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REPORT ON A NEEDS ASSESSMENT FOR THE RE-EXAMINATION/RE-OPENING OF CASES IN THE REPUBLIC OF AZERBAIJAN

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EXECUTIVE SUMMARY

This Report embodies the conclusions of a needs assessment undertaken with respect to the national practice and legal framework for re-examination/re-opening of cases following judgments by the European Court of Human Rights finding violations of the European Convention on Human Rights, as well as following the conclusions of friendly settlements and the issuing of unilateral declarations in connection with applications submitted to it

The Report, by way of background, first reviews the relevant European standards, particularly, those in the European Convention (as elaborated in the case law of the European Court), various Recommendations of the Committee of Ministers and guidance material prepared by the Steering Committee for Human Rights and the Council of Europe's Department for the Execution of Judgments of the European Court of Human Rights.

It then analyses the existing legal framework regarding the position of the Authorized Representative (Agent) of the Republic of Azerbaijan to the European Court and the scope for re-examination/re-opening of cases, as well as the extent to which the need for such re-examination/re-opening has arisen and been acted upon following judgments of the European Court, friendly settlements and unilateral declarations.

Thereafter, it assesses the extent to which the legal framework and practice are sufficient to give effect to the requirements of European standards and makes recommendations that appears necessary for ensuring compliance with them. These recommendations concern the arrangements for the re-opening and re-examination of cases following a judgment or decision of the European Court and certain institutional matters relating to coordination structures and the role that could be played by the Milli Majlis and the Commissioner for Human Rights of the Republic of Azerbaijan. They cover legislative amendments, other regulations and institutional arrangements, as well as matters of practice and capacity building activities and training.

ABBREVIATIONS AND ACRONYMS

2022 Annual Report	Supervision of the Execution of Judgments and Decisions 2022
Agent	Authorized Representative (Agent) of the Republic of Azerbaijan to the European Court
AHRC	Commissioner for Human Rights of the Republic of Azerbaijan
Brussels Declaration	Brussels Declaration of the Committee of Ministers
Committee of Ministers	Committee of Ministers of the Council of Europe
Drafting Guide	Guide for the drafting of action plans and reports for the execution of judgments of the European Court of Human Rights
European Convention	European Convention on Human Rights
European Court	European Court of Human Rights
Execution Department	Council of Europe's Department for the Execution of Judgments of the European Court of Human Rights
Good Practice Guide	Guide to good practice on the implementation of Recommendation CM/Rec(2008)2
judgments and decisions of the European Court	judgments of the European Court, friendly settlements and unilateral declarations
Milli Majlis	Milli Majlis of the Republic of Azerbaijan
NGOs	non-governmental organisations
NHRIs	National Human Rights Institutions
Parliamentary Assembly	Parliamentary Assembly of the Council of Europe
Prevention and Remedying Guidelines	Guidelines of the Committee of Ministers on the prevention and remedying of violations of the Convention for the protection of human rights

	and fundamental freedoms
Recommendation No. R (2000) 2	Recommendation No. R (2000) 2 of the Committee of Ministers to member states on the re-examination or reopening of certain cases at domestic level following judgements of the European Court of Human Rights
Recommendation Rec(2004)5	Recommendation Rec(2004)5 of the Committee of Ministers to member states on the verification of the compatibility of draft laws, existing laws and administrative practice with the standards laid down in the European Convention on Human Rights
Recommendation Rec(2004)6	Recommendation Rec(2004)6 of the Committee of Ministers to member states on the improvement of domestic remedies
Recommendation CM/Rec(2008)2	Recommendation CM/Rec(2008)2 of the Committee of Ministers to member states on efficient domestic capacity for rapid execution of judgments of the European Court of Human Rights
Recommendation CM/Rec(2019)5	Recommendation CM/Rec(2019)5 of the Committee of Ministers to member States on the system of the European Convention on Human Rights in university education and professional training
Recommendation CM/Rec(2021)1	Recommendation CM/Rec(2021)1 of the Committee of Ministers to member States on the development and strengthening of effective, pluralist and independent national human rights institutions

Recommendation CM/Rec(2021)4	Recommendation CM/Rec(2021)4 of the Committee of Ministers to member States on the publication and dissemination of the European Convention on Human Rights, the case law of the European Court of Human Rights and other relevant texts
Regulation	Regulation on the Authorized Representative of the Republic of Azerbaijan to the European Court of Human Rights
Rules of Court	European Court's Rules of Court
Tirana Round Table	Round table: Efficient Domestic Capacity for rapid execution of the European Court's Judgments 15-16 December 2011 Conclusions of the Chairperson

A. INTRODUCTION

1. This Report embodies the conclusions of a needs assessment undertaken with respect to the national practice and legal framework for re-examination/re-opening of cases following judgments by the European Court of Human Rights ("the European Court") finding violations of the European Convention on Human Rights ("the European Convention"), as well as following the conclusions of friendly settlements and the issuing of unilateral declarations in connection with applications submitted to it.

2. The implementation of judgments and decisions of the European Court is expected to be an important theme of the Council of Europe Summit of Heads of State and Government, which will take place in Reykjavik on 16 and 17 May 2023. Indeed, as the Plenary Court underlined in a Memorandum adopted in view of this Summit:

> Deficiencies in execution and compliance with the Court's judgments and decisions undermine the effectiveness of the Convention system and of the Convention's role as an instrument for the protection of European public order in the field of human rights. It is therefore of paramount importance that the member States reaffirm their commitment to the execution of the Court's judgments and decisions, given their binding nature and the States' parties obligations under the Convention.[1]

3. Furthermore, the Secretary General of the Council of Europe has urged member States to show increased political will to implement judgments from the European Court and to improve their capacity for doing so.[2]

4. This is an issue of particular significance for Azerbaijan as most recent report of the Committee of Ministers on the Supervision of the Execution of Judgments and Decisions ("the 2022 Annual Report") notes the existence of a large number of judgments in respect of it which have remained unexecuted, often for many years.[3]

5. Indeed, the *Information note* by rapporteurs from the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly of the Council of Europe following their visit to Azerbaijan in November 2022 concluded that "quicker mechanisms are needed for addressing individual measures".[4]

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[1] At para. 31.

[2] https://www.coe.int/en/web/portal/-/rule-of-law-secretary-general-calls-for-increased-political-will-to-implement-echr-judgments.

[3] At p. 69.

[4] AS/JUR (2023) 01, at para. 18.

6. The preparation of the needs assessment has been based on desk research - relating to legislation, case law, analytical studies and official and other relevant documentation - and a visit to Azerbaijan.

7. During the visit, meetings were held with members and staff of the Constitutional and Supreme Courts, the staff of the Authorized Representative (Agent) of the Republic of Azerbaijan to the European Court ("the Agent"), representatives of the Ministry of Justice and Justice Academy, the Office of the Prosecutor General, the Milli Majlis of the Republic of Azerbaijan ("the Milli Majlis"), the Commissioner for Human Rights of the Republic of Azerbaijan ("the AHRC"), the Center for Legal Examination and Legislative Initiatives, the "Law and Human Rights Institute" Public Legal Entity, the Bar Association and civil society, as well as with independent human rights lawyers/advocates.

8. The purpose of these meetings was to seek answers to questions relating to the national practice and legal framework for re-examination/re-opening of cases that had been provided in advance to the respective interlocutors, as well as to gather other information that they considered relevant.

9. Furthermore, the preparation of the needs assessment has been guided by the requirements established in relevant European standards.

10. An initial draft of the Report was revised to take account of additional information, as well as comments and suggestions, provided by both the interlocutors and the Council of Europe's Department for the Execution of Judgments of the European Court of Human Rights ("the Execution Department").

11. The Report, by way of background, first reviews the relevant European standards. It then analyses the existing legal framework regarding the position of the Agent and the scope for re-examination/re-opening of cases, as well as the extent to which the need for such re-examination/re-opening has arisen and been acted upon following judgments of the European Court, friendly settlements and unilateral declarations ("judgments and decisions of the European Court"). Thereafter, it assesses the extent to which the legal framework and practice are sufficient to give effect to the requirements of European standards and makes recommendations that appears necessary for ensuring compliance with them. These recommendations cover legislative amendments, other regulations and institutional arrangements, as well as matters of practice and capacity building activities and training.

12. The Report has been prepared by Jeremy McBride[5] and Marek Nowicki[6] under the auspices of Council of Europe Project "Support for the improvement of the execution of the European Court judgments by Azerbaijan".

B. RELEVANT EUROPEAN STANDARDS

The relevant European standards are those in the European Convention, as elaborated in the case law of the European Court, Recommendation CM/Rec(2008)2 of the Committee of Ministers to member states on efficient domestic capacity for rapid execution of judgments of the European Court of Human Rights ("*Recommendation CM/Rec(2008)2*"),[7] the Guide to good practice on the implementation of Recommendation CM/Rec(2008)2 prepared by the Steering Committee for Human Rights ("the *Good Practice Guide*"),[8] Recommendation Rec(2004)5 of the Committee of Ministers to member states on the verification of the compatibility of draft laws, existing laws and administrative practice with the standards laid down in the European Convention on Human Rights ("*Recommendation Rec(2004)5*"),[9] Recommendation No. R (2000) 2 of the Committee of Ministers to member states on the re-examination or reopening of certain cases at domestic level following judgements of the European Court of Human Rights ("*Recommendation No. R (2000) 2*"), Recommendation Rec(2004)6 of the Committee of Ministers to member states on the improvement of domestic remedies ("*Recommendation Rec(2004)6*"), Recommendation CM/Rec(2019)5 of the Committee of Ministers to member States on the system of the European Convention on Human Rights in university education and professional training ("*Recommendation CM/Rec(2019)5*"),Recommendation CM/Rec(2021)1 of the Committee of Ministers to member States on the development and strengthening of effective, pluralist and independent national human rights institutions ("Recommendation CM/Rec(2021)1"), Recommendation CM/Rec(2021)4 of the Committee of Ministers to member States on the publication and dissemination of the European Convention on Human Rights, the case law of the European Court of Human Rights and other relevant texts ("*Recommendation CM/Rec(2021)4*"), the Brussels Declaration of the Committee of Ministers ("the *Brussels Declaration*"),[10] the Guide for the drafting of action plans and reports for the execution of judgments of the European Court of Human Rights ("the *Drafting Guide*")[11] the Round table: Efficient Domestic Capacity for rapid execution of the European Court's Judgments 15-16 December 2011 Conclusions of the Chairperson ("the *Tirana Round Table*") and the

[5] Barrister, Monckton Chambers, London.
[6] Retired barrister and former member of the European Commission of Human Rights.
[7] Adopted on 6 February 2008.
[8] CM(2017)92-add3final, 15 September 2017.
[9] Adopted on 12 May 2004.
[10] Adopted at the High-level Conference on the "Implementation of the European Convention on Human Rights, our shared responsibility", 27 March 2015.
[11] Prepared by the Department for the Execution of Judgments of the European Court of Human Rights in the Directorate General Human Rights and Rule of Law.

Guidelines of the Committee of Ministers on the prevention and remedying of violations of the Convention for the protection of human rights and fundamental freedoms ("the *Prevention and Remedying Guidelines*").

13. The provisions in *Recommendation CM/Rec(2008) 2* are applicable, mutatis mutandis, to the execution of friendly settlements and cases closed on the basis of a unilateral declaration by the member State concerned.

14. These standards relate to: the measures that may need to be adopted once there is a judgment of the European Court finding a violation of the European Convention, as well as where there is a friendly settlement or a unilateral declaration; the re-examination/re-opening of the case as one of those measures; the role of the Government Agent in the process leading to their adoption; and the roles that can be played by the Parliament and National Human Rights Institutions ("NHRIs"). They are considered in turn.

1. Measures

15. The principal standard applicable to the measures to be taken where there is such a judgment is Article 46 of the European Convention, which entails an obligation – once it has become final to abide by it, with this provision entrusting supervision of its execution to the Committee of Ministers of the Council of Europe ("the Committee of Ministers").

16. The nature of the obligation has been elaborated in the case law of the European Court, the practice of the Committee of Ministers, *Recommendation CM/Rec(2008) 2*, *Recommendation No. R (2000) 2*, the *Good Practice Guide* and the *Drafting Guide*.

17. Each case in which a violation is found by the European Court invariably has its own particular features and thus will require the adoption of measures tailored to them.

18. Nonetheless, the essential objective is to ensure that the measures taken deal both with the specific situation of the individual applicant and with any shortcomings in law or practice that gave rise to the application concerned, i.e., the general position regarding compliance with the requirements of the European Convention.

19. In the case of the former objective, the effect of the measures should be, as the European Court has made clear on many occasions, "to put the applicant, as far as possible, in the position he would have been in had the requirements of the Convention not been disregarded"[12], i.e., to achieve the applicant's *restitutio in integrum*.

[12] See, e.g., *Del Río Prada v. Spain* [GC], no. 42750/09, 21 October 2013, at para. 137.

20. As regards the latter one, the obligation under Article 46 of the European Convention to abide by the final judgment of the European Court also requires that the High Contracting Party concerned should "put an end to the situation that gave rise to the finding of a violation".[13]

21. The nature of some violations – notably in the case of violations leading to a person's death or imprisonment - may mean that the making of a payment in respect of compensation, costs and expenses will be the most that can be done by way of *restitutio in integrum*.

22. However, there will be many violations where the individual measures that ought to be adopted will not be limited to making such payments. Instead, they could extend to a wide range of actions, including the reopening of judicial proceedings[14], the adoption or reversal of decisions by public authorities and the making of various practical arrangements either to undo the consequences of a violation or to mitigate its future effects (such as the provision of a substitute for an item taken or destroyed and the provision of treatment for injuries or illness occasioned by the violation).

23. The more general measures required can be equally wide-ranging. In some instances, there may be a need to change the substance of the law, whether through an amendment to one or more provisions in a particular law or through the replacement of an entire law by a new one or the adoption of a law dealing with a matter not previously addressed.[15] In other instances, the problem that may need to be addressed is not the content of the law but the way in which it has been interpreted and applied, for which the issuing of guidance and/or training for those concerned may be sufficient to preclude a repetition of the problem that led to the judgment of the European Court or the conclusion of a friendly settlement.

24. Often, however, the problems requiring attention will have been occasioned by the inadequacy of administrative, institutional and organisational arrangements, whether in terms of the existence of appropriate supervisory or monitoring systems, the allocation of responsibilities, the availability of a sufficient level of staffing and financing for particular activities to be undertaken or the provision of suitable equipment and premises for this purpose. There may also be a need to change regulations and other subordinate forms of legislation and official guidance and practice. [16]

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[13] Ibid, at para. 138.

[14] Dealt with in some detail in Recommendation No. R (2000) 2 and recognised by the European Court as appropriate in some cases; see *Moreira Ferreira v. Portugal (No. 2)* [GC], no. 19867/12, 11 July 2017, at paras. 88-100. See further in the following sub-section.

[15] This will entail verification of the compatibility of the draft law with the standards laid down in the European Convention, as envisaged in paragraphs 5-6 of the Appendix to Recommendation *Rec(2004)5*.

[16] For this purpose, there will be a need to verify the compatibility of the replacements for such regulations, subordinate legislation and official guidance and practice with the standards laid down in the European Convention, as envisaged in paragraphs 9-10 of the Appendix to Recommendation *Rec(2004)5*.

25. The adoption of the particular measures required following the delivery of a judgment by the European Court will in many instances be only a matter for the executive and judiciary. However, apart from the possibility of it overseeing whether these have acted appropriately, the legislature will also have particular responsibility to act where the measures required to be taken would entail the adoption and amendment of legislation and/or the provision of finance for the executive and the judiciary.

26. The determination of what measures are actually required in a given case is one that can involve both the European Court and the Committee of Ministers.

27. Thus, both individual and general measures may be specified as required by the European Court in the operative part of its judgment and they can also be in the terms of the friendly settlement which it approves under Article 39(3) of the European Convention, as well as in unilateral declarations by the respondent State which it has taken note of and then struck out the case under Article 37(1)(c) of the European Convention.

28. In the case of judgments, the individual measures prescribed by the European Court are generally restricted to the award of compensation, costs and expenses. However, as has been seen, it may in some cases order particular action to be undertaken with respect to the applicant. Although still an unusual feature of judgments, the possibility of such an order being made can no longer be excluded.

29. Most judgments do not indicate the general measures that will be required. However, they will be specified by the European Court in pilot judgments dealing with a systemic or structural problem relating to a requirement under the European Convention. In some instances, general measures will also be specified in judgments that are not pilot ones. However, this is rather exceptional.

30. In addition, to the specification of individual and general measures in the operative part of a judgment – which are thereby binding on the High Contracting Party concerned pursuant to Article 46 of the European Convention – the European Court may also suggest such measures in the course of its judgment. Such suggestions may indeed be adopted but there is no automatic requirement for this to be done.

31. Thus, the determination of what measures are required following a finding of a violation of the European Convention will not necessarily be resolved by the judgment itself. This becomes, therefore a matter normally to be resolved in the course of the process of supervising the execution of the judgment by the Committee of Ministers.

32. The responsibility for supervising the execution of judgments of the European Court has been entrusted to the Committee of Ministers by respectively Articles 39(4) and 46(2) of the European Convention following their transmission to it.

33. The measures that are to be taken in the case of judgments – other than the ones actually specified in their operative parts – are often established in the course of the supervision process.

34. States are expected by the Committee of Ministers to indicate the measures that they have taken and/or plan to take in an action plan, a practice specifically confirmed in *Recommendation CM/Rec(2008) 2*[17] and elaborated in detail in both the *Good Practice Guide* and the *Drafting Guide*.

35. Moreover, it is well-established in the case law of the European Court that a High Contracting Party generally has a discretion as to the choice of general and/or individual measures required for the execution of a judgment.

36. This is especially the case where the European Court has not, in its judgment, given any indication as to how it should be executed.[18]

37. However, the discretion that a High Contracting Party enjoys under Article 46 is subject to three interlinked limitations.

38. Firstly, the means chosen must be compatible with the conclusions contained in the Court's judgment.[19]

39. Secondly, in exercising their choice of individual measures, the High Contracting Party must bear in mind their primary aim of achieving *restitutio in integrum* for the applicant.[20]

40. Thirdly, the nature of the violation found may be such as to leave the High Contracting Party no real choice as to the individual measures which it is required to take.

41. Whether the means chosen by a High Contracting Party are compatible with the conclusions contained in the European Court's judgment will be something that can only be determined by the result actually achieved by them.

42. In particular, those chosen should be such as ensures both that the violation found by the European Court to have occurred has ceased and that the injured party has, to the extent possible, been restored to the situation that existed before this occurred.

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[17] Paragraph 7.

[18] See, e.g., *Emre v. Switzerland (No. 2)*, no. 5056/10, § 69, 11 October 2011.

[19] See, e.g., *Assanidze v. Georgia* [GC], no. 71503/01, paras. 198 and 202; *Ilaşcu and Others v. Moldova and Russia* [GC], no. 48787/99, para. 490; *Al Saadoon and Mufdhi v. the United Kingdom*, no. 61498/08, para. 170; and *Hirsi Jamaa and Others v. Italy* [GC], no. 27765/09, para. 209.

[20] *Proceedings under Article 46 § 4 of the Convention in the case of Ilgar Mammadov v. Azerbaijan* [GC], no. 15172/13, 29 May 2019, para. 150.

43. In this regard, it is especially important that the High Contracting Party can be seen to have undertaken examination of the reasoning in the European Court's judgment even though no specific measure for its execution had been indicated.[21]

44. Moreover, as the European Court has indicated, the execution of its judgments should involve good faith on the part of the High Contracting Party and take place in a manner compatible with the "conclusions and spirit" of the judgment.[22]

45. The situations in which the nature of a violation will be such as to leave no real choice as to the individual measures that should be taken have been found by the European Court to include, for example, ones to secure the release of a person who was being "held arbitrarily in breach of the founding principles of the rule of law"[23] and to seek assurances from another State that someone extra-judicially transferred to it would not be subjected to the death penalty.

46. There may also be situations in which a particular measure may be the most natural means of executing a judgment and best correspond to the principle of *restitutio in integrum* even though it is possible that another result might be acceptable.[24]

47. The fact that, in cases such as those discussed above the European Court has found it useful to indicate to the High Contracting Party the type of measures that might be taken to put an end to the situation which has given rise to the finding of a violation does not, however, mean that it is only in those cases where such an indication is given that a High Contracting Party will either have no choice as to individual or general measures to be taken in execution of a judgment or that such measures will not be the most natural means of doing so.

48. The indication of certain measures by the European Court undoubtedly helps the High Contracting Party in the execution of a judgment. However, the ultimate responsibility for determining how a judgment should be executed is that of the Committee of Ministers.

49. This has been confirmed by the European Court in its first judgment concerned with infringement proceedings brought under Article 46(4) of the European Convention by the Committee of Ministers with respect to an alleged failure to abide by a final judgment.

50. In this judgment, the European Court emphasised that:

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[21] *Emre v. Switzerland (No. 2)*, no. 5056/10, 11 October 2011, para. 69.

[22] *Ibid.*, at para. 75, *Proceedings under Article 46 § 4 of the Convention in the case of Ilgar Mammadov v. Azerbaijan* [GC], no. 15172/13, 29 May 2019, para. 214 and *Proceedings under Article 46 § 4 of the Convention in the case of Kavala v. Türkiye [*GC], no. 28749/18, 11 July 2022, para. 128.

[23] *Assanidze v. Georgia* [GC], no. 71503/01, paras. 199 and 202.

[24] *Emre v. Switzerland (No. 2)*, no. 5056/10, 11 October 2011, para. 75.

> An approach which limited the supervision process to the Court's explicit indications would remove the flexibility needed by the Committee of Ministers to supervise, on the basis of the information provided by the respondent State and with due regard to the applicant's evolving situation, the adoption of measures that are feasible, timely, adequate and sufficient.[25]

51. Thus, the obligation to execute a judgment requires that the measures taken by the High Contracting Party actually ensure that the violation concerned has ceased and that the injured party has, as far as possible, been restored to her, his or its pre-existing situation.

52. Moreover, in certain cases, the nature of a certain violation will mean that this obligation can only be fulfilled through the taking of one or more specific measures. In such cases, the High Contracting Party cannot claim that it has the right to determine how to execute the judgment of the European Court.

53. However, it is likely to be very unusual for there to be no choice of means as regards the general measures that are required for the execution of a judgment.

54. Such a situation would probably only arise where there was a legislative provision that unambiguously conflicted with a requirement of the European Convention or where it would be impossible to prevent the recurrence of the violation found without the provision of additional resources or facilities.

55. Nonetheless, the approach followed by the Committee of Ministers in assisting the determination of general measures in its interaction with a High Contracting Party – including through the provision of legal expertise, round tables and training activities – has been endorsed by the European Court.

56. Thus, it has stated that:

> 162. According to the Court's established case-law the execution process concerns compliance by a Contracting Party with its obligations in international law under Article 46 § 1 of the Convention. Those obligations are based on the principles of international law relating to cessation, non-repetition and reparation as reflected in the ARSIWA[26] …They have been applied over the years by the Committee of Ministers and currently find expression in Rule 6.2 of the Rules of the Committee of Ministers[27] …

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[25] *Proceedings under Article 46 § 4 of the Convention in the case of Ilgar Mammadov v. Azerbaijan*, no. 15172/13, 29 May 2019, para. 184.

[26] Articles on Responsibility of States for Internationally Wrongful Acts; Report of the International Law Commission on the Work of its Fifty-third Session, Official Records of the General Assembly, Fifty-sixth Session (Supplement no. 10 (A/56/10), chap. IV.E.1 and chap. IV.E.2, pp. 46 and 133-145).

[27] "When supervising the execution of a judgment by the High Contracting Party concerned, pursuant to Article 46, paragraph 2, of the Convention, the Committee of Ministers shall examine: a. whether any just satisfaction awarded by the Court has been paid, including as the case may be, default interest; and b. if required, and taking into account the discretion of the High Contracting Party concerned to choose the means necessary to comply with the judgment, whether: i. individual measures have been taken to ensure that the violation has ceased and that the Injured Party is put, as far as possible, in the same situation as that party enjoyed prior to the violation of the Convention; ii. general measures have been adopted, preventing new violations similar to that or those found or putting an end to continuing violations" (footnotes omitted).

163. Accordingly, the supervision mechanism now established under Article 46 of the Convention provides a comprehensive framework for the execution of the Court's judgments, reinforced by the Committee of Ministers' practice. Within that framework the Committee's continuous supervision work has generated a corpus of public documents encompassing information submitted by respondent States and others concerned by the execution process, and recording decisions taken by the Committee in cases pending execution. That practice has also influenced general standard-setting in the Committee's Recommendations to the Member States on topics relevant to execution issues (for example Recommendation R (2000) 2 on the re-examination or reopening of certain cases at domestic level following judgments of the European Court of Human Rights or Recommendation CM/Rec(2010)3 on effective remedies for excessive length of proceedings). The result is that the Committee of Ministers has developed an extensive *acquis.*

164. With this in mind, the Court notes that it has previously held that Article 41 is a *lex specialis* in relation to the general rules and principles of international law, whilst also concluding that this provision should be interpreted in harmony with international law (see *Cyprus v. Turkey* (just satisfaction), cited above, §§ 40-42). Having regard to its conclusions above concerning the legal framework for the execution process and the Committee of Ministers' *acquis,* it will adopt a similar approach in the present context and consider Rule 6 of the Committee's rules to reflect the principles of international law set out in the ARSIWA.[28]

2. Re-examination/re-opening of cases

57. *Recommendation No. R(2000) 2* encouraged member States to ensure that:

> that there exist adequate possibilities of re-examination of the case, including reopening of proceedings, in instances where the Court has found a violation of the Convention, especially where:
>
> i. the injured party continues to suffer very serious negative consequences because of the outcome of the domestic decision at issue, which are not adequately remedied by the just satisfaction and cannot be rectified except by re-examination or reopening, and
>
> ii. the judgement of the Court leads to the conclusion that
>
> a. the impugned domestic decision is on the merits contrary to the Convention, or
> b. the violation found is based on procedural errors or shortcomings of such gravity that a serious doubt is cast on the outcome of the domestic proceedings complained of.

58. However, there is no provision in the European Convention that deals specifically with the need for the re-examination/re-opening of proceedings following the finding by the European Court that one or more rights guaranteed by it have been violated.

59. Nonetheless, the European Court has emphasised that:

> as stated in Recommendation No. R (2000)2 of the Committee of Ministers, the practice of the Committee of Ministers in supervising the execution of the Court's judgments shows that in exceptional circumstances the re-examination of a case or the reopening of proceedings has proved the most efficient, if not the only, means of achieving *restitutio in integrum*, that is to say ensuring that the injured party is restored, as far as possible, to the situation which he or she enjoyed prior to the

[28] *Proceedings under Article 46 § 4 of the Convention in the case of Ilgar Mammadov v. Azerbaijan*, no. 15172/13, 29 May 2019.

> violation of the Convention. Among the cases in which the Court finds a violation, re-examination or reopening will be of particular importance in the field of criminal law, according to the explanatory memorandum to the Recommendation.[29]

60. This statement echoed similar remarks previously made with respect to the importance of re-opening of civil proceedings for the purpose of executing its judgments.[30]

61. In addition, the European Court has stated that the re-opening of proceedings where a violation of Article 6 of the European Convention has been found:

> also reflects the principles of international law whereby a State responsible for a wrongful act is under an obligation to make restitution, consisting in restoring the situation which existed before the wrongful act was committed (Article 35 of the Draft Articles of the International Law Commission on Responsibility of States for Internationally Wrongful Acts.[31]

62. Furthermore, although the European Court considers that it does not have the authority to order such re-examination/re-opening,[32] it has still indicated in many cases in which one or more violations of aspects of the right to fair trial have been found that this – whether using these terms or referring to the need for a rehearing, a retrial, trial *de novo* or the quashing of a judgment – would "in principle" be the most appropriate form of redress[33].

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[29] *Moreira Ferreira v. Portugal (No. 2)* [GC], no. 19867/12, 11 July 2017, at para. 48.

[30] *Bochan v. Ukraine (No. 2)* [GC], no. 22251/08, 5 February 2015, at para. 58.

[31] See, e.g., *Laska and Lika v. Albania*, no. 12315/04, 20 April 2010, at para. 75.

[32] See *Moreira Ferreira v. Portugal (No. 2)* [GC], no. 19867/12, 11 July 2017, at paras. 48-49

[33] Such as where violations have been found on account of: unjustified deprivation of access to court (*Kurşun v. Turkey*, no. 22677/10, 30 October 2018) or a disproportionate restriction on access to a court (*Gil Sanjuan v. Spain*, no. 48297/15, 26 May 2020) ; the absence of a tribunal established by law *(Besnik Cani v. Albania*, no. 37474/20, 4 October 2022); the lack of the tribunal's independence and/or impartiality (*Stoimenovikj and Miloshwvikj v. North Macedonia*, no. 59842/14, 25 March 2021); the failure to grant legal aid (*Shumikhin v. Russia*, no. 7848/06, 16 July 2015); insufficient time to prepare a defence (*Iglin v. Ukraine*, no. 39908/05, 12 January 2012); the inability of the accused or a party to participate in the proceedings (*X. v. Netherlands*, no. 72631/17, 27 July 2021); the absence of equality of arms (*Zinin v. Russia*, no. 54339/09, 9 March 2021); the refusal to search for or to examine relevant defence witnesses (*Vasaráb and Paulus v. Slovakia*, no. 28081/19, 15 December 2022); the refusal to consider evidence (*Ter-Sargsyan v. Armenia*, no. 27866/10, 27 October 2016); the inability of the accused either to see anonymous witnesses during their testimonies or to learn their identities (*Krasniki v. Czech Republic*, no. 51277/99, 28 February 2006); the inability to cross-examine witnesses(*Buliga v. Romania*, no. 22003/12, 16 February 2021); the failure to guarantee an accused an effective defence and representation (*Suslov and Batikyan v. Ukraine*, no. 56540/14, 6 October 2022); an unreasoned decision based on a factual error (*Tağaç and Others v. Turkey*, no. 71864/01, 7 July 2009); reliance on evidence obtained in breach of the prohibition on ill-treatment (*Golubyatnikov and Zhuchkov v. Russia*, no. 49869/06, 9 October 2018) or the right to silence and the privilege against self-incrimination (*Bajić v. North Macedonia*, no. 2833/13, 10 June 2021), as well as through the denial of access to a lawyer (*Harun Gürbüz v. Turkey*, no. 68556/10, 30 July 2019), incitement to commit the offence (*Zinin v. Russia*, no. 54339/09, 9 March 2021), a search that did not observe the necessary procedural safeguards (*Budak v. Turkey*, no. 69762/12, 16 February 2021) or was otherwise obtained in a manner that was unfair (*Razvozzhayev v. Russia and Ukraine and Udaltsov v. Russia*, no. 75734/12, 19 November 2019); the failure to consider whether there had been incitement to commit the offence charged (*Kuzmina and Others v. Russia*, no. 66152/14, 20 April 2021); reasoning that was inconsistent with the requirement of legal certainty (*Melgarejo Martinez de Abellanosa v. Spain*, no. 11200/19, 14 December 2021); the cumulative consequence of the manner of proceeding (*Navalnyy and Ofitserov*

63. It has also done so where procedural failings have been the basis for finding violations of other rights under the European Convention.[34]

64. Moreover, the European Court has accepted that a valid objection to the striking out of an application pursuant to a unilateral declaration by the respondent State was that a judgment by it following its examination of the case on the merits could be the only legal basis for the re-examination of the applicant's case at the national level.[35]

65. In addition, where the legal system did not provide for the possibility of re-examining cases, including the reopening of domestic proceedings, the European Court has stated that it considered that:

> it is for the respondent State to remove any obstacles in its domestic legal system that might prevent the applicants' situation from being adequately redressed (see, amongst other authorities, *Karanović v. Bosnia and Herzegovina*, no. 39462/03, § 28, 20 November 2007) or introduce a new remedy that would enable the applicants to have the situation repaired. Moreover, the Contracting States are under a duty to organise their judicial systems in such a way that their courts can meet the requirements of the Convention. This principle also applies to the reopening of proceedings and the re-examination of the applicants' case (see, *mutatis mutandis, Verein gegen Tierfabriken Schweiz (VgT)* (no. 2), cited above, § 97).[36]

66. Nonetheless, there has been at least one instance where the European Court declined to give such an indication where it considered that the re-opening of the proceedings had not been implicitly requested by the applicant.[37]

67. On the other hand, in another case, it did not indicate – without any explanation - that re-opening was the most appropriate redress for the finding of a violation of Article 6 even though this had been contended by the applicant.[38]

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v. Russia, no. 46632/13, 23 February 2016 *Corneschi v. Romania*, no. 21609/16, 11 January 2022); and the failure to provide interpretation (*Amer v. Turkey*, no. 25720/02, 13 January 2009).

[34] See, e.g., *Ageyevy v. Russia*, no. 7075/10, 18 April 2013 and *Haddad v. Spain*, no. 16572/17, 18 June 2019 (Article 8; adoption proceedings); *Pişkin v. Turkey*, no. 33399/18, 15 December 2020 (Article 8; employment proceedings); *Verein Gegen Tierfabriken Schweiz (VgT) v. Switzerland (No.2)*, [GC], no. 32777/02, 30 June 2009 (Article 10; proceedings relating to a prohibition on advertising); *Guță Tudor Teodorescu v. Romania*, no. 33751/05, 5 April 2016 (Article 1 of Protocol No. 1; determining amount of compensation); *Domenech Aradilla and Rodríguez González v. Spain*, no. 32667/19, 19 January 2023 and *Valverde Digon v. Spain*, no. 22386/19, 26 January 2023 (Article 1 of Protocol No. 1; pension proceedings); and *Rostovtsev v. Ukraine*, no. 2728/16, 25 July 2017 and *Y.B. v. Russia*, no. 71155/17, 20 July 2021 (Article 2 of Protocol No. 7; adopting an interpretation that led to the refusal of appeals against conviction).

[35] *Davydov v. Russia*, no. 18967/07, 30 October 2014, at paras. 18-32. However, the need for re-examination was not actually indicated in respect of the violation found of Article 6 of the European Convention and of Article 1 of Protocol No. 1.

[36] *Laska and Lika v. Albania*, no. 12315/04, 20 April 2010, at para. 77. Similarly, *Shkalla v. Albania*, no. 26866/05, 10 May 2011, at paras. 78-79.,

[37] *Sivukhin v. Russia*, no. 31049/05, 7 May 2009, at para. 34.

[38] *Dimitar Mitev v. Bulgaria*, no. 34779/09, 8 March 2018. However, in refusing the applicant's claim for an award of non-pecuniary damage, it noted that "it does not follow from its finding of a violation of Article 6 §§ 1 and 3 (c) of

68. On many but not all, occasions when stating that re-opening would be the most appropriate redress, the European Court has also specified that this would be so if it is requested by the applicant,[39] However, sometimes it has simply specified that such re-opening in the respondent State should be at the applicant's request.[40] Although not expressly stated, both formulations point to the need for the successful applicant to be able to initiate the re-opening process.[41]

69. Nevertheless, it is not impermissible for an application for re-opening to be subject to some admissibility criteria.[42]

70. In particular, it may be concluded in a given case that re-opening is not required where, for example:

> the procedural irregularity noted by the European Court could have had an impact on the applicant's sentence, it had not been serious enough for the conviction to be considered incompatible with the Court's judgment.[43]

71. However, any such admissibility ruling must neither be arbitrary in the sense of distorting or misrepresenting the judgment delivered by the European Court[44] nor be overly formalistic in determining the application for re-opening[45].

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the Convention that the applicant was wrongly convicted, and that it is impossible to speculate as to what might have occurred had there not been a breach of the Convention"; para. 76.

[39] See, most recently, *Y.B. v. Russia*, no. 71155/17, 20 July 2021; *X. v. Netherlands*, no. 72631/17, 27 July 2021; and *Besnik Cani v. Albania*, no. 37474/20, 4 October 2022

[40] See, e.g., *Cabral v. Netherlands*, no. 37617/10, 28 August 2018:*Pişkin v. Turkey*, no. 33399/18, 15 December 2020; *Negulescu v. Romania*, no. 11230/12, 16 February 2021; *Buliga v. Romania*, no. 22003/12, 16 February 2021; and *Serrano Contreras v. Spain (No. 2)*, no. 2236/19, 26 October 2021.

[41] This is also generally reflected in the practice of the Committee of Ministers, although it has accepted a situation in which a public authority such as a prosecutor had the right to request re-opening ; *Reopening of Domestic Judicial Proceedings Following the European Court's Judgments*, at p.4.

[42] *Moreira Ferreira v. Portugal (No. 2)* [GC], no. 19867/12, 11 July 2017, at para. 53. This was, however, strongly contested in the dissenting opinion of Judge Pinto de Albuquerque joined by Judges Karakaş, Sajó, Lazarova Trajkovska, Tsotsoria, Vehabović and Kūris.

[43] *Ibid*, at para. 88.

[44] As was found to have occurred in *Bochan v. Ukraine (No. 2*) [GC], no. 22251/08, 5 February 2015 and *Serrano Contreras v. Spain (No. 2)*, no. 2236/19, 26 October 2021; and

[45] As was found to have occurred in *Verein Gegen Tierfabriken Schweiz (VgT) v. Switzerland (No.2)*, [GC], no. 32777/02, 30 June 2009; "The Federal Court subsequently dismissed the applicant association's application to reopen the proceedings on the ground that the association had not provided a sufficient indication of its position as to the nature of "the amendment of the judgment and the redress being sought", as it was formally required to do by section 140 of the former Federal Judicature Act (see paragraph 29 above). On this point, the Grand Chamber shares the view expressed in paragraph 62 of the Chamber judgment that this approach is overly formalistic in a context in which it is clear from the circumstances as a whole that the association's application necessarily concerned the broadcasting of the commercial in question, which had been prohibited by the Federal Court itself on 20 August 1997" (para. 94).

72. Although Article 6 is not applicable to proceedings concerning an application for a re-opening of proceedings, [46] the requirements of this provision must be respected where the relevant proceedings have been re-opened as these will result in a decision which directly affects the civil rights and obligations of the person concerned or the determination of the criminal charge in respect of such a person[47].

73. The European Court has also indicated that it is not for it to indicate how any new trial is to proceed and what form it is to take, stating that:

> The respondent State remains free, subject to monitoring by the Committee of Ministers, to choose the means by which it will discharge its obligation to put the applicant, as far as possible, in the position he would have been in had the requirements of the Convention not been disregarded (see *Piersack v. Belgium* (Article 50), 26 October 1984, § 12, Series A no. 85), provided that such means are compatible with the conclusions set out in the Court's judgment and with the rights of the defence (see *Lyons and Others v. the United Kingdom* (dec.), no. 15227/03, ECHR 2003-IX).[48]

74. Nonetheless, it has also considered that it was:

> appropriate to refer to the general principle relating to the re-opening of a criminal case following the Court's judgment, namely that the courts acting in the new proceedings should be under an obligation to remedy the violations of the Convention found by the Court in its judgment. Failure to fulfil this requirement will result in the individual measures to be taken in the execution of a judgment in question remaining outstanding, as follows from the Committee of Ministers' decision (CM/Del/Dec(2016)1265/H46-24), adopted at the 1265th meeting of the Ministers' Deputies on 20-21 September 2016, in relation to the execution of the Court's judgment in *Pichugin v. Russia* (no. 38623/03, 23 October 2012), as well as from its decision (CM/Del/Dec(2017)1294/H46-25), adopted at the 1294th meeting of the Ministers' Deputies on 19-21 September 2017, in relation to the execution of the Court's judgment in *Navalnyy and Ofitserov*, cited above.[49]

75. Thus, it should be kept in mind that:

> the reopening of proceedings that have infringed the Convention is not an end in itself; it is simply a means – albeit a key means – that may be used for a particular purpose, namely the full and proper execution of the Court's judgments.[50]

76. As a result, the fresh examination of a case following its re-opening must demonstrate that its resolution does actually take full account of the considerations set out in the judgment of the European Court finding a violation of the European Convention.[51]

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[46] *Surmont v. Belgium* (dec.), no. 13601/88, 6 July 1989 and *Kaisti v. Finland* (dec.), no. 70313/01, 14 September 2004.
[47] *Luli and Others v. Albania*, no. 64480/09, 1 April 2014, at para. 74 and *Topallaj v. Albania*, no. 32913/03, 21 April 2016, at para. 66.
[48] *Sejdovic v. Italy* [GC], no. 56581/00, 1 March 2006, at para. 127.
[49] *Navalnyye v. Russia*, no. 101/15, 17 October 2017, at para. 95.
[50] *Verein Gegen Tierfabriken Schweiz (VgT) v. Switzerland (No.2)*, [GC], no. 32777/02, 30 June 2009, at para. 90.
[51] As was found not to have occurred in, e.g.,*Emre v. Switzerland (No. 2)*, no. 5056/10, § 69, 11 October 2011;"75. (…) the Court finds that the most natural execution of its judgment, and that which would best correspond to the principle of *restitutio in integrum*, would have been to annul purely and simply, with immediate effect, the exclusion measure ordered against the applicant. Even assuming that another result would have been acceptable, the Court is

77. As acquittal may be the only outcome complying with the right found to have been violated, the Committee of Ministers will usually not close its examination of a case before this is known.[52]

78. The European Court has also made it clear in some cases that, in the absence of any re-examination/re-opening, it would not be possible to establish the extent to which any or certain forms of compensation would be required to be provided on account of the particular violation of the European Convention that has been established.[53]

79. Nonetheless, where it is satisfied about the prospect of an applicant's case being re-opened and that the scope of the domestic review would allow the applicant to formulate a pecuniary claim and have this examined by the domestic courts, it may decide to dismiss any claim as regards pecuniary damage.[54]

80. However, there have also been cases in which the European Court, after stating that the re-opening of proceedings was the most appropriate form of redress, has then concluded that the finding of a violation constituted sufficient just satisfaction as such re-opening was capable of providing *restitutio in integrum* as required under Article 41 of the European Convention and so no monetary award was required.[55]

81. On the other hand, it has also considered, when making an award for non-pecuniary damage, that:

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of the view that the binding force of its judgments under Article 46 § 1 and the importance of their effective execution, in good faith and in a manner compatible with the "conclusions and spirit" of the judgment, necessarily required, in the circumstances of the case, a more in-depth examination of the considerations set out in the Court's first judgment. 76. Accordingly, the applicant's exclusion from Switzerland for ten years, which is a considerable period in a person's life, cannot be regarded as necessary in a democratic society within the meaning of Article 8 § 2 of the Convention".

[52] See *Reopening of Domestic Judicial Proceedings Following the European Court's Judgments*, at p.4.

[53] See, e.g., *Bistrović v. Croatia*, no. 25774/05, 31 May 2007, at para. 58; *Volkova and Bisova v. Russia*, no. 842/02, 5 July 2007, at para. 56; and *Smirnitskaya and Others v. Russia*, no. 852/02, 5 July 2007, at para. 57

[54] See *Navalnyy and Ofitserov v. Russia*, no. 46632/13, 23 February 2016, at para. 137. See also *Lovrić v. Croatia*, no. 38458/15, 4 April 2017, at para. 77; *Navalnyye v. Russia*, no. 101/15, 17 October 2017, at para. 96. *Cf. Produkcija Plus storitveno podjetje d.o.o. v. Slovenia*, no. 47072/15, 23 October 2018, in which an award for pecuniary damage was made on account of there being no possibility to re-open the proceedings in respect of which a violation of Article 6 had been found.

[55] *Hokkeling v. Netherlands*, no. 30749/12, 14 February 2017, at paras. 67-68,, *Zadumov v. Russia*, no. 2257/12, 12 December 2017, at para. 81, *Cabral v. Netherlands*, no. 37617/10, 28 August 2018, at para. 43 and *Otegi Mondragon and Others v. Spain*, no. 4184/15, 6 November 2018, at para. 75 (as regards monetary awards in general) and *Muca v. Albania*, no. 57456/11, 22 May 2018, at para. 49, *Kumitskiy and Others v. Russia*, no, 66215/12, 10 July 2018, at para. 28, *Kuzmina and Others v. Russia*, no. 66152/14, 20 April 2021, at para. 122, *Y.B. v. Russia*, no. 71155/17, 20 July 2021, at para. 49, *X. v. Netherlands*, no. 72631/17, 27 July 2021, *X. v. Netherlands*, no. 72631/17, 27 July 2021, at para. 62, *Suslov and Batikyan v. Ukraine*, no. 56540/14, 6 October 2022, at para. 207 and *Vasaráb and Paulus v. Slovakia*, no. 28081/19, 15 December 2022, at para. 81 (as regards non-pecuniary damage).

damage cannot be sufficiently compensated for by the finding of a violation or the possibility to apply for the reopening of proceedings, even though the latter possibility must be taken into account for determining the amount of the award.[56]

82. The European Court may not give an indication as to re-opening being the most appropriate form of redress where the circumstances of the case suggest the decision in this regard is best left to the domestic courts to determine.[57]

83. Moreover, it has been recognised by the European Court that the particular circumstances of a case would mean that its re-examination/re-opening could not be effective and thus could not be expected to be pursued.[58]

84. Furthermore, it would probably be justified to refuse the re-opening of proceedings where this could result in infringing the principle of the prohibition of *reformatio in peius* applicable in criminal proceedings.[59]

[56] *Igranov and Others v. Russia*, no. 42399/13, 20 March 2018, at para. 40. See, to similar effect, *Elisei-Uzun and Andonie v. Romania*, no. 42447/10, 23 April 2019, at para. 78 ; *Adamčo v. Slovakia*, no. 45084/14, 12 November 2019, at para. 76; and *Gil Sanjuan v. Spain*, no. 48297/15, 26 May 2020, at para. 51. Cf. *Harun Gürbüz v. Turkey*, no. 68556/10, 30 July 2019, in which a claim for non-pecuniary damage was rejected on the basis that a retrial was the most appropriate form of redress; para. 92.

[57] As in *Chim and Przywieczerski v. Poland*, no. 36661/07, 12 April 2018; "the Court has found a violation of Article 6 § 1 as regards the principle of a "tribunal established by law" in respect of the first-instance court. It has also noted that the appellate courts dismissed the applicants' arguments to the effect that a formal fault in the assignment of a trial court judge had affected the content of the trial court's judgment. Having regard to the nature of its finding and the reasons underlying it (see paragraphs 138-142 above), the Court considers that, in the particular circumstances of the present case, it is not for this Court but for the domestic courts to decide whether a reopening of the criminal proceedings is necessary or not to give effect to the present judgment" (para. 219).

[58] See, e.g., *Business Support Centre v. Bulgaria*, no. 6689/03, 18 March 2010 (on account of the excessive length of the proceedings concerned and the approach of the courts to the interpretation and application of the relevant legislation); *Grudić v. Serbia*, no. 31925/08, 17 April 2012 (on account of the failure of the competent authority to receive the funds needed for it pay certain pensions); and *Oleksandr Volkov v. Ukraine*, no. 21722/11, 9 January 2013 ("Having regard to the above conclusions as to the necessity of introducing general measures for reforming the system of judicial discipline, the Court does not consider that the reopening of the domestic proceedings would constitute an appropriate form of redress for the violations of the applicant's rights. There are no grounds to assume that the applicant's case would be retried in accordance with the principles of the Convention in the near future. In these circumstances, the Court sees no point in indicating such a measure"; (para. 207).

[59] See CM/ResDH(2018)322 in respect of *Pfeiffer v. Austria*, no. 12556/03, 15 November 2007.

85. Also, very exceptionally, re-opening may not be considered by the European Court to be required where this could be inconsistent with the principle of legal certainty,[60] as well as where the legitimate interests of third parties could be affected[61].

[60] See *Henryk Urban and Ryszard Urban v. Poland*, no. 23614/08, 30 November 2010, which concerned the finding of a violation of Article 6(1) in the light of a constitutional ruling "assessors" – including the one who had heard the applicants' case – fell short of constitutional requirements because they did not enjoy the necessary guarantees of independence. The European Court stated that it was: "of the opinion that in this particular context the finding of a violation need not necessarily entail the respondent State's obligation to reopen all proceedings in which assessors participated at the first-instance level. In this regard, the Court notes that the Constitutional Court devoted a substantial part of its judgment to the constitutional importance of the principle of the finality of rulings. In particular, it observed that it would be disproportionate and contrary to legal certainty to allow challenges to final rulings given by assessors in the period when the manner of conferring judicial powers on them had not been constitutionally questioned. Further, it emphasised that the finding of unconstitutionality concerned institutional provisions, that is, provisions regulating the composition of the bodies which gave final rulings. The Constitutional Court considered that the finding of unconstitutionality in respect of such provisions was not determinative of unconstitutionality in respect of the content of a final ruling given by an assessor or the procedure employed to reach it (see paragraph 24 above *in fine*). Consequently, the Constitutional Court held in the operative part of the judgment that its ruling could not serve as a basis for the reopening of cases decided in the past by assessors (or with their participation). This ruling was even extended to two claimants who successfully challenged the provisions regulating the status of assessors before the Constitutional Court, thus depriving them of the so-called "right of privilege" (*przywilej korzyści*). 65. In this context, the Court recalls its case-law according to which the principle of legal certainty, which is necessarily inherent in the law of the Convention, may dispense States from questioning legal acts or situations that antedate judgments of the Court declaring domestic legislation incompatible with the Convention. The same considerations apply where a constitutional court annuls domestic legislation as being unconstitutional (see *Marckx v. Belgium*, 13 June 1979, § 58, Series A no. 31). Moreover, it has also been accepted, in view of the principle of legal certainty, that a constitutional court may set a time-limit for the legislator to enact new legislation with the effect that an unconstitutional provision remains applicable for a transitional period (see *Walden v. Liechtenstein* (dec.), no. 33916/96, 16 March 2000). Referring to the Constitutional Court's decision not to allow the reopening of the cases decided in the past by assessors on the ground that it would undermine the principle of legal certainty, the Court does not consider this interpretation to have been arbitrary or manifestly unreasonable. Indeed, the Court in its jurisprudence has underlined the significance of the principle of legal certainty in the context of final judicial rulings (see, *mutatis mutandis*, *Brumărescu v. Romania* [GC], no. 28342/95, § 61, ECHR 1999-VII). 66. The Court observes that the domestic law provides for a possibility of reopening of criminal proceedings when such a need results from a judgment of the Court (see paragraph 27 above). However, having regard to the foregoing, the Court reiterates its conclusion that in the instant case the reopening of the applicants' case is not called for (see paragraph 56 above). 67. The Court would further observe that in the view of the Constitutional Court the constitutional deficiency identified in its judgment required the intervention of the legislator to bring the status of assessors into line with the Constitution, but there was no automatic correlation between that deficiency and the validity of each and every ruling given previously by assessors in individual cases. To that end the Constitutional Court ruled that the unconstitutional provision should be repealed eighteen months after the promulgation of its judgment. It is noteworthy that the constitutional and Convention deficiency regarding the status of assessors was remedied by the domestic authorities – which decided to abolish the office of assessor altogether – within the time-frame allotted by the Constitutional Court (see paragraph 25 above). Having regard to the above, it may be noted that the authorities of the respondent State took the requisite remedial measures in order to address and remedy the deficiency underlying the present case". However, it did not take that position in the case of the same violation in *Pohoska v. Poland*, no. 33530/06, 10 January 2012 after having taken note of "the particular link of dependence which the law established between the assessors and supervising judges" (para. 62).

[61] See *Bochan v. Ukraine (No. 2)* [GC], no. 22251/08, 5 February 2015, at paras 57-58; *Yevdokimov and Others v. Russia*, no. 27236/05, 16 February 2016, at para. 59; and *Goryachkin v. Russia*, no. 34636/09, 15 November 2016, at para. 84.

86. In addition, in one case, the European Court has stated that the

> question of whether it is appropriate and practicable to reopen the domestic proceedings may be usefully addressed by the respondent State, when choosing, subject to supervision by the Committee of Ministers, the measures to be adopted in their domestic legal order to put an end to the violation found by the Court and to redress as far as possible the adverse effects of this violation.[62]

87. Even where the European Court has not indicated itself that the re-opening of proceedings would be the most appropriate form of redress, this has been an individual measure adopted in the course of the supervision by the Committee of Ministers of the execution of a judgment concerned with violations of the European Convention involving rights other than fair trial.[63] In addition, the re-opening of investigations has also been seen as appropriate in cases where shortcomings in the investigations of deaths and ill-treatment has led to findings of a violation of Articles 2 and 3.[64]

88. Also, the Committee of Ministers has suggested that

> states might envisage, if this is deemed advisable, the possibility of reopening proceedings similar to those of a pilot case which has established a violation of the Convention, with a view to saving the Court from dealing with these cases and where appropriate to providing speedier redress for the person concerned.[65]

89. Apart from re-opening, it might be possible to seek to achieve a *restitutio in integrum* through the granting of a pardon or the payment of compensation.[66]

3. The Government Agent

90. There is no provision in the European Convention dealing with the role and responsibilities of the Government Agent. Rather, the relevant European standards concerning these matters are to be found in European Court's Rules of Court ("the Rules of Court"), Recommendation CM/Rec(2008) 2, the *Good Practice Guide* and the *Drafting Guide*.

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[62] *Karelin v. Russia*, no. 926/08, 20 September 2016, at para. 99. In this case, the Code of Administrative Offences did not explicitly provide for a possibility of reopening the proceedings if the European Court found a violation of the European Convention but there was the possibility under the Code of making an application for review before the Supreme Court of Russia, which was, prima facie, capable of serving the aim of reopening the proceedings.

[63] See, e.g., *Mikolenko v. Estonia*, no. 10664/05, 8 January 2010 (Article 5), *Mamchur v. Ukraine*, no. 10383/09, 16 July 2015 (Article 8), *Erdoğan Gökçe v. Turkey*, no. 31736/04, 14 January 2015 (Article 10) and *Mushegh Saghatelyan v. Armenia*, no. 23086/08, 20 September 2018 (Article 11). See also some of the examples in *Reopening of Domestic Judicial Proceedings Following the European Court's Judgments*, pp. 6-12

[64] See, e.g., *Muradyan v. Armenia*, no. 11275/07, 24 November 2016 (Article 2) and *Kaverzin v. Ukraine*, no. 23893/03, 15 May 2012.

[65] Appendix to *Recommendation Rec(2004)6*, at para. 17. See also measures specified in DH-DD(2014)844 that were adopted in order to give effect to the judgment in *Del Rio Prada v. Spain* [GC], no. 42750/09, 21 October 2013.

[66] See *Reopening of Domestic Judicial Proceedings Following the European Court's Judgments*, at p.5.

91. Rule 35 of the European Court's Rules of Court provides that:

> The Contracting Parties shall be represented by Agents, who may have the assistance of advocates or adviser.

92. Further provisions of the Rules of Court provide for communications or notifications addressed to the agents to be deemed to have been addressed to the Contracting Party concerned,[67] the requirement to specify the name and address of the person or persons appointed as Agent in an inter-State application submitted under Article 33 of the European Convention,[68] the requirement to specify the name of the Agent in the contents of a judgment[69] and in various provisions of the Annex to the Rules that concerns investigations[70].

93. Apart from these provisions specifically referring to the Government Agent, all the provisions of the Rules of Court concerning the requirements to be followed by the parties in the conduct of proceedings before the European Court are, of course, by necessary implication applicable to the Government Agent as the representative of a Contracting Party.

94. There is, however, no specific provision in the Rules of Court relating to the role of the Government Agent in the execution of judgments.[71]

95. The latter are, however, dealt with quite extensively in *Recommendation CM/Rec(2008) 2* and the *Good Practice Guide*.

96. *Recommendation CM/Rec(2008) 2* does not expressly refer to the position of Government Agent but rather focuses on the need for the designation of a co-ordinator of execution of judgments at the national level.

97. However, the *Good Practice Guide* recognizes that the Government Agent is designated as the co-ordinator of the execution of the judgments of the European Court in the vast majority of member States of the Council of Europe[72] and, for the purpose of this Opinion, the position of co-ordinator and Government Agent are thus treated as synonymous.

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[67] Rule 37^2(1); insofar as there is a need to address persons other than the Agent, Rule 37^2(2) provides that "the President of the Court shall apply directly to that Government in order to obtain the necessary facilities".
[68] Rule 46(f).
[69] Rule 741(d).
[70] Namely, as regards the putting of questions by a delegate and the examination of witnesses, experts and other persons appearing before the delegation (Rule A7(1) and (2))
[71] The only Rules dealing with this issue are Rules 99-104, which concern proceedings under Article 46(4) and (5) of the European Convention, i.e., infringement proceedings.
[72] Paragraph 15.

98. The need for a co-ordinating role to be played by the Government Agent is seen in *Recommendation CM/Rec(2008) 2* as a prerequisite for the rapid and effective execution of the judgments of the European Court. To this end, it is recommended that the Government Agent have:

> the necessary powers and authority to:
> - acquire relevant information;
> - liaise with persons or bodies responsible at the national level for deciding on the measures necessary to execute the judgment; and
> - if need be, take or initiate relevant measures to accelerate the execution process[73]

99. The need for strengthening of coordination structures has been emphasized in the Prevention and Remedying Guidelines as follows:

> 13.1. Member States should enhance the support provided to co-ordinators or co-ordinating structures, in the form of improved resources, status or authority, and capacity building in co-operation with relevant national authorities and the Council of Europe's Department for the Execution of Judgments, with a view to these structures contributing to the timely development, presentation and implementation of action plans, the resolution of more important structural or complex problems, in particular those placed under enhanced supervision, as well as the rapid resolution of cases placed under standard supervision.
> 13.2. Member States should ensure that co-ordinators or co-ordinating structures, where appropriate, establish contacts with relevant parliamentary committees or departments and judicial authorities, as well as NHRIs, and that the continuity of their work and structures over time is safeguarded, as interruptions may have very negative effects on the handling of important execution issues and lead to unnecessary violations of the Convention and applications to the Court.
> 13.3. Member States should ensure the protection of co-ordinators from unjustified attacks and from any form of harassment or threat linked to the performance of their duties.

100. Certainly, more organised and elaborate coordination structures will be important in those States that have a relatively large number of cases and/or are required to execute judgments and decisions of the European Court of a structural or systemic nature, for which efforts involving a number of different authorities and institutions of the State, often over a considerable period of time, will be required.

101. Inter-institutional coordination and cooperation, undertaken for this purpose can take various forms and compositions. As the Council of Europe's Steering Committee for Human Rights emphasised in one of its recent analyses:

> While in certain States the establishment of contact points is not considered necessary, given their size or the quality of the inter-institutional dialogue, several other States have established networks of contact persons or inter-ministerial committees/working groups involving mainly representatives of relevant ministries, and sometimes also the highest courts or other public bodies. The Government Agent often plays an important role within those networks"[74].

[73] Paragraph 1.

[74] Compilation of additional information received from member states on the national implementation of the Brussels Declaration, CDDH(2019)21, 20/05/2019.

102. A new positive phenomenon – largely as a result of the *Brussels Declaration* – is the increasing participation in this dialogue of representatives of the parliament and the judiciary as well as NHRIs, non-governmental organisations ("NGOs"), academia and the legal profession, each with their own independent voice.[75]

103. The importance of this has been echoed in the *Prevention and Remedying Guidelines*:

> 17.1. MemberStates should encourage the involvement of all authorities concerned by a certain problem revealed by a judgment of the Court and promote, through meetings, liaison officers, joint working groups or in other ways, the development of synergies between them, whether in the reflection on necessary action or in the implementation of action plans that have been decided upon and the assessment of the results obtained.
> 17.2. Member States are encouraged to include NHRIs, relevant civil society organisations and legal professional associations, where the nature of the violation so requires, in consultations on the human rights implications of draft legislation and policy strategies relating to the execution of judgments at the earliest possible stage.
> 17.3. MemberStates are encouraged to associate relevant Council of Europe structures in the above processes. They are also encouraged to ensure that the experience of other States is taken into account.

104. In this regard, the following are some examples of good practices regarding institutionalized coordination and cooperation:

- ***Czech Republic*** – The Collegium of Experts on the Enforcement of European Court Judgments. This is an advisory body to the Czech government, which aims in particular to contribute to the effective enforcement of the European Court's judgments and to raise awareness among the competent authorities of the Czech Republic's obligations under the European Convention. Another aim is to apply the European Convention and the case law of the European Court in the daily practice of national authorities. The College meets every six to twelve months, or when needed. Representatives of all ministries, the Parliament, the Supreme Courts, the Public Prosecutor's Office, academics, members of civil society and the Office of the Public Defender of Rights sit in the College;
- ***Poland*** - The Interministerial Committee for Matters of the European Court. This body is chaired by the Government Agent and its tasks include: monitoring the execution of judgments and decisions of the European Court concerning Poland based on documents and information submitted by the competent ministers, on their own initiative or at the request of the minister competent for foreign affairs, and to analyse possible problems related to their execution; and drafting annual reports on the state of the execution of judgments of the European Court to be submitted through the office of the minister competent for foreign affairs, to the Council of Ministers for adoption. It meets every quarter, providing a platform for debates on the execution of judgments by Poland. The debates involve representatives of the relevant ministries, the judiciary (the Supreme Court, the Supreme Administrative Court and the National Council of the Judiciary), the Public Prosecution, the Chancelleries of both Chambers of the Polish Parliament, and the Office of the Polish Ombudsman. Some of its meetings are attended by legal professions and NGOs;
- ***Slovenia*** – The Interministerial Working Group for coordinating the execution of judgments of the European Court. This falls under the leadership of the Ministry of Justice and is supported by a

[75] *Ibid.*

'unit', also established within that ministry. The working group is chaired by the State Secretary of the Ministry of Justice. S/he, on a personal basis, appoints members and alternate members from various ministries, from the police, the Permanent Representation of the Republic of Slovenia to the CoE and the State Attorneys Office of the Republic of Slovenia. Two high-level Deputy Ombudsmen from the Office of the Human Rights Ombudsman, as well as representatives from the Supreme Court, are also members of the Working Group. The Working group meets once or twice per year, or when needed. Particular attention is devoted to those cases that have been placed under 'enhanced supervision' of the Committee of Ministers. Between the meetings, the coordination and expert work lie with the support group, which conducts the initial legal analysis of European Court cases as regards the required individual and general measures, coordinates measures to be taken (such as the drafting of legislative proposals) and drafts action plans and reports and cooperates with the Execution Department.

105. An important prerequisite for effective coordination is the publication and dissemination of judgments that need to be executed, as has been underlined most recently in the *Prevention and Remedying Guidelines*:

> 15.2. Member States should ensure that all judgments and decisions of the Court that they are required to execute, including those which are important for applicants to obtain individual redress, are duly and promptly disseminated to relevant actors in the execution process, in line with Recommendation CM/Rec(2021)4.[76]

106. It was also recommended in *Recommendation CM/Rec(2008) 2* that there be appropriate mechanisms for effective dialogue and transmission of relevant information between the Government Agent and the Committee of Ministers.[77]

107. There are, in addition, a number of other recommendations which – although not specifically directed to the role of the Government Agent – can be expected to come within the responsibilities of that position, even if not exclusively so.

108. These recommendations relate to:

- taking the necessary steps to ensure that all judgments are executed and that decisions and resolutions of the Committee of Ministers related to them are duly and rapidly disseminated to relevant actors in the execution process;
- identifying as early as possible the measures that may be required for rapid execution;
- facilitating the adoption of useful measures to develop effective synergies between those actors;
- rapidly preparing action plans on the measures envisaged;
- taking the necessary steps to ensure that the relevant actors are sufficiently acquainted with the case law of the European Court and the relevant recommendations and practice of the Committee of Ministers;
- disseminating the Good Practice Guide to those actors and encouraging its use, as well as that of the database on the state of execution in all cases pending before the Committee of Ministers;
- keeping the parliament informed of the situation concerning execution and the measures being taken; and

[76] Paragraph 1,6 of the Recommendation uses the same formulation as paragraph 15.2 of the *Prevention and Remedying Guidelines.*

[77] Paragraph 2.

- ensuring, where required by a significant persistent problem, that all necessary remedial action be taken at high level, political if need be.[78]

109. Various aspects of these recommendations have been elaborated in the Good Practice Guide, with this confirming that the Government Agent can have an important role to play in implementing the recommendations in *Recommendation CM/Rec(2008) 2* for which this office is not specifically mentioned.

110. However, the *Good Practice Guide* also makes it clear that the work of the Government Agent can be facilitated by the existence both of contact persons within the relevant executive, judicial and legislative authorities[79] and of inter-institutional bodies devoted to the execution of judgments[80]. In addition, it refers to the role that many other entities may play in the process of executing judgments of the European Court.

111. Similarly, the *Drafting Guide* - which provides guidance on the preparation of action plans - recognises that these may be prepared by an authority other than the Government Agent.[81]

112. Nonetheless, it is evident from the *Good Practice Guide* that the Government Agent generally has a key role in the execution process in the majority of member States.

113. In this connection, the *Good Practice Guide* particularly underlines the importance of the Government Agent having a clearly defined role and having appropriate human and financial means and sufficient authority for the purpose of achieving a rapid execution of the judgments of the European Court.[82] This is the view seen also in the Tirana Round Table.

4. Parliament

114. The only reference to a parliamentary role in the operation of the human rights mechanism established by the European Convention relates to that of the Parliamentary Assembly of the Council of Europe ("the Parliamentary Assembly") in the election of the judges of the European Court.[83]

[78] Paragraphs 3-10
[79] Pages 9-11. The Committee of Ministers in the Brussels Declaration also called upon member States to "establish "contact points", wherever appropriate, for human rights matters within the relevant executive, judicial and legislative authorities, and create networks between them through meetings, information exchange, hearings or the transmission of annual or thematic reports or newsletters"; para. 2(i).
[80] Pages 28-32.
[81] At page 14.
[82] Pages 7-8.
[83] Article 22.

115. Thus, neither the Parliamentary Assembly nor national parliaments have any explicit role under the European Convention in the execution of friendly settlements and judgments of the European Court.

116. The absence of any formal role in respect of execution has not deterred the Parliamentary Assembly from becoming concerned about the extent to which High Contracting Parties are implementing judgments.

117. Its involvement has taken the form of monitoring the extent to which High Contracting Parties have either failed to implement judgments concerning them or have done so with significant delay. The results of this monitoring are seen in reports produced by the Parliamentary Assembly's Committee on Legal Affairs and Human Rights. Eleven such reports have been prepared since 2001, together with information notes that focus on an individual High Contracting Party.[84]

118. Following these reports, the Parliamentary Assembly has adopted a series of resolutions and recommendations focusing on the execution process before the Committee of Ministers and drawing attention to shortcomings as regards the implementation of judgments both by specific High Contacting Parties and generally.

119. In its most recent resolution, the Parliamentary Assembly has called upon member States to:

> abide by, and take all necessary steps to implement, swiftly, the final judgments of the European Court of Human Rights, in line with the clear unconditional obligation under Article 46, paragraph 1, of the Convention.[85]

120. Furthermore, it strongly called on States Parties to the European Convention to:

> 7.3. cooperate fully with the Committee of Ministers, the Court and the Department for the execution of Court judgments as well as with other relevant Council of Europe bodies to swiftly and effectively enable the full and efficient implementation of ECtHR judgments;
> 7.4. submit action plans, action reports and information on the payment of just satisfaction to the Committee of Ministers in a timely manner and to ensure that such action plans and reports contain sufficiently detailed information to explain the measures being taken, how they will address the issues raised by the judgments and to set out a clear timeframe for the judgment to be implemented;
> 7.5. ensure that effective national coordination mechanisms are in place and have sufficient hierarchy and resources to be able to implement judgments and to coordinate responses in an efficient and informative manner, presenting the confirmed common position of various branches of power, and that such coordination bodies have the requisite clout to be able to ensure that priority is given to any necessary action;

[84] For the latest general report, see Doc. 15742.
[85] "European Convention on Human Rights and national constitutions", Resolution2494 (2023), 25 April 2023.

7.6. strengthen the role of civil society, bar associations and national institutions for the promotion and protection of human rights (NHRIs) in the process of implementing the Court's judgments, including through involving them in domestic planning on how to implement a judgment, as well as through providing replies to submissions made by applicants, NHRIs and NGOs under Rule 9 of the Committee of Ministers' Rules for the supervision of the execution of judgments and the terms of friendly settlements; (…)
7.9. take full advantage of the work undertaken as part of the 'Support to Efficient Domestic Capacity for the execution of ECtHR judgments (Phase 1)' Project, which could provide good practice to assist States in improving their domestic processes for implementing ECtHR judgments;
7.10. develop more effective structures and mechanisms for the exchange of good practice and support each other in the execution of ECtHR judgments, including by fully supporting the work done by the Council of Europe aimed at establishing a network to this end.

121. Moreover, in this Resolution, the Parliamentary Assembly, having regard to Recommendation 2245 (2023), and referring to its Resolution 1823 (2011) on national parliaments: guarantors of human rights in Europe, called on:

> the national parliaments of Council of Europe member States to implement the "Basic principles for parliamentary supervision of international human rights standards", advocated by the Assembly. Appropriate parliamentary structures are needed to monitor compliance with international human rights obligations and to ensure that democratically elected representatives are in a position to effectively encourage and facilitate the timely and complete implementation of ECtHR judgments. The Assembly calls on human rights or constitutional committees of national parliaments to engage in monitoring the implementation of ECtHR judgments, including through taking a pro-active role in finding solutions to potential frictions with the ECHR, by proposing necessary legislative reforms.[86]

122. Resolution 1823 (2011)[87] had emphasised that national parliaments were often overlooked in connection with the implementation of international human rights norms, particularly those in the European Convention.

123. In the view of the Parliamentary Assembly, national parliaments were:

> key to the effective implementation of international human rights norms at national level and fulfil their duty to protect human rights through legislating (including the vetting of draft legislation), involvement in the ratification of international human rights treaties, holding the executive to account, liaising with national human rights institutions and fostering the creation of a pervasive human rights culture.[88]

124. This Resolution went on to state that:

> 5. With respect to the implementation of judgments of the European Court of Human Rights (hereafter "the Court"), the Assembly:

[86] National parliaments: guarantors of human rights in Europe.
[87] 23 June 2011.
[88] *Ibid*., para. 2.

5.1. believes that national parliaments are uniquely placed to hold governments to account for swift and effective implementation of the Court's judgments, as well as to swiftly adopt the necessary legislative amendments;
5.2. regrets that the post-Interlaken debate on the future of the Convention system does not sufficiently take into account the potentially important role of parliaments and deplores the silence of the Izmir Declaration in this respect;
5.3. points to the positive examples in several member states, notably the United Kingdom, the Netherlands, Germany, Finland and Romania, which have set up parliamentary structures to monitor the implementation of the Court's judgments.
6. Furthermore, the Assembly:
6.1. encourages parliamentarians to monitor the determination and enforcement of human rights standards by the domestic judicial and administrative authorities;
6.2. urges parliamentarians to exercise their responsibility to carefully scrutinise the executive in their countries when it comes to the implementation of, in particular, international human rights norms;
6.3. calls on governments to involve national parliaments in the negotiation process of international human rights agreements and in the process of implementation of judgments of the European Court of Human Rights;
6.4. calls on all member states to provide for adequate parliamentary procedures to systematically verify the compatibility of draft legislation with Convention standards and avoid future violations of the Convention, including regular monitoring of all judgments which could potentially affect the respective legal orders;
6.5. urges parliaments to step up their efforts in contributing to the supervision of the Court's judgments by overseeing steps taken by the competent authorities to execute adverse judgments, including scrutiny of the actual measures taken;
6.6. calls on parliaments to set up and/or to reinforce structures that would permit the mainstreaming and rigorous supervision of their international human rights obligations, on the basis of the principles below.

125. The principles referred to in the last clause above were what the resolution termed "basic principles for parliamentary supervision of international human rights standards", which provide as follows:

1. Appropriate framework and responsibilities

National parliaments shall establish appropriate parliamentary structures to ensure rigorous and regular monitoring of compliance with and supervision of international human rights obligations, such as dedicated human rights committees or appropriate analogous structures, whose remits shall be clearly defined and enshrined in law.

These remits should include, *inter alia*:

- *the systematic verification of the compatibility of draft legislation with international human rights obligations;*
- *the requirement for governments to regularly submit reports on relevant judgments of the European Court of Human Rights and their implementation;*
- *the initiation of legislative proposals and amendments to laws;*
- *subpoena powers over witnesses and documents concerning their remit.*

Such committees shall have the responsibility to ensure that parliaments are properly advised and informed on human rights issues. Human rights training should also be provided for parliamentarians and their staff.[89]

2.Independent advice

Human rights committees or appropriate analogous structures shall have access to independent expertise in human rights law.

Adequate resources shall also be made available to provide specialised secretariat support.

3.Co-operation with other institutions and civil society

Co-operation and regular dialogue shall be maintained, as appropriate, with relevant national (for example, national human rights institutions, parliamentary commissioners) and international bodies (for example, the Parliamentary Assembly, the Council of Europe Commissioner for Human Rights, European and other international human rights monitoring bodies), as well as with representatives of well-established non-governmental organisations which have significant and relevant experience.

126. The Parliamentary Assembly has taken some steps to encourage the adoption of structures for parliamentary supervision in the form of seminars for parliamentarians and staff of parliaments[90], the preparation of a background memorandum[91] and the publication of a handbook[92].

127. These have all drawn on the evolving practice in the parliaments of Council of Europe member States. However, the most up to date picture of this practice is to be found in the Appendix to the 2019 report on the implementation of judgments by the Parliamentary Assembly's Committee on Legal Affairs and Human Rights, previously mentioned.[93]

128. This shows that, in terms of parliamentary structures, there continue to be the four different models in use that were identified in the background memorandum and the handbook, namely:

- A specialised human rights committee, i.e., one with a remit that is mainly or exclusively concerned with human rights and with specific functions dealing with matters such as the vetting of legislation for compliance with domestic, regional or international commitments and monitoring of the execution of judgments;
- A specialised sub-committee with such a human rights remit as the specialised committee that is formed under another committee with a wider mandate;
- A cross-cutting or fully 'mainstreamed model, i.e., one where there is no specialist committee or sub-committee but instead one which relies on all the parliamentary committees to deal with human rights matters as they arise within their respective mandates; and

[89] The latter are undoubtedly also amongst the professionals to which *Recommendation CM/Rec(2019)5 is directed.*

[90] See, e.g., https://pace.coe.int/en/news/6323/new-seminar-for-staff-of-national-parliaments-on-echr.

[91] The role of parliaments in implementing ECHR standards: overview of existing structures and mechanisms; available at: https://www.law.ox.ac.uk/sites/default/files/migrated/background_memorandum_on_the_role_of_parliaments_in_implementing_echr_standards_-_overview_of_existing_structures_and_mechanisms.pdf.

[92] *National parliaments as guarantors of human rights in Europe*.

[93] AS/Jur (2019) 45, 22 November 2019.

- A hybrid model, i.e., one combining both specialisation and mainstreaming with more than one committee having human rights committee within its mandate, which may or may not include specific functions such as monitoring the execution of judgments.

129. The Parliamentary Assembly has not sought to prescribe the adoption of any particular model. Indeed, as its background memorandum observed, the effectiveness of a particular model may be dependent on the context in which it operates.

130. Thus, it noted that the Open Society Justice Initiative in a report[94] had:

> ventured to suggest that in a weak parliamentary system, characterised by strong party discipline and dominance by a single party, 'mainstreaming human rights might have little effect'.1Similarly, it adds, 'tacking human rights on to the mandates of other standing committees runs the risk of thin commitment to, and insufficient time and resources for, implementation'. In states where the execution of judgments and the verification of legislation for human rights compatibility is poorly coordinated within the executive, there may be advantages to having a specialised human rights committee or sub-committee, which is independent of the executive and can, over time, develop both systematic oversight mechanisms and human rights expertise among its members and staff.[95]

131. Furthermore, the background memorandum observed that:

> 13. In bicameral parliaments, if the decision is taken to have a specialised human rights committee, there appear to be merits in making it a joint committee of both houses in order to maximise the potential for both detailed scrutiny and political influence.
> 14. Despite the potential advantages of having a specialised human rights committee or sub-committee, there is a risk that leaving human rights scrutiny to a single specialised body may create a 'silo' within parliament and discourage the integration of human rights and related rule of law issues into the work of other committees. Moreover, the mere existence of a specialised committee does not guarantee effective implementation; rather, the effectiveness of such structures is dependent upon factors such as political will and the availability of expert legal advice.

132. The value of parliamentary involvement in the process of executing judgments of the European Court has also been underlined by the Committee of Ministers in the *Brussels Declaration*, in which it called upon member States to:

> encourage the involvement of national parliaments in the judgment execution process, where appropriate, for instance, by transmitting to them annual or thematic reports or by holding debates with the executive authorities on the implementation of certain judgments.[96]

133. Regardless of the model chosen, it is clear from the engagement of the Parliamentary Assembly's Committee on Legal Affairs and Human Rights and its secretariat with parliaments in Council of Europe member States, as well as from

[94] Open Society Justice Initiative, From Rights to Remedies: Structures and Strategies for Implementing International Human Rights Decisions (New York, Open Society Foundations, 2013) at 68.
[95] Paragraph 12 of the background memorandum.
[96] Paragraph 2 (h).

academic research, that there are a number of considerations which are critical for the effectiveness of parliamentary supervision over the execution of judgments of the European Court and of friendly settlements.

134. These considerations concern: the nature of monitoring body; the powers conferred on it; its manner of working; the resources available to it; and its engagement with others interested in the process of engagement.

135. As regards the monitoring body itself, it is important that this:

a) has a permanent status, reflecting the fact that monitoring is necessarily an ongoing process, not only because the possibility of applications to the European Court and judgments or friendly settlements resulting from them is a continuing one but also because the achievement of execution requires the effectiveness of general measures taken to be kept under review;
b) has a composition and thus a method of appointment ensuring that it is both independent of the executive and is broadly-based so that its work can be as objective and non-partisan as possible; and
c) does not – if it is a specialist committee or sub-committee – lead to it having exclusive concern for the execution of judgments and friendly settlements in particular and the fulfilment of human rights commitments in general as these can have implications across the range of work undertaken by parliaments.

136. In terms of the monitoring body's powers, it is essential that its remit with respect to the execution of judgments and friendly settlements be explicitly and clearly defined in the relevant rules of the Parliament concerned so that there is no ambiguity as to its capacity to deal with this matter.

137. Furthermore, there is a need for it to have the powers to ensure that its monitoring is effective. This would entail the power: (a) to require or subpoena the production of documents (including action plans for execution) and the attendance of witnesses (including officials and ministers); and (b) to set in train the process of amending or adopting legislation where this is seen to be necessary.

138. The exercise of such powers may not be necessary where there is a good working relationship between the parliamentarians and everyone else concerned with execution. Nonetheless, their existence is a necessary safeguard against any risk of attempts being made to impede or frustrate monitoring by a parliament.

139. As regards working methods, the process of monitoring should be systematic and continuing so that it is: (a) synchronised with the proceedings before the Committee of Ministers; (b) takes account of the need for urgency in particular cases; (c) precludes unnecessary delays; and (d) ensures a follow-up to action that has been recommended.

140. This will undoubtedly entail the monitoring body meeting more than once a year. However, the specific frequency of its meetings should be a consequence of the number and significance of the judgments and decisions of the European Court to be executed, as well as of the process before the Committee of Ministers.

141. Moreover, working on more than an annual basis does not mean that some form of annual report by the Government with respect to execution should not be expected and reviewed – as happens in many member States of the Council of Europe – as this can provide a broader picture of the state of execution and any problems in that regard. However, if the focus is only on such an annual report, there is a risk that momentum in ensuring the timeliness of execution will not be attained.

142. The issue of resources is crucial for the effectiveness of parliamentary monitoring of the execution of judgments and friendly settlements. In particular, the parliamentarians concerned would need to have available to them both an adequate level of specialised support staff and sufficient time to fulfil their responsibility in this matter.

143. Undoubtedly there will be parliamentarians with expertise in human rights in general and the case law of the European Court in particular but others will certainly not have such expertise.

144. As a result, given both the diversity of the issues that can be raised and the desirability of drawing upon the experience of other member States who have had to deal with similar or related issues thrown by a particular case, the assistance of specialised support staff will in most instances be indispensable for determining what might be required where a violation of the European Convention has been found by the European Court and whether or not the measures being proposed might be sufficient to remedy it.

145. It will be important that the specialised staff are able to provide independent advice to all parliamentarians, whatever their political affiliation.

146. Moreover, such staff ought to have adequate time to prepare their advice. This will, of course, have implications for the extent of their other obligations and/or the number of them available to fulfil this task.

147. Although those providing the advice ought generally to be regular parliamentary staff, there should also be the possibility of the body being able to call upon outside experts where required for a specific case being examined.

148. In addition to having such support staff, it is also vital that the allocation of time for the monitoring process is actually sufficient for this both to be done properly and in a timely fashion. This necessarily has implications not only for the scheduling arrangements

within the parliament concerned but also for the commitments of the parliamentarians involved.

149. The government will invariably be seen as the principal entity with which the work of the monitoring body should be concerned since it has to take part in the process before the Committee of Ministers and has the ultimate responsibility for execution, even if this may sometimes require the adoption of legislation by the parliament.

150. However, the execution of a judgment, friendly settlement or unilateral declaration will be of concern to others who may be able to assist the monitoring process. These will include the applicant and her or his representative in the case with which monitoring is concerned. It will also include those who have specific responsibilities for the protection of human rights, such as national human rights institutions and ombudsperson.

151. Moreover, it will include non-governmental organisations and academic experts working in the field of human rights as their activities will mean that they are likely to have especial insights into both the problems that led to relevant the application to the European Court and the measures that may be needed to address them.

152. Furthermore, the body responsible monitoring may, in particular cases, be able to derive some assistance from the input of regional and international bodies or institutions working on human rights institutions.

153. The ability to engage with all of the forgoing actors is something to be covered in the powers conferred on the monitoring body. The availability of such a power is not, however, sufficient, as is clear from the experience of parliaments that already monitor the execution of judgments and friendly settlements. There must also be an unqualified willingness to undertake such engagement with these actors. Indeed, this should be seen as an integral part of the monitoring process.

154. Although the needs assessment is concerned with the execution of judgments, friendly settlements and unilateral declarations, the case law of the European Court resulting from applications brought in respect of a member State other than one's own ought also to be of concern for parliamentarians.

155. This is because the taking of such case law into account can: (a) lead to the revision of legislative proposals so that they do not result in the same or similar violations found by the European Court; (b) indicate the possibility that proposed budgetary allocations would be insufficient to prevent such violations from occurring; and (c) give notice of problems with existing law and practice that require attention so that there is then a possibility of addressing them before an application to the European Court is made or determined.

156. In the event of a specialist committee or sub-committee being tasked with monitoring the execution of judgments and friendly settlements, this could also be entrusted with the related responsibility of identifying problems of compliance with the European Convention that arise from existing law and practice.

157. However, in the case of preventing problems of such compliance being introduced through new legislation or proposed budgetary allocations, it would be inappropriate for this to be the sole responsibility of such a body as parliamentarians as a whole should take responsibility for fulfilment of treaty commitments made by the State. Nonetheless, much of the methodology set out above for monitoring execution – especially as regards the provision of advice by specialised support staff and recourse to outside expertise – will be relevant for the purpose of scrutinising legislative and budgetary proposals with a view to their adoption having an adverse impact on the observance of human rights obligations.[97]

158. The Committee of Ministers has, in its *Prevention and Remedying Guidelines*, endorsed the approach of the Parliamentary Assembly as regards the involvement of national parliaments in the execution of judgments of the European Court, stating that:

> 6.1. Member States should continue to promote the important role parliaments play in safeguarding human rights and monitoring the State's compliance with international human rights obligations, in line with the resolutions of the Parliamentary Assembly.
> 6.2. Member States are encouraged to support Parliamentary Assembly activities to enhance the knowledge of the Convention system and the case law of the Court of parliamentarians and the legal staff of all relevant parliamentary committees and departments. Independent expertise on Convention matters should be available to parliamentary committees responsible for assessing human rights compliance and overseeing the implementation of the execution of Court's judgments (see also paragraph 5.2.3 above).
> 6.3. Member States should encourage the further development of parliamentary mechanisms and procedures enabling effective control of the execution of the Court's judgments, for example on the basis of the regular dissemination of action plans and reports; parliamentary debates on outstanding issues, with presentations by responsible ministries/ministers as appropriate; or annual presentations by the government of an overview of the execution situation.

5. NHRIs

159. NHRIs, including ombudsperson institutions, can and should play an important role in the implementation of European Convention standards and in monitoring the execution of judgments and decisions of the European Court.

[97] Such scrutiny could also be assisted by requiring some form of human rights impact assessment by those responsible for introducing legislative proposals. However, this ought not to be the only basis for considering the potential effect of these proposals.

160. Such a task follows, for example, the 1993 United Nations *Paris Principles*,[98] which have clearly established a responsibility of NHRIs inter alia:

> to promote and ensure the harmonization of national legislation, regulations and practices with the international human rights instruments to which the State is a party, and their effective implementation.[99]

161. There is no doubt that this also applies to the European Convention, as the Committee of Ministers has made clear in *Recommendation CM/Rec(2021)1*, in which its Appendix states the member States should allow them to:

> encourage the signature, ratification of and accession to international human rights treaties and contribute to the effective implementation of such treaties, as well as related judgments, decisions and recommendations as well as to monitor States' compliance with them.[100]

162. Moreover, the Committee of Ministers in the Action Plan accompanying the *Brussels Declaration* called upon the States Parties to the European Convention to:

> promote accessibility to the Court's judgments, action plans and reports as well as to the Committee of Ministers' decisions and resolutions, by:
> - developing their publication and dissemination to the stakeholders concerned (in particular, the executive, parliaments and courts, and also, where appropriate, National Human Rights Institutions and representatives of civil society), so as to involve them further in the judgment execution process.[101]

163. The role of an NHRI in this process should rely on an ongoing analysis of cases pending before the European Court against its own State as well as those pending before it in respect of other member States where the issues involved are also relevant to its domestic human rights context. On this basis, it should formulate conclusions for national law and practice with recommendations for desirable improvements.

164. This monitoring should, if it is to be entirely effective, commence as soon as the European Court notifies the respondent State of an application submitted in respect of it.

165. If necessary, the NHRI can ask the European Court to allow it to participate in the proceedings as a third party. In this manner, it also has a chance to influence the resolution of the issues covered by Articles 41 and 46 of the Convention and may therefore have an impact on the manner in which the judgment is subsequently enforced, in the event of a violation of the European Convention being found.

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[98] Principles relating to Status of National Institutions (The Paris Principle), General Assembly Resolution 48/134, 20 December 1993.
[99] Principle 3(b).
[100] Paragraph 3.
[101] Paragraph 2(f).

166. Moreover, following the introduction of Rule 9 (2) to the Rules of the Committee of Ministers, NHRIs (and NGOs) are also entitled to submit a communication to the Committee containing their views on the required manner of execution of a specific judgment of the European Court, particularly concerning general measures, and to comment on the proposals made by the authorities in their action plans and action reports and other related documents presented by the government concerned. NHRIs, including ombudsman institutions, are increasingly taking this opportunity to have a real impact on the course and outcome of proceedings in respect of the execution of judgments of the European Court.

167. Beyond the proceedings before the European Court and then the Committee of Ministers, the authorities should allow the fullest possible participation of NHRIs in the process of execution of judgments at the national level. In particular, an NHRI should play an active role, cooperating with the state authorities responsible for the implementation of judgment in a way specific to its role while maintaining its independence. This should include cooperation with a national coordinator, in practice the Agent of the Government, as well as other bodies that have to be involved in the process, including the parliament. This can be achieved through the participation of NHRI representatives in any intergovernmental coordination structures established for the purpose of executing judgments of the European Court.

168. Proper implementation of such judgments, especially in cases involving structural or systemic problems rather than individual cases, also requires constant monitoring and evaluation as to whether the measures adopted for the purpose of execution have had the intended effect. In this connection, independent monitoring, including that by NHRIs, has a vital role to play.

169. An important instrument for an NHRI to monitor the implementation of European Court judgments is usually its annual report on the state of human rights and freedoms, which should include information and assessments on this matter. As such reports are public and are (or should be) discussed in the parliament, often in its plenary sessions, the conclusions contained therein are likely to have a wide, including political, impact. In specific cases, a NHRI may also present detailed reports on this subject to the parliament (and the general public).

C. EXISTING LEGAL FRAMEWORK

170. This section analyses the existing legal framework regarding the position of the Agent and the scope for re-examination/re-opening of cases.

1. The Agent

171. The Regulation on the Authorized Representative of the Republic of Azerbaijan to the European Court of Human Rights ("the Regulation") deals with the appointment and dismissal of the Agent, the provision of legal and organizational-technical support for this position[102] and stipulates that s/he is to base her/his:

> activities on the Constitution of the Republic of Azerbaijan, international agreements to which the Republic of Azerbaijan is a party, laws of the Republic of Azerbaijan, decrees of the President of the Republic of Azerbaijan, decisions of the Cabinet of Ministers, internal regulations of the European Court of Human Rights and this Regulation.

172. It is, however, only the Regulation that deals with the Agent's functions, of which just the following provisions in it have any relevance to the execution of rulings of the European Court:

> 9.2. Coordinating the activities of the relevant state bodies in order to ensure the implementation of the decisions of the Court and the Committee of Ministers of the Council of Europe regarding the Republic of Azerbaijan's compliance with obligations arising from the Convention;
> 9.3. Studying the legal consequences of the judgements and decisions issued by the Court on the states that are parties to the Convention and preparing proposals for improving the legislation and the practice of applying the law, taking into account the caselaw of the Court.

173. Moreover, the only powers conferred on the Agent of potential relevance for the execution of rulings of the European Court are as follows:

> 10.3. Creates working and expert groups for solving issues related to their authority, attracts specialists, scientists, and experts to this group. The composition and duration of working groups are determined by the head of the *Administration* of the President of the Republic of Azerbaijan;
> 10.5. Conducts negotiations with the purpose of settling the dispute through a settlement agreement in the pending cases regarding the Republic of Azerbaijan before the Court;
> 10.11. In the case of a decision by the Court to pay monetary compensation to the claimant or to restore the violated rights and freedoms, he/she informs the relevant state authorities for the purpose of the full and timely execution of the Court's decision;
> 10.12. Informs the Court and the Committee of Ministers of the Council of Europe about the Republic of Azerbaijan's execution of Court decisions;
> 10.13. Taking into account the legal consequences of the Court's decisions, he/she prepares proposals in order to adapt normative legal acts to the requirements of the Convention and to prevent further violations of the requirements of the Convention related to their application.

174. However, as already noted, only one of these – paragraph 10.11 – has any potential relevance for the re-opening of cases and even that possibility is not entirely clear.

[102] To be provided by the Section of Human Rights Protection of the Law Enforcement and Military Affairs Department of the Administration of the President of the Republic of Azerbaijan.

2. Provisions in respect of re-opening

175. This sub-section reviews the current scope for re-opening of criminal, civil and administrative proceedings in the event that these have given rise to a finding by the European Court of a violation of the European Convention, as well as the provisions concerned with the functioning of the Agent.

a. Criminal proceedings

176. An important step towards the creation of a legal basis for " f*or consideration of judicial acts*" in cases where the European Court has made a final finding of a violation of rights and freedoms guaranteed by the European Convention was the introduction in 2004 into the Eleventh Section (Special Proceedings) of the Code of Criminal Procedure[103] of Chapter L III of an entirely new category of proceedings, *"Proceedings on new cases of violation of rights and freedom"* [104].

177. The provisions concerning this category of proceedings were subsequently substantially modified in 2015.[105]

178. Thus, according to Article 455.0.2 of the Code of Criminal Procedure in the version currently in force, one of the grounds for reconsideration is:

> Determination by the European Court of Human Rights that the provisions of the Convention "On the Protection of Human Rights and Fundamental Freedoms" have been violated during the criminal case, simplified pre-trial proceedings materials or special prosecution complaint proceedings in the courts of the Republic of Azerbaijan.

179. However, it remains an open question whether proceedings of this nature can also be initiated as a result of the commitments accepted by the State before the European Court whether through either friendly settlements or unilateral declarations.

180. Under Article.456.1, the court empowered to 'review judicial acts' on this basis is the Plenum of the Supreme Court ,[106]which is composed of the President of the Supreme

[103] Law No. 907-IO of 14 July 2000 of the Republic of Azerbaijan.

[104] With the Law of the Republic of Azerbaijan No. 688-IIQD dated 11 June, 2004 "On Additions and Changes to some Legislative Acts of the Republic of Azerbaijan" (Legislative Collection of the Republic of Azerbaijan, 2004, No. 8,Article 598). It is possible that, notwithstanding the provisions of Chapter LIII of the Code of Criminal Procedure, the existing provisions in its Articles 464 and 465 of the Code of Criminal Procedure that allow the re-opening of proceedings on the basis of newly discovered circumstances could be relied upon where the European Court has found a violation of the European Convention in respect of particular proceedings but there does not appear to be any instance of this actually occurring.

[105] By the Law of the Republic of Azerbaijan No.1194-IVQD dated 13 February, 2015 ("Respublika" newspaper, 5 April, 2015, No. 070; Legislative Collection of the Republic of Azerbaijan, 2015, No. 4.

[106] See also: Article 73.3 of the Code of Criminal Procedure.

Court, her/his deputy, presidents of collegiums and judges and whose jurisdiction is limited to determining questions of law only, which seems natural given its nature and role in the judicial system.

181. Article 456.2 provides that after a case has been received by the Supreme Court

> the President of the Supreme Court shall instruct one of the judges to prepare and report the case in plenary.

182. The Plenum of the Supreme Court is required to re-examine the case to which the ruling of the European Court refers within a period of no more than 3 months from its receipt at the Supreme Court.

183. The provisions of the Code of Criminal Procedure do not, however, at any point, specify what entity, in what form, by what procedure, and within what deadline, can transmit a European Court ruling to the Supreme Court so that it can be deemed to have been "received".

184. In this regard, it can only be assumed that the legislator's intention is that this entity is the Agent. This may be supported by the wording of paragraph 10.11 of the Regulation, which provides that:

> in the case of a decision (…) to restore the violated rights and freedoms, he/she informs the relevant State authorities for the purpose of the full and timely execution of the Court decision.[107].

185. It follows that this is a *sui generis* proceeding initiated by the Supreme Court on the basis of the official notification of the European Court ruling provided by the Agent.

186. It is not indicated in any regulation whether the European Court ruling should be transmitted to the Supreme Court only in the original or together with an official translation into the official language of the Republic of Azerbaijan.

187. Article 457 of the Code of Criminal Procedure specifies that in such cases the proceedings shall be conducted in accordance with the generally applicable rules of procedure in proceedings before the Plenum of the Supreme Court. However, there is no clarity as to which of the rules contained in the current legislation fall into this category.

188. Article 459 of the Code of Criminal Procedure specifies that the Plenum of the Supreme Court is empowered to make the following rulings depending on the circumstances of the case:

> 459.0.1. relevant for the complete or partial annulment of the relevant first, appeal and cassation instance courts, as well as judicial acts issued in violation of rights and freedoms in the additional

[107] Approved by the Decree No.3 of 8 November 2003 of the President of the Republic of Azerbaijan.

> cassation procedure and for the review of the criminal case, simplified pre-trial proceedings materials or proceedings materials on appeals in the order of special accusation on referral to the first or appellate court;
> 459.0.2. on changing the decision of the cassation instance court and (or) the decision issued in the additional cassation procedure in the cases provided for in articles 421.1.2 and 421.1.3 of this code;
> 459.0.3. on the annulment of the decision of the cassation instance court and (or) the decision issued in the additional cassation order and issuing a new decision.

189. There is no clarity as to the basis on which any of the decisions or indeed the decision not to re-open proceedings will be taken.

190. In the situation mentioned in the para. 459.0.1, once the case has been sent back to either the court of first instance or the court of appeal for re-examination, the general rules in force at that instance apply.

191. The General Prosecutor's Office has a vital role to play in the proceedings before the Plenum of the Supreme Court as well as in any subsequent proceedings after it has been reopened and the case has been transferred to a lower court.

192. Indeed, the Prosecutor General may, following the conclusions of a judgment of the European Court, withdraw the prosecution and consequently, regardless of other circumstances, have the case closed by the court.[108]

193. On the same legal basis, the public prosecutor is entitled to withdraw from the prosecution in cases communicated by the European Court to the government, clearly demonstrating serious violations of the European Convention in specific criminal proceedings rendering the prosecution devoid of the requisite grounds and also in cases concluded before the European Court with a friendly settlement or the government's unilateral declaration.

194. Furthermore, in the course of criminal proceedings, even before the case is referred to court, the prosecutor may discontinue the proceedings and also apply to the court for the lifting of a measure involving deprivation of liberty. As a result, the Prosecutor General and public prosecutors, along with the Supreme Court, should be the key actors, in the implementation process of European Court rulings.

195. This is also confirmed by the obligation stated in Article 12 § 1 of the Code of Criminal Procedure that:

> The bodies that carry out the criminal process must ensure that the human and civil rights and freedoms established by the Constitution of all persons participating in the criminal process are observed.

[108] Article 43.1.1. of the Code of Criminal Procedure.

196. In the current state of the law, there are no provisions containing guarantees of *beneficum coahesionis*. There also appears to be no express provision allowing re-opening in respect of other accused persons in other criminal proceedings where the same violation was found. Here too, the General Prosecutor has a strong role to play by relying on a ruling of the European Court in another, albeit identical or similar, case.

197. Article 36 of the Code of Criminal Procedure provides that:

> in the course of the criminal proceedings, the right to demand the restoration of the violated rights and freedoms of the persons provided for in Articles 55 and 56 of this Code (Persons entitled to compensation for damages) and compensation for the damage caused to them must be ensured by the body conducting the criminal proceedings.

198. Furthermore, on the basis of Article 36.2.

> The rights of persons who have been harmed as a result of abuse of power or crime, as well as those who have been innocently convicted, illegally detained, or whose rights have been restricted in other forms during criminal proceedings, shall be restored in accordance with this Code and other laws of the Republic of Azerbaijan.

199. In case of acquittal or because of errors or abuses of the body conducting criminal proceedings, Chapter V (Acquittal (rehabilitation). Compensation for damages) of the Code of Criminal Procedure[109] provides for various forms of reparation for victims in the form of financial compensation and restitution of other rights related to damages, which allow for restitutio in integrum to the widest extent possible. These provisions, when properly applied, should generally be sufficient, in terms of reparations, in cases arising from European Court rulings and decisions in the context of criminal proceedings.

b. Civil proceedings

200. Provisions allowing for the reconsideration of a case following a European Court ruling were also introduced into the Code of Civil Procedure. Taking into account the peculiarities of civil proceedings, these are largely similar to those adopted in criminal proceedings.

201. Thus, a new Article 431-1 was introduced into Chapter 44-1 on "Proceeding on new circumstances related to violation of rights and freedoms", which is concerned with "Reconsideration of a case related to new circumstances of violation of rights and freedoms.".

202. One of the grounds for reconsideration is, according to paragraph 2.2 of this Article:

[109] Articles 55–63.

Determination by the European Court of Human Rights of violation of the provisions of the Convention on the Protection of Human Rights and Fundamental Freedoms by the courts of the Republic of Azerbaijan when considering the case.

203. At this point, however, it should be emphasized that Article 431-1.1 indicates the non-obligatory nature of reconsideration on this basis. Indeed, the provision states that such cases only 'may be re-opened'.

204. As in criminal proceedings, cases of this nature are considered by the Plenum of the Supreme Court and its adjudication is limited to 'legal issues related to the execution of decisions of the European Court of Human Rights'.[110]

205. The Plenum of the Supreme Court is bound to give its decision no later than three months after the European Court ruling is received by the Supreme Court.[111]

206. After the European Court's ruling is received by the Supreme Court, the President of the Supreme Court instructs one of the judges to prepare and report the case in the Plenum.[112] The case is heard in accordance with the procedure of the Plenum of the Supreme Court.[113]

207. The Plenum issues a ruling that must comply with the requirements of Articles 430.2 and 430.3 of the Code of Civil Procedure.[114]

208. In cases concerning the European Court ruling, the Plenum of the Supreme Court shall take one of the following decisions:

431-4.3.1. on full or partial annulment of the decision and (or) the decision of the court of cassation instance and the resolution or writ of the court of appeal instance related to it and sending the case to the court of cassation or the court of appeal instance for reconsideration (Plenum may also annul the acts of the court of first instance issued on violation of rights and freedoms, in whole or in part when the decision is made on court acts violating the right to apply to the court by the European Court of Human Rights);
431-4. 3. 2. on the repeal of the decision issued in the form of an additional cassation and (or) the decision of the cassation court instance and keeping the resolution or writ of the appellate court in force;
431-4. 3. 3. on the repeal of the decision made in the form of an additional cassation and keeping the decision of the court of cassation instance in force.
431-4. 3. 4. on amendments to the decision of the court of cassation instance or the decision of the additional cassation procedure;

[110] Article 431.2.
[111] Article 431-3.1.
[112] Article 431-3.2.
[113] Articles 431.3.4.
[114] Article 431-4.1

431-4. 3. 5. on the repeal of the acts that has been adopted on the case and termination of the case proceedings;
431-4. 3. 6. on the consideration and (or) execution of the provisions in the decision of the European Court of Human Rights.

209. In the current state of the law, there is a lack of provisions that address key issues concerning the need to adequately safeguard the rights and interests of third parties in civil cases who were not participants in the proceedings before the European Court.

c. Administrative proceedings

210. The Code of Administrative Procedure[115] does not contain an express provision which could provide a basis for the re-examination of a case concluded by an administrative court judgment should this be required to implement a ruling of the European Court.

211. However, in light of the relevant provisions of the Constitution and the above amendments to the civil and criminal procedure codes, there does seem to be some scope - pending the adoption of appropriate modifications to the Code of Administrative Procedure - for trying to overcome the impossibility of re-opening this type of case using a dynamic interpretation of certain provisions, in particular Articles 100 – 107 in Chapter XII (Proceedings on newly opened cases), using the notion of "new circumstances", which is currently one of the grounds for re-opening a case.

D. PRACTICE WITH RESPECT TO RE-OPENING

212. This section considers the extent to which the possible need for re-examination/re-opening has arisen and then been acted upon following judgments and decisions of the European Court.

1. Cases in which the issue of re-opening has arisen

213. There have been thirteen cases in respect of which the European Court indicated in its judgments that re-opening would, in principle, be the most appropriate form of redress following a finding of a violation of the right to fair trial.[116]

[115] Approved by the Law of the Republic of Azerbaijan No. 846-IIIQ of 30 June 2009.
[116] *Abbasov v. Azerbaijan*, no. 24271/05, 17 January 2008, *Maksimov v. Azerbaijan*, no. 38228/05, 8 October 2009, *Pirali Orujov v. Azerbaijan,* no. 8460/07, 3 February 2011 and *Mammad Mammadov v. Azerbaijan*, no. 38073/06, 11 October 2011 (inability of the applicant to be present and participate effectively in the hearing concerning the determination of criminal charges against him); *Huseyn and Others v. Azerbaijan*, no. 35485/05, 26 July 2011 ; (lack of impartiality in court's composition, lack of access to lawyer during pre-trial investigation, inadequate time and facilities to examine the investigation file, inability to benefit from effective legal representation during the trial,

214. In addition, the effective need for the re-opening of proceedings has been indicated by the European Court in two cases – one in respect of detention and the search of premises driven by improper purposes and the other in respect of the disbarment of a lawyer that it found to constitute a violation of the rights to respect for private life and to freedom of expression. Thus, it stated that the individual measures to be adopted in respect of each of the applicants should be:

> aimed, among others, at restoring his professional activities. Those measures should be feasible, timely, adequate and sufficient to ensure the maximum possible reparation for the violation found by the Court, and they should put the applicant, as far as possible, in the position in which he had been

before the first one's detention and the second one's disbarment.[117]

215. The issue of re-opening of proceedings has also been referred to, notwithstanding the absence of any indication of this as a form of redress by the European Court, in the course of the supervision by the Committee of Ministers in respect of violations of the European Convention relating to the disbarment of lawyers[118], a conviction following participation in a demonstration[119] and detention for purposes other than bringing the applicants before a competent legal authority on reasonable suspicion of having committed an offence[120].

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inability to exercise right to closing address, failure to address substantiated objections and inadequate reasoning in assessment of the evidence); *Asadbeyli and Others v. Azerbaijan*, no. 3653/05, 11 December 2012 (lack of access to lawyer during pre-trial investigation, inability to cross-examine prosecution witnesses, failure to address substantiated objections and inadequate reasoning in assessment of the evidence); *Insanov v. Azerbaijan*, no. 16133/08, 14 March 2013 (inability to participate in civil proceedings, refusal to call witnesses in criminal proceedings against the applicant and lack of effective legal assistance in those proceedings); *Zeynalov v. Azerbaijan*, no. 31848/07, 30 May 2013 (lack of impartiality in court's composition); *Abdulgadirov v. Azerbaijan*, no. 24510/06, 20 June 2013 (denial of the right to be heard in person in an appeal); *Layijov v. Azerbaijan*, no. 22062/07, 10 April 2014, *Jannatov v. Azerbaijan*, no. 32132/07, 31 July 2014 and *Sakit Zahidov v. Azerbaijan*, no. 51164/07, 12 November 2015 (the manner in which evidence had been obtained and the failure to address objections and justified arguments regarding its authenticity and use); and *Efendiyev v. Azerbaijan*, no. 27304/07, 18 December 2014 (inability to cross-examine the prosecution witness whose statements served as the basis for the applicant's conviction).

[117] *Aliyev v. Azerbaijan*, no. 68762/14, 20 September 2018, at para. 228 and *Bagirov v. Azerbaijan*, no. 81024/12, 25 June 2020, at para. 110.

[118] The *Namazov* Group of cases (*Namazov v. Azerbaijan*, no. 74354/13, 30 January 2020; *Aslan Ismayilov v. Azerbaijan*, no. 18498/15, 12 March 2020 and *Bagirov v. Azerbaijan*, no. 81024/12, 25 June 2020).

[119] *Majidli and Others v. Azerbaijan*, no. 56317/11, 26 September 2019 out of the *Gafgaz Mammadov* Group of 43 cases in which such a violation was found.

[120] The former *Ilgar Mammadov* Group of cases (*Ilgar Mammadov v. Azerbaijan*, no. 15172/13, 22 May 2014; *Rasul Jafarov v. Azerbaijan*, no. 69981/14, 17 March 2016; *Mammadli v. Azerbaijan*, no. 47145/14, 19 April 2018; *Rashad Hasanov and Others v. Azerbaijan*, no. 48653/13, 7 June 2018; *Aliyev v. Azerbaijan*, no. 68762/14; 20 September 2018; *Natig Jafarov v. Azerbaijan*, no. 7 November 2019; *Ibrahimov and Mammadov v. Azerbaijan*, no. 63571/16, 13 February 2020*; Khadija Ismayilova v. Azerbaijan (No. 2)*, no. 30778/15, 27 February 2020; *Yunusova and Yunusov v. Azerbaijan (No. 2*), no. 68817/14, 16 July 2020; *and Azizov and Novruslu v. Azerbaijan*, no. 65583/13, 18 February 2021). The case *Ilgar Mammadov v. Azerbaijan (No.2)*, no. 919/15, 16 November 2017 was also included in this group and concerned a finding that the conviction for the offences for which the applicant had been detained was in breach

216. The issue of the re-opening of an investigation into offences has also been raised with respect to the death or ill-treatment of the applicants' next of kin[121] and offences found to have led to violations of a journalist's right to respect for private life and to freedom of expression[122].

217. There have been no instances, so far, of re-opening of proceedings - even in cases in which violations of the right to fair trial have been alleged - being an element of the arrangements proposed where friendly settlements or unilateral declarations have been adopted or made and accepted by the European Court as a means of resolving the applications concerned.

2. The extent to which re-opening has so far occurred

218. Only in three of the thirteen cases in which the European Court has indicated that re-opening would, in principle be the most appropriate form of redress for violations of the right to a fair trial has there actually been a re-hearing.[123]

219. In one of them, the applicant was acquitted following the re-examination of the criminal proceedings but the re-examination of the decision in the civil proceedings, which

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of the right to a fair trial. Following the closure of supervision in respect of the first two cases and of *Ilgar Mammadov v. Azerbaijan (No.2)*, the remaining cases are referred to as belonging to the *Mammadli* Group.

[121] In the *Mammadov (Jalaloglu) Group* of cases (*Mammadov (Jalaloglu) v. Azerbaijan*, no. 34445/04, 11 January 2007; *Layijov v. Azerbaijan*, no. 22062/07, 10 April 2014; *Jannatov v. Azerbaijan*, no. 32132/07, 31 July 2014; *Igbal Hasanov v. Azerbaijan*, no. 46505/08, 15 January 2015; *Uzeyir Jafarov v. Azerbaijan*, no. 54204/08, 29 January 2015; *Emin Huseynov v. Azerbaijan*, no. 59135/09, 7 May 2015; *Mehdiyev v. Azerbaijan*, no. 59075/09, 18 June 2015; *Hilal Mammadov v. Azerbaijan*, no. 81553/12, 4 February 2016; *Mustafa Hajili v. Azerbaijan*, no. 42119/12, 24 November 2016; *Pirgurban v. Azerbaijan*, no. 39254/10, 20 December 2016; *Satullayev v. Azerbaijan*, no. 22004/11, 19 March 2020; *Haji v. Azerbaijan*, no. 3503/10, 1 October 2020; *Haziyev v. Azerbaijan*, no. 3650/12, 5 November 2020; and *Hajiyev v. Azerbaijan*, no. 15996/12, 22 April 2021), the *Muradova* Group of cases (*Muradova v. Azerbaijan*, no. 22684/05, 2 April 2009; *Rizvanov v. Azerbaijan*, no. 31805/06, 17 April *2012; Najafli v. Azerbaijan*, no. 2594/07, 2 October 2012; *Tahirova v. Azerbaijan*, no. 47137/07, 3 October 2013; *Yagublu and Ahadov v. Azerbaijan*, no. 67374/11, 30 January 2020; *Mahaddinova and Others v. Azerbaijan*, no. 34528/13, 19 November 2020; *Badalyan v. Azerbaijan*, no. 51295/11, 22 July 2021; *Hasanov v. Azerbaijan*, no. 31793/10, 22 April 2021; *Petrosyan v. Azerbaijan*, no. 32427/16, 4 November 2021; *Khojoyan and Vardazaryan v. Azerbaijan*, no. 62161/14, 4 November 2021; *Tagiyeva v. Azerbaijan*, no. 72611/14, 7 July 2022; and *Abishov v. Azerbaijan*, no. 46419/16, 23 March 2023) and the *Mikayil Mammadov* Group of cases (*Mikayil Mammadov v. Azerbaijan*, no. 4762/05, 17 December 2009; *Aliyeva and Aliyev v. Azerbaijan*, no. 35587/08, 31 July 2014; *Gasimov v. Azerbaijan*, no. 8937/09, 10 November 2016; *Huseynova v. Azerbaijan*, no. 10653/10, 13 April 2017; *Mustafayev v. Azerbaijan*, no. 47095/09, 4 May 2017; *Malik Babayev v. Azerbaijan*, no. 30500/11, 1 June 2017; *Mammadov v. Azerbaijan*, no. 36837/11, 14 *February 2019; Mammadov and Others v. Azerbaijan*, no. 35432/07, 21 February 2019; *Saribekyan and Balyan v. Azerbaijan*, no. 35746/11, 30 January 2020; *Shuriyya Zeynalov v. Azerbaijan*, no. 69460/12, 10 September 2020; and *Lapshin v. Azerbaijan*, no. 13527/18, 11 October 2021).

[122] *Khadija Ismayilova v. Azerbaijan*, no. 65286/13, 10 January 2019.

[123] *Insanov v. Azerbaijan*, no. 16133/08, 14 March 2013, *Abdulgadirov v. Azerbaijan*, no. 24510/06, 20 June 2013 and *Layijov v. Azerbaijan*, no. 22062/07, 10 April 2014.

had been quashed, was discontinued on the basis that he had lost interest in pursuing his complaint after he had expressly refused to appear before the court concerned.[124]

220. In the other two cases, the convictions were upheld at the end of the re-hearing.

221. However, in one of them, the applicant had not actually been able to participate in the re-hearing[125] and in respect of the other the Committee of Ministers had reservations as to whether all the deficiencies in the original proceedings had been satisfactorily addressed[126].

222. As regards all the other cases, the applicant in one of them appears not to have requested the re-opening of the relevant proceedings,[127] the applicant in another one is known to have been released but there is no information as to whether this was following a re-hearing,[128] a third case is pending before the Supreme Court for a decision on this issue[129], the judgments leading to the finding of a violation in two others appear to have been quashed but the Execution Department has not been informed about the outcome of any re-examination[130] and there are five cases for which it has received no information regarding the action taken[131].

223. In the case that was not reopened because there had been no application for this to occur, the Government stated in its Action Report of 16 February 2023 that the applicant had not made any such application for nine years, even though he was legally

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[124] *Layijov v. Azerbaijan*, no. 22062/07, 10 April 2014. According to the Action Plan submitted by the authorities, on 30 October 2015 the Plenum of the Supreme Court reopened the proceedings and as a result of the decision adopted at the Plenum of 30 October 2015, the judgment of the Supreme Court of 19 June 2007 and the judgment of the Court of Appeals of 22 December 2006 were quashed and the case was remitted to the Shaki Court of Appeals for new re-examination. According to the decision of the Shaki Court of Appeals of 27 April 2016, the applicant was acquitted.

[125] *Abdulgadirov v. Azerbaijan*, no. 24510/06, 20 June 2013.

[126] *Insanov v. Azerbaijan*, no. 16133/08, 14 March 2013. According to the information provided by the authorities, the Court of Appeal of Baku re-opened the criminal proceedings, summoned relevant witnesses and upheld the first instance judgment on 25 February 2014. Both the applicant and his representatives attended the hearings and were able to question these witnesses. The applicant appealed and the Supreme Court held on 9 June 2016 that the shortcomings established by the European Court had been fully addressed and upheld the judgment of the Court of Appeal. In response, the Committee of Ministers noted that, although the failure to hear certain witnesses appeared to have been addressed in the re-opened proceedings, the European Court had also been critical of the lack of opportunity for the applicant to consult confidentially with his lawyers and requested clarification as to how this defect had been addressed during those proceedings; CM/Del/Dec(2019)1340/H46-3, 14 March 2019.

[127] *Zeynalov v. Azerbaijan*, no. 31848/07, 30 May 2013.

[128] *Asadbeyli and Others v. Azerbaijan*, no. 3653/05, 11 December 2012.

[129] *Huseyn and Others v. Azerbaijan*, no. 35485/05, 26 July 2011.

[130] *Abbasov v. Azerbaijan*, no. 24271/05, 17 January 2008 (this case was sent to the Criminal Chamber of the Supreme Court for reconsideration and its re-examination was scheduled for 3 May 2009) and *Maksimov v. Azerbaijan*, no. 38228/05, 8 October 2009 (the judgment was quashed on an unspecified date).

[131] *Pirali Orujov v. Azerbaijan,* no. 8460/07, 3 February 2011; *Mammad Mammadov v. Azerbaijan*, no. 38073/06, 11 October 2011; *Efendiyev v. Azerbaijan*, no. 27304/07, 18 December 2014; *Jannatov v. Azerbaijan*, no. 32132/07, 31 July 2014; and *Sakit Zahidov v. Azerbaijan*, no. 51164/07, 12 November 2015.

allowed to do so.[132] In so doing, it referred to the statement in the judgment of the European Court that:

> the possibility exists under Azerbaijani law (see paragraph 13 above) for the applicant, if he so requests, to obtain a rehearing of his appeal on points of law in the light of the Court's finding that it was not examined by a "tribunal established by law.[133]

However, the legislative provisions to which the European Court had referred – namely those noted in the preceding sub-section – make no provision for a request having to be made by the applicant, nor indeed – as is clear from the preceding analysis of the legislation - do they envisage any role for the applicant in this respect.

224. The quashing of convictions or adverse decisions has occurred in ten cases following the re-opening of proceedings notwithstanding that there was no indication by the European Court as to this being the most appropriate form of redress in this respect.[134] Nonetheless, such quashing was not always the outcome of an initial re-examination of these cases, with the result that a further re-examination took place.

225. Moreover, re-opening – let alone the quashing of convictions or decisions – has not occurred (or not so far) in respect of many cases in which comparable violations of the European Convention had been found by the European Court.

226. This is, for example, the position in respect of the *Mammadli* Group of cases (the former *Ilgar Mammadov* Group). In all of the case in this group the European Court had found that the actions resulting in the detention of the applicants (human rights defenders, civil society activists and a journalist) constituted a misuse of criminal law intended to punish and silence them. However, so far, the criminal convictions of the applicants in only two of the cases from the *Mammadli* Group of cases - *Azizov and Novruslu v. Azerbaijan* and *Rashad Hasanov and Others v. Azerbaijan* – have been quashed and the criminal charges against them then discontinued, following the approach seen in the three cases from the former *Ilgar Mammadov* Group which were re-opened.[135]

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[132] At para. 6.

[133] *Zeynalov v. Azerbaijan*, no. 31848/07, 30 May 2013 , at para. 41.

[134] Cases involving disbarment of lawyers (*Namazov v. Azerbaijan*, no. 74354/13, 30 January 2020 and *Aslan Ismayilov v. Azerbaijan*, no. 18498/15, 12 March 2020); conviction following participation in a demonstration (*Majidli and Others v. Azerbaijan*, no. 56317/11, 26 September 2019)*;* detention for purposes other than bringing the applicants before a competent legal authority on reasonable suspicion of having committed an offence *(Ilgar Mammadov v. Azerbaijan*, no. 15172/13, 22 May 2014; *Rasul Jafarov v. Azerbaijan*, no. 69981/14, 17 March 2016; *Mammadli v. Azerbaijan*, no. 47145/14, 19 April 2018; *Ibrahimov and Mammadov v. Azerbaijan*, no. 63571/16, 13 February 2020; *Khadija Ismayilova v. Azerbaijan (No. 2)*, no. 30778/15, 27 February 2020;; *Yunusova and Yunusov v. Azerbaijan (No. 2*), no. 68817/14, 16 July 2020; *and Azizov and Novruslu v. Azerbaijan*, no. 65583/13, 18 February 2021).

[135] See respectively CM/Del/Dec(2022)1451/H46-4 and CM/ResDH(2021)426.

227. Despite the similarity of the other six cases in the *Mammadli* Group to that in *Azizov and Novruslu* and *Rashad Hasanov* ones, there has yet to be any re-opening of the convictions found to give rise to violations of the European Convention.

228. The failure to take such a step in respect of these cases has led to the Committee of Ministers to state in its latest decision concerned with the supervision of the execution of the judgments concerned that:

> recalling that *restitutio in integrum* in this group of cases urgently requires the quashing of the remaining applicants' convictions, their erasure from their criminal records and the elimination of all other consequences of the criminal charges brought against them, including by fully restoring their civil and political rights; reiterated their hope that the remaining proceedings would be concluded expeditiously and called on the authorities once again to take all steps within their powers to ensure that the convictions of the remaining seven applicants in this group of cases are quashed without further delay.[136]

229. Moreover, the Committee of Ministers also stressed that

> quashing the convictions of the remaining applicants in the present group by the Supreme Court remains a key general measure, which will also permit the establishment of a solid and consistent national judicial practice against retaliatory and abusive detentions and prosecutions.[137]

230. Similarly, only in one of the three cases in the *Namazov* Group of cases - *Aslan Ismayilov v. Azerbaijan* – have the proceedings been re-opened. In that case, the re-opening led to the previous decisions adopted in it being quashed, the case being remitted back to the Baku Court of Appeal for a re-examination and the quashing of the applicant's disbarment. Subsequently, the applicant's membership in the Azerbaijani Bar Association was restored following the decision of its Presidium.

231. However, the other two cases of other lawyers in the *Namazov* Group have not been referred to the Supreme Court with a view to obtaining a reopening of the proceedings, despite the Committee of Ministers having, in respect of all the cases in the group, invited:

> the authorities to ensure that the proceedings against the applicants are re-opened with a view to rectifying the shortcomings identified by the Court, in particular with due regard to the Court's findings as regards the lack of reasons for the decisions taken and the disproportionate nature of the sanctions imposed on the applicants.[138]

232. Instead, the Government has informed the Committee of Ministers that:

[136] Paragraph 3.
[137] Paragraph 4.
[138] CM/Del/Dec(2021)1411/H46-4, 16 September 2021.

the authorities submitted that their cases were transmitted to the ABA and other relevant authorities to examine the individual measures required to achieve *restitutio in integrum*.[139]

233. This does not seem to be capable of securing a *restitutio in integrum* since the Azerbaijani Bar Association remains bound by the final decisions of the courts in these two cases. At most, there would be the possibility of re-applying for admission to the Azerbaijani Bar Association and then taking the admission exam. This is understood not to have been successful in the case of one lawyer whose re-applications were rejected on several occasions and, in any event, such an option could not be its very nature amount to *restitutio in integrum* for disbarment that is contrary to the European Convention from the outset of its adoption.

234. Only in one of the 43 cases in the *Gafgaz Mammadov* Group - *Majidli and Others v. Azerbaijan* – has the case been sent to the Supreme Court and, so far, no decision appears to have been taken as to whether "the need for re-opening persists".[140] Closure was proposed for the other cases in the group, as these involved convictions for administrative rather than criminal offences and were erased from the criminal records in one rather than two years. This different approach may also reflect the lack of clarity as to the possibility of re-opening cases concerned with administrative offences

235. There have also been seven cases involving the conviction of journalists for criminal defamation of several journalists in which the European Court found violations of the right to freedom of expression a conviction for defamation.[141]

236. In one of them, the journalist's convictions were quashed following the European Court's judgment and the question related to the time unjustly spent in detention was resolved as a result of his early release, following a presidential pardon freeing him from serving a prison sentence imposed for another offence.[142] In a second one, the applicants were exempted from serving the sentence imposed as a result of an amnesty and there was to be no mention of the sentence in the criminal record.[143] In three others, the applicants were dispensed from serving the remainder of their sentence by a presidential

[139] CM/Notes/1451/H46-5, 8 December 2022
[140] DH-DD(2023)181.
[141] *Fatullayev v. Azerbaijan*, no. 40984/07, 22 April 2010; *Mahmudov and Agazade v. Azerbaijan*, no. 35877/04, 18 December 2008; *Tagiyev and Huseynov v. Azerbaijan*, no. 13274/08, 5 December 2019; *Hasanov v. Azerbaijan*, no. 52584/09, 8 July 2021; *Mahmudov and Agazade v. Azerbaijan*, no. 28083/08, 22 July 2021; *Azadliq and Zayidov v. Azerbaijan*, no. 20755/08, 30 June 2022; and *Aliyev v. Azerbaijan*, no. 34717/10, 2 February 2023. In the Fatullayec case, violations of Article 6(1) and (2) were also found to have occurred.
[142] *Fatullayev v. Azerbaijan*, no. 40984/07, 22 April 2010.
[143] *Mahmudov and Agazade v. Azerbaijan*, no. 35877/04, 18 December 2008.

pardon decree and were released from prison.[144] No action has yet been taken in respect of the two most recent cases.[145]

237. Although the power to pardon is an important part of the President's prerogative, it is questionable whether such a way of closing these cases will always be an appropriate response to the European Court's finding of violations of the European Convention. Certainly, that might not be so where the finding of a violation turned on the absence of a justification for the applicants' freedom of expression[146] and not just the severity of the penalties imposed. In the former instance, an opportunity to be cleared of the charges against the applicants concerned, which could only be done by an acquittal by the court after the reopening of their criminal cases, might be a more adequate form of redress.

238. Finally, only in two of the cases in respect of which the re-opening of an investigation into offences had been raised has that actually occurred. One came from one of the three groups of cases concerned with the death or ill-treatment of the applicants' next of kin[147] and the other one related to violations of a journalist's right to respect for private life and to freedom of expression[148].

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E. ACHIEVING COMPLIANCE WITH EUROPEAN STANDARDS

239. The implementation of the European Convention - including the execution of judgments and decisions of the European Court - is a multifaceted process, requiring political will (general political will regarding respect for human rights and the rule of law and recognition of the importance of and willingness to respect those judgments, and specific political will regarding a particular judgment; the latter form of political will being especially necessary to ensure the enforcement of 'difficult' cases).

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[144] *Tagiyev and Huseynov v. Azerbaijan*, no. 13274/08, 5 December 2019; *Hasanov v. Azerbaijan*, no. 52584/09, 8 July 2021; and *Mahmudov and Agazade v. Azerbaijan*, no. 28083/08, 22 July 2021.

[145] *Azadliq and Zayidov v. Azerbaijan*, no. 20755/08, 30 June 2022; and *Aliyev v. Azerbaijan*, no. 34717/10, 2 February 2023.

[146] As in *Fatullayev v. Azerbaijan*, no. 40984/07, 22 April 2010; *Tagiyev and Huseynov v. Azerbaijan*, no. 13274/08, 5 December 2019; and *Hasanov v. Azerbaijan*, no. 52584/09, 8 July 2021.

[147] I.e., the *Mammadov (Jalaloglu), Muradova* and *Mikayil Mammadov* Groups of cases. As a result of the re-opened proceedings in *Aliyeva and Aliyev v. Azerbaijan*, no. 35587/08, 31 July 2014 (from the *Mikayil Mammadov* Group), Mr R.A. was convicted for the murder of the applicants' son and sentenced to ten years' imprisonment. In respect of the other cases in these groups, the Committee of Ministers has recalled that its concerns previously raised regarding the lack of information on new investigations into the deaths of the applicants' next of kin or ill-treatment allegedly imputable to law enforcement officers, had not been alleviated. As a result, it has stated that information was therefore urgently awaited in respect of all of them; see CM/Del/Dec(2021)1419/H46-5, 2 December 2021.

[148] *Khadija Ismayilova v. Azerbaijan*, no. 65286/13, 10 January 2019. So far, the re-opening of the investigation – which was made with with express reference to a decision of the Committee of Ministers – has yet to reach any conclusion.

240. In addition, there is a need for there being in place not only appropriate legal regulations that allow, inter alia, for the swift re-opening of previously concluded judicial proceedings before criminal, civil or administrative courts which have become final but also an institutional framework for the efficient conduct of this process, in accordance with the standards set by the European Court and the expectations of the Committee of Ministers.

241. This section thus draws together some conclusions and recommendations from what has been learnt from the review of the legal framework and the cases in which the need for re-opening has been indicated by the European Court or has been referred to in the supervision of judgments by the Committee of Ministers, together with the information obtained during the meetings in the course of the visit to Azerbaijan.

242. It does this first in respect of the specific arrangements concerned with re-opening and then as regards some institutional matters that are relevant both for that and more generally.

1. Re-opening

243. There is no prescribed procedure to be followed after a judgment finding a violation of the European Convention has been received by the Agent from the European Court.

244. In practice, a judgment in which the violation concerns in some respect judicial proceedings will be transmitted by the Agent to the Supreme Court in its original language and without any accompanying analysis as to what steps might be required, although a note explaining the type of violations involved may be attached to the letter accompanying the judgment. The absence of a more systematic approach in this regard seems a loss of the opportunity to provide essential guidance with respect to the implementation of judgments of the European Court.

245. However, although it was clear that transmittal will not occur before the judgment becomes final, there was uncertainty as whether this occurs immediately after that or at some later point. It was suggested that it would be attempted to send the judgment as soon as possible but it was also indicated that there may be complicating factors to consider. However, none of the cases discussed in the preceding section pointed to the existence of complicating factors such as the interests of third parties.

246. Similarly, although the judgment is sent to the applicant concerned, it is not clear when that occurs, in particular whether this is before the judgment becomes final, and there is no indication as to what steps might be taken to implement the judgment.

247. The translation of the judgment into Azerbaijani will be undertaken by the Supreme Court. This appears to be done initially for the internal use of its judges and it is not clear when the translation might be posted on the Supreme Court's website. In any event, there do not seem to be a sufficient number of qualified translators available to ensure that translation of judgments and decisions of the European Court occurs in a manner that would facilitate their prompt execution.

248. Although the Plenum of the Supreme Court is required to re-examine the case to which the ruling of the European Court refers within a period of no more than 3 months from its receipt at the Supreme Court, this would not seem to happen in practice unless re-examination can be an open-ended process. It is not clear whether the actual delay in re-examination reaching some conclusion is a consequence of delays in translation, the workload of the Supreme Court or for some other reason. In any event, it is clear that years rather than months can elapse before any decision on re-opening is taken.

249. It was suggested on a number of occasions that an applicant could approach the Supreme Court with a view to its consideration as to whether the relevant proceedings should be re-opened pursuant to Articles 464-465 of the Code of Criminal Procedure, which allows for re-opening of proceedings based on newly discovered circumstances. However, there is no such possibility for the applicant to do this under the possibility introduced as Articles 455 and 456 that allow for re-opening where the European Court has found a violation of the European Convention. Moreover, it appears that the response to approaches by applicants who ask for re-opening (and who will only have the untranslated judgment of the European Court) is to tell them to raise the matter with the Agent, notwithstanding that there seems no reason, in principle, to interpret "newly discovered circumstances" in Articles 464 and 465 as including the finding of a violation of the European Convention, even if there is the more explicit basis for re-opening in Articles 455 and 456 .

250. As has been seen,[149] the European Court appears to have considered that there was an ability for an applicant to seek re-opening under Articles 464 and 465 of the Code of Criminal Procedure, although it did not refer to any instance of this occurring in practice. Nonetheless, it would be entirely appropriate for the person most affected by the violation found by the European Court to be able to initiate proceedings for re-opening. Indeed, in some cases there could be a need for such a role to be undertaken by an applicant's next of kin as s/he may have died in the course of the proceedings before the European Court.

251. The proceedings to decide on re-opening are governed by the general procedural rules. In civil and administrative cases, the procedure is written whereas there will be an oral hearing, open to the public, in criminal ones.

[149] See para. 223 above.

252. In principle, the applicant and the other party – the prosecutor in criminal cases - should be able to take part in them. However, it is unclear whether the participation of the applicant always occurs, not least because it was also indicated that an applicant may be invited to attend the Plenum or may have to request to do so. At the same time, it was acknowledged that there was the possibility of granting legal aid to an applicant, which would be essential given the potential complexity of the issues involved. Nonetheless, the ambiguity regarding the possible participation of the applicant in proceedings for re-opening is undesirable

253. On the other hand, the prosecution was said always to be present at proceedings concerned with the re-opening of criminal cases. In addition, the Supreme court indicated that it would endeavour to notify others with an interest in the case, such as victims, about the proceedings.

254. The Agent does not take part in the proceedings before the Plenum and so does not give any guidance as the implications of the judgment of the European Court for re-opening, which could be problematic in those cases where the European Court has not indicated that this would be most appropriate form of redress.

255. Similarly, the AHRC is not able to take part in such proceedings, which is regrettable as s/he might be in a position to place the issue of re-opening in the wider human rights context.

256. The purpose of the proceedings before the Plenum is to determine whether a case is to be re-opened. If the conclusion is that this should occur, the case will generally be remitted for re-examination by the relevant court. This will often be a court of appeal but it could be the Supreme Court itself. Moreover, the Supreme Court will conduct the re-examination in certain cases, such as those involving a violation of Article 18 of the European Convention.

257. Where a decision is taken to re-open the proceedings, there does not appear to be any possibility pending the actual re-examination of the case for an applicant serving a sentence pursuant to the decision found by the European Court to be in violation of the European Convention to be provisionally released, other than perhaps the grant of a pardon.

258. It does not seem that the legal provisions allowing for the re-opening of a case would also permit the re-opening of other judicial decisions that are vitiated by the same defect found by the European Court to be in violation of the European Convention, including ones in respect of which applications to the European Court have already been communicated to the Government.

259. Moreover, there is no possibility of a friendly settlement or a unilateral declaration providing a basis for the re-opening of proceedings even though it is acknowledged by the Government that the relevant proceedings were in violation of the European Convention.

260. In addition, it is not clear whether the judges, prosecutors or public officials who may, in some way, have contributed to the circumstances which contributed to a violation of the European Convention being required to undergo specific training or being subject to criminal or disciplinary action depending upon the outcome of the re-examination of the proceedings that have been re-opened.

261. The Agent will report on the outcome of re-opening and re-examination to the Committee of Ministers. However, there appear to be many instances of this being belated or not occurring.

262. There is no obstacle to the General Prosecutor's Office re-investigating cases that are the object of applications to the European Court in which it is alleged that there has not been an effective investigation into a death or ill-treatment as required by Articles 2 and 3 of the European Convention. Indeed, it appears that this can occur but it is not automatic.

263. In the light of the foregoing, compliance with the requirements under the European Convention and other European standards relating to the re-opening of proceedings(asto which see paras. 57-89 above) would benefit from the following measures being adopted:

a. *The possibility of re-opening proceedings being extended to cases where this has been undertaken in decisions of the European Court that have approved friendly settlements or unilateral declarations, as well as being explicitly applicable to proceedings that involve convictions in respect of administrative offences;*
b. *Introducing a legal obligation for the Agent promptly to inform the applicant of the merits of the relevant European Court judgment, friendly settlement or unilateral declaration and her, his or its rights in relation to implementation, as well as the steps that the Agent intends to take in order to remedy the violation found;*
c. *A pool of professionals with the highest legal and human rights expertise (in particular the European Convention and the case law of the European Court) and the highest linguistic competence (in both English and French) being identified and given appropriate training with respect to translating judgments and decisions of the European Court;*
d. *The Agent being required to publish a translation of such a judgment, friendly settlement or unilateral declaration into the official language in the official gazette as soon as any one of these become final;*
e. *The Agent being required immediately after such publication (i) to transmit such a translated judgment, friendly settlement or unilateral declaration to the Supreme*

Court and the General Prosecutor where the re-opening of the relevant proceedings is indicated in the judgment, this seems to be an appropriate response to the violation found in the judgment or this has been undertaken in the friendly settlement or unilateral declaration, (ii) to transmit a copy also to the applicant at the same time and (iii) to publish the fact of transmittal on the web page of the office of the Agent;

f. *The applicant (or, in the event of her/his death, the applicant's next of kin), the General Prosecutor and, in cases involving the disbarment of lawyers, the Azerbaijani Bar Association being authorized to initiate and take part in proceedings before the Supreme Court for the re-opening of proceedings which have given rise to a finding of a violation of the European Convention or a friendly settlement or unilateral declaration through an amendment to Articles 455 and 456 of the Code of Criminal Procedure;*
g. *The applicant (or next of kin) being legally represented in these proceedings and any subsequent re-examination of the case concerned and not being required to bear the costs of such representation;*
h. *The Agent being required to make submissions in connection with the need for re-opening of proceedings for the purpose of implementing a judgment of the European Court or a friendly settlement or unilateral declaration;*
i. *The AHRC being authorised to appear as a third party in any proceedings for the re-opening of proceedings;*
j. *The Supreme Court having the power, pending its decision to re-open proceedings and after it has done so, to suspend the execution of the judgment or decision found to have given rise to a violation of the European Convention;*
k. *The Supreme Court being required to take a decision on the re-opening of proceedings within six months of receiving the judgment, friendly settlement or unilateral declaration concerned;*
l. *The General Prosecutor being willing to withdraw any prosecution at the outset of a re-examination of proceedings that have been re-opened;*
m. *The court re-examining proceedings that have been re-opened being required to give the re-examination priority in the conduct of proceedings before it;*
n. *The negative consequences of a conviction being removed to the widest extent possible, together with the making of an award of compensation for pecuniary and non-pecuniary loss, by a court which finds that a conviction or judgment should not be upheld following the re-examination of proceedings that have been re-opened;*
o. *the prohibition of reformatio in pejus being applicable whenever a conviction is upheld following the re-examination of proceedings that have been re-opened;*
p. *The courts being under an obligation to notify the Agent of the outcome of any re-examination of proceedings that have been re-opened immediately after this has been concluded; and*
q. *The Agent being required to notify the General Prosecutor of all applications communicated to her/him by the European Court in which it is alleged that there has been a failure to conduct an effective investigation in respect of a death or ill-*

treatment and the General Prosecutor then being required to review whether the investigation concerned should be renewed.

264. Consideration should also be given to:

a. *Providing in the Criminal Procedure Code for a beneficium cohaesionis for any co-defendants of the applicant where these were not party to the proceedings before the European Court that led to the re-opening of the proceedings in which s/he was convicted;*
b. *Allowing for the re-opening of proceedings in which there have been convictions that appear to be vitiated by the same violation (in terms of the combination of factual or legal circumstances) that was found in a European Court judgment that has led to the proceedings with which it was concerned being re-opened; and*
c. *Making arrangements for reviewing whether the outcome of the re-examination of a case following the re-opening of proceedings points to the need for training for the judges, prosecutors or public officials who may, in some way, have contributed to the circumstances which contributed to a violation of the European Convention.*

2. Institutional matters

265. The efficient conduct of the process of executing judgments of the European Court, as well as friendly settlements and unilateral declarations, requires – as has been seen in the discussion of applicable standards the effective coordination of the activities of all state authorities and institutions whose effective participation is essential for the proper remedy of violations identified by the European Court or acknowledged by the State.

266. For the purposes of this report, certain conclusions and recommendations are made concerning three important elements of the institutional framework, namely, the coordination structures and the role of the Milli Majlis and the AHRC.

a. Coordination structures

267. As already noted, the Agent is tasked by the Regulation with coordinating the activities of the relevant state bodies in order to ensure the implementation of the decisions of the Court and the Committee of Ministers, as well as studying the legal consequences of the judgments and decisions issued by the Court and preparing proposals for improving the legislation and the practice of applying the law, taking into account the caselaw of the Court.

268. However, although the Agent is also tasked with creating working and expert groups for solving issues related to the authority of those involved, there appears to be no particular obligation on the members of those groups regarding execution of judgments and decisions of the European Court. Moreover, the Agent has no specific authority over the efforts needed for such execution.

269. Two potentially important developments connected with coordination arrangements in Azerbaijan have been the establishment within the structure of the Presidential Administration of the Law Enforcement and Human Rights Department, of which the Agent and her or his staff have become a part, and the establishment of a Working Group coordinated by the Agent.

270. These events indicate an effort to significantly strengthen and improve the effectiveness of the process of execution of judgments and decisions of the European Court. However, for the time being, the Working Group lacks any clear legal basis and defined procedure, thus remaining a rather loose instrument of inter-institutional cooperation. Moreover, at the same time, the work of the Agent is being hampered by serious budgetary and staffing shortages. Furthermore,

271. In the light of the foregoing and the relevant European standards (as to which see paras. 90-113), arrangements for coordination would benefit from the following:

a. *Introducing a single piece of legislation that comprehensively regulates all relevant issues in the process of executing judgments and decisions of the European Court;*
b. *Establishing an institutional framework, with a clear legal basis and defined procedure, for the existing Working Group, in which representatives from academia, civil society and the legal profession will join the authorities and other bodies already participating in it and for which the Agent will be given the role of directing the coordination of steps to be taken to execute judgments and decisions of the European Court;*
c. *Undertaking an evaluation of the arrangements governing the Agent and her or his staff and revising them, in the light of the experience of other Council of Europe member States that have established a discrete Office of the Government Agent, with a view to enhancing the effectiveness of the institutional arrangements for the execution of judgments and decisions of the European Court;*
d. *Ensuring that, for the purpose of executing judgments and decisions of the European Court, the Agent has at her or his disposal both funding that is adequate and staff that are well-qualified; and*
e. *Ensuring that all involved in the execution of judgments and decisions of the European Court are able to learn from experience of other member States in fulfilling this responsibility.*

b. The Milli Majlis

272. As has already been noted in Section B4 of this Report, parliaments such as the Milli Majlis should play a key role in providing effective oversight over the execution of judgments and decisions of the European Court.

273. In the case of Azerbaijan, it is the Human Rights Committee (currently composed of eleven members) that potentially has this responsibility.

274. However, at present the Milli Majlis, does not seem to be actively and systematically involved in considering issues relating to the execution of judgments and decisions of the European Court.

275. Rather, it focuses on the legislative process and the implementation of the European Convention standards within it. As a result, it can be concluded that, for the time being, there is a lack of parliamentary oversight of the execution process to any significant extent.

276. Moreover, although there is some specialist support expertise available to members of the Committee, this does not seem sufficiently extensive to deal with all the issues that may arise with respect to execution of judgments and decisions of the European Court

277. In the light of the foregoingand the relevant European standards (as to which see paras. 114-158 above), arrangements for parliamentary oversight of execution of judgments and decisions of the European Court would benefit from the following:

a. *Introducing a legal obligation for the Agent to report regularly to the Milli Majlis on the state of execution of judgments and decisions of the European Court and any problems in this regard;*
b. *Members of the Milli Majlis participating in the institutional framework established for the Working Group dealing with execution of judgments and decisions of the European Court; and*
c. *Developing continuing training programmes in the field of human rights (and particularly he European Convention) for members of the Milli Majlis's Committee and the professional staff of its Secretariat.*

c. The AHRC

278. The AHRC promotes awareness of the European Convention and the case law of the European Court in a variety of ways. It also has some role in scrutinizing and evaluating legislative drafts that in some respect cover issues relating to human rights before these

are sent to the Milli Majlis. Furthermore, its initiative has led to Constitutional Court and the Supreme Court taking important decisions strengthening the level of judicial protection of rights and freedoms.

279. However, issues directly related to execution of judgments and decisions of the European Court have featured minimally in the activities of the AHRC and, in particular, these have not so far been the subject of any significant analyses or interventions. Moreover, the AHRC has not received any substantial complaints about problems with the execution of judgments and decisions of the European Court.

280. This is perhaps unsurprising since the current legal framework of the AHRC does not give it much scope to intervene in the execution process. In particular, no specific statutory role has been assigned to it in the procedures for re-opening and re-examination following a judgment or decision of the European Court, such as a third party in the proceedings before the relevant court.

281. In the light of the foregoing and the relevant European standards (as to which ses paras. 159-169 above), the contribution of the AHRC to the execution of judgments and decisions of the European Court would be enhanced by the following:

a. *It being able to participate in the institutional framework established for the Working Group dealing with execution of judgments and decisions of the European Court;*
b. *It monitoring the execution of judgments and decisions of the European Court on an ongoing basis, including through the Rule 9 (2) procedure before the Committee of Ministers;*
c. *The conclusions and recommendations from this monitoring forming an integral part of its Annual Report concerning the state of protection of human rights and freedoms and being discussed in the Milli Majlis;*
d. *It publishing a separate thematic public report where there are particularly serious problems with respect to the prompt execution of judgments and decisions of the European Court, with this being the subject of a debate; and*
e. *Its professional staff being provided with training with respect to their role in the process of executing judgments and decisions of the European Court that draws on the best practices of other member States of the Council of Europe.*

282. Consideration should also be given to:

Undertaking, with the assistance of the Council of Europe, of an assessment of the functioning and needs of the AHRC, particularly with a view to strengthening the role it can play in monitoring the execution of judgments and decisions of the European Court.