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The role of national human rights structures in case of non-execution of domestic judgments

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WORKSHOP DEBRIEFING PAPER

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[1] *The electronic version of this publication is also available at* *www.centrodirittiumani.unipd.it*

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Introduction

The issue

The non-execution of judgments of domestic courts by the authorities of their own country constitutes not only a breach of domestic law and legal principles, but also a breach of the right to a fair trial, as contained in Article 6 of the European Convention on Human Rights (ECHR).

For example, in its judgment in the case of *Hornsby v. Greece* of 19 March 1997, the European Court of Human Rights (Court) affirmed that the "*right to a court*" "*would be illusory if a Contracting State's domestic legal system allowed a final, binding judicial decision to remain inoperative to the detriment of one party. It would be inconceivable that Article 6 para. 1 should describe in detail procedural guarantees afforded to litigants - proceedings that are fair, public and expeditious - without protecting the implementation of judicial decisions; to construe Article 6 as being concerned exclusively with access to a court and the conduct of proceedings would be likely to lead to situations incompatible with the principle of the rule of law which the Contracting States undertook to respect when they ratified the Convention*". Furthermore the Court observed that the administrative authorities form one element of a State subject to the rule of law and their interests accordingly coincide with the need for the proper administration of justice. Where administrative authorities refuse or fail to comply, or even delay doing so, the guarantees under Article 6, enjoyed by a litigant during the judicial phase of the proceedings, are rendered devoid of purpose.

Many structural problems are revealed by non execution of domestic judgment cases, as it was demonstrated during a round table entitled "*Non-enforcement of domestic court decisions in Council of Europe member*

states: General measures to comply with European Court of Human Rights judgments" that was organised by the Council of Europe[2].
These structural problems resulted in a high number of violations of the ECHR in certain States revealing a problem of non-compliance by the State and its entities with domestic court decisions and causing the steady influx of new complaints to the Court in this respect. Therefore there are a great number of judgments of the European Court that concern the non execution of domestic judgments in several member States. Recently, the Court delivered a judgement concerning Russia on the non-enforcement or delayed enforcement of final domestic in the case of *Burdov v. Russia* (no. 2)[3]. In a more general perspective, the lack of proper enforcement of judicial decisions severely affects the efficiency of the State structures, frustrates the citizens' legitimate expectations and their confidence in the judicial system, the rule of law as well as the effective implementation of human rights in general. This topic therefore seems to lay in the heart of the competencies of ombudsmen and national human rights institutions (NHRSs).

Aims and themes of the workshop

The workshop aimed at informing participants on Council of Europe standards and practice on the topic. Each presentation was followed by discussions and exchanges of information among NHRSs on their potential involvement in aiding best their own States to ensure that binding judgments of their courts are effectively executed. Following an introductory session, each of the three working sessions of the workshop was dedicated to a specific aspect of the non–execution, namely:

1. Non execution of domestic court judgments delivered against public entities or against private persons or entities but where public authorities fail to ensure execution;

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[2] *See the document prepared by the Department for the execution of judgments the European Court of Human Rights and the 2007 Annual Report at www.coe.int/T/E/Human_Rights/execution*

[3] *Case no. 33509/04, judgment of19 January 2009.*

2. Non execution of domestic court judgments that annul a decision taken by public authorities and oblige them to make a new one;
3. The existence of effective remedies in case of non execution of domestic judgments by public authorities.

The active discussion, which followed each session proved that the workshop was not just another academic meeting, but it was a practice oriented one. Participants and Council of Europe experts also learned about the existing national problems as well as possible solutions, that can later be brought to and implemented on an international level as good practices.

Council of Europe staff members attending the seminar were also made aware of NHRS's work and what these institutions could offer in terms of addressing the problem at international level. It was made clear that a solution can no longer be found at European level and the best would be to prevent human rights violations at the national level: in this context NHRSs' role can bring an important added value.

As a follow up to this event, it was decided to produce this workshop debriefing paper, which summarises the findings of the workshop and provides practical information to the NHRSs and references to documents concerning the role of NHRSs in the exection of domestic judgments. Each chapter lists points most relevant to the topics and discussions of the workshop, including summaries of experts' contributions.

1]

Chapter 1
Non-execution of domestic court judgments delivered against public entities or against private persons or entities where public authorities fail to ensure execution

The issue

As already mentioned, non- execution of domestic judgments is one of the most common problems identified by the European Court, which has seen this problem as a violation of the right to a fair trial.

Moreover, the Court has deemed the non-execution also a violation of the more general provision under Article 13 (right to an effective remedy). The respect of this right is crucial for the rule of law and democracy, otherwise the whole democratic system is jeopardized and looses credibility. Thus, non- execution of domestic judgments is both a human rights issue and a problem for democracy.

In view of this, domestic law must offer a remedy for this violation. This implies that the domestic legal system must not only be effective, but also should be able to offer an adequate a sufficient redress, if judgments are not executed.

In any case, the complexity of the domestic enforcement procedure or the presence of structural problems should not be an excuse to relieve the State's authorities for not redeeming the violation of such a fundamental human right.

Article 13 ECHR

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

Article 6 ECHR

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly by the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

3. Everyone charged with a criminal offence has the following minimum rights:
(a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
(b) to have adequate time and the facilities for the preparation of his defence;
(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
(e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

Case-law of the European Court of Human Rights

Since the last 15 years, the Court has interpreted the ECHR in events of non-execution of domestic judgements, which is still a widespread problem in a number of Council of Europe member States. In this area the jurisprudence of the Court has evolved and the following three leading cases well represent this evolution.

HORNSBY V. GREECE[4]

This case concerns the delay by the administrative authorities in taking the necessary measures to comply with two judgments of the Supreme Administrative Court. In its judgment the Court raised for the first time the issue of non-execution of domestic judgments.

Facts: a UK citizen's couple applied for an authorisation to open a private English language school in Greece. The Ministry of Education refused to grant permission on the ground that only Greek nationals could be granted such authorisation. They sought remedy to their non-pecuniary damages at the Court of Justice of the European Communities that decided in their favour but the final judgment was not executed. The case was referred to the European Court of Human Rights alleging violation of Article 6 of the ECHR.

Findings of the Court: *"The Court reiterates that, according to its established case-law, Article 6 para. 1 secures to everyone the right to have any claim relating to his civil rights and obligations brought before a court; in this way it embodies the "right to a court", of which the right of access, that is the right to institute proceedings before courts in civil matters, constitutes one aspect (see the Philis v. Greece judgment of 27 August 1991, Series A no. 209, p. 20, para. 59). However, that right would be illusory if a Contracting State's domestic legal system allowed a final, binding judicial decision to remain inoperative to the detriment of one party. It would be inconceivable that Article 6*

[4] *Case No.18357/91, judgment of 11 December 1995.*

para. 1 should describe in detail procedural guarantees afforded to litigants -proceedings that are fair, public and expeditious - without protecting the implementation of judicial decisions; to construe Article 6 as being concerned exclusively with access to a court and the conduct of proceedings would be likely to lead to situations incompatible with the principle of the rule of law which the Contracting States undertook to respect when they ratified the Convention (see, mutatis mutandis, the Golder v. the United Kingdom judgment of 21 February 1975, Series A no. 18, pp. 16-18, paras. 34-36)". Execution of a judgment given by any court must therefore be regarded as an integral part of the *"trial"* for the purposes of Article 6; moreover, the Court has already accepted this principle in cases concerning the length of proceedings (see the Di Pede v. Italy and *Zappia v. Italy* judgments of 26 September 1996, Reports of Judgments and Decisions 1996-IV, pp. 1383-1384, paras. 20-24, and pp. 1410-1411, paras. 16-20 respectively).

IMMOBILIARE SAFFI V ITALY[5]

Since the Hornsby judgment a significant development took place in the Court's case law concerning non-execution of domestic judgements. Recalling, as stated by the Court in Hornsby, that failure by the authorities to execute the judgments of the domestic courts is likely *"to lead to situations incompatible with the principle of the rule of law"*, a few years ago, the Committee of Ministers urged the Italian authorities to put an end without delay to the violations of the Convention found in those cases where the applicants continue to be faced with the failure to execute domestic judgments and are therefore unable to recover their properties.

[5] *Case No. 22774/93, judgment of 28 July 1999.*

Pilot Judgment

Since 2004 and in response to the large number of cases deriving from systemic or structural problems in certain countries the European Court of Human Rights has developed a pilot-judgment procedure. This consists in identifying in a single judgment systemic problems underlying a violation of the ECHR and indicating in that judgment the remedial measures required to resolve such situations. The pilot-judgment procedure is not only intended to facilitate effective implementation by respondent states of individual and general measures necessary to comply with the Court's judgments, but also induces the respondent State to resolve large numbers of individual cases arising from the same structural problem at domestic level, thus reinforcing the principle of subsidiarity which underpins the ECHR.

Facts: this case concerns excessive delays in enforcing court decisions ordering the eviction of tenants. Since 1947, there have been a number of changes to Italian tenancy legislation with, first, the introduction of rent control, then the statutory extension of all existing tenancies and, finally, the suspension or staggering of evictions.
Findings of the Court: the Court found that the legislation pursued a legitimate aim, since the simultaneous enforcement of numerous evictions could have posed a threat to public order. However, in all the cases where the applicants had experienced excessive delays in recovering their properties, there had not been a fair balance between the interests of the community and the right of landlords (violation of Article 1 of Protocol No.1). The Court also ruled that the consequence of such measures should not be to prevent, invalidate or unduly delay execution of court decisions, and still less to undermine the substance of such decisions, since this would be incompatible with the principle of the rule of law (violation of Article 6§1).[6]

[6] *For information on measures taken by Italy to comply with the judgement of the European Court, see Appendix I to resolution CM/ResDH (2007).*

BURDOV V. RUSSIA[7]

Non-enforcement or delayed enforcement of domestic judgments constitutes a recurrent problem in the Russian Federation. This has led to more than 200 judgments finding violations of the ECHR since the first case in 2002[8]. Approximately 700 cases concerning similar facts were pending in 2009, in some instances cases which could lead the Court to find a second set of violations as in this case. The Court held, in the light of its own findings and the other material in its possession, that the breaches found reflected a persistent structural dysfunction and that the situation has to be qualified as a practice incompatible with the ECHR.

Facts: it concerns the non-execution of final decisions delivered between 1997 and 2000 by the Shakhty City Court (Rostov Region), which ordered the Russian social authorities to pay the applicant a fixed compensation and a monthly allowance (with subsequent indexation) for damage to his health sustained during his participation in emergency operations at the Chernobyl nuclear plant. The applicant complained under Article 6 and Article 1 of Protocol No. 1 about the authorities' failure to comply with judgments delivered by domestic courts in his favour.

Findings of the Court (Burdov No. 2): the Court found the violation of several Articles of the Convention, notably Articles 6, Articles 1 of Protocol 1, Article 13 and Article 46.

In particular, concerning Article 13 (right to an effective judicial remedy) having examined the different remedies available the Court concluded that there was no effective domestic remedy, either preventive or compensatory, that allowed for adequate and sufficient redress in the event of violations of the Convention on account of prolonged non-enforcement of judicial decisions delivered against the State or its entities.

As concerns the measures to be taken by the respondent state to remedy the violation of Article 13 the Court's findings clearly called for the setting up of an effective domestic remedy or a combination of remedies allowing

[7] *Case of Burdov v. Russia (No. 2), application No. 33509/04, judgment of 15 January 2009.*

[8] *Case of Burdov v. Russia (No. 1), application No. 59498/00 , judgment of 7 May 2002.*

adequate and sufficient redress to be granted to large numbers of people affected by such violations.
The Court considered also that binding and enforceable judgments create an established right the payment in favour of the applicant, which should be considered a possession within the meaning of Article 1 Protocol 1 of the ECHR. Therefore, the fact that the authorities failed for a prolonged time to comply with these judgments violates the applicant's right to peaceful enjoyment of his possession.

Against the backdrop of a huge number of cases concerning similar facts, the Court ordered the Russian Federation to set up such a remedy within six months from the date on which the judgment became final, i.e. by 4 November 2009, and to grant adequate and sufficient redress by 4 May 2010 to all persons in the applicant's position in the cases lodged with the Court before the delivery of the pilot judgment.

Non-execution of domestic judgments and non-effective remedy: problems

The three above-mentioned leading cases concern the failure or substantial delay of the administration or state companies in abiding by final domestic judgements, or failure by the authorities to provide the necessary assistance to individuals to secure the enforcement of a court order. The structural problems related to the execution of domestic judgments arising from the cases against Greece (Hornsby and related cases) and Italy (Immobiliare Saffi and related cases) were considered solved by the Committee of Ministers in its resolutions: ResDH (2004)81 as concerns the Greek Government and ResDH(2007)84 as concerns the Italian Government.

In relation to the Russian Federation structural problems seem to persist, in light of a still considerable number of Court decisions condemning the State to the payment of sums to the applicants, which are not executed or

are executed with great delay. The main obstacles can be listed under the following groups[9]:

1. Legislative issue: for example, despite the adoption of laws and policies involving public expenditures, no corresponding provisions seem to be always anticipated in the budget.
2. Judicial issues: for example, if there is a practice of contradictory court decisions which are delivered on the same issue, this practice might incite the administration to wait for a possibly more favourable decision to be given by the other court system before executing the decision.
3. Budgetary issues: sums to be paid by the State in compliance with judicial decisions must be foreseen in the budget; if there is no possibility to pay under the current budget (no reserves in the budget), this creates automatic delays in the execution.
4. Administration issues: it is not always clear which body has to execute the court decision. In other circumstances, the body in charge of the payment of allowances lacks financial and human resources to remedy the excessive delays in execution of court decisions.

Non- execution of domestic judgments and non- effective remedy: solutions

PREVENTION

- a coherent legal framework and/or coherent practices for the control and restitution of properties;
- setting up, where appropriate, a special fund or special reserve budgetary lines, to ensure timely compliance with judicial decisions;
- clearly identifying the authority responsible for execution and simplifying the requirements to be fulfilled by the execution documents.

[9] *For more information see the document of the European Commission for the Efficiency of Justice CEPEJ(2005)8.*

REMEDIES IN CASE OF NON-EXECUTION:

- ensuring effective civil liability of the State for damages arising from the non-execution of domestic judicial decisions;
- guaranteeing the existence of effective procedures capable of accelerating the execution process leading to full compliance with the judicial decision;
- providing the bailiffs with sufficient means and powers so as to allow them to properly ensure the enforcement of judicial decisions;
- strengthening the individual responsibility (disciplinary, administrative and even criminal if appropriate) of decision makers in case of abusive non-execution and providing the responsible State authorities with the necessary powers to that effect.

Contributions on the subject from NHRSs

GEORGIA

In accordance with Article 82, para. 2 of the Georgian Constitution, *"Acts of courts shall be obligatory for all state bodies and persons throughout the whole territory of the country"*. The matter is further regulated by the Georgian Act on *"executive implementation"*.

The majority of the applications received by the Office of the Public Defender of Georgia are about non-execution of Court decisions. From July 2008 to January 2009 there were about 2.000 cases relating to payment from State budget by legal entities of public law: not more than 560 of these cases were processed in a reasonable time.

Another kind of non-execution cases are related to illegal dismissals from civil service of personnel during 2004-2005. Georgian common courts annulled a number of administrative decision concerning the dismissal, but the courts' order for reinstatement of illegally dismissed personnel remained non-executed by the administration.

As of now the law on *"executive implementation"* does not include a proper mechanism, allowing the bailiff to implement effective compulsory enforcement proceedings.

The situation of non-execution of domestic judgement in Georgia is at the basis of many violations of the ECHR by the Georgian State. For example in the case of LTD *"Iza" and Makrakhidze v. Georgia*. The Court found that *"there was a persistent problem of non-enforcement of final judgments delivered against State institutions which was recognised by the authorities. The Court found that the Georgian authorities, by failing for five years and eight months in the case of Amat-G and for over four years in the case of Iza, to execute judgments, had deprived the provisions of Article 6 § 1 of the Convention of all useful effect. The Court noted that the remedy open to the applicants of taking out criminal proceedings against the Enforcement Agent was of little value since the enforcement of judgments was dependent on budgetary considerations rather than the agent's conduct. It therefore concluded that the applicant company did not have an effective remedy. Furthermore, the Court found the fact that the applicant companies were unable to have final judgments in their favour enforced constituted an interference with their right to the peaceful enjoyment of their possessions."*[10]

GREECE

The Greek National Commission for Human Rights (GNCHR) submitted a number of recommendations to the Greek Government for ensuring conformity of the Bill on the Greek administration's compliance with judicial decisions (law of 9 July 2002). These recommendations were based on the Greek Constitution, the International Covenant on Civil and Political Rights and the ECHR. The main points were the following:

1. The most effective means of compliance by the administration would be the establishment by law of the "action for performance" against the Greek administration;
2. Compliance should be provided for also in cases of judgments regarding interim protection;
3. The judicial board in charge of supervising the administration's compliance should include judges who have already participated in the relevant proceedings;

[10] *Application no. 28537/02, judgment of 27 September 2005.*

4. The waiting period regarding compliance should not be beyond the limits of reasonableness established by the European Court of human rights;
5. The Bill should proceed to the abrogation of the antiquated preferential default interest of the Greek state, as prescribed by contemporary human rights law and principles.

Subsequently, the Greek National Ombudsman proposed the possibility of pecuniary penalties to be imposed on any official responsible for the non-execution of judgments as well as criminal liability. While not all proposals were accepted by the Greek Government, the bill has worked so far and non-execution cases lowered. Still, problems of compliance by the local authorities with court judgements and orders remain. In fact, the Greek National Ombudsman deals with a number of complaints about non-execution. In dealing with these cases, the Ombudsman provides information to individuals about the law on execution and the possibility offered to them for redress. Facilitating contacts between citizen and authorities involved is of great importance, as often the non-execution is the result of bad organisation of the administration or of no clear division of responsibilities in the execution process.

MONTENEGRO

In general, the Ombudsman institution is not empowered to supervise public authorities. It only intervenes in cases of excessive length of court proceeding or non-execution of judgements. In this context, the Ombudsman may act in cases of:

- unreasonable delays of court proceedings;
- misuse of procedural competences (such as denying procedural rights);
- non- enforcement of court's orders.

The Ombudsman has the authority to urge courts to initiate the enforcement procedure in due time, as provided for under the Law of Enforcement Procedure. This law provides that the court has an obligation to act promptly in a procedure for enforcement (Article 4, para.1) as follows:

- to decide upon a request on enforcement within 3 days as of the submission of the request;

- to decide on an appeal within 15 days as of the day the file was received.

The Ombudsman made some practical recommendations on enforcement procedure in order for courts to deal with their backlog, such as to start first with the execution of judgments, which have a delay of more than a year.

UKRAINE

A certain number of judgments[11] by the European Court show that there is a systemic problem of non-compliance with judgments by the administration in Ukraine. The Committee of Ministers of the CoE has issued an interim resolution[12] on the execution of judgments concerning 232 cases against Ukraine, relating to failure or serious delay in abiding by final domestic judgements delivered against the State or its entities, as well as the absence of an effective remedy.

The main problem seems to be that State budget is limited and does not provide for the necessary sums to comply with these court's decisions ordering payments.

Upon the initiative of the Ombudsman of Ukraine, the Ministry of Justice started dealing with cases of non compliance by civil servants. The Ombudsman also requested the parliament to adopt a law providing for compliance procedure, which can have considerable effect on improved compliance with court's decisions. The Ombudsman strongly lobbied, even at Presidential level, in favour of the ratification of the CoE Convention on compensation of victims of violent crimes[13]. However, the Parliament has not yet ratified this Convention. The Ombudsman has proposed a draft law that provides for courts' competence with complaints against the prosecutor or other State bodies related to the excessive length of proceedings and determining compensation for the victims.

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[11] *See for example the case of Zhovner v. Ukraine, application No. 56848, judgment of 29 June 2004.*

[12] *CM/ResDH(2008)1.*

[13] *European Convention on the Compensation of Victims of Violent Crimes, (ETS No. 116), entered into force January 2, 1988 and signed by Ukraine in 2005.*

RUSSIAN FEDERATION

The main causes for non-execution of domestic judgements in Russia can be identified as follows:

1. The parts of the judgements related to their execution are not clear;
2. The administration responsible for the execution is not informed correctly on actions required or it makes an arbitrary interpretation of court decisions;
3. Budget constraints are an obstacle to make funds available for the compensation to victims.

The Ombudsman's role is to suggest more rational procedures in this matter and to advise individual on their rights to obtain redress. The ombudsman's intervention also aims to prevent corruption, as non- execution of judgments can lead to cases of corruption of the administration in order to have judgments executed.

SERBIA

In Serbia only the courts are authorized to execute domestic civil court judgments through a special procedure for execution of court judgments regulated by the Law on *"Execution Procedure"* of 2004. Of course, these rules apply only if the original debtors do not fulfil their obligations voluntarily, so the object of execution has to be their properties, for example:

1. compulsory sale of movable property;
2. compulsory sale of immovable property;
3. seizure of means on debtor's bank account under legal process;
4. seizure of debtor's claim for money to third party and
5. transmission of debtor's rights to the creditor.

According to the Ombudsman, courts are not very efficient and thorough when it comes to the execution of domestic civil court judgments. The main reasons are:

1. a large number of claims;
2. lack of court's personnel;

3. difficulties concerning delivery of court documents to the parties in dispute;
4. inefficient bankruptcy procedure, which leaves many creditors unable to collect their claims, even though their rights were previously determined in court.

The Ombudsman is authorized to act only in situations when an individual's right is violated by action or inaction by the administration. The judiciary is excluded from the Ombudsman supervision. In cases of non-execution of court's judgments delivered against private persons, the Ombudsman has no other option than to advise the petitioner on how to address its claim to the bodies in charge of the supervision of the work of courts. However, these bodies have very limited possibilities of intervention, due to the principle of the independence of the judiciary.

In the case of non-execution of court judgments delivered against public entities, the Ombudsman has at least the right to request explanations on the reason why the administration doesn't comply with the decision of the court. Still, the Ombudsman cannot oblige public entities to fulfil their obligation. It can only recommend that a court judgment be executed, and in case of further non-execution, to raise the issue at the level of the Serbian Government, the Parliament and, as *ultima ratio*, to bring it to the attention of the media.

2]

CHAPTER 2

Non-execution of domestic court judgments that annul a decision taken by public authorities and oblige them to make a new one

The issue

A judgment given by a domestic court, usually an administrative tribunal, quashing an administrative decision, has generally three effects: annulment of the decision; restitution of the situation to its original state; statement of some duties that the administrative authority has from now on in front of the plaintiff.

In general, annulment and restitution can take effect immediately after a judgment (also a judgement of a lower court in some cases, even if it is still subject to appeal, or has been already appealed). However, in view of the annulment of its previous decision, the public authority must take a new one. The administration can have a wide margin of appreciation and can choose whether and how to comply (for instance, making a new decision in accordance with the judgment), or it can suspend any activity until the judgement is final. The wide discretion of the public administration is based on the principle of separation of powers between the judiciary and the public administration.

However in some cases, the judicial review of an administrative act can create a conflict between the judiciary and the administration, with public authorities uncertain or simply unwilling to draw the consequence of the annulment. This results in the administration not making a new decision or simply issuing a new decision with exactly the same content of the previous decision. This situation can amount, in practice, to a non-execution of a court judgement, thus violating the right of the plaintiff.

In order to avoid such a *"stand still"* situation, there is a tendency by some legislators to provide the courts with more powers than the simple annulment of the decision taken by the administration. This new trend is based on *"the realization that the abolition of an administrative action is often in itself both insufficient and excessive" ... "as it creates a legal void that is then difficult to fill"*[14]. In many judicial systems of CoE member States, the powers of declaration and injunction (statement of duties) of the judiciary have been developed, permitting the court to go beyond the annulment of illegal decisions and to help re-establishing administrative legality by indicating to the administration how to act following the annulment of its decision[15]. Moreover, the annulment of a decision creates an obligation for the administration to reconsider the case retroactively up to the day on which the decision was taken by the public authority. The annulment can have very adverse effects on the principal of legal certainty: a situation, which had the appearance of legality, is modified with retroactive effect. This situation can be detrimental to the rights of a third party (e.g. a owner, who built already a terrace with a nice view on the seaside could face damages if the neighbour is reinstated by the judiciary into his/her building permission, previously refused by the local administration). So the obligation of the administration is not only to pay compensation, but to reconsider the case in light of the new situation and eventually remedies to it.

The role of NHRSs

NHRSs, and in particular ombudsmen, have an important role to play to avoid frictions between the individual interest of the plaintiff, recognised by a judgement, and the alleged collective interest at the base of the earlier

[14] *"Protecting Legality: Public administration and judiciary in EU countries. How to conciliate executive accountability and judicial review?" by Jean-Marie Woehrling. Conference proceedings on Public Administration Reform and European Integration, Budva, Montenegro 26-27 March 2009.*

[15] *See further in Chapter 3 on the role of the judge in enforcement of court decisions in Europe.*

decision of the administration, which the court has annulled. This role is inherently related to ombudsmen' mediatory functions. While *"the court determines the legal rights of the parties to a case"... "an ombudsman takes into account broader principles of good administration, which, are inherently open-ended" "As regards the norms, the ombudsman complements the work of the courts, in particular as regards the methods through which those norms are implemented"*[16].
More importantly, the intervention of the Ombudsman can prevent the excessive resort to the judicial remedy by individuals, thus defusing the risk of overloading the judiciary with repetitive cases. In the extreme situation where an effective judicial remedy does not exist, the Ombudsman is the only possible remedy to be offered to the individual, who is a victim of the inaction or wrong action by the administration. The Ombudsman has the power to recommend to the administration a certain conduct, which takes into consideration the legitimate expectation of the individual.

In this context, it seems pertinent to recall the recommendation of the Committee of Ministers of the CoE on *"alternatives to litigation between administrative authorities and private parties"*[17]. This recommendation indicates that civil or even criminal liability of the responsible civil servant cannot be an effective remedy for the individual when the judicial system is not working properly and already suffers of excessive delay in the proceedings. In other words, punishing civil servants might not be the most effective solution, as it would not help improve the situation of non-execution when it is due to structural problems. Indeed, in order to decrease the number of non-executed judicial decisions, policies aiming at preventing judicial disputes are a better solution and could be developed, in particular through the promotion of alternative means of solving disputes between public au-

[16] *"The Ombudsman Institution and the quality of democracy", P. Nikiforos Diamandouros, EU Ombudsman, published in "Distinguished Speakers Lectures" No. 3/2006, University of Siena.*

[17] *Rec. (2001) 16.*

thorities and individuals. This implies that procedures for internal reviews, conciliation and mediation, including the traditional mediatory role of the ombudsman, should be reinforced.

Contributions on the subject from NHRSs

SERBIA[18]

Judicial review of administrative acts

In the Serbian legal system, courts can control the legality of administrative acts. Following the footsteps of Austrian and Former Yugoslav legal tradition, the so called *"General Law"* of 1997 regulates administrative procedure, and it is applied by all administrative organs and subjects with public authorities when they decide about rights or obligations of individuals. When individuals exhaust ordinary legal remedies without success against an administrative act, the act becomes final in administrative procedure. However, individuals can still initiate the so called "*judicial procedure in contentious administrative matters"*, except in some rare cases when this judicial review is expressly excluded by the Constitution or by the Law.

The Law on *"judicial procedure in contentious administrative matters"* of 1996 enables courts to review whether the law was applied correctly by an administrative organ or other public authority. If it finds that the law was applied correctly, it denies the plaintiff's lawsuit. On the contrary, if it is found a breach of the plaintiff's legal rights, the court annuls the administrative act and order the administrative organ to make a new decision within 30 days after the verdict is received, taking into consideration any objections of the court.

If the administration remains inactive, the plaintiff has the right to submit a written request to remind the competent body to issue a new act within 7 days, and, after that, the plaintiff has the right to address to the court again, requesting that a court order replaces the missing act of the administra-

[18] *Based on a written contribution by Mr Marko Jovanovic, Legal Adviser, Office of the National Ombudsman of Serbia.*

tive organ. In this way, there is always a legal remedy in cases of *"silence of administration"*.
The problem is that, in the judicial review of contentious administrative decision, courts are not authorized to consider whether the administrative act is opportune or not, but just are bound to control its legality, and if it is illegal, they simply annul it. Situations when the court actually decides instead of the administrative organ are extremely rare, even though that possibility exists in theory. In practice, administrative courts limit their control on judging whether the law was obeyed or disobeyed on purely procedural matters.

The role of the Ombudsman

The Ombudsman experience shows that there are two different ways of administrative organ's ignoring court's judgments, which annul decisions of public authorities: 1) the administration doesn't act at all, or 2) it issues a formally new act which is exactly the same as the act that was previously annulled, without taking in consideration objections and legal points of the court. The second situation is potentially more dangerous, because it creates sort of *"vicious circle"* which can theoretically last forever and all legal remedies will never be exhausted in that way.
In such cases, the Ombudsman can recommend to public authority to issue a new act in accordance with court's judgment, or to stop ignoring it by constantly issuing new acts, which are identical to the annulled ones. The Ombudsman's intervention is fully justified, since this behaviour by the administration betrays the purpose of the judicial review in contentious administrative matters, leaving citizens without a final decision regarding their rights or obligations for a long period of time.
In January 2010, the Law on the new organization of courts entered into force in Serbia. The newly created administrative court will be the only court in the country deciding about the legality of administrative acts. Until then all courts, from the district court up to the supreme Court of Serbia were authorized to act on administrative matters. It is hoped that the establishment of administrative courts will improve the efficiency of the judicial review in contentious administrative matters in Serbia.

3]

Chapter 3

The existence of effective remedies in case of non- execution of domestic judgments by public authorities

The issue

As seen in the previous chapters, the effects of the non execution of domestic judgments are multifaceted and can undermine the rule of law and promote distrust of the State in general. It has also an economic implication, limiting participation, competition and redress in the government procurement process, thus exacerbating human rights abuses including corruption.

As reiterated in many discussions at Council of Europe level as well as at national level[19], there should be in place effective domestic remedies to accelerate execution proceedings and compensation in cases of non-execution should be made available.

PROBLEMS:

- lack of effective domestic remedies at the disposal of claimants in case of non-execution of judicial decisions;
- lack of adequate compensation for pecuniary and non-pecuniary damages;
- lack of adequate mechanisms for acceleration of execution proceedings and for compulsory enforcement;

[19] *The Council of Europe has a Department which assists the Committee of Ministers in the supervision of the execution of the judgments of the European Court. This Department has organised discussions to address the problem of delayed or lacking action on domestic court decisions. For more information: www.coe.int/t/dghl/monitoring/execution/default_en.asp.*

- ineffectiveness of other procedures (administrative, civil, criminal, etc.) to compel the responsible authorities to comply with judicial decisions;
- lack of clarity of the bailiffs' powers, insufficient means allocated to them and absence of an appropriate legal framework governing compulsory enforcement in respect of the State and its entities.

SOLUTIONS:

- priority action to improve domestic remedies;
- acceleration of pending execution proceedings;
- adequate compensation for delays in execution;
- rapidly improve funding in sectors particularly affected by the non-execution of judicial decisions.

A number of measures have been taken by several countries in this direction. Progress is under way through action plans or national strategies, reforms of the bailiffs systems, new laws introducing remedies, enforcement mechanisms set up for instance by both supreme courts and councils of State.

New Project on removing the obstacles to the non-enforcements of domestic court judgements

The Council of Europe started implementing a new regional project "Removing the obstacles to the non-enforcement of domestic court judgments / ensuring an effective implementation of domestic court judgments". The project, funded by the Human Rights Trust Fund, includes Albania, Azerbaijan, Georgia, Moldova, Serbia and Ukraine, and will last for 36 months. Operational partners of the project will be Government agent offices, Finance and Justice Ministries, as well as Supreme Courts, judges and bailiffs. The aim of the project is to improve the execution of the execution of the judgements by the European Court of Human Rights in Albania, Azerbaijan, Georgia, Moldova, Serbia and Ukraine by assisting these states in putting in place effective norms and procedures for a better enforcement of national court decisions.

Examples

GREECE[20]

A number of legislative measures were adopted in Greece following the *Hornsby case*, quoted in chapter 1. These included:

- Constitutional amendments to reinforce and extend the administration violation's obligation to comply with domestic decision;
- Introduction of compulsory execution against the state and legal entities of public law;
- Legislative amendments to ensure administration's proper compliance with judicial remedies: the creation of a three-member council.

It appears, in particular, that the establishment of the special judicial councils, their independent status, as well as their powers to impose sanctions and to provide the necessary guidance to the administration, guarantee an effective control of the latter's compliance with decisions of all courts.

SPAIN

In the Spanish system there are no enforcement agents for the execution of court decisions, as judges themselves are responsible for enforcement. Only in very exceptional cases do solicitors play a role in enforcement. This is because Article 113 of the Spanish Constitution lays a duty on judges to ensure that judgements are enforced. Judges have dual powers: they say what the law is and themselves enforce it.

[20] *Resolution of the Committee of Ministers of the CoE ResDH(2004)81.*

The role of the judge in the enforcement of court decisions in Europe

The very possibility of a judge-enforcement agent requires two conceptions of the administration of justice:

- *According to the first, which is most widespread, judges say what the law is and enforcement agents, who are not judges, put the decision into effect.*
- *According to the second conception, which is less frequent, judges have dual powers, in other words, they say what the law is and themselves enforce their decisions or they are made responsible for enforcing the decisions of other judges. In this case, the judge's primary task (which is to judge) is accompanied or supplemented by another one: to enforce.*

If the enforcement agent is the judge who handed down the decision, the decision is not detached from either his / her position or person. In this hypothesis, the judge's role is understood to be very wide, going beyond the usual one of "deciding". This system has at least two advantages: it leaves the case in the hands of a judge who is already very familiar with it and who will be able to begin a procedure on the basis of a case that is "still fresh", in other words, a case containing information most of which remains unchanged. However, on the other hand, it makes the judge responsible for an extra task. When the question of the speediness of justice arises, such additional task should be taken into account as a possible factor of inefficiency.

Conclusions

Domestic remedies against the non-execution of domestic judgments should always be distinguished from international remedies. If domestic judgments are not executed, remedies can be sought eventually at the European Court's level. However, this distinction is becoming more theoretical than practical: the risk is that European Court's judgments against States, that do not execute domestic judgments, are bound not to be executed either. That is exactly why non-judicial remedies are very important, since they could contribute to the solution of the problem of the inefficiency of the judiciary in two ways: by preventing the non-execution of a judgment through mediation (in particular when it is the administration which fails to ensure the execution) and, as a consequence, by decreasing the number of applications flooding the domestic and European judiciary. In this way, it is hoped that applications before the European Court do not accumulate, due to the vicious circle of *"non-execution of judgments related to the non-execution of judgements"*.

The role of NHRSs

What follows is a summary of good practices for NHRS's intervention, as discussed during the workshop.

1. Lobbying for the establishment of redressing mechanisms

- Support the establishment of enforcement mechanisms, for instance like the Special Judicial Council operating in Greece;
- Make recommendations to improve the efficiency of such mechanisms when already existing.

2. Disseminating information

- Disseminate information to the applicants on the options for access to remedy (for example, a cover letter attached to the court's decision that informs citizens what to do in case non-execution of the judgment could

be a productive and targeted dissemination of information);
- Favour all kind of other practicalities so that citizens become familiar with their options for remedies;
- Help the administration to make citizens aware of available remedies.

3. Improving relations with the administration
- Participate in the legislative drafting process and make recommendations at any stage of it (since NHRSs know the problem from the most practical points of view, they can be in a better position to spot out shortcomings of the law or improve its implementation by the administration);
- Help the administration's work with advices more than criticisms, so that administration realizes that the NHRS is not an *"enemy"*, but a *"friend"* of the administration suggesting ways to save future *"waste of time"*.

4. Using Council of Europe mechanisms
- Familiarise with the Council of Europe work related to the enforcement of domestic court decisions (e.g. European Commission for the Efficiency of judgments – CEPEJ) and use their findings and recommendations at domestic level;
- Submit amicus curiae brief to the European Court or request for the intervention of the Commissioner for Human Rights ex Article 13 of the new Protocol 14 of the ECHR[21].
- Help the Committee of Ministers work related to the monitoring of execution of the Court's judgments, by advising on the existing relevant practices in their countries, causes of the problems and possibilities of redressing (see the frame on the role of NHRSs at page 40).

5. Turning practical experience into systemic changes
- Turn their very practical experience of dealing on a daily basis with citizen's problems into systemic changes (for example NHRSs should be able to draw conclusions from their experiences turning them into sug-

[21] *"In all cases before a Chamber or the Grand Chamber, the Council of Europe Commissioner for Human Rights may submit written comments and take part in hearings."*

gestions for the improvement of the law *"legislation on substance"*);
- Intervene in remedy-making legislation. Once effective remedies are put into place, NHRSs are relieved from work too, since individual complaints will decrease;
- Advise on legislation in a way to avoid non-execution of judgments, by including reasonable time limits and clearly identifying authorities responsible for the non-execution.

6. Strengthening prevention
- Increase their efforts on prevention of human rights violations, thus avoiding court proceedings and, eventually, the problem of non-execution of domestic judgments (NHRSs have more potential in the prevention of these violations rather then in compensation- remedy).

7. Solving individual cases by way of general recommendation
- Identify on the basis of individual complaints the pattern of behaviour by the administration which leads to the non-execution of judgements and recommend possible behaviours of the administration which can prevent the problem.

8. Making the issue public
- Generate a deterrent effect by highlighting the issue of non-execution in their annual reports presented to the parliament;
- Require that costs of compensations for non-execution encountered by the administration be budgeted and made public.

9. Favouring disciplinary pressure on individuals responsible for executing judgments
- Recommend the establishment of disciplinary measures on individuals responsible for non-executing judgement (who usually are not motivated when the non-execution does not involve pecuniary sanctions or budgetary restrictions). In some cases, these measures could help increase the individuals awareness and commitment to execute judgements.

Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements

Rule 9 - Communications to the Committee of Ministers

1. *The Committee of Ministers shall consider any communication from the injured party with regard to payment of the just satisfaction or the taking of individual measures.*
2. *The Committee of Ministers shall be entitled to consider any communication from non-governmental organisations, as well as national institutions for the promotion and protection of human rights, with regard to the execution of judgments under Article 46, paragraph 2, of the Convention.*
3. *The Secretariat shall bring, in an appropriate way, any communication received in reference to paragraph 1 of this Rule, to the attention of the Committee of Ministers. It shall do so in respect of any communication received in reference to paragraph 2 of this Rule, together with any observations of the delegation(s) concerned provided that the latter are transmitted to the Secretariat within five working days of having been notified of such communication.*

www.coe.int/t/e/human_rights/execution/02_documents/CMrules2006.asp#TopOfPage

Appendixes

List of background documents

COUNCIL OF EUROPE

Treaties

- European Convention on Human Rights
  www.echr.coe.int

Committee of Ministers

http://www.coe.int/t/dghl/monitoring/execution/default_en.asp

- Resolution ResDH(2004)81 concerning the judgments of the European Court of Human Rights relating to non-execution of domestic judicial decisions in Greece as a leading example of general measures to be adopted by States party to the ECHR on the-execution of domestic judgements
- Recommendation (2003) 16 on the execution of administrative and judicial decisions in the field of administrative law
- Recommendation (2003) 17 on enforcement
- Information document CM/inf/DH (2006)19 rev3 Memorandum on "Non-enforcement of domestic judicial decisions in Russia: general measures to comply with the European Court's judgments"
- Information document CM/Inf/DH(2007)33 Conclusions of the Round table on "Non-enforcement of domestic courts decisions in member states: general measures to comply with European Court judgments"
- Final Resolution CM/ResDH(2007)84 Execution of the judgments of the European Court of Human Rights - Non-execution of court orders to evict tenants - Immobiliare Saffi and 156 other cases against Italy

European Commission for the Efficiency of Justice

http://www.coe.int/T/dghl/cooperation/cepej/default_en.asp

- Enforcement of court decisions in Europe - CEPEJ Studies No. 8
- Report "Examination of problems related to the execution of decisions by national civil courts against the state and its bodies in the Russian Federation"

- Report on "Non-enforcement of court decisions against the state and its entities in the Russian Federation: remaining problems and solutions required"

Selected judgments of the European Court of Human Rights

- Selection of summaries of judgements on non-execution of domestic decision from the 1st Annual report 2007 on the supervision of the execution of judgements of the Europen Court of Human Rights. Pages 106 -114
  www.coe.int/t/e/human_rights/execution/CM_annreport2007_en.pdf
- Hornsby v. Greece, judgement on 19 March 1997 relating to non-execution of domestic judicial decisions in Greece
- Burdov v. Russia (no. 2), judgement of 19 January 2009 (not yet final)
  Pilot judgment concerning Russia on the non-enforcement or delayed enforcement of final domestic judgments
- Qufaj Co. SH.p.k. v. Albania 54268/00 Judgment final on 30/03/2005
  Non-enforcement of a final domestic decision ordering a municipality to compensate the applicant company for damage sustained following the refusal to grant a building permit (violation Art. 6§1).
- Jeličić v. Bosnia and Herzegovina 41183/02 Judgment final on 31/01/2007
  Right of access to court violated because of non-enforcement of a final domestic judgment of 1998 ordering the state to release old savings accounts in foreign currency; and also violation of right of property (violations of Art. 6§1 and 1, Prot. 1).
- Angelov and other similar cases v. Bulgaria 44076/98 Judgment final on 22/07/2004
  Delay by authorities in complying with court judgments, between 1996 and 2003, awarding compensation to the applicants (violations of Art. 1 Prot. 1 and, in some cases, of Art. 6§1).
- "Iza" Ltd and Makrakhidze v. Georgia / "Amat-G" Ltd et Mebaghishvili v. Georgia 28537/02 2507/03 Judgments final on 27/12/2005 and 15/02/2006
  Impossibility to obtain execution of final domestic judgments ordering payment of state's debts (violation of Art. 6§1, 13 and Art. 1, Prot. 1).
- Immobiliare Saffi v. Italy, judgment on 28/07/99
  Systemic violation of flat owners' right to peaceful enjoyment of their possessions by failure to enforce judicial eviction orders as a result either of legislation suspending or staggering enforcement or simply of the applicants' inability to obtain assistance from the police and lack of any effective remedies to

establish the state's liability and obtain compensation for delays in, or lack of, enforcement (violations of Art. 1, Prot. 1 and Art. 6§1).

- Luntre and other similar cases v. Moldova 2916/02 Judgment final on 15/09/2004
  Non-enforcement of final judgments delivered by domestic courts (violations of Art. 6§1 / 1 prot 1)
- Timofeyev v. Russia 58263/00 Judgment final on 23/01/04
  Violations of the applicants' right to effective judicial protection due to the administration's failure to comply with final judicial decisions in the applicants' favour including decisions ordering welfare payments, pension increases, disability allowance increases, etc. (violations of Art. 6§1 and of Art. 1, Prot. No. 1).
- Zhovner and other similar cases v. Ukraine Judgment final on 29/09/2004
  Failure or serious delay by the Administration or state companies (including in case of bankruptcy and liquidation) in abiding by final domestic judgments mainly ordering payments; absence of effective remedies to secure compliance; violation of applicants' right to protection of their property (violations of Art. 6§1, 13 and 1, Prot. No. 1).
- Popescu Sabin and other similar cases v. Romania 48102/99 Judgment final on 02/06/04,
  Non-enforcement by local authorities of domestic courts' decisions ordering the restitution of land property nationalised or lost during the communist period (violation of Art. 6§1 and 1, Prot. No. 1).

The Commissioner for Human Rights

- Pilot project "enhancing the role of human rights structures in the execution of judgments"
  www.coe.int/t/commissioner/News/2008/080202NHRSmeeting_en.asp
- Viewpoint "Flawed enforcement of court decisions undermines the trust in State justice"
  www.coe.int/t/commissioner/Viewpoints/090831_en.asp

OTHER USEFUL LINKS AND DOCUMENTS

- Council of Europe's web site dedicated to the execution of judgments of the European Court of Human Rights
  http://www.coe.int/t/dghl/monitoring/execution/default_en.asp

Workshop programme

TUESDAY, 24 MARCH 2009

Arrival of participant

18.30 – 19.00 **OPENING SESSION**
Words of welcome
by Marco Mascia, Director of the Interdepartmental Centre on Human Rights and the Rights of Peoples of the University of Padua
by Markus Jaeger, Deputy to the Director, Office of the Commissioner for Human Rights, Council of Europe

Non execution of domestic court judgments: issues at stake
by Christos Giakoumopoulos, Director, Directorate of Monitoring, Directorate General of Human Rights and Legal Affairs, Council of Europe

20.30 Dinner

WEDNESDAY, 25 MARCH 2009

9.00 – 11.00 **WORKING SESSION 1: Non execution of domestic court judgments delivered against public entities or against private persons or entities but where public authorities fail to ensure execution**

Introductory presentation
by Mikhail Lobov, Head of Legal Division, Registry of the European Court of Human Rights

Discussion and exchange of experiences with contributions namely from the NHRSs of Georgia, Greece, Montenegro, Ukraine and Russian Federation

11.00 – 11.30 Coffee break

11.30 – 13.00 **Discussion continued**

13.00 – 15.00 Lunch break

15.00 – 16.15 **WORKING SESSION 2: Non execution of domestic court judgments that annul a decision taken by public authorities and oblige them to make new one**

Introductory presentation
by Vasileia Pelekou, Deputy and Legal Advisor to the Permanent Representative of Greece to the Council of Europe

Discussion and exchange of experiences with contributions namely from the NHRS of Serbia

16. 15 -16.45 Coffee break

16.45 – 18.00 **Discussion continued**

20.30 Dinner

THURSDAY, 26 MARCH 2009

9.00 – 10.30 **WORKING SESSION 3: The existence of effective remedies in case of non execution of domestic judgments by public authorities**

Introductory presentation
by Christos Giakoumopoulos

Discussion and exchange of experiences with the contributions namely from the NHRSs of Greece and Spain

10.30 – 11.00 Coffee break

11.00 – 13.00 **Discussion continued**

13.00 – 13.45 **Winding-up of the workshop**
by Stefano Valenti, P2P Project Manager, Interdepartmental Centre on Human Rights and the Rights of Peoples of the University of Padua

13.45 **Close of the workshop**

14.00 – 15.00 Lunch

15. 00 -19.00 Guided tour of the city of Padua or transfer to Venice

20.30 Dinner

FRIDAY, 27 MARCH 2009

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[22] *All reference to Kosovo, whether to the territory, institutions or population, in this document shall be understood in full compliance with United Nations Security Council Resolution 1244 and without prejudice to the status of Kosovo.*

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notes

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Workshop debriefing papers 2008

"Rights of persons deprived of their liberty: the role of national human rights structures which are OPCAT mechanisms and of those which are not"
9 -10 April 2008 Padua (Italy)

"Complaints againts the police - their handling by the national human rights structures"
20-21 May 2008 St. Petersburg (Russian Federation)

"Protecting the human rights of irregular migrants: the role of national human rights structures"
17 -19 June 2008 Padua (Italy)

"The promotion and protection by national human rights structures of freedom of expression and information"
21-23 October 2008 Padua (Italy)

"The role of national human rights structures in promoting and protecting the rights of persons with disabilities"
2-3 December 2008 Budapest (Hungary)

Workshop debriefing papers 2009

"The protection of the rights of Roma people by the national human rights structures"
24-25 February 2009 Budapest (Hungary)

"The role of national human rights structures in case of non-execution of domestic judgments"
24 - 26 March 2009 Padua (Italy)

"The role of national human rights structures as regards anti-terrorists measures"
09 - 11 June 2009, Padua (Italy)

"The role of the ombudsman in the defence of social rights in times of economic crisis"
2-4 September 2009 St. Petersburg (Russian Federation)

"The protection and promotion by national human rights structures of the rights of the elderly"
15-16 September 2009 Budapest (Hungary)

"The protection of separated or unaccompanied minors by national human rights structures"
20 - 22 October 2009 Padua (Italy)

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This project aims at setting up an active network of independent non-judicial human rights structures in Council of Europe member States.