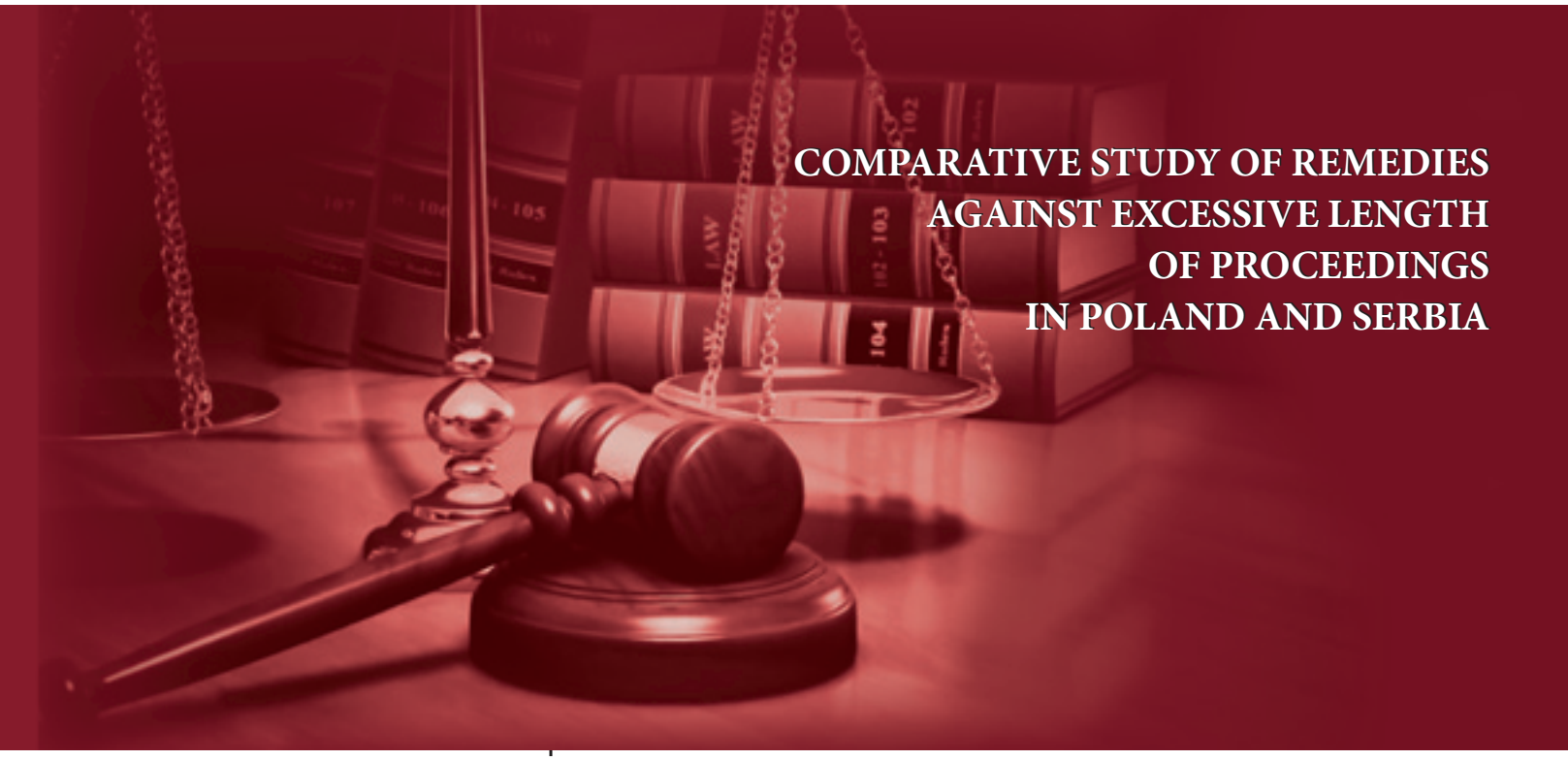

COMPARATIVE STUDY OF REMEDIES AGAINST EXCESSIVE LENGTH OF PROCEEDINGS IN POLAND AND SERBIA

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COUNCIL OF EUROPE
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A COMPARATIVE STUDY OF REMEDIES AGAINST EXCESSIVE LENGTH OF PROCEEDINGS IN POLAND AND SERBIA

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EXECUTIVE SUMMARY

The purpose of the reasonable time guarantee is to protect "all parties to court proceedings...against excessive procedural delays" (*Stögmüller v. Austria*, 1602/62, 10 November 1969, § 5), and "underlines the importance of rendering justice without delays which might jeopardize its effectiveness and credibility" (*H. v. France*, 10073/82, 24 October 1989, § 58) (Harris D., O'Boyle M., Bates E., Buckley E., *"Harris, O'Boyle & Warbrick. Law of the European Convention on Human Rights"*, Oxford University Press, Second Edition, 2009, p. 278).

This report analyses the problem of excessive length of proceedings and remedies established in Poland and Serbia. It presents the situation in both countries taking into account the recent legislative reforms in Serbia and pertinent Polish and European case-law.

Serbia amended the Law on the Organisation of Courts in November 2013, transferring the cases related to the excessive length of proceedings from the Constitutional Court to the "immediately higher court," or, in this case, one of four Serbian Appellate Courts. The Law on Protection of the Right to a Trial within a Reasonable Time was adopted on 7 May 2015. The Law will enter into legal force on 1 January 2016. These reforms were carried out in order to provide an effective remedy for the excessive length of proceedings in compliance with the Article 13 of the European Convention on Human Rights (ECHR).

The objective of this report is not to comment on the Serbian legislation. Rather, it is presented as a comparative study of the Polish and Serbian experiences. Poland is ahead of Serbia in the implementation of the Convention, as it has been in effect there for ten years longer than in Serbia. This report also provides a pilot judgment concerning the effective remedy against excessive length of proceedings, which was recently delivered by the Court.

In 2004, Poland established an effective remedy for the excessive length of proceedings (Law of 17 June 2004 on complaint about breach of the right to have a case examined in judicial proceedings without undue delay Dz.U. (Journal of Laws) from 2004 No. 179 Item 1843 – "the 2004 Act"). The Act itself needed to be amended in 2009 because the remedy did not cover the preliminary proceedings and the level of maximum compensation

was deemed to be too low (Law of 20 February 2009 on amendments to the law on complaint about breach of the right to have a case examined in judicial proceedings without undue delay Dz.U. (Journal of Laws) from 2009 No. 61 Item 498 – "the 2009 Amendment"). Poland's remedy was ultimately presented as an example for other countries to follow, such as Slovenia where a law has been passed following the adoption of the European Court of Human Rights' (ECtHR) judgment *Lukenda v. Slovenia* (23032/02, 6 October 2005). However, the national case law has since shown that the interpretation of the 2004 Act was not appropriate, and it had to be clarified by a Resolution of the Supreme Court of 28 March 2013 (III SPZP 1/13). 594 cases are being communicated under the frame of the pilot judgment *Rutkowski and others v. Poland* (nos. 72287/10, 13927/11 and 46187/11, 7 July 2015), in which insufficient compensation was central to a violation of Article 6 § 1.

The challenges faced by the Polish legislators and judges are reflective of the general difficulty of ensuring that judicial systems act promptly and maintain a high level of quality in their judgments. Taking into account the power of judges' interpretation of law, which is confirmed by the Polish experience, this report intends to highlight the importance of the training of judges in the future months before the Serbian Law enters into force.

The pilot judgment *Rutkowski and others v. Poland,* cited above, should be important for Serbian national authorities at this particular moment. This judgment is a reminder that "a failure to deal with a case within a reasonable time is not necessarily the result of fault or omission on the part of individual judges or prosecutors. There are instances where delays result from the State's failure to place sufficient resources at the disposal of its judiciary or from deficiencies in domestic legislation pertaining to the organisation of its judicial system or the conduct of legal proceedings" (*Rutkowski and others*, § 184). The Report therefore suggests that the authorities have to take measures, of both organisational and legislative character, on the basis of thorough analysis of the key factors which lead to the excessive numbers of backlogs of cases. In the judgment *Gossa v. Poland* (no. 47986/99, 9 January 2007), the Court emphasised that the chronic backlog of a court does not constitute a valid justification of a delay in the treatment of cases. The Report emphasises that expediency should never be at the expense of the overall fairness of the system and the quality of judicial decisions.

The central concern is that speediness of the proceedings should not be the origin of eventual mistakes committed by the judges. If this is the case, not only will the proceedings be longer, because of the remittals of higher instances, but also the fairness of the proceed-

ings under Article 6 of the Convention may be breached. Again, in the judgment *Rutkowski and others v. Poland*, cited above, the Court recalls: "Although the Court is not in a position to analyse the juridical quality of the case-law of the domestic courts, the remittal of cases for re-examination is usually ordered as a result of errors committed by lower courts. The repetition of such orders within one set of proceedings discloses a deficiency in the judicial system. Moreover, this deficiency is imputable to the authorities and not the applicants (see, among many others, *Wierciszewska v. Poland*, no. 41431/98, § 46, 25 November 2003; *Matica v. Romania*, no. 19567/02, § 24, 2 November 2006; and *Vlad and Others v. Romania*, nos. 40756/06, 41508/07 and 50806/07, § 133, 26 November 2013)" (*Rutkowski and others*, § 149).

The continuous education of judges and prosecutors on ECtHR case law is necessary in preventing an increasing number of cases against Serbia. Perhaps most important, however, is ensuring that each individual is protected from enduring trials of excessive length. Indeed, prevention should be privileged over the redressing of the violation: "The best solution in absolute terms is indisputably prevention. Where the judicial system is deficient with regard to the reasonable-time requirement in Article 6 § 1 of the Convention, 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" (*Rutkowski and others*, § 173). For the State, it is also the best solution to avoid the large-scale payment of significant sums of money to the victims of excessive length of proceedings as compensation.

This approach also conforms to the principle of subsidiarity: "Once such a defect has been identified, it falls to the national authorities, under the supervision of the Committee of Ministers, to take, retroactively if appropriate the necessary remedial measures in accordance with the subsidiary character of the Convention, so that the Court does not have to repeat its finding in a lengthy series of comparable cases" (*Rutkowski and others*, § 200). The Report provides a number of relevant elements that will facilitate such an analysis, thus enabling the Serbian authorities to choose appropriate measures.

INTRODUCTION

I. Context

This document has been prepared at the request of the Council of Europe pursuant to the Council of Europe project, "Support to the judiciary in Serbia in the implementation of the European Convention on Human Rights" and is based on a fact-finding mission conducted from 26 to 28 March 2014 in Belgrade, Serbia and visits of Serbian judges to the Council of Europe in October 2014 and in May 2015, during which the author of the report conducted interviews with the relevant stakeholders.

The request for the fact-finding mission originates from recent changes to the Law on Protection of the Right to a Trial within a Reasonable Time. The Law was adopted on 7 May 2015, but will enter into legal force on 1January 2016.

The Law completely changes the current system of protection of the right to a trial within a reasonable time, and defines the legal remedies that protect this right. In Serbian legislation, this legal matter was covered by just a few articles of the Law on Organization of Courts ("The Official Gazette of Republic of Serbia", No. 101/2013), which was obviously not enough to solve the problem of frequent violations of the right to a trial within a reasonable time.

The four Appellate Courts of Kragujevac, Niš, Belgrade and Novi Sad, and the Supreme Court of Cassation deal with cases involving the problem of excessive length of proceedings.

The reason for this delay in the Law's coming into force is to give the judges time to prepare for compliance with the Law. If the Serbian domestic courts dealing with cases related to Article 6 achieve harmonisation and consistency of their case law, and if they efficiently implement the standards established by the European Court of Human Rights (ECtHR), the further increase of potential new applications against Serbia before the ECtHR might be prevented through the action undertaken by the project. It may allow for an increase in the level of judicial protection of each individual and to help the judiciary function in compliance with the requirements of the European Convention on Human Rights (ECHR). In consequence, the knowledge of the national judges and judicial assistants should be enhanced.

The implementation of these measures and the recent legislative changes require a longer time-frame than originally envisaged by the project, as well as additional funds as more activities are to be organised for the purpose of acquainting judges dealing with such cases with the reasonable time standard established by the ECtHR.

II. General rules of "reasonable time" established by the ECtHR

The right to a fair and public hearing within a reasonable time is established in Article 6 § 1 of the Convention and covers administrative, civil and criminal proceedings.

The period to take into consideration *ratione temporis* begins at the date that the State ratified the ECHR. The Court may, however, have regard to facts prior to ratification inasmuch as they could be considered to have created a situation extending beyond that date or may be relevant for the understanding of facts occurring after that date (*Hutten-Czapska v. Poland* [GC], §§ 147–53; *Kurić and Others v. Slovenia* [GC], §§ 240–41, *"Practical guide on admissibility criteria, European Court of Human Rights"*, European Court of Human Rights, 2014, pp. 46 –52, http://www.echr.coe.int/Documents/Admissibility_guide_ENG.pdf

Delay of departure, *dies a quo*, in civil matters is the date when the action was lodged before the competent court or when the applicant joined the ongoing proceedings (*Bock v. Germany*, 29 March 1989, § 35, Series A, no.150). The period can include the mandatory preliminary administrative procedure that precedes the civil judicial proceedings (*Kress v. France* (GC) 39594/98, § 90, ECHR 2001-VI; *Siegel v. France,* no. 36350/97, ECHR 2000-XII). In criminal proceedings, the time period begins from the date of notification of charges (*Neumeister v. Austria*, 27 June 1968, § 18, Series A, no. 8), e.g. the date of opening of the preliminary proceedings (*Ringeisen v. Austria*, 16 July 1971, § 110, Series A, no. 13), the date on which the arrest warrant or search warrant was issued (*Eckle v. Germany*, 15 July 1982, § 75, Series A, no. 51) or the date of the applicant's actual arrest (Wemhoff v. Germany, 27 June 1968, § 19, Series A no. 7) etc. (see e.g. Petrović-Škero V., Rajska D., *"Protection of the right to a trial within a reasonable time in the court proceedings"*, Council of Europe and Serbian Supreme Court of Cassation, May 2015).

Concerning the term of delay *dies ad quem*, the period taken into consideration by the Court ends when the last decision delivered by the domestic legal system has become final and has been executed. The Member States are not obligated to establish the extraordinary remedies before the Supreme Court. However, if these remedies

exist, they are covered by the guarantees of Article 6 of the Convention (*Siałkowska v. Poland*, no. 8932/05, § 106, 22 March 2007).

Constitutional disputes may also come within the ambit of Article 6 if the constitutional proceedings have a decisive bearing on the outcome of the dispute in the ordinary courts (*Ruiz-Mateos v. Spain,* 12952/87, 23 June 1993, Practical guide on admissibility criteria, Council of Europe/European Court of Human Rights, 2014, pp. 46 –52, http://www.echr.coe.int/Documents/Admissibility_guide_ENG.pdf).

The ECtHR's case-law has worked out, already abundant, criteria to establish if the length of proceedings was excessive (*Frydlender v. France* [GC], no. 30979/96, ECHR 2000-VII, Garlicki L., Implementacja orzecznictwa Europejskiego Trybunału Praw Człowieka w ustawodawstwie krajowym – problemy przewlekłości postępowania, Biul. BIRE 2002, Nr 2, p. 8 sqq.; Vitkauskas D., Dikov G. "Ochrona prawa do rzetelnego procesu sądowego w Europejskiej Konwencji o Ochronie Praw Człowieka, Council of Europe, 2012, pp. 77–81):

1) Complexity of the case (*Papachelas v. Greece* (GC), 31423/96, § 39, 25 March 1999) taking into account the factual or legal issues, e.g. number of parties or defendants (*Angelucci v. Italy*, 12666/87, 19 February 1991);
2) Conduct/actions of the applicant, e.g. if the applicant fails to attend hearings by fault (*Skočajić and Bjelić v. Serbia*, 9460/05, 18 September 2007);
3) Conduct/actions of the national authorities, e.g. failure to set down (hearings) within a longer time period (*Napijalo v. Croatia*, 66485/01, 13 November 2003).

These elements are assessed by the Court in each individual case, subject to specific circumstances on the basis of the above-mentioned criteria established by the Court.

The most recent criterion in examining the length of proceedings is the stake for the applicant in the dispute (Hofmański P., Wróbel A., *"Rozpoznanie sprawy w rozsądnym terminie"* [in] *"Konwencja o Ochronie Praw Człowieka i Podstawowych Wolności"*, vol. I, Garlicki L., Beck 2010).

There are cases that require particular diligence, such as family matters (*V.A.M. v. Serbia*, 39177/05, § 98–101, 13 March 2007), employment (*König v. Germany*, 6232/73, 28 June 1978, § 111), and legal capacity of persons (*Jevremović v. Serbia*, 3150/05, §79–81, 17 July 2007). Other cases may require exceptional diligence, such as those concerning child custody (*Paulsen-Medalen and Svensson v. Sweden*, 149/1996/770/967, 19 February 1998) or persons at the end of their lives (*V.A.M. v. Serbia*, 39177/05, § 98–101, 13 March, 2007).

PART I – "Reasonable time" remedies in the Council of Europe Member States

Chapter I – Serbian experience

- **Serbian legislation and national jurisprudence concerning the remedies against excessive length of proceedings**

The Republic of Serbia has been a member of the Council of Europe since 3 April 2003, while the ECHR entered into force on the 3 March 2004. On 12 March 2003, the Prime Minister of Serbia was assassinated and a state of emergency was declared in Serbia, suspending various civil rights. Thus, the ECHR became binding on the Republic of Serbia during a state of emergency when the civil rights and freedoms were exposed to the most severe test (Pavlovic D. *"Serbia"* [in] *"The European Convention on Human Rights and Fundamental Freedoms in Central and Eastern Europe"*, ed. L. Hammer and F. Emmert, Eleven International Publishing, Netherlands, 2012).

Concerning the position of the international treaty, more particularly the ECHR in the domestic legal order, it is a part of the legal system in Serbia and applies directly according to Article 16 § 2 of the Constitution under the condition that this international treaty is in accordance with the Constitution. The right of interpretation belongs to the Constitutional Court in Serbia.

The Constitution of Serbia was adopted after the ratification of the Convention in 2006 and required a 2/3 majority of votes in the Parliament, followed by approval in a nation-wide referendum with an absolute majority.

Under Article 20 of the Constitution, restrictions of human rights are permitted, but only to the extent that is "necessary to meet the constitutional purpose of restriction in a democratic society and without encroaching upon the substance [of the] relevant guaranteed right".

Article 6 is perhaps the most important article for the ECtHR, as the right to a fair trial is essential to ensure the protection of other rights established in the ECHR. The efficiency of the proceedings depends on a fair trial without undue delay. Unfortunately, the excessive length of proceedings is still an important problem raised before the ECtHR.

Legislators have an obligation to establish an efficient remedy for the excessive length of proceedings and sufficient redress for the victims of excessively lengthy proceedings.

The Serbian legal developments can be summarised as follows:

Constitutional complaint

The applicants have at their disposal a constitutional appeal, which is deemed to be an effective remedy. Article 82 § 2 of the Constitutional Court Act (Zakon o Ustavnom sudu, published in OG RS no. 109/2007 and 99/2011) provided that "a constitutional appeal may be lodged even if all available remedies have not been exhausted in the event of a breach of an applicant's right to a trial within a reasonable time". The Constitutional Court in principle instructed lower courts to accelerate the proceedings. As to the compensation claims, the claimants lodged an application with the Commission for Compensation (*Vinčić and Others v. Serbia*, nos. 44698/06, 44700/06, 44722/06, 44725/06, 49388/06, 50034/06, 694/07, 757/07, 758/07, 3326/07, 3330/07, 5062/07, 8130/07, 9143/07, 9262/07, 9986/07, 11197/07, 11711/07, 13995/07, 14022/07, 20378/07, 20379/07, 20380/07, 20515/07, 23971/07, 50608/07, 50617/07, 4022/08, 4021/08, 29758/07 and 45249/07, 1 December 2009). In accordance with Article 89 § 3 of the Constitutional Court Act, the Constitutional Court was empowered to decide on the applicant's compensation claim. The possibility to reduce the length of the prison penalty by way of compensation for an excessive length of proceedings did not exist in Serbia.

According to the amendments of the Constitutional Court Act (OG RS no. 18/2013 and 40/2015), the responsibility was transferred to the ordinary jurisdiction courts.

Criminal Procedure Code

The Criminal Procedure Code was adopted to conform previous legislative acts with the Constitution (2006) and the international treaties, more particularly the provisions of the ECHR related to criminal procedure. One of the features of the Criminal Procedure Code (Official Gazette No. 72/2011, 101/2011, 121/2012, 32/2013) is the right to trial within a reasonable time (Article 14): "Courts are required to conduct criminal proceedings without delays and to prevent all abuses of law aimed at delaying proceedings. Criminal proceedings against a defendant who is in detention are urgent."

The prosecutor, even if party to the proceedings, also has an unwritten duty, according to the ECtHR's case-law, to take care that the investigation is carried out without any undue delay.

Regulation of Courts Act of the Republic of Serbia

The Regulation of Courts Act of the Republic of Serbia (22 May 2014, Official Gazette of the Republic of Serbia, Nos. 116/2008, 104/2009, 101/2010, 31/2011 – other Act, 78/2011 – other Act, 101/2011 and 101/2013).

According to Article 8 a of the Regulation, a party to judicial proceedings may submit a request for protection of the right to trial within a reasonable time and a request of compensation for the violation in this respect to the directly superior court. The decision-making procedure regarding the request for protection shall be considered urgent. If the motion concerns proceedings conducted before the Appellate Commercial Court, Appellate Minor Offences Court or the Administrative Court, the Supreme Court of Cassation shall decide on said request.

According to Article 8 b of the Regulation, if a directly superior court establishes that the request of the applicant is grounded, it may determine the suitable compensation for the violation of the right to trial within a reasonable time as well as determine the period during which the lower court shall finalise the proceedings in which the violation of the right to trial within a reasonable time was committed. An appeal against the decision related to the request for protection of the right to trial within a reasonable time may be lodged to the Supreme Court of Cassation within a period of 15 days.

Following Article 8 v, the provisions of the Act which regulate non-contentious procedure shall be applied mutatis mutandis concerning the procedure for protection of the right to trial within a reasonable time and for the compensation for the violation of the right to trial within a reasonable time.

Law on Protection of the Right to a Trial within a Reasonable Time

This Law, adoptedon 7 May 2015 (Law of 7 May 2015), will enter into legal force on 1January 1st, 2016. According to this Law, a complaint about the excessive length of proceedings can be lodged by every party in court proceedings including enforcement proceedings, by every party in non-litigious proceedings and by the injured party in criminal proceedings, the private prosecutor and the injured party under condition that they have asserted a claim for damages in these criminal proceedings. The public prosecutor as a party to criminal proceedings is not entitled to a trial within reasonable time (Article 2 of Law of 7 May 2015). The guarantee of the fair trial within a reasonable time covers also an investigation phase (Article 1 (3) of Law of 7 May 2015).

There are three remedies established by the Law: complaint in order to accelerate proceedings, complaint about the excessive length of proceedings ("appeal"), and the request for just satisfaction. There is no fee to be imposed on the person lodging the complaint (Article 3).

The complaints should be lodged with the court in charge of the proceedings or the court where the proceedings are conducted, if it is considered that the public prosecutor has violated this right (Article 7(1) of Law of 7 May 2015). The President of the court conducts the

procedure initiated by the complaint (Article 7(2) of Law of 7 May 2015) and decides on the complaint, no later than two months from receipt of the complaint (Article 7(4) of Law of 7 May 2015).

If the complaint is rejected or dismissed on formal grounds or without undertaking the inquiry procedure in the view of the shortness of the proceedings (if it is obvious, already at this stage, that the complaint is unfounded or contains formal deficiencies), there may be no appeal against such a decision (Article 8 of Law of 7 May 2015).

According to Article 14, when the President of the court orders the inquiry procedure, the party has the right to appeal within two months from the date of receipt of the decision.

In other cases, the applicant can lodge an appeal against the decision of the court which ruled on the complaint. The President of this court shall forward the complaint to the President of the directly superior Court, who should make a ruling on the complaint (Article 16 of Law of 7 May 2015). The new complaint about the excessive length of proceedings can be lodged every four or five months according to the individual situation (please see Article 13 of Law of 7 May 2015 for more details).

There are different types of just satisfaction for the excessive length of proceedings, more particularly the pecuniary compensation for non-material damages, the right to publication of a written statement that the right to a trial in reasonable delay was infringed made by the State Attorney; and the right to publication of the judgment determining that the party's right to trial in reasonable delay was not respected (Article 23 of Law of 7 May 2015). The amount of this compensation was defined as between 300 and 3000 euros (Article 30(1) of Law of 7 May 2015).

According to Article 31(1) of the Law of 7 May 2015, the party may file a claim for compensation of material damage caused by a violation of the right to trial in reasonable time, within one year of the time when all conditions have been achieved for the right to just satisfaction.

According to Article 36 of the Law of 7 May 2015, as of the day of this law coming into effect the following provisions shall cease to be in effect: provisions of Article 8a – 8v of the Law on Organisation of Courts („The Official Gazette of RS", Nr. 116/08, 104/09, 101/10, 31/11, Dr. Law 78/11, Dr. Law 101/11 and 101/13); provisions of Article 82, paragraph 2, of the Law on Constitutional Court („The Official Gazette of RS", Nr. 109/07, 99/11 and 18/13 – US).

- **Overview of Serbian cases before the ECtHR**

Serbia experiences excessive delays in all types of judicial proceedings. There is an important problem of the enforcement of judgments of national, mostly civil, courts *("Can excessive length of proceedings be remedied?"*, Venice Commission, Council of Europe, June 2007).

The case *V.A.M. v. Serbia* (application no. 39177/05) delivered on 13 March 2007 and the case *Jevremović v. Serbia* (application no. 3150/05) delivered on 17 July 2007 were the first cases concerning the length of proceedings in conjunction with right to family life.

In the case V.A.M. v. Serbia, the applicant's husband deprived the applicant, an HIV-positive mother, of all contact with their daughter. The applicant complained about the excessive length of civil proceedings (Article 6) brought by the applicant against her husband and the authorities' failure to enforce an interim access order, Article 8 (right to respect for private and family life) and Article 13 (right to an effective remedy). The applicant lodged her civil claim with the Municipal Court on 11 February 1999. However, the period which comes within the Court's competence *ratione temporis* did not begin on that date, but on 3 March 2004, after the Convention entered into force in Serbia (see, *mutatis mutandis*, *Foti and Others v. Italy*, judgment of 10 December 1982, Series A no. 56, pp. 18–19, § 53) and were still pending when the application was introduced at the ECtHR. The period *ratione materiae* taken into consideration by the ECtHR was thus of eight years, of which more than two years and eleven months were to be examined by the Court. In any event, the state of the case on the date of ratification (see, among other authorities, *Styranowski v. Poland*, judgment of 30 October 1998, Reports 1998-VIII) was also to be considered, and it was found that on 3 March 2004 the proceedings at issue had already been pending for some five years at first instance. In consequence, the Court found a violation of Article 6 § 1 (right to a fair hearing within a reasonable time), a violation of Article 8 (right to respect for private and family life), and a violation of Article 13 (right to an effective remedy).

The second judgment, *Jevremović v. Serbia* (application no. 3150/05), was delivered on 17 July 2007. The facts and the legal analysis in this case are described in the part of the study concerning the selected judgements of the ECtHR against Serbia and Poland (PART II).

There are two other paternity–related cases involving a problem of the excessive length of proceedings (Article 6 § 1 and Article 8, right to respect for private and family life): *Nikolić v. Serbia* (application no. 3551/08), communicated to the Government for observations, concerns the request of the applicant to exhume the body of his father to establish his identity, and *Dukanović v. Serbia* (application no. 10038/08) concerns establishing paternity, in which a decision of strike-out was delivered on 2 September 2014 as the parties reached a friendly settlement.

The others cases, which are numerous, are mostly repetitive and suitable for the well-established case law procedure applied by the ECtHR for e.g. a labour-related issue like *Doric v. Serbia* (no. 33029/05, 27 January 2009).

The length of the execution of proceedings is a significant problem in the case law of the Court. For the most part, the final judgments against socially-owned companies are going unenforced, for example, see the leading judgment *Kačapor and others v. Serbia* (nos. 2269/06, 3041/06, 3042/06, 3043/06, 3045/06 and 3046/06).

The case concerned the non-enforcement of numerous final judgments given in the applicants' favour against "socially-owned" companies. The ECtHR found a violation of Article 6 § 1 (right to a fair trial) and Article 1 of Protocol No. 1 (protection of property). The Court found that the "period of non-execution should not be limited to the enforcement stage only, but should also include the subsequent insolvency proceedings (see *Mykhaylenky and others v. Ukraine*, cited above, § 53). Consequently, the period of debt recovery in the applicants' cases has so far lasted between two years and four months and three years and eight months since the Serbian ratification of the Convention on 3 March 2004 (the period which falls within this Court's competence *ratione temporis*)" (*Kačapor and others,* § 115). The Court ordered Serbia to pay not only pecuniary damage but also what was owed to the applicants in accordance with the domestic judgments. The same problem was the object of other cases, among them: *Ilic v. Serbia* (no. 30132/04, 9 October 2007); *EVT v. Serbia* (no. 3102/05, 21 June 2007); *Marčić v. Serbia and Others* (no. 17556/05, 30 October 2007); the leading decision *Sokolov v. Serbia and Others* (application no. 30859/10, 14 January 2014).

Vinčić and Others v. Serbia (nos. 44698/06, 44700/06, 44722/06, 44725/06, 49388/06, 50034/06, 694/07, 757/07, 758/07, 3326/07, 3330/07, 5062/07, 8130/07, 9143/07, 9262/07, 9986/07, 11197/07, 11711/07, 13995/07, 14022/07, 20378/07, 20379/07, 20380/07, 20515/07, 23971/07, 50608/07, 50617/07, 4022/08, 4021/08, 29758/07 and 45249/07, 1 December 2009) belongs to the most important judgments regarding the obligation to exhaust domestic remedies.

The applicants are 31 Serbian nationals who were all members of the Independent Union of Aviation Engineers of Serbia. Following a strike organised by their Union, they complained that their claims for an employment-related benefit were rejected by the District Court in Belgrade, while other identical claims were simultaneously accepted, a violation of Article 6 § 1 (right to a fair trial). In addition, the Court found that a constitutional appeal should, in principle, be considered an effective domestic remedy in respect of all applications introduced as of 7 August 2008. Consequently, about 1000 applications were declared inadmissible for failure to exhaust that remedy.

In the case of *Marinković v. Serbia* (no. 5353/11, 22 October 2013), the Court recognized that the debtor is no longer a state-controlled entity. It considered, however, that the domestic judgments rendered in the ap-

plicant's favour became final in September 2007 when the debtor operated as a state-controlled entity. In view of this and the Court's case law, the Court found that the respondent state was directly responsible for the enforcement of the domestic judgments under consideration in this case, and found a violation of Article 6 of the Convention and/or Article 1 of Protocol No. 1 to the Convention in cases raising issues similar to those raised in the present case (see *R. Kačapor and Others*, cited above, §§ 115–116 and § 120; *Marčić and Others v. Serbia*, no. 17556/05, § 60, 30 October 2007; *Crnišanin and Others v. Serbia*, nos. 35835/05, 43548/05, 43569/05 and 36986/06, §§ 123–124 and §§ 133–134, 13 January 2009; *Rašković and Milunović v. Serbia*, nos. 1789/07 and 28058/07, § 74 and § 79, 31 May 2011; and *Adamović v. Serbia*, no. 41703/06, § 41, 2 October 2012).

In the case of *Ferizović v. Serbia* (no. 65713/13, 26 November 2013), the Court considered that the Serbian Constitutional Court fully harmonised its approach towards the non-enforcement of judgments against socially/state-owned companies undergoing restructuring with the Court's case law. Since the first such Constitutional Court decision was published in the Official Gazette on 4 October 2013, the Court considers a constitutional appeal to be an effective remedy within the meaning of Article 35 § 1 of the Convention for that last category of cases concerning the non-enforcement of judgments against socially/state-owned companies as of that date. The applicant did not file a constitutional appeal but instead lodged her application with the Court on 4 October 2013. Her complaint was thus rejected for non-exhaustion of domestic remedies.

In the case of *Tešić v. Serbia* (nos. 4678/07 and 50591/12, 11 February 2014), the Court recalled that the Constitutional complaint "should, in principle, be deemed effective within the meaning of Article 35 § 1 of the Convention in respect of applications introduced against Serbia as of 7 August 2008 (see *Vinčić and Others v. Serbia*, no. 44698/06 and others, § 51, 1 December 2009; see also *Rakić and Others v. Serbia*, no. 47460/07 and others, § 39, 5 October 2010, and *Hajnal v. Serbia*, no. 36937/06, §§ 122 and 123, 19 June 2012)".

Chapter II– Polish experience

- **Polish legislation and national jurisprudence concerning the remedies against excessive length of proceedings**

Poland is a post-Communist state, which signed the Convention in 1991 and ratified it in 1993. The right to individual application was established in 1993. The change of the regime required the reformation of the Polish legal system, including the principles of fair trial, to comply with the requirements of the Convention.

Regarding Poland, Article 91 of the Constitution of 2 April 1997 allows the direct applicability of the Convention: "1. After promulgation thereof in the Journal of Laws of the Republic of Poland (Dziennik Ustaw), a ratified international agreement shall constitute part of the domestic legal order and shall be applied directly, unless its application depends on the enactment of a statute. 2. An international agreement ratified upon prior consent granted by statute shall have precedence over statutes if such an agreement cannot be reconciled with the provisions of such statutes. 3. If an agreement, ratified by the Republic of Poland, establishing an international organization so provides, the laws established by it shall be applied directly and have precedence in the event of a conflict of laws." Regarding specifically the application of Article 6 of the Convention, it is essential to point out that the Polish Constitution of 2 April 1997 transcribed in Article 45 of the next treaty provision: "1. Everyone shall have the right to a fair and public hearing of his case, without undue delay, before a competent, impartial and independent court. 2. Exceptions to the public nature of hearings may be made for reasons of morality, State security, public order or protection of the private life of a party, or other important private interest. Judgments shall be announced publicly".

The excessive length of proceedings (criminal, civil, criminal) is a complex systemic problem in many Member states of the Council of Europe, among them the Republic of Poland and Serbia, where the legislative reforms have been on-going with respect to the excessive length of proceedings.

Article 6 is, again, the most important article for the ECtHR as the right to a fair trial is the basis for ensuring protection of the rights set out in the ECHR.

It is worthwhile to discuss the mechanism of remedy introduced in Poland (see also: Rajska D., *"Droit à un procès équitable en France et en Pologne"*, Presses Universitaires d'Aix-Marseille (PUAM), June 2015, pp. 138–176; Petrović-Škero V., Rajska D., *"Protection of the right to a trial within a reasonable time in the court proceedings"*, Council of Europe and Serbian Supreme Court of Cassation, May 2015). On 30 October 1998, the Court gave its judgment in the case of *Styranowski*, cited above, and for the first time found a violation of Article 6 § 1 by Poland on account of the excessive length of proceedings (see *Styranowski v. Poland*, 30 October 1998, §§ 57–58 Reports of Judgments and Decisions 1998-VIII).

Following the ECtHR's judgment *Kudła v. Poland* ([GC], 30210/96, 26 October 2000), on 17 June 2004, the national authorities established Law of 17 June 2004 on complaint about breach of the right to have a case examined in judicial proceedings without undue delay (Usta-

wa o skardze na naruszenie prawa strony do rozpoznania sprawy w postępowaniu sądowym bez nieuzasadnionej zwłoki). This law entered into force on 17 September 2004 ("2004 Act"). This law permits applicants to obtain compensation for the excessive length of pending judicial proceedings. The maximum compensation was fixed at 10.000 zlotys (2.500 euros), but complementary compensation can be obtained according to Article 417 of the Civil Code. The Court considered this remedy as effective.

The Law of 17 June 2004 on an amendment of the Civil Code Act and some other Acts were signed by the President on 5 July 2004 and entered into force on 1 September 2004. This amendment allows for the possibility to obtain compensation for the excessive length of the proceedings during three years after their end.

However, the 2004 Act contained lacunae, as it did not provide the disposition permitting complaints about the excessive length of the instruction/preliminary proceedings (*Bąk v. Poland*, no. 7870/04, § 73, 16 January 2007). The level of the compensation was considered too low.

On 20 February 2009, there was an amendment to the 2004 Act. The legislator created a possibility to complain about the length of preliminary proceedings. The amount of compensation was increased up to 20.000 zlotys (5.000 euros).

In consequence, some 600 Polish cases pending before the Court were rejected for non-exhaustion of domestic remedies in 2005.

However, every year since then, 300 prima facie well-founded applications concerning complaints about a breach of the right to a hearing within a reasonable time are lodged with the Court by persons who have exhausted the remedies under the 2004 Act. As in the cases described above, the applicants complain about the excessive length of proceedings and the domestic courts refuse to grant them appropriate redress for the breach of Article 6 § 1 of the Convention.

In 2013, hundreds of cases involving complaints about the length of proceedings were pending before the Court, of which 61 have been communicated to the Polish Government and the remainder earmarked for communication and examination under Article 28 § 1 (b) of the Convention in the frame of the pilot-judgment procedure under Rule 61 of the Rules of Court (*Suchecki v. Poland and Others*, no. 23201/11).

In 2015, the ECtHR delivered a new pilot judgment involving the excessive length of proceedings to deal with the increasing number of cases (see below, PART II – Chapter II).

- **Overview of Polish cases before the ECtHR**

The reforms concerning the remedy against the excessive length of proceedings started after the ECtHR's judgment in *Kudła v. Poland* ([GC], no. 30210/96, 26 October 2000, ECHR 2000-XI). In this judgment, the Court decided that there was no effective remedy to obtain compensation for the excessive length of the proceedings. In the aforementioned *Kudła* judgment, the Court found that the then existing legal remedies had not met the standard of 'effectiveness' for the purposes of Article 13 because the required remedy against undue delays of proceedings must be effective both in law and practice (Kudła, § 158–159).

The Court considered the remedy established by the 2004 Act and amended by the 2009 Amendment was effective (*Charzyński v. Poland* no. 15212/03 (dec.), §§ 36–43 ECHR 2005-V; *Ratajczyk v. Poland* no. 11215/02 (dec.), ECHR 2005-VIII; *Krasuski v. Poland*, no. 61444/00, §§ 68–73, ECHR 2005-V).

The Court recalled:

"as it ha[d] already indicated on a great number of occasions, the reasonableness of the length of the proceedings must be assessed in the light of the particular circumstances of the case taken as a whole. The Court's approach consist[ed] in examining the overall length of proceedings and in covering all stages of the proceedings" (see *Majewski v. Poland*, no. 52690/99, § 35, 11 October 2005).

The Court confirmed this approach on several occasions, but the interpretation of domestic courts, the Supreme Court included, did not change until the Resolution of the Supreme Court of 28 March 2013 (see, for instance, *Kęsiccy* v. Poland, no. 13933/04, § 62, 16 June 2009). Actually, the problem of the "fragmentation of proceedings" will be solved under conditions of the correct application of the law and the European and national case-law by the national courts.

On 7 July 2015, the ECtHR delivered a judgment in the case *Rutkowski and others v. Poland* (nos. 72287/10, 13927/11 and 46187/11, 7 July 2015). This is a pilot judgment under the frame of which some 594 cases were already communicated to the Government.

Chapter III– Other countries' experience

This chapter provides an overview of two recent cases before the ECtHR concerning the excessive length of proceedings against **Greece**, *Michelioudakis v. Greece* (no. 54447/10, 3 April 2012) and *Glykantzi v. Greece* (no. 40150/09, 30 October 2012). The comparative study of the remedies established in different Member States of the Council of Europe for these cases will shed light on

the situation in the other countries and the remedies they have proposed.

The leading judgment concerning the remedy against the excessive length of criminal proceedings is *Micheliou-dakis v. Greece* (application no. 54447/10, 3 April 2012).

In most of the Member States of the Council of Europe there is an established mechanism to accelerate criminal proceedings, **Poland** and **Serbia** included. In any event, it is a Member State that decides if a party to the proceedings is obligated to use this remedy before lodging a complaint about the excessive length of proceedings, like it is the case e.g. in **Germany**.

In **France** and in **Spain** the acceleration measures are taken by the court in charge of the case; in **the Czech Republic** by the higher court or the Constitutional Court; in **Serbia** by the Constitutional Court; in **the Former Yugoslav Republic of Macedonia** by the prosecutor; in **Portugal** by the Supreme Judicial Council.

The request for acceleration measures may be lodged by the parties (**Spain, France, Poland**), by the courts (**Finland, France**), by the barristers or by the prosecutors (**Denmark**).

Alternative proceedings are established in Italy, where there is the possibility to lodge a request for condemnation a hearing or decision during the preliminary hearing.

In the **United Kingdom**, it is possible to make public the violation of the right to a fair hearing withina reasonable time. In **Russia**, the date of the hearing can be fixed.

In **Switzerland**, the proceedings for a violation of the Convention can be engaged if the proceedings are excessively lengthy.

The control over the proceedings *in meriti* can be administrative or judicial, or both administrative and judicial, like in **France**.

There are also Member States that haven't established a mechanism to accelerate the criminal proceedings, e.g. **Ireland**, **Luxembourg**, and **Malta**.

In Turkey, the law establishes that the penalty is reduced proportionally if the person is detained during the period of criminal proceedings.

Compensatory proceedings for excessive length of criminal proceedings exist in most of the Member States of the Council of Europe. In **Luxembourg**, **Switzerland**, **Lithuania**, and **Iceland** they have been established, but they have never been engaged. In **Bulgaria**, **Cyprus**, **Estonia**, **Georgia**, **Hungary**, **Ireland**, **Romania** and **Turkey** the compensatory remedy has not been established.

The leading judgment concerning the remedy against the excessive length of civil proceedings is *Glykantzi v. Greece* (no. 40150/09, 30 October 2012).

In the majority of Member States of the Council of Europe, there is a possibility to request an application of acceleration measures in civil proceedings, as it is the case in **Poland** and **Serbia**. Most often, it involves planning the procedural steps to be taken by the courts in charge of the case.

The request to accelerate the civil proceedings is lodged at the court in charge of the case (**France, Russia**), higher court (**Croatia**), Supreme Court (**the former Yugoslav Republic of Macedonia**) or Constitutional Court (**Germany**). In **Finland**, there is a system of prioritising the cases incoming to each court.

In **Germany**, the request to accelerate the proceedings has to be lodged before the compensatory complaint is lodged.

There are also Member States where a mechanism to accelerate civil proceedings doesn't exist, whilst some Member States, such as the **United Kingdom**, have established special rules to accelerate the proceedings *ex officio* in family law matters and commercial matters. The compensatory proceedings can be engaged during or after the end of the proceedings, in this second case, most often in cases of delay of six months or up to three years. There are some States where the mechanism to accelerate the proceedings was not established.

In certain States, the acceleration of proceedings are simplified, for example in **Finland** (single judge procedure), in **Lichtenstein** (written proceedings), and in **Germany** (procedure without hearing).

In most of the Member States of Council of Europe it is possible to request compensation for excessive length of civil proceedings.

PART II– Selected ECtHR judgments concerning excessive length of proceedings in Serbia and Poland

Chapter I – Leading judgement *Jevremović v. Serbia* (Application no. 3150/05)

The judgment, *Jevremović v. Serbia* (application no. 3150/05), was delivered on 17 July 2007 and concerned the applicants' (mother's and daughter's) complaint about the proceedings they had brought in June 1999 against the father of the daughter, a very popular local singer, in order to establish paternity and obtain child maintenance. The civil proceedings were still pending when the applicants lodged their complaint to the Court. The applicants complained about the length of the proceedings and that they had no means to speed them up. Before the ECtHR, they raised Article 6 § 1 (right to a fair hearing within a reasonable time) and Article 8 (right to respect for private and family life). The daughter also complained under Article 13 that the domestic legal system did not oblige defendants in paternity suits to comply with a court order to undergo a DNA test. The Court held unanimously that there had been a violation of Article 6 § 1 on account of the proceedings having lasted more than three years and four months from the date of Serbia's ratification of the Convention on 3 March 2004. It further held unanimously that there had been a violation of Article 8 on account of the daughter, Ina Jevremović, having been left, throughout the duration of the paternity proceedings, in a state of prolonged uncertainty about her identity. Finally, it held unanimously that there had been a violation of Article 13 taken together with Article 6 § 1.

The case *Jevremović v. Serbia* (Application no. 3150/05) was classified by the Department for the Execution of Judgements of the ECtHT as "leading case". It means that it was the first case against Serbia, which revealed a new structural problem and required the legislative measures to be taken. The following cases concerning the same problem are called "repetitive cases". The case *Jevremović v. Serbia* is still pending before the Department for the Execution of Judgements ECtHR and submitted under its standard supervision (see 8th Annual Report of the Committee Ministers 2014, Council of Europe, Committee of Ministers, http://www.coe.int/t/dghl/monitoring/execution/Source/Publications/CM_annreport2014_en.pdf).

The main Serbian legislative developments concerning the remedy against excessive length of proceedings are described in Part I, Chapter I of the present study.

Among other legislative measures taken as general measures are Mediation Act, Family Act in 2005 and Amendments to Civil Procedure Act.

The Mediation Act introduced mediation as alternative means of dispute resolution to further alleviate the workload of courts. The Amendments of Civil Procedure Act as in force since 22 February 2005, permit to avoid the remittal of cases for re-examination more then once, other Amendments have been foreseen to avoid the excessive length of proceedings by e.g. enforcing the poor service of court documents. The 2005 Family Act permitted to tight the deadlines in family related procedures since.

In 2009, the new court network, with new infrastructure in Belgrade, was introduced and ameliorated the efficiency of judiciary. A web portal (www.portal.sud.rs) has been made accessible for public. The information can be found on individual cases including e.g. schedule of court hearings.

The "pilot judgement procedure" applied in the case *Rutkowski and others v. Poland* and described in the next chapter of this study is a specific procedure that is different from a notion of "leading case". The pilot judgement procedure is a means of dealing with large number of identical repetitive cases that derive from the same underlying problem. The Court had huge number of these repetitive cases pending before it and it contributed to the congestion in the Court's process. In the pilot judgement, the Court defines if there has been violation of the Convention. It identifies the dysfunction of the legal system at the national level. It gives clear indication to the Government how to eliminate the problem and create the remedy to deal efficiently with the concerned cases, the cases pending before the ECtHR included. The important feature of this procedure is "adjournment" or "freezing" of the examination of all related cases in a certain period of time. In this way, the national authorities can establish the remedy that will permit to obtain the redress more speedily (http://www.echr.coe.int/Documents/Pilot_judgment_procedure_ENG.pdf).

The impact of the pilot procedure is very important. The leading case only identifies the structural problem and is probably a harbinger of other forthcoming judgements of the ECtHR with the same violation of the Convention. The pilot judgement requires that the effective remedy is created as regards the cases pending before the ECtHR, but also as regards the similar situations that haven't been yet the object of the application to the ECtHR.

Chapter II – Pilot judgement *Rutkowski and others v. Poland* (Applications nos. 72287/10, 13927/11 and 46187/11)

- **Findings of the ECtHR**

On 7 July 2015, the ECtHR delivered a judgment in the case of *Rutkowski and others v. Poland* (nos. 72287/10, 13927/11 and 46187/11, 7 July 2015).

The first applicant, Mr Rutkowski, who was a policeman, was accused of participating in an organised criminal group and corruption. His complaint concerned the criminal proceedings engaged against him in September 2002 and finished by acquittal in July 2010.

Two other applicants, Mr Orlikowski and Ms Grabowska, complained about two different sets of civil proceedings. In March 1999, Mr Orlikowski lodged his civil action for damages against his landlord, a claim partially granted by the appeal court in November 2010. Ms Grabowska joined the proceedings, in a civil case which concerned the rights to property she had inherited, in April 2000. Her claim was rejected and upheld by the appeal court in June 2013.

All three applicants lodged complaints about the length of the proceedings under the 2004 Act. Mr Rutkowski was granted 500 euros, Mr Orlikowski's and Ms Grabowska's complaints were dismissed.

The three applicants complained about the unreasonable length of civil or criminal proceedings under Article 6 of the Convention:

"1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a ... hearing within a reasonable time by [a] tribunal..."

They also complained about the lack of effectiveness of a Polish remedy under Article 13 of the ECHR, as the domestic courts refused to grant them sufficient and appropriate redress for a breach of their right to a hearing within a reasonable time:

"Everyone whose rights and freedoms as set forth in [the] 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."

In the case of the first applicant, Mr Rutkowski, the Court established that the proceedings lasted seven years and about ten months at one level of jurisdiction. The Court thus concluded that the proceedings did not proceed with the necessary expedition and that there was a breach of the right to a fair trial without undue delay under Article 6 of the Convention.

The Court considered that the fact that the proceedings were of more than average complexity did not justify

the total length of the proceedings, taking into consideration that the applicant was detained for eight months at the initial stage of the proceedings and that the authorities were obligated to proceed with "special diligence" (see, for instance, *Kreps v. Poland*, no. 34097/96, § 52, 26 July 2001 and *Czajka v. Poland*, no. 15067/02, § 60, 13 February 2007).

In the period between December 2002 and November 2005 there were only a small number of procedural decisions delivered, but the date of hearing was not fixed during this period, as the act of indictment hadn't yet been delivered to the applicant. Thus, the Court considered that the applicant's case should be considered as lying dormant.

In 2005, the applicant's file was transferred from one court to another over the course of four months and in late 2007 and early 2008, it was transferred for a period of eight months. Taking into account that the courts were located in the same city, the Court found it "difficult to accept that handling such a purely technical matter as transfer of a case file between the courts should take such a considerable time" (*Rutkowski and Others*, § 139).

In the case of the second applicant, Mr Orlikowski, the Court established that the proceedings lasted eleven years and some eight and a half months for two levels of jurisdiction. The Court found no justification for the delay in the applicant's case and decided that there was a breach of Article 6 of the Convention.

The Court considered that, as the case concerned the claim rising from a simple lease contract and "didn't involve complex issues of fact and law, even though evidence from experts in three different fields needed to be obtained in order to estimate the value of the outlays made by the applicant, and in consequence, the amount of damages" (*Rutkowski and Others,* § 147).

First, the dates of hearings were fixed in lengthy intervals, often of over one year. Second, the expert proceedings themselves were too lengthy and: "No attempts were made to discipline the experts and ensure that they complied with the deadlines set" (*Rutkowski and Others*, § 149).

The Court reiterated that: "expert work in the context of judicial proceedings supervised by a judge, who remains responsible for the preparation and speedy conduct of proceedings" (see, for instance, *Proszak v. Poland*, 16 December 1997, § 44, Reports of Judgments and Decisions 1997-VIII and *Łukjaniuk v. Poland*, no. 15072/02, § 28, 7 November 2006) (*Rutkowski and Others*, § 149).

Following two remittals ordered by the Court of Appeal, the applicant's case was examined three times by the first instance court. In consequence, the Court considered that: "the remittal of cases for re-examination is usually ordered as a result of errors committed by lower courts. The repetition of such orders within one set of proceedings discloses a serious deficiency in the judicial

system. Moreover, this deficiency is imputable to the authorities and not the applicants" (see, among many others, *Wierciszewska v. Poland*, no. 41431/98, § 46, 25 November 2003; *Matica v. Romania*, no. 19567/02, § 24, 2 November 2006; and *Vlad and Others v. Romania*, nos. 40756/06, 41508/07 and 50806/07, § 133, 26 November 2013) (*Rutkowski and Others*, § 149).

In the case of the third applicant, Ms Grabowska, the proceedings lasted for thirteen years and two months at two levels of jurisdiction. The Court established that the length of the proceedings must be attributed to the State.

The Court criticised the quality of the first judgment for "incomplete findings of fact and the way in which that court had dealt with the merits of the case, but also because it was not discovered until that advanced stage that the applicant and other parties had not yet been served with the copies of the 1999 application for adverse possession" (*Rutkowski and Others*, § 159).

Concerning the allegation of ineffective remedy concerning the excessive length of proceedings, the applicants raised Article 13 relying upon the domestic courts' defective application of the 2004 Act.

The Court established that: "Where a domestic legal system has made provision for bringing an action against the State, such an action must remain an effective, sufficient and accessible remedy in respect of the excessive length of judicial proceedings. Its sufficiency may be affected by excessive delays and depend on the level of compensation" (*Rutkowski and Others*, § 173).

The Court does not require that the domestic courts compensate the litigants at the level of the amounts approaching the compensations awarded in similar cases by the ECtHR (*Scordino v. Italy (no. 1)* [GC], no. 36813/97, ECHR 2006-V, § 189). However, the domestic courts, when deciding the amount of compensation to be awarded for excessive length of proceedings, should refer to the amount of compensation awarded at domestic level for other types of damage (*Rutkowski and others*, § 174). The amounts awarded must not be unreasonably low compared to the Court's awards in similar cases. The domestic courts should take decisions "consonant with the legal tradition and the standard of living in the country concerned, are speedy, reasoned and executed very quickly" (*Rutkowski and others*, § 175).

Even though the Court had previously considered the 2004 Act as an effective remedy against excessive length of proceedings, the considerable delays occurring in the applicants' cases were not compatible with the case law on the assessment of the reasonableness of the length of proceedings and thus resulted in a breach of Article 6 of the Convention (see, among many other examples, *Kudła*, cited above, § 119–124; *Humen v. Poland* [GC], no. 26614/95, §§ 58–60, 15 October 1999; *Turczanik v. Poland*, no. 38064/97, §§ 38–39, ECHR 2005-VI; *Beller*

v. Poland, no. 51837/99, § 67–71, 1 February 2005; *Koss v. Poland*, no. 52495/99, §§ 28 and 33, 28 March 2006; and, in particular, *Majewski v. Poland*, no. 52690/99, § 35, 11 October 2005).

The main problem with the existing remedy was the fact that the domestic courts did not take into consideration the length of all the stages of proceedings as a whole, but only selected parts of them. Thus, the period before the 2004 Act's entry into force was not taken into consideration by the domestic courts in the case of the first and third applicants. In the case of the second applicant, the domestic courts took into account only the time in which the case was pending when the claim for excessive length of proceedings was lodged.

This practice resulted from the case law of the Supreme Court as a principle of so-called "fragmentation of proceedings" established by the Supreme Court in its rulings given between 2005 and 2012 (see, in particular, the following rulings: 18 January 2005, III SPP 113/04; 18 February 2005 III SPP 14/05; 18 February 2005 III SPP 19/05; 12 May 2005 III SPP 76/05; 7 June 2005 III SPP 95/05, 8 July 2005 III SPP 120/05, 27 July 2005 III SPP 127/05, 16 November 2005 III SPP 162/05, 6 January 2006 III SPP 154/05, 6 January 2006 III SPP 167/05, 19 January 2006 III SPP 162/05, 21 February 2007 III SPP 5/07, 9 January 2008 III SPZP 1/07, 15 January 2008 III SPP 46/07, 9 February 2011 III SPP 34/10, 21 April 2011 III SPP 2/11, 26 January 2012 III SPP 42/11, 27 March 2012 III SPP 8/12, 9 September 2012 III SPP 20/11).

On 28 March 2013, the Supreme Court issued the Resolution that changed the interpretation of section 5(1) of the 2004 Act. Since this date, the domestic courts should take into consideration the whole length of proceedings in compliance with the Court's case law on the assessment of the reasonableness of the length of proceedings.

This fragmentation of proceedings had an impact on the defendants' claims and the amount of compensation awarded. For instance, in the case of Mr Rutkowski the amount granted of PLN 2,000 corresponded to 5,5% of what the Court would have awarded (PLN 12,300) if the remedy didn't exist and the Court would have directly awarded the compensation.

The Court recognizes that there is a presumption in favour of non-pecuniary damage being normally brought about by the excessive length of proceedings. This presumption is rebuttable in cases where the national authorities cannot be held responsible for the excessive length of proceedings.

The fragmentation of proceedings was a systemic problem and it should not be considered as a failure to deal with a case within a reasonable time attributable to individual judges and prosecutors. The Court also pointed out the problem of insufficient resources put at the

disposal of the judiciary and the deficiencies in judicial organisation or conduct of legal proceedings (*Rutkowski and others*, § 184).

The Court considered that the existence of a subsequent, separate civil action based on the rules for the state's liability for tort (also mentioned in sections 15 and 16 of the 2004 Act allowing applicants to receive supplementary damages after the termination of the proceedings *in meriti*) cannot repair the ineffectiveness of the primary compensatory remedy under the 2004 Act. The supplementary action in the case of victims of unreasonable delay should be considered as an unjustified and excessive burden. The 2009 Amendment raised the maximum level of compensation to a level intended to be adequate to permit the persons concerned to lose their victims' status.

- **Pilot procedure**

Article 46 of the Convention– "Binding force and execution of judgments"

"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."

Rule 61 of the Rules of Court – "Pilot – judgment procedure"

"1. The Court may initiate a pilot-judgment procedure and adopt a pilot judgment where the facts of an application reveal in the Contracting Party concerned the existence of a structural or systemic problem or other similar dysfunction which has given rise or may give rise to similar applications.

2. (a) Before initiating a pilot-judgment procedure, the Court shall first seek the views of the parties on whether the application under examination results from the existence of such a problem or dysfunction in the Contracting Party concerned and on the suitability of processing the application in accordance with that procedure.

...

3. The Court shall in its pilot judgment identify both the nature of the structural or systemic problem or other dysfunction as established as well as the type of remedial measures which the Contracting Party concerned is required to take at the domestic level by virtue of the operative provisions of the judgment.

4. The Court may direct in the operative provisions of the pilot judgment that the remedial measures referred to in paragraph 3 above be adopted within a specified time, bearing in mind the nature of the measures re-

quired and the speed with which the problem which it has identified can be remedied at the domestic level..."

The responsibility to implement judgments belongs to the States, who take general and individual measures to execute them. Since 21 February 2011, the ECtHR can adopt the pilot judgment procedure, which underlines the structural problems, defines the violations and suggests the possible solutions. The evaluation of the implementation of judgments is made by the Committee of Ministers under Article 46 § 2 of the Convention (see e.g. *"Pilot judgment procedure in the European Court of Human Rights"*, Seminar documents, Contrast, Warsaw 2009).

The pilot judgment procedure allows the state to treat a large number of individual cases in compliance with the principle of subsidiarity. Concerning the problem of excessive length of proceedings, the general measure, the remedy against lengthy proceedings was introduced by the 2004 Act and 2009 Amendment. However, the problem was not completely solved, taking into account that since the introduction of the 2004 Act, 280 judgments were delivered which found a breach of the right to a fair trial in reasonable time, and the Government recognised this breach in 358 other cases finished by friendly settlement or unilateral declaration. There are about 100 prima facie well-founded complaints lodged every year with the ECtHR. The number of complaints lodged under the 2004 Act increased between 2006 (2600) and 2013 (12532) in Poland. The statistics show that 80 – 90 % of complaints for excessive length of proceedings are rejected every year in Poland. In consequence, the Court found that this practice could not be considered compatible with the Convention (see, for instance, *Bottazzi v. Italy* [GC], no. 34884/97, § 22, ECHR 1999-V; *Burdov* (no. 2), *Burdov v. Russia (no. 2)*, no. 33509/04, § 135, ECHR 2009; and *Michelioudakis*, cited above, § 73).

The lack of proper case management, including lengthy intervals between hearings and repetitive remittals of the case to lower instance, was a serious problem of domestic courts. At the same time, the general measures introduced after the aforementioned *Kudła* judgment, such as computerisation and transfer of some judicial responsibilities to non-judicial officers and other measures simplifying and accelerating the proceedings, were not sufficient to prevent the excessive length of proceedings.

In the end, the Court stressed that, "apart from the conduct of domestic authorities, such factors as deficiencies in domestic legislation governing the organisation of the judicial system and the conduct of legal proceedings may often contribute to excessive length of proceedings" (*Rutkowski and others*, § 210).

Concerning the persisting problem of the excessive length of proceedings under Article 13, the Court considered that the proceedings were not being taken as a whole and that the redress awarded by the domestic

courts was not sufficient, although the ECtHR recalled the standards required in many of its judgments.

The Court recalled that, "as it ha[d] already indicated on a great number of occasions, the reasonableness of the length of the proceedings must be assessed in the light of the particular circumstances of the case taken as a whole. The Court's approach consist[ed] in examining the overall length of proceedings and in covering all stages of the proceedings" (see *Majewski v. Poland*, cited above, § 35). The Court confirmed this approach on several occasions, but the interpretation of domestic courts, the Supreme Court included, did not change until the Resolution of the Supreme Court of 28 March 2013 (see, for instance, *Kęsiccy* v. Poland, no. 13933/04, § 62, 16 June 2009). Actually, the problem of "fragmentation of proceedings" will be solved under condition of the correct application of the law and the European and national case-law by the national courts (Ryngielewicz K., Rajska D. *"Nadmierna długość postępowań sądowych w świetle orzecznictwa Europejskiego Trybunału Praw Człowieka"* [in] *"Przegląd Sądowy"* 3/2015, Wolters Kluwer, pp. 62–80).

The domestic courts still award amounts approaching the minimum of 2000 zlotys (500 euros) established by the 2004 Act. The Court has been forced to deal with a large number of repetitive cases, as the victims of excessive length of proceedings were not receiving sufficient redress at the domestic level. In 2007, the Committee of Ministers, at the 992nd meeting of the Ministers' Deputies, adopted Interim Resolution (CM/ResDH(2007)28), which concerns the judgments of the ECtHR in 143 cases against Poland relating to the excessive length of criminal and civil proceedings and the right to an effective remedy. In 2013, the Committee of Ministers examined the Polish Government's plan DH-DD(2013)787 and gave a decision on the state of execution. The plan was submitted on 4 July 2013 and concerned measures taken in execution of the Court's judgments regarding the length of civil and criminal proceedings in Poland. The Committee of Ministers has thus expressed serious concern with a permanent problem of excessive length of proceedings.

The Court did not indicate the measures to be taken by the State to implement the pilot judgment, but left it under the supervision of the Committee of Ministers of the Council of Europe.

The Court communicated 591 similar cases in the framework of the pilot judgment procedure in accordance with Rule 54 § 2 (b) of the Rules of Court as the ECtHR blocked the cases concerning the excessive length of proceedings since 2012. In compliance with the principle of subsidiarity and giving the priority to the State to deal with these cases, the Court decided to adjourn the applications communicated before the date of the pilot judgment for two years after its delivery. The other

similar cases, lodged after this day, will be adjourned for one year.

In this way the States have an appropriate amount of time to find a way to award the appropriate amount to the victims of the violations of the excessive length of proceedings. Since the date of the pilot judgment, the Polish Government will be made aware of new cases concerning excessive length of proceedings lodged at the Court.

- **Impact of the pilot judgment on the Serbian and Polish legal system**

The pilot judgment *Rutkowski and others v. Poland* (nos. 72287/10, 13927/11 and 46187/11, 7 July 2015) has had an important impact on the Polish and Serbian legal system.

First of all, Poland is required to execute the judgment and ensure sufficient redress for the victims in three and 591 other communicated cases in a period of two years following delivery of the judgment. Future cases of excessive length of proceedings should be examined and compensated by the national authorities in the period of one year after the date of the pilot judgment.

The pilot judgment is a very important judgment stressing the power of the judiciary and the correct interpretation of the law, in compliance with the respective national Constitutions and the European Convention on Human Rights, by the highest courts in the Member States of the Council of Europe. Only in this way is the right to a fair trial without undue delay respected.

The Resolution of 28 March 2013 delivered by the Polish Supreme Court brought an end to the incorrect interpretation of the 2004 Act with the 2009 Amendment. This incorrect interpretation was the origin of the principle of "fragmentation of the proceedings" established by the domestic courts. According to this principle, the domestic courts took into account only the parts of the proceedings on-going after the date of entering into force of the 2004 Act and pending at the moment of lodging the complaint for excessive length of proceedings.

The close cooperation between the legislator and judiciary should be privileged to avoid the breach of dispositions of the Convention in systematic and individual cases. The correct interpretation, that is to say, the interpretation in the spirit of the Convention, can fill in the eventual gaps of law. The judges should refer to the Strasbourg case law to justify this kind of initiative in their judgments.

CONCLUDING REMARKS AND SUMMARY OF RECOMMENDATIONS

The Serbian domestic courts are the principal actors defending human rights at the national level, as they are best placed to understand the context of violations and are closer to the individuals concerned by these violations. The role of the ECtHR is subsidiary and it should intervene only if the victim has exhausted the domestic remedies and did not obtain adequate redress of a violation at the national level. However, the ECtHR cannot be considered as a compensation commission. The Court considers that: "The primary responsibility for implementing and enforcing the rights and freedoms guaranteed by the Convention is laid on the national authorities and that the machinery of complaint to the Court is only subsidiary to the national systems safeguarding human rights" (*Rutkowski and others*, § 219).

Serbia has faced serious problems in the administration of justice in recent years, among them the increase of repetitive cases involving the excessive length of proceedings. The Polish experience should serve as an example for Serbia to prevent the same experience happening to them. The continuous training of judges should be funded and recognised as a means of reducing spending on the compensation of victims of the excessive length of proceedings. Furthermore, measures must be taken to limit the existing and future backlog of cases. The experiences from previously treated cases can serve as lessons for the future. One solution could be to group similar cases and treat them at the same time. The use of new technologies is fundamental. Common agendas could be introduced between judges and prosecutors, which would allow for a smoother functioning of justice, and avoid unnecessary cancellations and displacement of judges, prosecutors, barristers and parties. Long-term savings can be made if there is a budget determined by the Administrative Office of the High Judicial Council to cover the costs of judicial and technological training, together with technological improvements of tools serving justice. The backlog requires the development and implementation of an Action Plan.

As regards the recommendations for the domestic courts, the Serbian Supreme Court of Cassation should develop guidelines, as was done by the Polish Supreme Court on 28 March 2013. As such, the ordinary judges could safely stick to the interpretation taken by the Su-

preme Court of Cassation. The Polish experience could thus prevent hundreds of future Serbian cases lodged before the ECtHR from being treated in a pilot–judgment procedure. Continuous training should be enforced so as to enhance the knowledge of all judges and make them better able to refer to the Strasbourg case law, but also to the case law of the Serbian Constitutional Court.

If the courts find a violation of the right to a trial within reasonable time, they need to determine the reasonable time for a lower court to examine the complaint and the amount of compensation for the victim. If the case is not resolved in the amount of time indicated by a superior court, a new complaint about excessive length of proceedings can be lodged. In any event, this should be avoided, as in a contrary case the whole system will become inefficient, as evidenced by such a case in Italy (*Cocchiarella v. Italy* [GC], no. 64886/01, ECHR 2006-V).

Another important consideration is the amount of compensation to be awarded. If the Serbian law establishes the minimal amount at 300 euros and the maximal amount at 3000 euros, the compensation awarded by the national judges should not always be at the minimal level, but proportional to the length of proceedings and its consequences for the victim. The Court recalled this problem recently in the judgment of *Rutkowski and others* v. Poland cited above. If the Serbian judges will not adjust the amount of awarded compensation to the particular circumstances of each case, they risk that the Strasbourg Court will declare their judgment in a breach of Article 6, as it was in the case of the Polish courts: "The reluctance on the part of the national courts to award more substantial amounts may be linked with many factors, which are not for the Court but for the State to identify so that it can ensure compliance with the Convention in the future. However, the Court cannot but note that in the present case each applicant's claim for non-pecuniary damage could have been satisfied in accordance with the Scordino (no. 1) requirements at domestic level, without the need for any of them to address their complaints to the Court – if only the relevant courts had respected the Convention standards. The minimum domestic awards required in each case were all below the maximum ceiling set at PLN 20,000. It cannot therefore be said that the relevant courts were bound by the statutory limitations on awards or that they did not enjoy a sufficient margin of appreciation in their assessment of the relevant circumstances" (*Rutkowski and others*, § 218).

In consequence, despite the introduction of a domestic remedy by Poland – a complaint designed to provide "appropriate just satisfaction" for unreasonable length of judicial proceedings, the Court is continually forced to act as a substitute for the national courts and

handle hundreds of repetitive cases where its only task is to award compensation which should have been obtained by using a domestic remedy.

"This situation, subsisting for already several years in Poland, is not only incompatible with Article 13 but has also led to a practical reversal of the respective roles to be played by the Court and the national courts in the Convention system. It has upset the balance of responsibilities between the respondent State and the Court under Articles 1 and 19 of the Convention. In that regard, the Court would once again reiterate that, in accordance with Article 1, the primary responsibility for implementing and enforcing the rights and freedoms guaranteed by the Convention is laid on the national authorities and that the machinery of complaint to the Court is only subsidiary to the national systems safeguarding human rights. The Court's task, as defined by Article 19, cannot be said to be best achieved by repeating the same findings of a Convention violation in a series of cases" (*Rutkowski and others*, § 219).

The credibility of the awarded compensation can always be enforced by reference to Strasbourg case law that is actually often translated into Serbian language (database: *Hudoc* on the website of the European Court of Human Rights www.echr.coe.int).

It should be kept in mind that the cases pending on 21 May 2014 have been transferred from to the Constitutional Court to the general jurisdiction courts. Thus, the general jurisdiction courts will decide on the complaints about the excessive length of proceedings. The new Law on Protection of the Right to a Trial within a Reasonable Time was adopted in 7 May 2015, but will not enter into force until 1 January 2016.

In any event, the courts should cumulate the backlog in the period between 7 May and 31 December 2015. The cases should continue to be examined under the previous law until the new legislation enters into force.

A comprehensive system for dealing with the enforcement of final judgments must be introduced by the competent judicial and government authorities.

The above analyses should contribute to more conscious and confident approach of the problem of excessive length of proceedings by the judiciary.

BIBLIOGRAPHY

BOOKS

Garlicki L., *„Implementacja orzecznictwa Europejskiego Trybunału Praw Człowieka w ustawodawstwie krajowym – problemy przewlekłości postępowania"*, Biul. BIRE 2002, Nr 2

Harris D., O'Boyle M., Bates E., Buckley E., *"Harris, O'Boyle & Warbrick. Law of the European Convention on Human Rights"*, Oxford University Press, Second Edition, 2009

Hofmański P., Wróbel A., *"Rozpoznanie sprawy w rozsądnym terminie" [in] "Konwencja o Ochronie Praw Człowieka i Podstawowych Wolności"*, vol. I, Garlicki L., Beck 2010

Pavlovic D. *"Serbia"* [in] *"The European Convention on Human Rights and Fundamental Freedoms in Central and Eastern Europe"*, ed. L. Hammer and F. Emmert, Eleven International Publishing, Netherlands, 2012

Petrović-Škero V., Rajska D., *"Protection of the right to a trial within a reasonable time in the court proceedings"*, Council of Europe and Serbian Supreme Court of Cassation, May 2015

Rajska D., *"Droit à un procès équitable en France et en Pologne"*, Presses Universitaires d'Aix-Marseille (PUAM), June 2015

Ryngielewicz K., Rajska D., *"Nadmierna długość postępowań sądowych w świetle orzecznictwa Europejskiego Trybunału Praw Człowieka"* [in] *Przegląd Sądowy* 3/2015, Wolters Kluwer

Vitkauskas D., Dikov G. *"Ochrona prawa do rzetelnego procesu sądowego w Europejskiej Konwencji o Ochronie Praw Człowieka"*, Council of Europe, 2012

JOINT PUBLICATIONS

"Practical guide on admissibility criteria, European Court of Human Rights", European Court of Human Rights, 2014

"Can excessive length of proceedings be remedied?", Venice Commission, Council of Europe, June 2007

"Pilot judgment procedure in the European Court of Human Rights", Seminar Papers, Contrast, Warsaw 2009

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This handbook is a tool for judges, lawyers and prosecutors for taking into account the various requirements of the European Convention of Human Rights as regards the right to a fair trial within a reasonable time.

It is an overview of principles established in the key rulings of the European Court of Human Rights (ECtHR) and presented using examples from Poland and Serbia.

The subject of this comparative study is very topical. Poland ratified the European Convention of Human Rights in 1993 and Serbia ratified it in 2004. This is the reason for Poland being ten years ahead of Serbia concerning the legislative reforms on the right to a trial without undue delay. Serbia has recently established a new remedy that came into force in January 2016.

This handbook is particularly useful for practitioners as the interpretation, in light of the principles established by the ECtHR case law, is essential to preserve the efficiency of the remedy.

Lech Garlicki, Former Judge of the European Court of Human Rights and the Polish Constitutional Court

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