in Warsaw on 16-17 May 2005, expressed their determination to ensure that effective domestic remedies exist for anyone with an arguable complaint of a violation of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereafter referred to as "the Convention");

b. Recalling Recommendation Rec(2004)6 of the Committee of Ministers to member states on the improvement of domestic remedies and intending to build upon this by giving practical guidance to member States in the specific context of excessive length of proceedings;

c. Recalling also the Declaration of the Committee of Ministers on sustained action to ensure the effectiveness of the implementation of the Convention at national and European levels (adopted on 19 May 2006 at its 116th Session);

d. Welcoming the work of other Council of Europe bodies, notably the European Commission for Democracy through Law and the European Commission for the Efficiency of Justice;

e. Emphasising High Contracting Parties' obligations under the Convention to secure to everyone within their jurisdiction the rights and freedoms protected thereby, including the right to trial within a reasonable time contained in article 6(1) and that to an effective remedy contained in article 13;

f. Recalling that the case law of the European Court of Human Rights (hereinafter "the Court"), notably its pilot judgments, provides important guidance and instruction to member States in this respect;

g. Reiterating that excessive delays in the administration of justice constitute a grave danger, in particular for respect for the rule of law and access to justice;

h. Concerned that excessive length of proceedings, often caused by systemic problems, is by far the most common issue raised in applications to the Court and that it thereby represents a threat to the long-term effectiveness of the Court and hence the human rights protection system based upon the Convention;

i. Convinced that the introduction of measures to address the excessive length of proceedings will contribute, in accordance with the principle of subsidiarity, to enhancing the protection of human rights in member states and to preserving the effectiveness of the Convention system, including by helping to reduce the number of applications to the Court;

RECOMMENDS that member States:

1. take all necessary steps to ensure that all stages of domestic proceedings, irrespective of their domestic characterisation, in which there may be determination of civil rights and obligations or of any criminal charge are determined within a reasonable time;

2. to this end, ensure that mechanisms exist to identify proceedings that risk becoming excessively lengthy, as well as the underlying causes, with a view also to preventing future violations of Article 6;

3. recognise that when an underlying systemic problem is causing excessive length of proceedings, measures may be required that address this problem as well as its effects in individual cases;

4. ensure that means exist whereby proceedings that risk becoming excessively lengthy may be expedited in order to prevent them from becoming so;

5. take all necessary steps to ensure that effective remedies before national authorities exist for all arguable claims of violation of the right to trial within a reasonable time;

6. ascertain that such remedies exist in respect of all stages of proceedings in which there may be determination of civil rights and obligations or of any criminal charge;

7. to this end, where proceedings have become excessively lengthy, ensure that the violation is acknowledged either expressly or in substance and that either:

   a. the proceedings are expedited, where possible;
   b. redress is afforded to the victims for disadvantage they have suffered; or, preferably,
   c. allowance is made for a combination of the two measures;

8. ensure that requests for expediting proceedings or affording redress will be dealt with rapidly by the competent authority and that they represent an effective, adequate and accessible remedy;

9. ensure that amounts of compensation that may be awarded are reasonable and compatible with the case law of the Court and recognise, in this context, a strong but rebuttable presumption that excessively long proceedings will occasion non-pecuniary damage;

10. consider providing for specific forms of non-monetary redress, such as reduction of sanctions or discontinuance of proceedings, as appropriate, in criminal or administrative proceedings that have been excessively lengthy;

11. where appropriate, provide for the retroactivity of new measures taken to address the problem of excessive length of proceedings, so that applications pending before the Court may be resolved at national level;

12. take inspiration and guidance from the annexed Guide to Good Practice when implementing the provisions of this recommendation and, to this end, ensure that the text of this Recommendation and of the annexed Guide to Good Practice, in the

language(s) of the country, is published and disseminated in such a manner that it can be effectively known and that the national authorities can take account of it.

Draft Guide to Good Practice

(as adopted by the DH-RE at its second meeting, 2-4 November 2009)

I. INTRODUCTION

A. The aim of the Recommendation and Guide to Good Practice

1. This Guide to Good Practice accompanies Recommendation Rec(2009)… of the Committee of Ministers to member States on effective remedies for excessive length of proceedings.

2. The Recommendation and Guide are intended to improve the implementation of the rights to trial within a reasonable time and to an effective remedy, which reflect the central role of the judicial system amongst national authorities and are fundamental to the European Convention on Human Rights (the Convention) system and to the notion of a democratic state governed with respect for human rights and the rule of law. Membership of the Council of Europe implies an obligation to strive constantly for self-improvement. The Recommendation and this Guide, therefore, whilst not in themselves legally binding, should be taken as essential guidance to member States on how to fulfil their legally binding obligations under the European Convention on Human Rights.

3. Violations of the right to trial within a reasonable time, caused by excessive length of proceedings, combined with a lack of effective domestic remedies for such violations, generate thousands upon thousands of applications to the European Court of Human Rights ("the Court" or "the Strasbourg Court"). These applications frequently arise from the same underlying problem and are, for that very reason, often well-founded.[1] As the Court itself 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."[2]

4. The Recommendation and Guide encourage States to anticipate problems that may lead to the Court finding a violation and to take prompt action at national level to prevent such problems and remedy them should they arise. The obligations set out in the Convention are obligations of result: there may be different ways in which the result can be achieved. The Guide, by also giving examples of existing good practice, aims to show that there are many and various ways to take effective action and that the implementation of appropriate solutions can be a simple and cost-effective matter, easily accomplished in accordance with particular national legal systems and traditions.

5. The obligation to secure Convention rights and freedoms, including the rights to trial within a reasonable time and to an effective remedy for violations thereof, applies to all branches of State power. Whilst it is the government that responds for the State before the

[1] In November 2009, the Court had some 13,000 cases pending before a Chamber involving length of proceedings, including non-enforcement. See, for example, the information at http://www.echr.coe.int/NR/rdonlyres/ACD46A0F-615A-48B9-89D6-8480AFCC29FD/0/FactsAndFigures_EN.pdf and http://www.echr.coe.int/NR/rdonlyres/D5B2847D-640D-4A09-A70A-7A1BE66563BB/0/ANNUAL_REPORT_2008.pdf.

[2] See *Kudla v. Poland*, App. No. 30210/96, judgment of 26 October 2000, para. 155.

Court, all public authorities are required to respect Convention rights at domestic level. This implies that judicial authorities, whose independence is undoubtedly of central importance to the Convention system (being expressly protected by Article 6), must also ensure that they operate in compliance with the reasonable time requirement.

6. The Recommendation and this Guide should accordingly be translated into official languages, as appropriate to maximise their impact, and widely disseminated, in particular to the following categories:

- national and, insofar as they may have relevant competence, regional legislative bodies;
- bodies responsible for making relevant proposals for procedural or legislative reforms, such as judicial councils;
- judicial authorities, up to and including the highest jurisdictions, and including as part of judicial training;
- officials responsible for court administration, including court officers and those responsible for the execution/ enforcement of decisions and judgments;
- relevant officials of government departments responsible for the administration of justice, whether at national or regional level;
- officials within other departments of public administration responsible for non-judicial stages of relevant proceedings, including the police and prosecuting authorities, in accordance with national particularities.

7. It may also be of particular interest and should therefore be distributed to other groups concerned by the efficiency of justice and the length of proceedings, including:

- legal professionals, including their professional bodies;
- civil society organisations.

B. The background to the Recommendation

8. The development of effective domestic remedies for violations of the Convention is a long-standing concern of the Council of Europe, repeatedly stressed as a priority at the highest political levels.[3] In particular, the Action Plan of the Warsaw Summit of Heads of State and Government of the Member States of the Council of Europe (16-17 May 2005) stated that,

> "At national level, we shall ensure that […] effective domestic remedies exist for anyone with an arguable complaint of a Convention violation".

9. Prior to the Warsaw Summit, the Committee of Ministers, in Recommendation Rec(2004)6 on the improvement of domestic remedies, had made concrete proposals for improving the situation at national level, with particular emphasis on the problem of effective remedies for excessive length of proceedings. This Recommendation included a provision on assistance to member States requesting help with its implementation and gave practical guidance and some examples of good practice in its appendix. The Committee of Ministers returned to the question of domestic remedies in a Declaration adopted in May 2006, which requested that review of implementation of Recommendation Rec(2004)6 on the improvement of domestic remedies be deepened and, in the context of pilot judgments of the

[3] It has also been of concern to other international organisations, including the European Union and the United Nations, in both their legal and political instances.

Court, proposed that consideration be given to the development of guidelines for member States on domestic remedies following such judgments.[4]

C. Sources of material for the Recommendation and Guide to Good Practice

10. The Recommendation and Guide are based firstly, on the extensive material that has been produced by various organs of the Council of Europe (in particular the Court, the Committee of Ministers, the European Commission for Democracy Through Law and the European Commission for the Efficiency of Justice), and secondly, on a non-exhaustive selection of examples of existing good practice by certain member States. These examples are intended for inspiration; they are not intended as models and it is recognised that they may not be suitable to other States' national legal systems and traditions. 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 (the CEPEJ), as appropriate, for further expert guidance and assistance in making necessary improvements to their domestic systems.

11. The Court, by Article 32 of the Convention, has exclusive and mandatory jurisdiction to interpret and apply the Convention and its Protocols through its judgments. Under Article 46, States undertake to abide by the binding force of final judgments. (This obligation is one of result, subject to a certain discretion regarding the means chosen to achieve that result.) The Court's judgments thus provide the most important reference point for the Council of Europe as a whole in its work on human rights standard-setting, monitoring and cooperation. They therefore constitute the legal foundations of the present recommendation and a primary source of material for this Guide to Good Practice.

12. Article 46 also states that the process of execution is supervised by the Committee of Ministers. In the context of its supervision of the execution of the Court's judgments, the Committee of Ministers invites States particularly concerned to give high political priority to solving the problem of excessive length of proceedings. The Committee of Ministers' annual reports and interim and final resolutions, adopted in the context of the execution process, provide guidance on necessary general measures and good practice. The Committee of Ministers has also adopted many recommendations relating to the efficiency of justice, aimed at ensuring respect for the right to trial within a reasonable time.

13. In addition, numerous other Council of Europe bodies have addressed themselves to the question of effective remedies for excessive length of proceedings, including the Parliamentary Assembly, the Council of Europe Commissioner for Human Rights and the Consultative Council of European Judges (CCJE).

[4] See the "Declaration of the Committee of Ministers on sustained action to ensure the effectiveness of the implementation of the European Convention on Human Rights at national and European levels," adopted by the Committee of Ministers on 19 May 2006 at its 116th Session. Other noteworthy events include the Workshop on the improvement of domestic remedies with particular emphasis on cases of unreasonable length of proceedings (organised by the Polish Chairmanship of the Committee of Ministers, Strasbourg, 28 April 2005) and the Round Table on way of protection of the right to a trial within a reasonable time – countries' experiences (organised by the Slovenian Chairmanship of the Committee of Ministers, Bled, Slovenia, 21-22 September 2009).

II. THE BASIC LEGAL PRINCIPLES UNDERLYING THE RECOMMENDATION

A. The right to trial within a reasonable time

14. Article 6 of the Convention, which sets out the right to a fair trial, includes the following obligation for States parties:

> "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law…" *(emphasis added).*

Identifying relevant proceedings

15. All proceedings in which there may be determination of civil rights and obligations or of any criminal charge are subject to Article 6 and its reasonable time requirement. This is the case regardless of how domestic law defines relevant concepts: for example, whether proceedings are defined as criminal or civil (using the terminology of Article 6) or, alternatively, administrative or fiscal; or whether a charge is defined as criminal or disciplinary.[5] For the purposes of Article 6, the relevant concepts are autonomously defined and must be understood within the meaning of the Convention, as interpreted by the Court. What is relevant is not the name given to the type of proceedings but their substantive nature – in other words, what they involve and what is at stake.

Defining the relevant period

16. It is important that national authorities be aware of how to identify the relevant period for assessing the overall duration of proceedings. This is essential to the effective functioning of mechanisms or procedures intended to expedite proceedings that risk becoming or have already become excessively lengthy, as well as to the correct calculation of compensation for violations of the right to trial within a reasonable time. In order to ensure that the proceedings as a whole are not excessively lengthy, States should make every effort to ensure that each stage is concluded within a reasonable time.

The relevant period – proceedings relating to civil rights and obligations

17. Civil proceedings are generally taken to commence upon the institution of the relevant court procedure, in other words when the individual or his/ her legal representative files proceedings at court. In some circumstances, however, depending on the particularities of the national system, the relevant period may commence at an earlier stage: for example, application to the administrative authorities when it is obligatory to exhaust a preliminary administrative procedure before having recourse to a court;[6] or, where an administrative authority's decision is a necessary preliminary for bringing the case before a tribunal, as soon as a "dispute" arises between the applicant and the relevant administrative authority.[7] They terminate on the date of judgment being given in the final instance or the issuing of the written judgment to the applicant. In some cases, however, the termination of the proceedings on the merits of the claim does not always constitute an end to the process of "determination of a civil right" within the meaning of Article 6.

18. The duration of any enforcement proceedings must also be taken into account, since the right to trial within a reasonable time would be ineffective if a State's domestic legal

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[5] See e.g. *Engels & otrs v. the Netherlands*, Apps. Nos. 5100/71 etc, judgment of 8 June 1976, paras. 80-82.
[6] See *Kiurkchian v. Bulgaria*, App. No. 44626/98, judgment of 24 March 2005, paras. 51-52; also *Farange S.A. v. France*, App. No. 77575/01, judgment of 13 July 2006, para. 39.
[7] See *Hellborg v. Sweden*, App. No. 47473/99, judgment of 28 February 2006, para. 59.

system allowed a final, binding judicial decision to remain inoperative to the detriment of one party[8]. In cases where the party to civil proceedings has to institute enforcement proceedings in order to satisfy his or her judicially-determined claim, therefore, those proceedings must be regarded as a second stage of proceedings on the merits and, consequently, an integral part of the original proceedings, to be taken into account when assessing whether proceedings as a whole were determined within a reasonable time. An unreasonably long delay in enforcement of a binding judgment may thus breach the Convention.[9] This applies also to the enforcement of instruments other than court decisions that relate to civil rights or obligations, for example a notarial deed concerning a non-contested debt.[10]

19. A person who has obtained a judgment against the State, as opposed to a private party, may not be expected to bring separate enforcement proceedings, although they may be required to undertake certain procedural steps in order to recover the judgment debt. This requirement must not, however, go beyond what is strictly necessary and, in any event, does not relieve the authorities of their obligation under the Convention to take timely action of their own motion. The burden of ensuring compliance with a judgment against the State thus lies primarily with the State authorities, starting from the date on which the judgment becomes binding and enforceable. The complexity of the domestic enforcement procedure or of the State budgetary system cannot relieve the State of its obligations, nor may it cite lack of funds or other resources as an excuse.[11] [12]

The relevant period – proceedings relating to criminal charges

20. Criminal proceedings commence from the moment that a formal charge is brought against the applicant or where the person has otherwise been substantially affected by actions taken by the prosecuting authorities as a result of the suspicion against him.[13] This latter situation could be, for example, when the police arrest and question a suspect or search his/ her property. They thus include pre-trial proceedings, whether conducted by the police of the prosecuting authorities. They terminate upon acquittal or, in the event a guilty verdict, sentencing or, in case of appeal against conviction or sentence, judgment being given in the final instance.

The relevant period – proceedings initiated before entry into force of the Convention

21. When the respondent State had only ratified the Convention after the commencement of the proceedings in question, the period to be taken into consideration runs from the date of entry into force of the Convention with respect to that State. Nevertheless, when assessing the reasonableness of the time that elapsed after that date, account must be taken of the state of the proceedings at that date.

<u>Assessing the "reasonable time"</u>

[8] *Hornsby v. Greece*, App. No. 18357/91, judgment of 19 March 1997, para. 40.
[9] See *Burdov v. Russia (no. 2)*, App, No. 33509/04, Grand Chamber judgment of 15 January 2009 (a "pilot judgment" on the issue of excessive length of enforcement proceedings in Russia), paras. 65-69; also e.g. *Dewicka v. Poland*, App. No. 38670/97, judgment of 4 April 2000, paras. 41-42.
[10] See *Estima Jorge v. Portugal*, 16/1997/800/1003, judgment of 21 April 1998, paras. 35-38.
[11] See *Burdov v. Russia (no. 2)*, op. cit., paras. 65-69; also e.g. *Dewicka v. Poland*, App. No. 38670/97, judgment of 4 April 2000, paras. 41-42.
[12] In recent years, the non enforcement or delayed enforcement of domestic courts' decisions has become the second most frequent identified problem in the Court's judgments. This has been a priority for the Committee of Ministers in the framework of the supervision of the execution of the judgments of the Court (see also under para. 31).
[13] See e.g. *Eckle v. Germany*, App. No. 8130/78, judgment of 15 July 1982, para. 73.

22. The reasonableness of the length of proceedings must be assessed in the light of the circumstances of the case and with reference to the following criteria:[14]

- the factual or legal complexity of the case;
- the number of levels of jurisdiction through which proceedings had passed;
- the conduct of the applicant;
- the conduct of the relevant authorities;
- what was at stake for the applicant in the dispute.[15]

B. The right to an effective remedy

23. 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 freedom 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."

The meaning of "remedy" within Article 13

24. 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.[16] A remedy is only effective if it is available and sufficient. It must be sufficiently certain not only in theory but also in practice,[17] and must be effective in practice as well as in law,[18] 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.[19]

25. Article 13 does not require any particular form of remedy, States having a margin of discretion in how to comply with their obligations, but the nature of the right at stake has implications for the type of remedy the State is required to provide.[20] 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.[21] 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.[22]

The meaning of "national authority" within Article 13

26. 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.[23]

The meaning of "violation" within Article 13

27. 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 question of whether the claim is arguable should be determined in the light of the particular facts and

[14] For further detail, see also the CEPEJ report on the length of court proceedings in the member States of the Council of Europe based on the case-law of the European Court of Human Rights, doc. CEPEJ(2006)15.
[15] See e.g. *Frydlender v. France*, App. No. 30979/96, Grand Chamber judgment of 27 June 2000, para. 43.
[16] See *Halford v. U.K.*, App. No. 20605/92, judgment of 25 June 1997, para. 64.
[17] See *Pizzati v. Italy*, App. No. 62361/00, Grand Chamber judgment of 29 March 2006, para. 38.
[18] See *Kudla v. Poland*, App. No. 30210/96, judgment of 26 October 2000, para. 152.
[19] See *Kudla v. Poland*, op. cit., para. 157.
[20] See *Budayeva & otrs v. Russia*, Apps. Nos. 15339/02 etc, judgment of 20 March 2008, paras. 190-191.
[21] See *Kudla v. Poland*, op. cit., para.157.
[22] See *Van Oosterwijck v. Belgium*, App. No. 7654/76, judgment of 6 November 1980, paras. 36-40.
[23] See *Kudla v. Poland*, op. cit., para. 157.

the nature of the legal issue or issues raised. In particular, a claim may be arguable if the following criteria are satisfied: the complaint is substantiated; it relates to a right of freedom guaranteed by the Convention; and it would give rise to a *prima facie* case of violation of the Convention, as interpreted by the Court's case law.[24]

C. Addressing length of proceedings at the national level

28. Articles 1 and 13 are amongst the essential provisions of the Convention for implementation of the principle of subsidiarity. Article 1, by obliging States to respect human rights, places upon them the responsibility to prevent violations. Article 13 then obliges them to provide effective remedies for any violations that nevertheless occur. Only when such remedies have been exhausted does the Convention, by way of the admissibility criterion contained in Article 35, allow the Court to deal with complaints of violation. The provision of effective domestic remedies is essential to ensuring that the protection of human rights remains a national matter; failure to provide them means that the violation may be addressed at the European level. The inadequacy of domestic remedies is one of the major contributing factors to the Court's current excessive caseload.

29. The obligations flowing from articles 1, 6 and 13 of the Convention imply activity in three areas: preventing proceedings from becoming of excessive length; expediting of proceedings that risk becoming excessively lengthy or that have already become so; and redressing violations of the right to trial within a reasonable time. Ways to act in these three areas will be described in following sections.

30. The Convention's obligations on States parties extend to all public authorities, including the judiciary and administrative authorities responsible for relevant proceedings and for the execution/ enforcement of judicial decisions. All public authorities concerned should therefore be vigilant to the reasonable time requirement and prepared to take all necessary measures to ensure that it is respected.

31. These measures may include legislative intervention in some cases. The Venice Commission has noted that "[t]he adoption by Council of Europe member States of specific laws on length-of-proceedings remedies does not appear indispensible and is not required in those countries which already dispose of effective remedies for excessive length, which are known to the authorities, the courts and the public. However, the Venice Commission underlines that specific laws present the matter of reparation [expedition or redress] in an abstract and general manner, and therefore have the advantage of clarity and comprehensiveness. They may thus be more easily accessible to the public (and, in some cases, even to the courts) as well as to the instances of the Council of Europe."[25]

[24] See *Boyle & Rice v. U.K.*, Apps. Nos. 9659/82 & 9658/82, judgment of 27 April 1988, paras. 52, 55, 59-60, 61-62 & 77.
[25] See doc. CDL-AD(2006)036rev, para. 247.

III. THE OPERATIVE PROVISIONS OF THE RECOMMENDATION

The Committee of Ministers […] RECOMMENDS that member States:

1. *take all necessary steps to ensure that all stages of domestic proceedings, irrespective of their domestic characterisation, in which there may be determination of civil rights and obligations or of any criminal charge are determined within a reasonable time;*

General principles

32. As the Court has stated, "[t]he best solution in absolute terms is indisputably, as in many spheres, prevention… Article 6 § 1 imposes on the Contracting States the duty to organise their judicial systems in such a way that their courts can meet each of its requirements, including the obligation to hear cases within a reasonable time."[26] Similarly, the Venice Commission has recommended that member States "should provide in the first place adequate procedural means of ensuring that cases are processed by courts in a foreseeable and optimum manner. These procedural means respond in the first place to the obligation of securing the reasonable time requirement."[27]

33. The Council of Europe has made numerous practical proposals to member States on how to improve the efficiency and effectiveness of their judicial systems. Since the constraints of space and practicality preclude their inclusion here in full, Member States are strongly encouraged to study these closely, with a view to ensuring that their domestic procedures comply with European standards. The relevant texts, which contain detailed practical guidance, include the following:

General

- CEPEJ Framework Programme: A new objective for judicial systems – the processing of each case within an optimum and reasonable timeframe.[28]

- CEPEJ/ SATURN Guidelines for judicial time management.[29]

- CEPEJ "Time Management Checklist."[30]

- Committee of Ministers' Recommendation No. R (94) 12 to member States on independence, efficiency and role of judges (in particular Principle III).[31]

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[26] See *Scordino v. Italy (No. 1)*, App. No. 36813/97, Grand Chamber judgment of 29/3/06, para 183.
[27] See doc. CDL-AD(2006)036rev, para. 238.
[28] See doc. CEPEJ(2004)19, in particular the 18 "lines of action" proposed therein.
[29] See doc. CEPEJ (2008) 8.
[30] See doc. CEPEJ (2005) 12 REV. The Checklist is described as being "not a questionnaire but a tool … whose purpose is to help justice systems to collect appropriate information and analyse relevant aspects of the duration of judicial proceedings with a view to reduce undue delays, ensure effectiveness of the proceedings and provide necessary transparency and foreseeability to the users of the justice system. [It] is aimed at legislators, policy-makers, all those responsible for the administration of justice including ministries of justice, judges, court officers in charge of court administration and case-management, and the research institutions that analyse functioning of the judicial system…"
[31] It should be noted that the Group of specialists on the independence, efficiency and role of judges (CJ-S-JUST), subordinate to the European Committee on Legal Cooperation (CDCJ), is (at the time of writing) working on revision of this recommendation.

Civil and commercial cases

- Committee of Ministers' Recommendation No. R (84) 5 to member States on the principles of civil procedure designed to improve the functioning of justice, which sets out in appendix nine principles to guide member States when adopting or reinforcing, as the case may be, all measures which they consider necessary to improve civil procedure.

- Committee of Ministers' Recommendation No. R (95) 5 to member States concerning the introduction and improvement of the functioning of appeal systems and procedures in civil and commercial cases, which sets out a series of measures that States should in particular adopt or reinforce as necessary to improve the functioning of appeal systems in civil and commercial cases.

Criminal justice

- Committee of Ministers' Recommendation No. R (87) 18 to member States concerning the simplification of criminal justice, which sets out principles that member States should take all appropriate measures to apply.

- Committee of Ministers' Recommendation R. (95) 12 to member States on the management of criminal justice.

Reducing courts' workloads

- Committee of Ministers' Recommendation Rec R(86)12 to member States concerning measures to prevent and reduce the excessive workload in the courts.

Mediation and alternative dispute resolution

- Committee of Ministers' Recommendation No. R (98)1 to member States on family mediation.

- Committee of Ministers' Recommendation Rec(2002)10 to member States on mediation in civil matters.

    - See also the CEPEJ Guidelines for a better implementation of the existing recommendations concerning family mediation and mediation in civil matters.[32]

- Committee of Ministers' Recommendation No. R (99)19 to member States concerning mediation in penal matters.

    - See also the CEPEJ Guidelines for a better implementation of the existing recommendation concerning mediation in penal matters.[33]

- Committee of Ministers' Recommendation Rec(2001)9 to member States on alternatives to litigation between administrative authorities and private parties.

Execution & enforcement

- Committee of Ministers' Recommendation Rec(2003)16 to member States on the execution of administrative and judicial decisions in the field of administrative law, along with its Explanatory Memorandum.

[32] See doc. CEPEJ(2007)14.
[33] See doc. CEPEJ(2007)13.

- Committee of Ministers' Recommendation Rec(2003)17 to member States on enforcement, along with its Explanatory Memorandum.

- CEPEJ Report on the Enforcement of Court Decisions in Europe, Appendix II, "Proposals for guidelines to improve the implementation of existing recommendations regarding the execution of Court decisions in Europe".[34]

- Resolution No. 3 of the 24th Conference of European Ministers of Justice on the general approach and means of achieving effective enforcement of judicial decisions.

- 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.[35]

The use of new technologies

- Committee of Ministers' Recommendation Rec(2001)3 to member States on the delivery of court and other legal services to the citizen through the use of new technologies; this Recommendation also identifies the main policy issues to be addressed by States in relation to each of the three principles mentioned above.

Examples of existing national practice

34. CEPEJ has also produced a "Compendium of 'best practices' on time management of judicial proceedings" containing numerous examples of existing good practice by member States, intended as a practical tool to help policy makers and judicial practitioners introduce new normative frameworks or judicial or administrative practices for improving time management of judicial proceedings both at the court level and at a national level.[36] Since the constraints of space and practicality preclude their inclusion here in full, Member States are strongly encouraged to study these examples closely, with a view to identifying, adapting if necessary and adopting those practices most likely to enhance their own national systems' capacity to identify the risk of and subsequently prevent excessively length proceedings.

[34] See doc. CEPEJ Studies No. 8, 2007.
[35] See doc. CM/Inf/DH(2007)33.
[36] See doc. CEPEJ(2006)13.

> *2. to this end, ensure that mechanisms exist to identify proceedings that risk becoming excessively lengthy, as well as the underlying causes, with a view also to preventing future violations of Article 6;*

General principles

35. It is better to prevent proceedings from becoming excessively long than to redress excessive length after it has arisen. This is only possible, however, if there are mechanisms in place to identify and forewarn the relevant authorities of proceedings under way that risk becoming excessively long. Such mechanisms may be valuable not only in the instant case, but also by highlighting situations that may cause problems of excessive length in future cases.

36. The CEPEJ has adopted a "Time Management Checklist," which proposes that States should ensure that the following features exist within their relevant systems:

(i) the ability to assess the overall length of proceedings, from their start to the final determination and, if applicable, the enforcement of the judicial decision;

(ii) established standards for the duration of proceedings for the purpose of assessment, planning and transparency. These should be elaborated in consultation with stakeholders and be available to users of the justice system;

(iii) a sufficiently elaborated typology of cases that allows for realistic and appropriate planning of standards and total duration of proceedings and is therefore neither too unrefined nor overly detailed;

(iv) the ability to monitor the course of proceedings, involving recording and analysis of the duration of at least the most important and typical stages of proceedings, since proper time management needs to take into account the length of every individual stage of the judicial process;

(v) the means to diagnose delays and mitigate their consequences promptly, including by instantly making aware the responsible persons and offices with a view to remedying the situation and preventing further dysfunction;

(vi) the use of modern technology as a tool for time management in the justice system, both for the purpose of monitoring timeframes and for the statistical processing and strategic planning.

37. The CEPEJ has also produced a "Checklist for promoting the quality of justice and the courts," which includes a section on the "Management of timeframes" containing the following "introspective questions" for policy makers, court managers, court presidents, judges and other judicial practitioners to ask themselves when improving the quality of services being provided by judicial systems:[37]

(i) Is there a policy for setting foreseeable and optimum timeframes?

[37] See doc. CEPEJ (2008) 2, section II.6.

(ii) Are standards or norms concerning the acceptable length of judicial proceedings defined?

(iii) Is there a policy for managing case flows preventing delays?

(iv) Are measures taken to speed up delayed cases and to reduce the backlog?

(v) Is there an active role for the judge in the management of the timeliness of the proceedings?

(vi) Can parties negotiate with the court on the timeframes that will be used?

(vii) Is there a timeframe set for delivering the decision after the court hearing?

Examples of existing national practice

38. The CEPEJ "Compendium of 'best practices' on time management of judicial proceedings" (see above) also includes sections on "Setting timeframes," "Enforcing timeframes" and "Monitoring and dissemination of data." Since the constraints of space and practicality preclude their inclusion here in full, Member States are strongly encouraged to study these examples closely, with a view to identifying, adapting if necessary and adopting those practices most likely to enhance their own national systems' capacity to identify the risk of and subsequently prevent excessively length proceedings.

3. recognise that when an underlying systemic problem is causing excessive length of proceedings, measures may be required that address this problem as well as its effects in individual cases;

General principles

39. Persistent systemic problems, affecting whole classes of cases, rather than exceptional problems are a common cause of excessive length of proceedings in several member States. These problems may be as simple as insufficiencies in budgetary resources or personnel or lack of appropriate training for the judiciary and court staff; on the other hand, they may be far more complex, for example relating to inconsistent or inadequate legislation or inefficient administrative structures and procedures. Whatever the causes, however, such systemic problems have very serious consequences both at national level, by undermining respect for human rights and the rule of law, and for the European Court of Human Rights, which may be faced with very large and persistent numbers of potentially well-founded complaints under Articles 6 and 13 of the Convention.

40. The Committee of Ministers has stressed that the provision of domestic remedies is all the more urgent in cases of repetitive violations, so as to enhance the remedial capacity of the national judicial system, pending the implementation of more comprehensive and time-consuming reforms.[38] It has also emphasised that the creation of new domestic remedies does not in any way relieve states from their general obligation to solve the structural problems underlying violations. It has invited national authorities to undertake interdisciplinary action involving the main judicial actors and to co-ordinate at the highest political level with a view to drawing up a new, effective strategy.[39]

41. Clearly, it is not enough in such cases simply to remedy an individual complaint without also addressing the underlying systemic problem. In ratifying the Convention, States undertake to secure the right to trial within a reasonable time to everyone within their jurisdiction. This general requirement is not properly satisfied simply by seeking to remedy individual violations caused by a systemic problem on a case-by-case basis after they occur. Systemic problems imply a systemic failure to respect a particular right or freedom; States should therefore implement systemic responses.

42. The form that such systemic responses may take can be seen in the general measures that form part of the Court's judgments. The Court aims not only to provide just satisfaction for the individual applicant but also to prescribe a remedy capable of preventing repetition of the violation in both the instant case and for potential future applicants. General measures relate to the obligation to prevent violations similar to that or those found or putting an end to continuing violations. In certain circumstances they may also concern the setting up of

[38] See in particular Interim Resolution CM/ResDH(2008)1 on the execution of the judgments of the European Court of Human Rights in 232 cases against Ukraine relative to the failure or serious delay in abiding by final domestic judicial decisions delivered against the state and its entities as well as the absence of an effective remedies adopted by the Committee of Ministers on 6 March 2008; Interim Resolution CM/ResDH(2009)43 on the execution of the judgments of the European Court of Human Rights in 145 cases against the Russian Federation relative to the failure or serious delay in abiding by final domestic judicial decisions delivered against the state and its entities as well as the absence of an effective remedy adopted by the Committee of Ministers on 19 March 2009.

[39] See e.g. Interim Resolution CM/ResDH(2009)42 on the execution of the judgments of the European Court of Human Rights concerning the excessive length of judicial proceedings in Italy adopted on 19 March 2009.

remedies to deal with violations already committed. The obligation to take general measures may, depending on the circumstances, imply a review of legislation, regulations, procedures and/or judicial practice to prevent similar violations. Some cases may even involve constitutional changes. In addition, other kinds of measures may be required such as increasing the number of judges or improving administrative arrangements or procedures.[40]

Examples of existing national practice

43. When seeking to develop a systemic response to a systemic problem, States may seek inspiration from the approach developed by the Court under Article 46 of the Convention as a way of responding to systemic problems capable of generating large numbers of applications. Such judgments, whilst adjudicating on a single application, involve a finding of a violation of the Convention on account of a particular systemic problem that also affects a whole class of individuals.[41] They also include detailed indications for a general measure capable of resolving the underlying problem and thereby providing an effective domestic remedy to other (potential) applicants.

44. The Committee of Ministers has called on States to "review, following Court judgments which point to structural or general deficiencies in national law or practice [including pilot judgments], the effectiveness of the existing domestic remedies and, where necessary, set up effective remedies, in order to avoid repetitive cases being brought before the Court" and to "pay particular attention, in [this] respect […], to the existence of effective remedies in cases of an arguable complaint concerning the excessive length of judicial proceedings".[42]

45. The Court thus applied Article 46 of the Convention in the case of *Lukenda v. Slovenia*, which concerned Articles 6(1) and 13 of the Convention.[43] In relation to Article 46 (and the question of general measures), the Court observed that the persistent backlog in the Slovenian courts indicated that the length of judicial proceedings remained a major problem in Slovenia and noted that there were some 500 length of proceedings cases pending before it. It was intrinsic to its findings in the instant case that the violation of the applicants right to trial within a reasonable time was not an isolated incident but rather a systemic problem resulting from inadequate legislation and inefficiency in the administration of justice. The Court had identified some of the weakness of Slovenia's established legal remedies. It therefore encouraged Slovenia to amend the existing range of legal remedies or add new remedies so as to secure genuinely effective redress for violations of that right, on the basis of the characteristics of an effective remedy as found in case law cited by the Court.[44]

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[40] See Committee of Ministers, "Supervision of the execution of judgments of the European Court of Human Rights – Annual Report 2008," p.18, paras. 10 & 13.

[41] See e.g. *Broniowski v. Poland*, App. No. 31443/96, Grand Chamber judgment of 28 September 2005; *Hutten-Czapska v. Poland*, App. No. 35014/97, Grand Chamber judgment of 19 June 2006; *Burdov v. Russia (No. 2)*, App. No. 33509/04, judgment of 15 January 2009; *Ivanov v. Ukraine*, App. No. 40450/04, judgment of 15 October 2009.

[42] See Committee of Ministers' Recommendation Rec(2004)6. In accordance with Rule 4 of its Rules for the supervision of the execution of judgments and of the terms of friendly settlements, the Committee of Ministers shall give priority to the supervision of the execution of judgments (including pilot judgments) in which the Court has identified what it considers a systemic problem in accordance with Resolution Res(2004)3 of the Committee of Ministers on judgments revealing an underlying systemic problem.

[43] Article 46 of the Convention reads as follows:

> "1. The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties.
> 2. The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution."

[44] See *Lukenda v. Slovenia*, App. No. 23023/02, judgment of 6 October 2005, paras. 89-98.

46. That said, States should not passively await a Court judgment, let alone such application of Article 46, before taking action on systemic problems causing excessive length of proceedings. Specific systems should exist to identify and respond promptly to systemic problems at national level before repetitive applications are submitted to the Court in order to secure the right to trial within a reasonable time and an effective remedy for its violation. States are encouraged to cooperate with and seek the assistance of the Registry of the Court and/ or the Execution Department when developing and implementing systemic responses to systemic problems.[45]

[45] The Department for the Execution of Judgments of the Court, part of the Secretariat General of the Council of Europe, assists the Committee of Ministers in exercising its responsibility under article 46 of the Convention to supervise execution of judgments.

4. ensure that means exist whereby proceedings may be expedited in order to prevent them from becoming excessively lengthy;

General principles

47. Prevention plays a two-fold role in addressing excessive length of proceedings: on the level of organisation and functioning of the judicial system and other relevant public authorities; and by expediting proceedings that risk becoming excessively lengthy. This section deals with the latter.

48. The CEPEJ has noted that "mechanisms which are limited to compensation are too weak and do not adequately incite the States to modify their operational process and provide only one element *a posteriori* in the event of violation proven instead of trying to find a solution for the fundamental problem of excessive delays."[46] The Venice Commission has similarly recommended that States "should provide in the first place procedural means of ensuring that cases are processed by courts in a foreseeable and optimum manner. These procedural means respond in the first place to the obligation of securing the reasonable time requirement."[47]

49. There are many ways in which States may expedite proceedings to prevent them from becoming excessively lengthy, described notably in the various Council of Europe texts mentioned above. The following section sets out details of some examples of existing good practice, which may inspire similar action in other member States.

Examples of existing national practice[48]

50. Various member States already have measures in place to ensure that proceedings are determined in a reasonable time and to expedite proceedings with a view to avoiding excessive length. The following represent a few examples of these.

Civil procedure rules

51. In Norway, a new act on civil procedure (the Dispute Act) entered into force on 1 January 2008.[49] An important objective of the new Act was to concentrate and reduce the overall time spent on civil proceedings. The responsibility of judges to deal with cases in an expeditious manner is clearly stated on several occasions. The judge responsible for the case must actively lead its preparation: for example, immediately after a reply to the writ of summons has been given, he must hold a meeting with the parties (which could take place by telephone) in which a plan for the preparation of the case is established, time limits are given and necessary decisions made. The Act also prescribes various absolute time limits, for example that the date for the start of the main hearing must be set to a date no later than six months after service of the writ of summons, unless special circumstances prevent it. The court must actively lead and control the main hearing. Should delays nevertheless occur, the parties may demand that the head of the court take action to expedite the case, which may include replacing the appointed judge, and decision of the head of the court may be appealed.

[46] See doc. CEPEJ (2004) 19 REV 2, "A new objective for judicial systems: the processing of each case within an optimum and foreseeable timeframe – Framework Programme".
[47] See doc. CDL-AD(2006)036rev, paras. 238 & 239.
[48] These examples not being "remedies," they have not been the subject of case law of the Court.
[49] Law 17 June 2005 nr. 90. An English translation of the law could be found at: www.ub.uio.no/ujur/ulovdata/lov-20050617-090-eng.pdf

The Act also sets out rules of evidence intended to concentrate the proceedings devoted to the issues in question.[50]

Mediation

52. The 2008 Crystal Scales of Justice were awarded to the United Kingdom's "Small Claims Mediation Service," a free service for cases in the Small Claims Court (i.e. of a value up to around £5,000) available on a voluntary basis when both parties have ticked the relevant box on the court form and/or the judge has considered it appropriate. Over 95% of cases in which mediation is used are dealt with by telephone, without the need to attend court, thus saving time and cost; mediation usually takes place within 5-6 weeks, as opposed to the 13-14 weeks usually required for a court hearing. Over the 12 months up to the end of August 2009, some 10,000 mediations had been conducted with a settlement rate of 73%. For disputes valued at between £5000-8000, there is a National Mediation Helpline, established in March 2004 to provide members of the public with a simple, low-cost method of resolving a wide range of civil disputes. In 2008, the Helpline conducted 654 mediations with a settlement rate of 66%.

Use of new technologies

53. The Milan Tribunal in Italy received a special mention in the CEPEJ's 2006 Crystal Scales of Justice award, given for innovative practice contributing to the quality of civil justice, for its computerised civil lawsuits office. Introduced through cooperation between the Ministry of Justice, the Milan Tribunal and the Bar Association, the new office allows the computerised dispatch of petitions for injunctions to pay, with the case file remaining paperless until the debtor is notified of the injunction: all communications between lawyers and the court are computerised and computerised court orders are deemed legitimate. The Ministry of Justice contributed technical expertise, the Milan Tribunal trained judges and clerks in the new system and the Bar Association made financial and technical resources available to set up the necessary computerised infrastructure, as well as training lawyers, in collaboration with the University of Milan. A "Mixed Commission," consisting of representatives of the courts' clerks' offices, magistrates delegated by the office of the President of the Court, lawyers representing the Bar Association and computer technicians from the Ministry of Justice, was established as a monitoring and co-ordination body. The benefits have included a clear reduction in the length of proceedings, better use of human resources by the court, lower stationery costs and improved productivity in the clerks' office.[51]

[50] For further details of such approaches, see the "Checklist for promoting the quality of justice and the courts," doc. CEPEJ (2008) 2.

[51] See the Milan Tribunal's application for the Crystal Scale of Justice award, doc. JEJC.2008.24.

5. *take all necessary steps to ensure that effective remedies before national authorities exist for all arguable claims of violation of the right to trial within a reasonable time;*

6. *ascertain that such remedies exist in respect of all stages of proceedings in which there may be determination of civil rights and obligations or of any criminal charge;*

7. *to this end, where proceedings have become excessively lengthy, ensure that the violation is acknowledged either expressly or in substance and that either:*

   a. *the proceedings are expedited, where possible;*

General principles

54. As noted in the Introduction above, Article 13 of the Convention imposes an obligation of result on States to provide effective domestic remedies for any arguable claim of a violation of the right to trial within a reasonable time contained in Article 6(1). This reasonable time requirement applies to all proceedings, irrespective of their domestic characterisation, in which there may be determination of civil rights or obligations of or any criminal charge. Remedies for excessive length of proceedings are "effective" only if they are capable of covering all stages of the proceedings and thus of taking into account their overall length.[52] Such remedies must be effective and adequate; in particular, they must be sufficiently certain not only in theory but also in practice, failing which they will lack the requisite accessibility and effectiveness.[53] The Court has also noted that "a remedy designed to address the length of proceedings may be considered effective only if it provides adequate redress speedily."[54] The remedy should be accompanied by the national authorities' acknowledging, either expressly or in substance, the breach of the Convention; if not, any decision or measure favourable to the applicant will not in principle be sufficient to deprive the applicant of his/ her status as a 'victim' of the violation.[55] The conditions under which a particular remedy is available may imply that a finding of a violation is made in substance.[56]

55. The Court has consistently indicated that "the most effective solution" is a remedy designed to expedite the proceedings, "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*… [T]his type of remedy is 'effective' in so far as it hastens the decision by the [authority] concerned."[57] "What is important is whether a given remedy is capable of speeding up proceedings or preventing them becoming unreasonably long. Thus, the effectiveness of a remedy […] may depend on whether it has a significant effect on the length of the proceedings as a whole."[58]

56. It should also be noted that the Court has repeatedly stated that "Some States have understood the situation perfectly by choosing to combine two types of remedy, one designed

[52] See e.g. *Božić v. Croatia*, App. No. 22457/02, judgment of 11 December 2006, para. 32.
[53] See e.g. *Tomé Mota v. Portugal*, App. No. 32082/96, decision of 2 December 1999, para. 2.
[54] See *Vidas v. Croatia*, App. No. 40383/04, judgment of 3 July 2008, para. 37.
[55] See e.g. *Cocchiarella v. Italy*, App. No. 64886/01, Grand Chamber judgment of 29 March 2006, para. 71.
[56] See *Scordino v. Italy (No. 1)*, App. No. 36813/97, Grand Chamber judgment of 29 March 2006, para. 194.
[57] See e.g. *Scordino v. Italy (No. 1)*, op. cit., paras. 183-184.
[58] *Holzinger v. Austria*, App. No. 23459/94, judgment of 30 January 2001, para. 22.

to expedite the proceedings and the other to afford compensation."[59] The latter type of remedy will be addressed in a later part of this Guide.

57. A variety of approaches exist in member States for providing remedies to expedite proceedings, which may be summarised as follows.[60]

58. In civil or administrative proceedings, parties may lodge a request for the proceedings to be expedited either to a superior authority or court (whether directly or through the court dealing with the case, which will transmit it to the superior body) or to the dilatory court itself. The responsible court or authority may then fix an appropriate time limit for the relevant authority to take an appropriate procedural step; and/ or decide on the merits of the case or terminate proceedings. There may also be the possibility of transferring jurisdiction for further conduct of the proceedings to a different court or superior authority.

59. In criminal proceedings, where the investigative (pre-trial) stage is conducted by a body separate from that which must decide on the merits of the case, some countries provide for specific preventive remedies aiming at expediting the investigatory/ pre-trial stage. This may be done by allowing complaints or requests for acceleration to be lodged with the superior prosecuting or judicial authority, as the case may be. Measures taken in response to such requests, if justified, may include fixing a time limit for concluding the investigative stage or appropriate hierarchical instructions between prosecutors, for example on how to handle the case. (Specific preventive measures relating to the trial phase, however, appear to be less common.)

Examples of existing national practice

Constitutional complaint

60. In 2002, Croatia introduced a remedy for expediting proceedings in the form of a constitutional complaint under Section 63 of the Constitutional Act on the Constitutional Court, which reads as follows:

> "(1) The Constitutional Court shall examine a constitutional complaint even before all legal remedies have been exhausted in cases when a competent court has not decided within a reasonable time a claim concerning the applicant's rights and obligations or a criminal charge against him ...
>
> (2) If the constitutional complaint ... under paragraph 1 of this Section is accepted, the Constitutional Court shall determine a time-limit within which a competent court shall decide the case on the merits..."[61]

61. The Strasbourg Court has found the Section 63 remedy to be generally effective.[62]

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[59] See e.g. *Missenjov v. Estonia*, App. No. 43276/06, judgment of 29 April 2009, para. 44.

[60] See the Venice Commission Report, doc. CDL-AD(2006)036rev, paras. 69-71 and 82-83.

[61] S.63(3) additionally provides for a compensatory remedy: "In a decision under paragraph 2 of this Article, the Constitutional Court shall fix appropriate compensation for the applicant in respect of the violation found concerning his constitutional rights ... The compensation shall be paid from the State budget within a term of three months from the date when the party lodged a request." For this reason, the Court has referred to Croatia as being one of those "States [that] have understood the situation perfectly by choosing to combine two types of remedy, one designed to expedite the proceedings and the other to afford compensation."

[62] See *Slaviček v. Croatia*, App. No. 20862/02, decision of 4 July 2002. An earlier remedy under Section 59(4) of the 1999 Constitutional Court Act, which gave the Constitutional Court a discretion to admit complaints subject to the applicant having suffered a gross violation of his/ her rights and being at risk of serious and irreparable consequences, was not considered effective by the Strasbourg Court as it lacked a sufficient degree of certainty: see *Horvat v. Croatia*, App. No. 51585/99, judgment of 26 July 2001, paras. 41-43.

62. The remedy has exhibited certain limitations and difficulties in practice, however, which may be instructive for other States seeking to adopt a similar approach.

(i) The Strasbourg Court has considered that the wording of Section 63 was not sufficiently clear as to leave no doubt that it applied to proceedings that had already been concluded. The decisions of the Croatian Constitutional Court clearly indicated that it considered that Section 63 did not apply to concluded proceedings. The Strasbourg Court therefore found that a constitutional complaint under Section 63 did not constitute an effective remedy for concluded proceedings.[63] The Croatian Constitutional Court has subsequently changed its practice and now examines complaints where proceedings have been concluded.[64]

(ii) The Constitutional Court's case law had also interpreted Section 63 as not applying to enforcement proceedings, with the result that it could not constitute an effective remedy for their excessive length. By a decision of 2 February 2005, however, the Constitutional Court changed its practice, accepting a complainant's constitutional complaint and awarding him compensation as well as ordering the competent court to conclude the enforcement proceedings within six months from its decision. In doing so, the Constitutional Court expressly relied on the Strasbourg Court's case-law on the matter.[65]

(iii) There have been occasions on which the constitutional complaint proceedings themselves took too long. As a result, the Strasbourg Court found that "the effectiveness of the constitutional complaint as a remedy for the length of the pending civil proceedings was undermined by its excessive duration", with the result that there had been a violation of Article 13 of the Convention.[66]

(iv) There have also been problems with execution of the Constitutional Court's orders to expedite proceedings. The Strasbourg Court has stated that Article 13 must also require effective implementation of remedies afforded. Where the applicants did not receive sufficient compensation for the excessive length of proceedings and where the competent court failed to implement the Constitutional Court's decision in due time, exceeding the set time-limit by six months, therefore, the constitutional complaint was not an effective remedy. The Strasbourg Court also noted, however, that this did not call into question the effectiveness of the remedy as such.[67]

<u>A remedy to expedite administrative proceedings</u>

[63] See *Šoć v. Croatia*, App. No. 47863/99, judgment of 9 August 2003.
[64] For further information, see Committee of Ministers' Resolution CM/ResDH(2007)102.
[65] See *Majski v. Croatia*, App. No. 33593/03, judgment of 1 June 2006, paras. 16-17.
[66] See *Vidas v. Croatia*, App. No. 40383/04, judgment of 3 July 2008, para. 37. In response to the large increase in complaints to the Constitutional Court concerning length of proceedings and in order to prevent proceedings before the Constitutional Court themselves becoming too lengthy, a supplementary remedy was introduced under Articles 27 and 28 of the Courts Act, by which the court directly superior to that dealing with proceedings would hear complaints about their excessive length; the Constitutional Court will only deal with the cases that are not admissible under the new Courts Act remedy or where this remedy has been exhausted. The effects of the new remedy have not yet become clear and the Strasbourg Court has not had an opportunity fully to evaluate it.
[67] See *Kaić & otrs v. Croatia*, App. No. 22014/04, judgment of 17 October 2008, paras. 40 & 43. The Court has subsequently found that the new remedy under the Courts Act (see footnote 59 above), in combination with the constitutional complaint, could provide an effective remedy in the situation where the court responsible for the proceedings had not complied with the Constitutional Court's time-limit: see *Roje v. Croatia*, App. No. 8301/06, decision of 25 June 2009.

63. The Croatian Constitutional Court has held that only the conduct of judicial authorities is relevant in the context of the Section 63 constitutional complaint; the duration of the administrative stage of proceedings is not taken into account when determining the reasonableness of their overall length. In 2007, the Constitutional Court decided, in conformity with the Strasbourg Court's criteria, that the period during which the case was pending before the administrative authorities should also be taken into consideration when assessing the length of administrative proceedings.

64. There is, however, an alternative remedy under the Administrative Procedure Act and Administrative Disputes Act:

(i) Article 218(1) of the Administrative Procedure Act provides that in simple matters, where there is no need to undertake separate examination proceedings, an administrative body is obliged to issue a decision within a period of one month after a party lodged a request. In all other, more complex, cases, an administrative body is obliged to issue a decision within a period of two months after the request was lodged.

(ii) Article 218(2) enables a party whose request has not been decided within the periods established in the previous paragraph to lodge an appeal, as if his request had been denied.

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

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

65. The Strasbourg Court has found inadmissible a case in which the applicant had failed to pursue a claim under the above set of provisions.[68]

A remedy to expedite civil proceedings

66. In Austria, Section 91 of the Courts Act provides for a remedy to expedite civil proceedings, as follows:

> "(1) If a court is dilatory in taking any procedural step, such as announcing or holding a hearing, obtaining an expert's report, or preparing a decision, any party may submit a request to this court for the superior court to impose an appropriate time-limit for the taking of the particular procedural step; unless sub-section (2) of this section applies, the court is required to submit the request to the superior court, together with its comments, forthwith.
>
> (2) If the court takes all the procedural steps specified in the request within four weeks of receipt, and so informs the party concerned, the request is deemed withdrawn unless the party

[68] See *Štajcar v. Croatia*, App. No. 46279/99, decision of 20 January 2000.

declares within two weeks after service of the notification that it wishes to maintain its request.

(3) The request referred to in sub-section (1) shall be determined with special expedition by a Chamber of the superior court consisting of three professional judges, one of whom shall preside; if the court has not been dilatory, the request shall be dismissed. This decision is not subject to appeal."

67. In the case of *Holzinger v. Austria*, the Court found this remedy to be effective. It has since reiterated this finding in other cases against Austria.[69]

A remedy to expedite criminal proceedings

68. In Portugal, Articles 108 and 109 of the 1987 Code of Criminal Procedure provide for a person who alleges that criminal proceedings against him have been excessively lengthy – for example, where the statutory time-limits for any step of the proceedings have been exceeded – to apply to the Attorney-General or the High Judicial Council for an order to expedite those proceedings. If such an application is successful, it may, among other effects, lead to a decision to give the prosecutor responsible for the investigation notice to close that investigation, or if need be, to request the judge to take the necessary steps, such as fixing a date for the hearing or closing the judicial investigation. The Court has found that these provisions constitute "a true legal remedy enabling a person to complain of the excessive length of criminal proceedings".[70]

[69] Most recently in the case of *Saccoccia v. Austria* App. No. 69917/01, decision of 5 July 2007.
[70] See *Tomé Mota v. Portugal*, App. No. 32082/96, decision of 2 December 1999, para. 2.

> *7. to this end, where proceedings have become excessively lengthy, ensure that the violation is acknowledged either expressly or in substance and that either:*
>
> *[…]*
> *b. redress is afforded to the victims for disadvantage they have suffered; […]*

General principles

69. The Court has repeatedly stated that "a decision or measure favourable to the applicant is not in principle sufficient to deprive him of his status as a "victim" unless the national authorities have acknowledged, either expressly or in substance, and then afforded redress for, the breach of the Convention."[71] It should be noted that the requirement that a remedy be sufficiently certain suggests that express acknowledgement of a violation may be preferable. An example of acknowledgement "in substance" can be found in the Court's decision in the case of *Menelaou v. Cyprus*, in which the relevant domestic court, whilst not expressly acknowledging a violation of the right to trial within a reasonable time, stated that:

> "It is a fact that the lapse of six years from the date of the applicant's arrest and more than seven years (almost eight) from the commission of the offences for which he has been found guilty, constitutes in itself a period of time that should be taken into account in the determination of an appropriate sentence. The uncertainty of the pending proceedings leading to understandable anxiety about one's guilt or innocence is in itself harrowing, but this is aggravated by the circumstances of this case...
> ....
> We have carefully examined the circumstances of the present case knowing that they lasted for such a long period that their duration must have a substantial impact on the sentence as a primary mitigating factor."[72]

70. As to the general requirements for a remedy providing redress to be effective, see further under paras. 23-27 above.[73]

71. A variety of approaches exist in member States for providing remedies to offer redress for excessive length of proceedings, which may be summarised as follows.[74] (It should be noted that this section deals only with compensatory redress. The question of specific forms of non-monetary redress in criminal or administrative proceedings will be considered below – see paras. 113-118 below.)

72. In civil and administrative proceedings, compensation may be sought from the same authority that decides on the reasonableness of the length of proceedings or in separate proceedings. It may be granted on account of some identifiable fault in the proceedings (e.g. that of a judge or another court official, the heavy workload of tribunals, an irregularity in proceedings such as non-compliance with an obligation to act within a statutory time limit or an unlawful act or omission). More generally, it may be granted on account of a

[71] See e.g. *Riccardo Pizzati v. Italy*, App. No. 62361/00, Grand Chamber judgment of 29 March 2006, para. 70.
[72] See *Menelaou v. Cyprus*, App. No. 32071/04, decision of 12 June 2008.
[73] See also Committee of Ministers' Interim Resolution CM/ResDH(2008)1 on the execution of the judgments of the European Court of Human Rights in 232 cases against Ukraine relative to the failure or serious delay in abiding by final domestic judicial decisions delivered against the state and its entities as well as the absence of an effective remedies (adopted on 6 March 2008); and CM/ResDH(2009)43 on the execution of the judgments of the European Court of Human Rights in 145 cases against the Russian Federation relative to the failure or serious delay in abiding by final domestic judicial decisions delivered against the state and its entities as well as the absence of an effective remedy (adopted on 19 March 2009**).**
[74] See the Venice Commission Report, doc. CDL-AD(2006)036rev, paras. 72-80 and 84-87.

malfunctioning of justice or denial of justice or a violation of the right to trial within a reasonable time. Several member States' highest jurisdictions consider that excessive length of proceedings is to be treated as a "fault," "unlawful act," "malfunctioning of administration of justice," "denial of justice" or "irregularity in the conduct of proceedings" that engages the State's responsibilities and obliges it to make redress.

73. Compensation may take different forms: pecuniary compensation (of material or non-material damage, or both); assumption of a decision in the applicant's favour; or exemption from legal costs.

74. The question of the amount of compensation will be dealt with under the relevant paragraph 9 of the Recommendation (see paras. 106-112 below).

Examples of existing national practice

Constitutional complaint

75. Article 39 of the Maltese Constitution provides for the right to a fair hearing within a reasonable time. The remedies for complaints of violation of this right consist of lodging an application before the Civil Court (First Hall) in its constitutional jurisdiction, with a further appeal to the Constitutional Court if necessary. The remedy is available with respect to civil, administrative and criminal proceedings. The Strasbourg Court has found it to be generally effective.[75]

76. In certain cases, however, the levels of compensation awarded have been insufficient, although there is no limit on the potential amount of compensation that could be awarded.[76] There have also been instances of problematic implementation of the remedy: for instance, the domestic courts have overlooked the issue of length of proceedings, despite it having been raised before them and the Strasbourg Court subsequently finding a violation;[77] or they have found a violation but awarded only minimal redress.[78] Other States seeking to introduce such a remedy should ensure that such problems are avoided.

Judicial remedies

77. The French legal system includes two compensatory judicial remedies for excessive length of proceedings, one concerning judicial proceedings, the other administrative.

78. As to judicial proceedings, Article L. 141-1 of the Code de l'organisation judiciaire (Code of legal organisation) provides that:

> "The State shall be under an obligation to compensate for damage caused by a malfunctioning of the system of justice. This liability shall be incurred only in respect of gross negligence or a denial of justice."

79. The French domestic courts have since interpreted this provision to cover all cases of excessive length of proceedings:

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[75] See *Zarb v. Malta*, App. No. 16631/04, judgment of 4 July 2006 & *Central Mediterranean Development Corporation Limited v. Malta*, App. No. 35829/03, judgment of 24 October 2006.
[76] See *Zarb v. Malta*, op. cit. & *Central Mediterranean Development Corporation Limited v. Malta*, op. cit.
[77] See *Bezzina Wettinger and otrs v. Malta*, App. No. 15091/06, judgment of 8 April 2008, paras. 60 & 83.
[78] See *Central Mediterranean Development Corporation Limited v. Malta*, op. cit. and *Zarb v. Malta*, op. cit. It should be noted that in both cases, the Court stated that "The mere fact that the amount of compensation given was low does not render the remedy in itself ineffective" (see para. 51 in both judgments).

> "Anyone who has submitted a dispute to a court shall have the right to have his case heard within a reasonable time; an infringement of that right, which constitutes a denial of justice within the meaning of Article L. 781-1 of the Code of Judicial Organisation,[79] shall oblige the State to compensate for the damage caused by the malfunctioning of the system of justice".[80]

80. As to administrative proceedings, the French Conseil d'Etat has confirmed that a party wishing to complain of the excessive length of proceedings may have recourse to a remedy consisting of an acknowledgement of a violation and compensation for resulting damages. In doing so, it reversed earlier case law that had required "gross negligence" on the part of the administrative authority concerned.[81] Furthermore, this judgment clarified that the remedy allowed compensation for all pecuniary and non-pecuniary damages. The procedure has since been modified: under Article R311-1, 7° of the Code of Administrative Justice, applications must now first be made to the *Garde des Sceaux* (Minister of Justice) and any express or implied refusal may subsequently be appealed to the Conseil d'Etat.

81. These remedies are available at all stages of proceedings, whether pending or concluded. The Strasbourg Court has found them to be effective for judicial [82] and administrative [83] proceedings respectively.

82. There have, however, been occasional problems relating to the length of the remedial proceedings themselves, which may be instructive for other States considering pursuing such options. In two cases, one concerning judicial proceedings,[84] the other administrative,[85] the Court thus found that the length of the compensatory proceedings themselves had been excessive: in the former, the Court concluded that the applicant could not reasonably be required to have recourse to further remedial proceedings at domestic level; in the latter, that the award of compensation had been insufficient to compensate also the further delay.

[79] The fore-runner of Article L. 141-1.
[80] Paris Court of Appeal judgment of 20 January 1999; see *Mifsud v. France*, App. No. 57220/00, Grand Chamber decision of 11 September 2002.
[81] See *Garde des Sceaux, Ministre de la Justice c. Magiera*, Assemblée du contentieux du Conseil d'Etat, 28 June 2002.
[82] See *Mifsud v. France*, op. cit., para. 17; also *Garretta v. France*, App. No. 2529/04, decision of 4 March 2008.
[83] See *Broca et Texier-Micault v. France*, Apps. No. 27928/02 & 31694/02, judgment of 21 October 2003, para. 19; also *Trummel & Le Gall v. France*, App. No. 15406/04, decision of 25 November 2008.
[84] See *Vaney v. France*. App. No. 53946/00, judgment of 28 February 2005.
[85] See *Sartory v. France*, App. No. 40589/07, judgment of 24 September 2009, paras. 26-27.

> *7. to this end, where proceedings have become excessively lengthy, ensure that the violation is acknowledged either expressly or in substance and that either:*
>
> *[…]*
> *or, preferably,*
> *c. allowance is made for a combination of the two measures;*

General principles

83. The Court has repeatedly stated that "Article 6(1) imposes on the Contracting States the duty to organise their judicial systems in such a way that their courts can meet each of its requirements, including the obligation to hear cases within a reasonable time. 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."[86]

84. The Court has also repeatedly stated that "A remedy is therefore effective if it can be used either to expedite a decision by the courts dealing with the case, or to provide the litigant with adequate redress for delays that have already occurred… Some States have understood the situation perfectly by choosing to combine two types of remedy, one designed to expedite the proceedings and the other to afford compensation."[87]

Examples of existing national practice

85. In Slovenia, the 2006 Act on the Protection of the Right to a Trial without Undue Delay of enables parties to judicial proceedings to use compensatory remedies only after expeditory remedies have been exhausted. The Court has noted that this "could have the legitimate aim of simplifying the procedure by, *inter alia*, preventing repeated filing of just satisfaction claims during the pending proceedings."[88]

86. The two types of remedy can be combined either in a single procedure or in separate procedures. An example of the former is Croatia, where Article 63(3) of the Constitutional Law on the Constitutional Court provides for both the setting of time limits for procedural steps and the fixing of amounts of compensation for the violation (see para. 60 and the footnote thereto, above). An example of the latter is Spain, where proceedings may be expedited through the *recurso de amparo* remedy before the Constitutional Court and damages for excessive length of judicial proceedings sought under Sections 292 et seq. of the Judicature Act by way of a claim made to the Ministry of Justice, with appeal against refusal to the administrative courts.[89]

<u>Complaint to the superior court</u>

[86] See e.g. *Gjonboçari & otrs v. Albania*, App. No. 10508/02, judgment of 23 October 2007, para. 76.
[87] See e.g. *Sürmeli v. Germany*, App. No. 75529/01, Grand Chamber judgment of 8 June 2006, paras. 99-100.
[88] See *Žunič v. Slovenia*, App. No. 24342/04, decision of 18 October 2007, in which the Court found that the Slovenian remedy appeared in principle to be effective, provided that applicants have prompt access to the compensatory remedy once use has been made of the acceleratory remedy (see paras. 49-50 & 54).
[89] The Court has found the Spanish compensatory remedy to be effective: see *Caldas Ramírez de Arellano v. Spain*, App. No. 68874/01, decision of 28 January 2003.

87. In Poland, the Law of 17 June 2004 (as amended with effect from 1 May 2009) provides for both types of remedy – expedition and compensation – in relation to pre-trial, judicial and enforcement/ execution proceedings. Under the Law, a party to proceedings may lodge a complaint that their right to trial within a reasonable time has been breached if the proceedings last longer than is necessary to examine the factual and legal circumstances of the case or to conclude enforcement/ execution proceedings. The criteria for examining unreasonable delay are based on the case law of the Strasbourg Court. When appropriate, the court examining the complaint is obliged to issue, within two months of the complaint being filed, an instruction to the relevant court or prosecutor to take appropriate action within a fixed time-limit. (A copy of the form for the written statement of claim required for lodging a complaint may be found at Appendix I.)

88. The text of the relevant provisions of the Law, as amended in 2009, reads as follows:

> Section 2 *(in so far as relevant)*:
> "1. A party to proceedings may lodge a complaint that their right to a trial within a reasonable time has been breached [in the proceedings] if the proceedings in the case last longer than is necessary to examine the factual and legal circumstances of the case ... or longer than is necessary to conclude enforcement proceedings or other proceedings concerning the execution of a court decision (unreasonable length of proceedings).
>
> 1(a). Article 2(1) shall similarly apply to preparatory proceedings."
>
> 2. In order to determine whether unreasonable delay has occurred in a case, it must be assessed, in particular: whether the court had acted in a timely and correct manner in order to adjudicate on the merits of the case; whether the prosecutor conducting or supervising preparatory proceedings had acted in a timely and correct manner in order to conclude such proceedings; or whether the court or court enforcement officer had acted in a timely and correct manner in order to conduct and conclude execution proceedings or other proceedings regarding enforcement of a court decision; having regard to the nature of the case in question, its factual and legal complexities, the significance of the case for the party who filed the complaint, the issues involved therein and the conduct of the parties, particularly of the party alleging unreasonable delay in the proceedings."
>
> Pursuant to section 3:
> "The following may lodge a complaint: ...
> *[Succeeding paragraphs set out the application of this principle in practice as it applies to different forms of proceedings and those that might have an interest therein.]*
>
> Section 4 *(in particular)*:
> "1. The complaint shall be examined by the court superior to the court conducting the impugned proceedings…"
> *[Succeeding paragraphs set out the application of this principle in practice between the various jurisdictions, including those responsible for preparatory and execution proceedings.]*
>
> Section 5 reads *(in particular)*:
> "1. A complaint about unreasonable delay in proceedings shall be lodged while the proceedings in question are pending. ..."
>
> Section 11 reads:
> "The court shall pass a decision within two months of the complaint being lodged."
>
> Section 12, providing for measures that may be applied by the court dealing with the complaint, reads *(in particular)*:
> "1. The court shall dismiss a complaint which is unjustified.

2. If the court considers that the complaint is justified, it shall find that there was unreasonable delay in the impugned proceedings.
3. At the request of the complainant or ex-officio, the court may instruct the court examining the merits of the case or the prosecutor conducting or supervising preparatory proceedings to take appropriate measures within a fixed time-limit, unless such instructions are manifestly redundant. Such instructions shall not concern the factual and legal assessment of the case.
4. If the complaint is justified the court may, at the request of the complainant, order the State Treasury or, when the complaint concerns unreasonable delay in proceedings conducted by a court enforcement officer, the relevant court enforcement officer, to pay an amount of money between PLN 2,000 and PLN 20,000.
5. If the amount of money is to be paid by the State Treasury, the payment shall be made by:
1) the court conducting the delayed proceedings, from its own budget;
2) the Office of the Circuit Prosecutor in whose circuit the delayed preparatory proceedings are being conducted and, as regards preparatory proceedings conducted by local branches of the Organised Crime Bureau of the National Prosecutor's Office, by the competent Appellate Prosecutor's Office, from their own respective budgets.
…"

Section 15 provides for an additional compensatory remedy:
"1. A party whose complaint has been allowed may seek, in separate proceedings, compensation for the damage it suffered as a result of the undue length of the proceedings, either from the State Treasury or, jointly and severally, from the State Treasury and the court enforcement officer.

2. The ruling allowing a complaint shall be binding on the court in civil proceedings for damages or compensation, with regard to the finding of unreasonable delay in proceedings."

Section 16 further provides that:
"A party which has failed to lodge a complaint about the undue length of the proceedings under section 5 (1) may claim, under Article 417 of the Civil Code, compensation for the damage which resulted from the undue length of the proceedings after the proceedings concerning the merits of the case have been concluded by a binding decision."

Section 17 concerns court fees for lodging a complaint *(in particular)*:
"1. The complainant shall pay a fixed court fee in the amount of PLN 100.
…
3. The court, having allowed or rejected the complaint, shall automatically reimburse the court fee to the complainant."

Section 18 lays down the following transitional rules in relation to the applications already pending before the Court (i.e. it gives limited retrospective effect to the Law):
"1. Within six months after the date of entry into force of this law persons who, before that date, had lodged a complaint with the European Court of Human Rights (hereinafter referred to as "the Court") complaining of a breach of the right to a trial within a reasonable time guaranteed by Article 6 (1) of the Convention for the Protection of Human Rights and Fundamental Freedoms ..., may lodge a complaint about the unreasonable length of the proceedings on the basis of the provisions of this law if their complaint to the Court had been lodged in the course of the impugned proceedings and if the Court has not adopted a decision concerning the admissibility of their case.
2. A complaint lodged under Section 18(1) shall indicate the date on which the application was lodged with the Court.
3. The relevant court shall immediately inform the Minister of Foreign Affairs of any complaints lodged under Section 18(1)."

89. The Court has found this remedy to be effective.[90]

90. Prior to the 2009 amendments, however, the Court had identified certain shortcomings in the Polish courts' application of the 2004 Law; notably the following, which may be instructive for other States considering adopting a similar approach:

(i) The domestic courts found a violation of the right to trial within a reasonable time but did not award any compensation or awarded insufficient compensation.[91] (The 2009 amendments increased the maximum amount that may be awarded from PLN 10,000 (c. €2,500) to PLN 20,000 (c. €5,000) and required domestic courts to award at least PLN 2,000 (c. €500) upon acknowledging undue delays in proceedings.)[92]

(ii) The domestic courts did not take into account the overall period of the examination of the case by the domestic courts, as required by the Strasbourg Court's case-law.[93] (Courts are now specifically required to examine the overall length of proceedings.)

(iii) The domestic courts did not examine delays in the pre-trial phase of criminal proceedings. (The scope of the Law was extended to include such delays.)

(iv) The domestic courts failed to take into account the period when proceedings were underway before the entry into force of the 2004 law, considering that it did not have retroactive effect.[94]

91. In addition to the 2004 Law, Article 417 of the Civil Code provides for the possibility of compensation for claims of unreasonable length of proceedings made after the proceedings in question have been concluded. Paragraph 3 of Article 417 reads as follows:

> "If damage has been caused by a failure to give a ruling or decision where there is a statutory duty to do so, reparation may be sought once it has been established in the relevant proceedings that the failure to give the ruling or decision was unlawful, unless specifically provided for otherwise."

92. The practice of Polish domestic courts confirms that it is possible to seek just satisfaction for non-pecuniary damage caused by the excessive length of proceedings on the basis of Article 448 of the Civil Code in conjunction with Article 417. The Court has found the remedy under Article 417 to be effective.[95]

Constitutional complaint

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[90] See e.g. *Charzyński v. Poland*, App. No. 15212/03, decision of 1 March 2005, para. 39.
[91] See *Jagiełło v. Poland*, App. No. 59738/00, judgment of 23 January 2007 and *Czajka v. Poland*, App. No. 15067/02, judgment of 13 February 2007, para. 56, respectively.
[92] It should be noted that fixing maximum amounts of compensation may cause problems, notably in cases of exceptionally long proceedings for which the maximum amount would not constitute sufficient redress. States should ensure that it is possible to accommodate such cases. In Poland, this is achieved through the possibility of combining the remedy under the 2004 Law with that under Article 417 of the Civil Code, for which there is no maximum amount. Furthermore, States that may wish to pursue an approach based on the Polish law (or any other existing domestic remedy with a maximum amount of compensation) should ensure that the figure is adjusted to take account of national circumstances, including relative per capita income.
[93] See *Majewski v. Poland*, App. No. 52690/99, judgment of 11 October 2005, para. 35 and *Wyszczelski v. Poland*, App. No. 72161/01, judgment of 29 November 2005, para. 26. In both cases, the domestic courts had examined only the period of time after the remittal of the case by the appellate court.
[94] *Kyzioł v. Poland*, App. No. 24203/05, judgment of 12 February 2008, paras. 11 & 25; also *Czaus v. Poland*, App. No. 18026/03, judgment of 22 January 2008.
[95] See *Krasuski v. Poland*, App. No. 61444/00, judgment of 14 June 2005, para. 72.

93. The Constitution of the Slovak Republic (as amended with effect from 1 January 2002) provides for both types of remedy – expedition and compensation – in relation to the judicial proceedings. The relevant parts of Article 127 of the Constitution read as follows:

> "1. The Constitutional Court shall decide on complaints lodged by natural or legal persons alleging a violation of their fundamental rights or freedoms or of human rights and fundamental freedoms enshrined in international treaties ratified by the Slovak Republic ... unless the protection of such rights and freedoms falls within the jurisdiction of a different court.
>
> 2. When the Constitutional Court finds that a complaint is justified, it shall deliver a decision stating that a person's rights or freedoms set out in paragraph 1 were violated as a result of a final decision, by a particular measure or by means of other interference. It shall quash such a decision, measure or other interference. When the violation found is the result of the failure to act, the Constitutional Court may order that [the authority] which violated such rights or freedoms should take the necessary action. At the same time the Constitutional Court may return the case to the authority concerned for further proceedings, order that such an authority abstain from violating fundamental rights and freedoms ... or, where appropriate, order that those who violated the rights or freedoms set out in paragraph 1 restore the situation existing prior to the violation.
>
> 3. In its decision on a complaint the Constitutional Court may grant adequate financial satisfaction to the person whose rights under paragraph 1 were violated."

94. The Court has found the complaint under Article 127 to be an effective remedy. Applicants in cases against Slovakia concerning length of proceedings should have recourse to this remedy notwithstanding that it was enacted after their applications had been filed with the Court or the European Commission of Human Rights.[96] The Court has subsequently emphasized that applicants are obliged to use the remedy in compliance with the formal requirements and time-limits laid down in domestic law, as interpreted and applied by domestic courts.[97] In this respect, it should be noted that according to the Constitutional Court's practice, a constitutional complaint about undue delays in the proceedings has to be lodged while the proceedings are still pending otherwise it will be rejected.

95. Nevertheless, the Court has also identified certain shortcomings in respect of application of Article 127 by the Constitutional Court, including:

(i) The Constitutional Court found a violation of the right to trial within a reasonable time but did not award any compensation or awarded insufficient compensation. [98]

(ii) The Constitutional Court did not take into account the overall period of the examination of the case by the domestic courts, as required by the Strasbourg Court's case-law.[99]

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[96] See *Andrášik and Others v. Slovakia*, App. No. 57984/00 etc., decision of 22 October 2002.
[97] See *Mazurek v. Slovakia*, App. No. 16970/05, decision of 3 March 2009.
[98] See, for example, *Komanický v. Slovakia (no. 5)*, App. No. 37046/03, judgment of 13 October 2009; *Báňas v. Slovakia*, App. No. 42774/04, judgment of 12 February 2008; *Judt v. Slovakia*, App. No. 70985/01, judgment of 9 October 2007; *Magura v. Slovakia*, App. No. 44068/02, judgment of 13 June 2006; *Sika v. Slovakia*, App. No. 2132/02, judgment of 13 June 2006; *Palgutová v. Slovakia*, App. No. 9818/02, judgment of 17 May 2005; *Horváthová v. Slovakia*, App. No. 74456/01, judgment of 17 May 2005; or *Gábriška v. Slovakia* App. No. 3661/04, judgment of 13 December 2005.
[99] See, among others, *Keszeli v. Slovakia*, App. No. 34602/03, judgment of 13 October 2009; *Softel v. Slovakia (no. 2)*, App. No. 32836/06, judgment of 16 December 2008; *Mikolaj and Mikolajová v. Slovakia*, App. No.

96. Notwithstanding these shortcomings, however, the Court has confirmed, in principle, the effectiveness of the constitutional complaint in numerous cases against the Slovak Republic given the sufficient redress afforded by the Constitutional Court.[100]

68561/01, judgment of 29 November 2006; *Jakub v. Slovakia*, App. No. 2015/02, judgment of 28 February 2006.

[100] See, for example, *Bartl v. Slovakia*, App. No. 50365/08, decision of 6 October 2009; *Becová v. Slovakia*, App. No. 23788/06, decision of 18 September 2007; *Cervanová v. Slovakia*, App. No. 47623/06, decision of 9 January 2007; *Šedý v. Slovakia*, App. No. 72237/01, judgment of 19 December 2006; *Machunka v. Slovakia*, App. No. 62217/00, decision of 27 June 2006; *Končeková v. Slovakia*, App. No. 63946/00, decision of 9 May 2006; *Bako v. Slovakia*, App. No. 60227/00, decision of 15 March 2005; *Dubjaková v. Slovakia*, App. No. 67299/01, decision of 19 October 2004; *Eštok v. Slovakia*, App. No. 63994/00, decision of 28 September 2004 or *Širancová v. Slovakia*, App. No. 62216/00, decision of 7 September 2004.

> *8. ensure that requests for expediting proceedings or affording redress will be dealt with rapidly by the competent authority and that they represent an effective, adequate and accessible remedy;*

General principles

97. The reasons why it is important that proceedings be determined within a reasonable time apply also to remedial proceedings intended to expedite or afford redress for excessive length.

98. The Court has thus repeatedly stated that "even if a remedy is 'effective' in that it allows for an earlier decision by the courts to which the case has been referred or the aggrieved party is given adequate compensation for the delays that have already occurred, that conclusion applies only on condition that an application for compensation remains itself an effective, adequate and accessible remedy in respect of the excessive length of judicial proceedings. Indeed, it cannot be ruled out that excessive delays in an action for compensation will affect whether the remedy is an adequate one."[101]

99. The Court has also stated that "the late payment, following enforcement proceedings, of amounts owing to the applicant cannot cure the national authorities' long-standing failure to comply with a judgment and does not afford adequate redress. […] The Court can accept that the authorities need time in which to make payment. However, in respect of a compensatory remedy designed to redress the consequences of excessively lengthy proceedings that period should not generally exceed six months from the date on which the decision awarding compensation becomes enforceable."[102]

100. Such problems have manifested themselves in practice in several countries, including, for example, Croatia (see para. 62 above) and France (see para. 82 above).

101. It should also be noted that procedural rules for remedies affording compensation within a reasonable time, even if not exactly the same as for ordinary applications for damages, must conform to the principles of fairness guaranteed by Article 6 of the Convention.[103] In this respect, the Venice Commission has recommended that "[t]he remedial proceedings should be conducted as swiftly as possible, and possible with fewer levels of jurisdiction. Complex determination of material damage should either follow the ordinary way, or be carried out by the authority competent to assess the reasonableness of the proceedings through a simplified but clearly fast-tracked procedure, the choice between the two being left to the applicant."[104]

102. Furthermore, rules on legal costs for seeking remedies for excessive length of proceedings may be different from those applicable in other types of proceedings and avoid placing an excessive burden on litigants where their action is justified. Costs should not be excessive such as to constitute an unreasonable restriction on the right to lodge such an application.[105] In this respect, it should be noted that in Poland, the court fee required of

[101] See e.g. *Scordino v. Italy (No. 1)*, App. No. 36813/97, Grand Chamber judgment of 29 March 2006, para. 195.
[102] See e.g. *Scordino v. Italy (No. 1)*, op. cit., para. 198.
[103] See e.g. *Scordino v. Italy (No. 1)*, op. cit., para. 200.
[104] See doc. CDL-AD(2006)036rev, para. 246.
[105] See e.g. *Scordino v. Italy (No. 1)*, op. cit., para. 201.

complainants is automatically returned whether the court allows or rejects the complaint (see para. 88 above).

Examples of existing national practice

103. As regards the need to deal with requests rapidly, several countries have sought to avoid the risk of remedial proceedings themselves becoming excessive lengthy by including time-limits for dealing with complaints. These include Poland (see para. 88 above), and Croatia (see the footnote to para. 60 above). Both the decision on the substance and its execution should be prompt.

104. In Bulgaria, where a court fails to perform a particular procedural step in due time, Article 255 of the Civil Code of 2006 allows a party, at any stage of the proceedings, to submit a petition to set an appropriate time limit for the performance of that step. Article 257 requires a judge of the superior court to examination the petition within one week after its receipt and, if the superior court finds an unreasonable delay, to set a time limit for performance of the step.[106]

105. In Slovakia, Article 56(5) of the Act on the Organisation of the Constitutional Court of the Slovak Republic, on the Proceedings before the Constitutional Court and the status of its Judges provides that, should the Constitutional Court decide to award appropriate financial compensation, the authority which has breached a fundamental right or freedom should be liable to pay it to the complainant within two months of the decision of the Constitutional Court entering into force.

[106] The Strasbourg Court has found the remedy under Article 217a of the Civil Code to be effective in principle, although not, on the facts, in particular cases before it: see e.g. *Jeliazkov & otrs v. Bulgaria*, App. No. 9143/02, judgment of 3 April 2008. Part of the problem lies in the fact that there is no compensatory remedy with which this remedy could, if necessary, be combined.

9. ensure that amounts of compensation that may be awarded are reasonable and compatible with the case law of the Court and recognise, in this context, a strong but rebuttable presumption that excessively long proceedings will occasion non-pecuniary damage;

General principles

106. The level of compensation awarded is an essential element in such a remedy being adequate and thus effective. It depends on the characteristics and effectiveness of the domestic remedy.[107]

107. Where a State has introduced a compensatory remedy, the State has a wider margin of appreciation to organise the remedy in a manner consistent with its own legal system and traditions and consonant with the standard of living in the country concerned. Domestic courts may refer to the amounts awarded at domestic level for other types of damage and rely on their innermost conviction, even if that results in awards of amounts that are lower than those fixed by the Court in similar cases. A State which has introduced a number of remedies, one of which is designed to expedite proceedings and one to afford compensation, may award amounts which are lower than those awarded by the Court, provided they are not unreasonable and the relevant decisions, which must be consonant with the legal tradition and the standard of living in the country concerned, are speedy, reasoned and executed very quickly.[108] States should take this as an incentive to introduce domestic remedies, noting that the level of compensation that the Court would expect to be paid to a victim under a combined remedy may be even lower than that under a purely compensatory approach.

108. There is a strong but rebuttable presumption that excessively long proceedings will occasion non-pecuniary damage.[109] The Court has considered that it is difficult to reconcile this with compensation being conditional on the respondent authority's fault;[110] although it should be noted that in some countries' laws, such fault is implicit in the very fact of excessive length of proceedings. In some cases, the length of proceedings may result in only minimal non-pecuniary damage or no non-pecuniary damage at all; if so, the domestic courts will then have to justify their decision by giving sufficient reasons.[111]

109. It is even conceivable that the court determining the amount of compensation will acknowledge its own delay and that accordingly, and in order not to penalise the applicant later, it will award a particularly high amount of compensation in order to make good the further delay.[112]

110. The authorities need time in which to make payment, but the period should not generally exceed six months from the date on which the decision awarding compensation becomes enforceable.[113]

Examples of existing national practice

[107] See *Apicella v. Italy,* App. No. 64890/01, Grand Chamber judgment of 29 March 2006, para. 94.
[108] See *Apicella v. Italy*, op. cit., paras. 78 & 95.
[109] See *Apicella v. Italy*, op. cit., para. 93.
[110] *Burdov v. Russia (No. 2),* App, No. 33509/04, Grand Chamber judgment of 15 January 2009, para. 111.
[111] See *Apicella v. Italy*, op. cit., para. 93. For examples of a case in which no compensation was necessary, see *Šedý v. Slovakia,* App. No. 72237/01, judgment of 19 December 2006, paras. 90-92 and *Nardone v. Italy,* App. No. 34368/02, decision of 25 November 2004.
[112] See *Apicella v. Italy*, op. cit., para. 96
[113] *Burdov v. Russia (No. 2),* op. cit., para. 108.

111. In the replies given to a questionnaire administered by the Venice Commission, the following information was provided:[114]

(i) In Denmark, when awarding compensation, "the courts may find guidance in the level of compensation set out by the [Court]."

(ii) In Lithuania, "the same criteria as those applied by the [Court] are used. The maximum amount of compensation is not set."

(iii) In Poland, the amount of compensation "depends from individual circumstances of the case – the domestic court shall applied criteria fixed by [the Court]."

(iv) In Slovakia, when deciding on the claim for pecuniary compensation for non-material damage, "the Constitutional Court generally also considers the relevant case-law of the [Court]... There is, according to binding law, no maximum amount of compensation to be awarded."

(v) In addition, in the United Kingdom, in "the relatively rare cases in which compensation is available, it will be linked to the [Court's] criteria... There is no prescribed maximum."

[114] See "Replies to the Questionnaire," doc. CDL(2006)026.

10. consider providing for specific forms of non-monetary redress, such as reduction of sanctions or discontinuance of proceedings, as appropriate, in criminal or administrative proceedings that have been excessively lengthy;

General principles

112. Non-monetary redress can take the form of an appropriate reduction in some cost, penalty or disadvantage that the individual would otherwise suffer. Indeed, such redress may prove more valuable to the individual and, furthermore, may have budgetary advantages for the national authorities concerned, since it may not involve financial outlay. It is imperative, however, that it be applied in accordance with the overall interests of justice (see further under para. 115 below).

113. The Court has stated that "the mitigation of a sentence on the ground of the excessive length of proceedings does not in principle deprive the individual concerned of his status as a victim within the meaning of Article 34 of the Convention. However this general rule is subject to an exception when the national authorities have acknowledged in a sufficiently clear way the failure to observe the reasonable time requirement and have afforded redress by reducing the sentence in an express and measurable manner."[115]

114. The Venice Commission has noted that "In criminal cases, there exist specific forms of compensatory remedies which are to be considered as forms of *restitutio in integrum*: the discontinuance of the prosecution; the mitigation of reduction of the sentence; an acquittal; the low-fixing of a fine; the non-deprivation of civil and political rights. They may cause however, in some cases, a lack of substantive justice. Acquittal and discontinuance of the proceedings should be only applied in exceptional cases. In the motivation used by the judge when assessing the length of the proceedings, the link between the latter and the assessment of the punishment should be made explicit, and it would seem appropriate to indicate what sentence would have been imposed if the duration [of the proceedings] had been reasonable."[116]

Examples of existing national practice

Criminal proceedings

115. In Belgium, Article 21(c) of the Code of Criminal Procedure provides that courts may make a finding of guilt without penalty or impose a sentence below the statutory minimum if proceedings have been of unreasonable duration. Under the case law of the Court of Cassation, the sentence reduction must be real and measurable in relation to the sentence that the court would have imposed if it had not found the proceedings to be excessively long. However, the Court of Cassation has accepted that when their excessive length has affected the taking of evidence or the rights of the defence, a decision that the prosecution is inadmissible may be required. The Belgian reply to the Venice Commission questionnaire notes that a finding of guilt without penalty does not preclude a ruling on related civil claims, whereas a decision that the prosecution is inadmissible means that it is no longer possible to rule on the civil action.[117]

Administrative proceedings

[115] See e.g. *Beck v. Norway*, App. No. 26390/95, judgment of 26 September 2001, para. 27.
[116] See doc. CDL-AD(2006)036rev, para. 240.
[117] See doc. CDL(2006)026, p.23.

116. In Austria, Section 51(7) of the 1991 Administrative Penal Act provides that, upon the expiry of a fifteen month period after an appeal has been served against a fine in proceedings in which only the defendant has the right to appeal, the fine shall become ineffective by law and the proceedings shall be dismissed. The period of duration of proceedings in the Constitutional Court, the Administrative Court or the Court of the European Communities shall not be included in this term.

117. In an Austrian case concerning road traffic offences, the Independent Administrative Panel had expressly acknowledged that the duration of the proceedings had been excessive and reduced the fine firstly from €1,162 to €650, finding that the length of the proceedings had to be considered as a special mitigating circumstance, and subsequently to the applicable minimum of €581 on account of the excessive duration of the proceedings. Compared to the initial fine which was twice as high, this constitutes a considerable reduction. It was granted expressly to compensate for the excessive duration of the proceedings. The Strasbourg Court was therefore satisfied that redress for the unreasonable length of the proceedings was afforded in an express and measurable manner.[118]

[118] See *Mittelbauer v. Austria*, App. No. 2027/06, decision of 12 February 2009.

11. where appropriate, provide for the retroactivity of new measures taken to address the problem of excessive length of proceedings, so that applications pending before the Court may be resolved at national level;

General principles

118. Application of new measures to address cases of excessive length of proceedings that are or could be the object of an individual application to the Court has the advantage of extending their scope to cases that may otherwise be without domestic remedy. It may also have budgetary advantages for States (see further under para. 108 above).

119. Application of new measures to existing cases may be subject to various limitations. It may be limited to cases in which applications have already been made to the Strasbourg Court, for instance, or it may have effect only for a limited period after the new measure comes into effect.

Examples of existing national practice

120. As noted above, the Polish Law of 2004 includes a provision on retroactivity (see Section 18 at para. 88 above). This applies only to cases pending before the Court.

121. In the Czech Republic, amendments to Law no. 82/1998 (on State liability for damage caused in the exercise of public authority by an irregularity in a decision or the conduct of proceedings) provided for adequate compensation (including for non-pecuniary damage) for violations of the reasonable time requirement. The amendments had retroactive effect, so that an applicant with a case already pending before the Strasbourg Court would have the possibility of obtaining a compensatory remedy at domestic level within one year of entry into force of the amendments.

> *12. take inspiration and guidance from the annexed [Guide to Good Practice] when implementing the provisions of this recommendation and, to this end, ensure that the text of this Recommendation and of the annexed [Guide to Good Practice], in the language(s) of the country, is published and disseminated in such a manner that it can be effectively known and that the national authorities can take account of it.*

122. As noted in the Introduction, the Guide to Good Practice is intended to explain the importance of the Recommendation and provide guidance, including in the form of concrete examples, on how the various provisions may be implemented. It is an essential companion to the Recommendation itself.

123. The provision calling on States to translate, publish and disseminate the Recommendation and Guide to Good Practice is based on Recommendation Rec(2002) 13 on the publication and dissemination in the member States of the text of the Convention and of the case law of the Court. Violations of the right to trial within a reasonable time, and the lack of effective domestic remedies for such violations, constitute the largest number of violations in applications to the Court and are thus responsible for a considerable proportion of the number of pending cases. The Recommendation and Guide are themselves based on the Court's extensive case law on the issue. It is thus entirely justified, especially in States where the problem is widespread or systemic, that the Recommendation and Guide be translated, as appropriate, and published and disseminated to all those national authorities potentially involved in finding a solution.

Appendix I

Warsaw, 15 September 2009

Regional Court in Warsaw
(the court competent to recognize the case)
via
District Court in Warsaw
(the court hearing the original case)

Jan Kowalski, Warsaw, ul. Kolejowa 144
(plaintiff)
With regard to the action of Jan Kowalski (with the participation of Henryk Kowalski) for division of the inheritance.
(details of the original case)

Complaint on infringement of the party's right to have a case examined in court proceedings without undue delay

I bring an action for ascertainment that undue delay of proceedings has occurred in the case ref. no XXX NS 1000/03 that is being heard by District Court in Warsaw

and also

1. for the issuance of instructions to the court hearing the case to take appropriate action within a stipulated period of time, by
   - urging the court's expert to prepare an opinion within 7 days and submit with and the case files with the court;
   - appointing a hearing day within 21 days.
2. for awarding from the State Treasury in my favour the amount of PLN 6000 for the undue delay of the above-mentioned proceedings.

Substantiation of the complaint should contain the following data:

1. length of the court proceedings and consequences it has caused for the plaintiff – in order to justify the motion for pecuniary award;
2. date of the first hearing and periods of unjustified intervals between hearings;
3. timeliness and the regularity of activities undertaken by the court and parties;
4. indication whether the court had prepared hearings properly and whether the court took full advantage of them;
5. indication whether the direction of hearing of evidence was properly specified and on what stage of the proceedings it took place;
6. terms of the adjudgement of appeals and the adjugement of formal motions lodged by parties;
7. timeliness of preparation of expert opinions and variety of disciplinary measures imposed by the court;
8. imposition of an administrative supervision over the proceedings;
9. complexity of the case;
10. contributory behaviour of the parties with regard to the length of the proceedings, in particular, the submission of extensive pleadings which required undertaking additional activities; gradual submission of new claims, facts and evidences; absence at hearings; submission of motions for adjournment of hearings;
11. prognosis for the term of the conclusion of the proceedings and for indispensable activities to be undertaken – in order to justify the motion for the issuance of instructions to the court.

.....

(plaintiff's signature)