THEORY AND PRACTICE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS

Fourth Edition

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easily available to the reader through other sources and would have overburdened the footnotes.

It almost seems a whim of fate that, whilst the previous edition had to anticipate the entry into force of Protocol No. 11, the date of which was uncertain at the moment of writing, the present edition has to anticipate the entry into force of Protocol No. 14, which was also unpredictable at the moment the editing had to be concluded. In each of the relevant chapters the future effects of Protocol No. 14 have been indicated, which however would appear to be less far-reaching than those of Protocol No. 11.

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July 2006

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CHAPTER 1
GENERAL SURVEY OF THE EUROPEAN CONVENTION

REVISED BY LEO ZWAAK

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1.1 GENESIS OF THE CONVENTION

The European Convention for the Protection of Human Rights and Fundamental Freedoms is a product of the period shortly after the Second World War, when the

issue of international protection of human rights attracted a great deal of attention. These rights had been crushed by the atrocities of National Socialism, and the guarantee of their protection at the national level had proved completely inadequate.

As early as 1941 Churchill and Roosevelt, in the Atlantic Charter, launched their four freedoms: freedom of life, freedom of religion, freedom from want and freedom from fear. After the Second World War the promotion of respect for human rights and fundamental freedoms became one of the purposes of the United Nations. Within that framework the Universal Declaration of Human Rights, adopted by the General Assembly of the United Nations on 10 December 1948, became a significant milestone.

Meanwhile, preliminary steps were also taken at the European level. In May 1948 the International Committee of the Movements for European Unity organised a 'Congress of Europe' at The Hague. This initiative gave the decisive impetus to the foundation of the Council of Europe in 1949. At the Congress a resolution was adopted, the introductory part of which reads as follows:

> The Congress
> *Considers* that the resultant union or federation should be open to all European nations democratically governed and which undertake to respect a Charter of Human Rights;
> *Resolves* that a Commission should be set up to undertake immediately the double task of drafting such a Charter and of laying down standards to which a State must conform if it is to deserve the name of democracy.

After the Council of Europe had been founded, the matter was discussed during the first session of the Consultative Assembly (at present called the Parliamentary Assembly) of the Council of Europe in August 1949. The Assembly charged its Committee on Legal and Administrative Questions to consider in more detail the matter of a collective guarantee of human rights.

From that moment onwards the Convention was drafted in a comparatively short period of time. In September of the same year the Consultative Assembly adopted the Committee's report, in which ten rights were included that were to be the subject of a collective guarantee, with a view to which the establishment of a European Commission of Human Rights and a European Court of Justice was proposed. In November of that year the Committee of Ministers of the Council of Europe decided to appoint a Committee of Government Experts, which was entrusted with the task of preparing a draft text on the basis of this report.

This Committee completed its work in the spring of 1950. It had made considerable headway, but had failed to find a solution to a number of political problems. The subsequently appointed Committee of Senior Officials also had to leave the ultimate decision on a number of matters to the Committee of Ministers, even though it reached agreement on the greater part of the text of the Committee of Experts.

On 7 August 1950 the Committee of Ministers approved a revised draft text, which was less far-reaching than the original proposals on a number of points. For example, the system of individual applications and the jurisdiction of the Court were made optional. This draft text was not substantially altered afterwards.

On 4 November 1950 the Convention, which according to its preamble was framed "to take the first steps for collective enforcement of certain rights stated in the Universal Declaration", was signed in Rome.[1] It entered into force on 3 September 1953 and to date (October 2005) has been ratified by the 46 Member States of the Council of Europe: Albania, Armenia, Andorra, Austria, Azerbaijan, Belgium, Bosnia Herzegovina, Bulgaria, Croatia, Cyprus, the Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece,[2] Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Macedonia ('FYROM'), Malta, Moldova, Monaco, the Netherlands, Norway, Poland, Portugal, Romania, Russia, San Marino, Serbia and Montenegro, Slovakia, Slovenia, Spain, Sweden, Switzerland, Turkey, Ukraine and the United Kingdom. Belarus has also shown its desire to become a member of the Council of Europe and as a consequence thereof to become a party to the Convention. To date, 14 Protocols have been added to the Convention,[3] but not all of them have been ratified by all the Contracting States.[4] As a result of the entry into force of Protocol No. 11, Protocols Nos 8, 9 and 10 were repealed. Protocol No. 2, conferring the competence upon the Court to give advisory opinions, has been included almost in its entirety in Protocol No. 11 and has thus become part of the Convention.[5]

1.2 SCOPE OF THE CONVENTION AS TO THE GUARANTEED RIGHTS AND FREEDOMS

As stated in the preamble to the Convention, the aim which the Contracting States wished to achieve was "to take the first steps for the collective enforcement of certain of the Rights stated in the Universal Declaration". The purpose of the Convention was therefore, within the framework of the Council of Europe, to lay down certain human rights, proclaimed in 1948 by the United Nations in the Universal Declaration of Human Rights, in a binding agreement, and at the same time to provide for supervision of the observance of those human rights provisions.

1 213 UNTS, No. 2889, p. 221; Council of Europe, *European Treaty Series*, No. 5, 4 November 1950; See: http://conventions.coe.int.
2 Greece withdrew from the Council of Europe in 1969, but became a member again in 1974 and re-ratified the Convention.
3 See Appendix I.
4 See Appendix I.
5 Article 47 of the Convention.

Only certain rights were included in these 'first steps'. A comparison with the Universal Declaration discloses that not all the rights mentioned there have been laid down in the Convention. It covers mainly those rights which would be referred to, in the later elaboration of the Universal Declaration in the two Covenants, as 'civil and political rights', and not even all of those. The principle of equality before the law, the right to freedom of movement and residence, the right to seek and to enjoy asylum in other countries from persecution, the right to a nationality, the right to own property and the right to take part in the Government, which are included in the Universal Declaration,[6] are not to be found in the Convention.

However, in that respect subsequent steps have been taken within the framework of the Council of Europe, both in the form of additional Protocols to the Convention[7] and in the form of other conventions, including in particular the European Social Charter of 1961.

The reason for the limited scope of the Convention was explained as follows by Teitgen, the rapporteur of the Legal Committee of the Consultative Assembly of the Council of Europe, which prepared the first draft of the Convention: "It [i.e. the Committee] considered that, for the moment, it is preferable to limit the collective guarantee to those rights and essential freedoms which are practised, after long usage and experience, in all the democratic countries. While they are the first triumph of democratic regimes, they are also the necessary condition under which they operate. Certainly, professional freedoms and social rights, which have themselves an intrinsic value, must also, in the future, be defined and protected. Everyone will, however, understand that it is necessary to begin at the beginning and to guarantee political democracy in the European Union and then to co-ordinate our economies, before undertaking the generalization of social democracy."[8] The drafters, therefore, concentrated on those rights which were considered essential elements of the foundation of European democracies and with regard to which one might expect that an agreement could easily be reached about their formulation and about the international supervision of their implementation, since they could be deemed to have been recognised in the Member States of the Council of Europe. On the other hand, both the detailed formulation of these rights, with the possibilities of limitations and the creation of a supervisory mechanism in a binding treaty, were novel and revolutionary.[9]

It was precisely these two points – the formulation of the rights and freedoms and the supervisory mechanism – which were used as arguments for separate regulation

6 Articles 7, 13, 14, 15, 17 and 21 respectively of the Universal Declaration.
7 For ratifications, see Appendix I.
8 Council of Europe, Cons. Ass., First Session, *Reports* (1949), p. 1144.
9 In view of the emphasis placed by the drafters on democracy it may be a matter of surprise that no provision was included on the right of participation in government and on free elections. Evidently the matter was considered too complex and would have delayed the signing of the Convention. The issue of free elections was covered by the First Additional Protocol soon thereafter (Article 3).

of, on the one hand, civil and political rights, and, on the other hand, economic, social, and cultural rights; a solution which was ultimately also chosen within the framework of the UN. The first category of rights was considered to concern the sphere of freedom of the individual vis-à-vis the Government. These rights and liberties and their limitations would lend themselves to detailed regulation, while the implementation of the resulting duty on the part of the Government to abstain from interference could be reviewed by national and/or international bodies. The second category, on the other hand, was considered to consist not of legal rights but of programmatic rights, the formulation of which necessarily is much vaguer and for the realisation of which the States must pursue a given policy, an obligation which does not lend itself to incidental review of government action for its lawfulness.[10]

It is undeniable that there are differences, roughly speaking, between the two categories of rights with respect to their legal character and their implementation. However, such differences also present themselves *within* those categories. Thus, the right to a fair trial and the right to periodic elections by secret ballot call not only for abstention but also for affirmative action on the part of the Governments. And in the other category the right to strike has less the character of a programmatic right than has the right to work. In the modern welfare state which is typical for most of the Member States of the Council of Europe, the civil rights and liberties are being 'socialised' increasingly, while the social, economic and cultural rights are becoming more concrete as to their content. Therefore, a stringent distinction between the two categories becomes less justified, while too strict a distinction entails the risk of the necessary connection between the two categories of rights being misunderstood. This connection was emphasised in the Proclamation of Teheran of 1968[11] and reaffirmed in the Vienna Declaration and Programme of Action, where it has been set forth that "All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms."[12]

10 See 'Annotations on the text of the draft International Covenant on Human Rights, prepared by the Secretary-General', Document A/2929, pp. 7-8. See also the statement of Henri Rolin, member of the Consultative Assembly, before the Belgian Senate, quoted in H. Golsong, *'Implementation of International Protection of Human Rights'*, RCADI 110, 1963-III, p. 58.

11 Text of the Proclamation in Res. 2442(XLII) of the General Assembly of the United Nations, 19 December 1968.

12 UN Doc. A/Cont.157/23, para. 5.

This connection, and the recognition of the relative value of the distinction between the two categories of rights, also led the Council of Europe to investigate whether certain economic and social rights should be added to the Convention, and, if so, which ones. The investigation led to Protocol No. 7. The original aim of this Protocol, as recommended by the Parliamentary Assembly in 1972, was "to insert as many as possible of the substantive provisions of the Covenant on Civil and Political Rights in the Convention".[13] However, the Committee of Experts which prepared the draft of the Protocol, followed a more restrictive approach, keeping in mind "the need to include in the Convention only such rights as could be stated in sufficiently specific terms to be guaranteed within the framework of the system of control instituted by the Convention".[14] Although the idea of such an extension was born in the early seventies, it was not until 22 November 1984 that the Protocol was opened for signature. And it was only in 1988 that sufficient States had ratified the Protocol for it to enter into force.[15]

Enthusiasm for Protocol No. 7 appears not to be very great. This has to do with the fact that the original aim of the Protocol can hardly be said to have been achieved. In a comparative report[16] a series of rights had been enumerated which were included in the UN Covenant on Civil and Political Rights but not in the Convention. Only some of these rights are now included in this Protocol. A clarification of the reasons for it, other than the above-mentioned general viewpoint of the Committee of Experts, is not to be found in the Explanatory Report. Although it is true that some of the other rights do not fulfill the requirement of 'sufficiently specific terms to be guaranteed', it is by no means clear why, for example, the right of the accused to be informed of his right to have legal assistance or the right of equality before the law, have not been included in the Protocol. Furthermore, the rights that have been incorporated are, on the whole, formulated rather narrowly. Most of the rights are framed in more restricted terms than their counterparts in the UN Covenant on Civil and Political Rights. It may be concluded, therefore, that the outcome of this lengthy exercise is rather disappointing.

In Part II the rights and freedoms laid down in the Convention and in its Protocols Nos 1, 4, 5, 6, 7, 12, 13 and 14 are discussed by reference to the Decisions and Reports of the former Commission and the case-law of the Court. As indicated above, although a number of provisions of the International Covenant on Civil and Political Rights may entail for those Contracting States which have also ratified that Covenant[17] more

13 Explanatory Report on Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Council of Europe, Strasbourg, 1985, p. 5.

14 *Ibidem*, p. 6.

15 Protocol No. 7 entered into force on 1 November 1988. For the state of ratifications, see Appendix I.

16 Problems arising from the co-existence of the United Nations Covenants on Human Rights and the European Convention on Human Rights, Doc. H(70)7, Strasbourg 1970, pp. 4-5.

17 These are all Contracting States except Andorra.

far-reaching obligations than rest on them under the Convention;[18] such obligations are left intact by virtue of Article 53 of the Convention.[19]

1.3 STRUCTURE OF THE CONVENTION

1.3.1 RIGHTS AND FREEDOMS LAID DOWN IN THE CONVENTION

After Article 1, which deals with the scope of the Convention and will be discussed in para. 3, the Convention lists the rights and freedoms that it guarantees.

Section I of the Convention contains the following rights and freedoms:

Article 2: right to life;
Article 3: freedom from torture and inhuman or degrading treatment or punishment;
Article 4: freedom from slavery and forced or compulsory labour;
Article 5: right to liberty and security of the person;
Article 6: right to a fair and public trial within a reasonable time;
Article 7: freedom from retrospective effect of penal legislation;
Article 8: right to respect for private and family life, home and correspondence;
Article 9: freedom of thought, conscience and religion;
Article 10: freedom of expression;
Article 11: freedom of assembly and association;
Article 12: right to marry and found a family.

Protocol No. 1 has added the following rights:

Article 1: right to peaceful enjoyment of possessions;
Article 2: right to education and free choice of education;
Article 3: right to free elections by secret ballot.

Protocol No. 4 has added the following rights and freedoms:

Article 1: prohibition of deprivation of liberty on the ground of inability to fulfil a contractual obligation;
Article 2: freedom to move within and choose residence in a country;

[18] See the report of the Committee of Experts on Human Rights to the Committee of Ministers, *Problems arising from the Co-Existence of the United Nations Covenants on Human Rights and the European Convention on Human Rights*, Doc. H(70)7, Strasbourg, 1970. In Protocol No. 7 the differences between the obligations resulting from the Covenant and those resulting from the Convention have been partly removed. This Protocol entered into force on 1 November 1988.

[19] On this, see *infra* 1.3.4.

Article 3: prohibition of expulsion of nationals and right of nationals to enter the territory of the State of which they are nationals;
Article 4: prohibition of collective expulsion of aliens.

Protocol No. 6 has added the prohibition of the condemnation to and execution of the death penalty (Article 1).

Protocol No. 7 has added the following rights and freedoms:

Article 1: procedural safeguards in case of expulsion of aliens lawfully resident in the territory of a State;
Article 2: right of review by a higher tribunal in criminal cases;
Article 3: right to compensation of a person convicted of a criminal offence, on the ground that a new or newly discovered fact shows that there has been a miscarriage of justice;
Article 4: prohibition of a second trial or punishment for offences for which one has already been finally acquitted or convicted (*ne bis in idem*);
Article 5: equality of rights and responsibilities between spouses.

Protocol No. 12 enlarges the scope of the prohibition of discrimination of Article 14 to the effect that the prohibition is no longer limited to the rights and freedoms enshrined in the Convention, but is extended to "any right set forth by law".[20]

Protocol No. 13 prescribes the abolition of the death penalty in all circumstances.

1.3.2 GENERAL PROVISIONS CONCERNING THE ENJOYMENT, THE PROTECTION AND THE LIMITATION OF THE RIGHTS AND FREEDOMS

Article 13 stipulates that everyone whose rights and freedoms set forth in the Convention are violated shall have an effective remedy before a national authority, notwithstanding that the violation has been committed by persons acting in an official capacity. Article 14 obliges the Contracting States to secure the rights and freedoms set forth in the Convention without discrimination on any ground. Article 15 allows States to derogate from a number of provisions of the Convention in time of war or other public emergency threatening the life of the nation. Under Article 16 States are allowed to impose restrictions on the political activity of aliens notwithstanding Articles 10, 11 and 14 of the Convention. Article 17 provides that nothing in the Convention may be interpreted as implying for any State, group or person any right to

[20] Protocol No. 12 entered into force on 1 April 2005.

engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth in the Convention or at their limitation to a greater extent than is provided for in the Convention. Finally, Article 18 implies a prohibition of misuse of power (*détournement de pouvoir*) as to the right of Contracting States to impose restrictions on the rights and freedoms guaranteed by the Convention.

1.3.3 PROVISIONS TO ENSURE THE OBSERVANCE BY THE CONTRACTING PARTIES OF THEIR OBLIGATIONS

Besides the above-mentioned substantive provisions, the European Convention also contains a number of provisions to ensure the observance by the Contracting States of their obligations under the Convention. The responsibility for the implementation of the Convention rests primarily with the national authorities, in particular the national courts (at least in States where the courts are allowed to directly apply the Convention).[21] This is implied in Article 13 where, in connection with violations of the rights and freedoms set forth in the Convention, reference is made to an 'effective remedy before a national authority'. For those cases where a national procedure is not available or does not provide for an adequate remedy, or in the last resort has not produced a satisfactory result in the opinion of the injured party or of any of the other Contracting States, the Convention itself provides for a supervisory mechanism on the basis of individual and State complaints. In addition, the Secretary General of the Council of Europe may take part in the supervision of the observance of the Convention (Article 52).

1.3.4 FINAL PROVISIONS

Section III contains miscellaneous provisions (Articles 52 to 59). Article 52, relating to inquiries by the Secretary-General, will be discussed separately.[22] The same holds good for Article 56, concerning territorial scope, and Article 58, which deals with denunciation of the Convention.[23] Article 57, concerning reservations, will be dealt with separately in Chapter 38.

Article 53 embodies what has become a general rule of international human rights law, *viz.* that a legal obligation implying a more far-reaching protection takes priority over any less far-reaching obligation. The article provides that nothing in the Convention may be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any Contracting State or under any other agreement to which the latter is a party.

21 On this, see *infra* 1.6 and 2.2.9.
22 *Infra*, Chapter 4.
23 *Infra*, 1.4, and 1.5.3, respectively.

Article 54 stipulates that the Convention shall not prejudice the powers conferred on the Committee of Ministers by the Statute of the Council of Europe.

Article 55 is aimed at leaving the supervision of the observance of the Convention at the international level exclusively in the hands of the organs designated by the Convention. The article provides that the Contracting States, except by special agreement, will not avail themselves of treaties, conventions or declarations in force between them for the purpose of submitting, by way of petition, a dispute arising out of the interpretation and application of this Convention to a means of settlement other than those provided for in this Convention. Article 55 applies in those instances where the Convention is expressly invoked. With respect to disputes where this is not the case, but where nevertheless a right is at issue that is also protected by the Convention, the rationale for such an exclusive competence is much less self-evident. It is submitted that the text of Article 55 does not dictate the exclusivity of the procedure provided for in the Convention as far as those latter cases are concerned. There is, however, still some difference of opinion as to the exact scope of the obligation of the Contracting States under Article 55.

In the Case of *Cyprus v. Turkey* the respondent Government alleged that a special agreement was in force between the States concerned to settle the dispute by means of other international procedures. In that respect they invoked Article 62 (the present Article 55). They claimed that, in fact, all the matters raised by the application were directly or indirectly handled within the United Nations, by the Secretary General acting under the direction of the Security Council. The Commission considered that, having regard to the wording of Article 62 (55) itself and the aim and purpose of the Convention as a whole, the possibility for a High Contracting Party of withdrawing a case from the jurisdiction of the Convention organs on the ground that it has entered into a special agreement with another High Contracting Party concerned, is given only in exceptional circumstances. The principle stipulated in Article 62 (55) starts from a monopoly of the Convention institutions for deciding disputes arising out of the interpretation and application of the Convention. The High Contracting Parties agree not to avail themselves of other treaties, conventions and declarations in force between them for the purpose of submitting such disputes to other means of settlement. Only exceptionally is a departure from this principle permitted, subject to the existence of a 'special agreement' between the High Contracting Parties concerned, permitting the submission of a dispute concerning 'the interpretation or application of the Convention' to an alternative means of settlement 'by way of petition'. The Commission considered that the conditions for invoking such a special agreement were not fulfilled in the present case. A primary condition, namely the consent of both High Contracting

Parties concerned to withdraw the particular dispute from the jurisdiction of the Convention organs, was lacking, the applicant Government clearly opposing such a way of proceeding.[24]

In a resolution of 1970 the Committee of Ministers declared "that, as long as the problem of interpretation of Article 62 [the present Article 55] of the European Convention is not resolved, States Parties to the Convention which ratify or accede to the UN Covenant on Civil and Political Rights and make a declaration under Article 41 of the Covenant should normally utilize only the procedure established by the European Convention in respect of complaints against another Contracting Party of the European Convention relating to an alleged violation of a right which in substance is covered both (by) the European Convention (or its Protocols) and by the UN Covenant on Civil and Political Rights, it being understood that the UN procedure may be invoked in relation to rights not guaranteed in the European Convention (or its Protocols) or in relation to States which are not Parties to the European Convention."[25]

In practice no problems have yet arisen in this respect. Since the entry into force of the UN Covenant on Civil and Political Rights in 1976, only three inter-State complaints have been dealt with in the context of the European Convention: two cases of *Cyprus v. Turkey*[26] and the joint cases of *France, Norway, Denmark, Sweden and the Netherlands v. Turkey*.[27] Since Turkey had not ratified the UN Covenant on Civil and Political Rights,[28] and Cyprus and France had not recognised the competence of the Human Rights Committee to receive inter-State complaints, there was no other possibility than to submit the case to the European Commission. In the inter-State complaint of *Cyprus v. Turkey* the Court referred to the preliminary objection of the Turkish Government which had alleged the existence of a special agreement between the respective Governments to settle the dispute by means of other international procedures and noted that the Commission in its admissibility decision of 28 June 1996 had rejected the respondent Government's objections.[29]

Finally, Article 59 contains a number of provisions about the ratification and the entry into force of the Convention.

24 Decision of 28 June 1996.
25 Res. (70)17 of 15 May 1970, Council of Europe, *Collected Texts*, Strasbourg, 1994, pp. 331-332.
26 Appl. 8007/77, Yearbook XX (1977), p. 98; D&R 13 (1979), p. 85; Appl. 25781/94, D&R 86 A (1995), p. 104 (134).
27 Appls 9940-9944/82, D&R 35 (1984), p. 143.
28 Turkey ratified the Covenant on 23 September 2003.
29 Judgment of 10 May 2001, para 57.

1.4 PERSONAL AND TERRITORIAL SCOPE OF THE CONVENTION

1.4.1 EVERYONE WITHIN THEIR JURISDICTION, IRRESPECTIVE OF RESIDENCE

Under Article 1 of the Convention the Contracting States are bound to secure to everyone within their jurisdiction the rights and freedoms set forth in Section I of the Convention. To the extent that a State has ratified any of the Protocols Nos 1, 4, 6, 7, 12 and 13, this obligation also applies to the rights and freedoms laid down in these Protocols, since the latter are considered to contain additional provisions of the Convention, to which all the provisions of the Convention apply accordingly.[30]

Under Article 1 of the Convention, the State is required to 'secure' the Convention rights to everyone within its jurisdiction. In certain cases it may therefore be necessary for the State to take positive action with a view to effectively securing these rights.[31] The Court has held that where an individual raises an arguable claim that there has been a breach of Article 2 or 3 that those provisions, read in conjunction with the State's general duty under Article 1 of the Convention to 'secure to everyone within their jurisdiction the rights and freedoms defined in ... [the] Convention', requires by implication that there should be an effective official investigation.[32] If this were not the case, the right to life and the prohibition of torture and inhuman and degrading treatment and punishment, despite their fundamental importance, would be ineffective in practice and it would be possible in some cases for agents of the State to abuse the rights of those within their control with virtual impunity.[33]

The Contracting States must secure these rights and freedoms to 'everyone within their jurisdiction'. These words do not imply any limitation as to nationality. Even those alleged victims who are neither nationals of the State concerned nor of any of the other Contracting States are entitled to protection when they are in some respect subject to the jurisdiction of the State from which they claim that guarantee.[34] Further

30 See Article 5 of Protocol No. 1, Article 6(1) of Protocol No. 4, Article 6 of Protocol No. 6, Article 7(1) of Protocol No. 7, Article 3 of Protocol No. 12 and Article 5 of Protocol No. 13.
31 Judgment of 13 June 1979, *Marckx*, para. 31; judgment of 26 May 1985, *X and Y v. the Netherlands*, para. 23; judgment of 9 June 1998, *L.C.B. v. the United Kingdom*, para. 36; judgment of 28 October 1998, *Osman*, para. 115; judgment of 10 October 2000, *Akkoç*, para. 77.
32 Judgment of 28 October 1998, *Assenov*, para. 102; judgment of 27 September 1995, *McCann*, para. 161; judgment of 19 February 1998, *Kaya*, para. 86; judgment 22 September 1998, *Yasa*, para. 98; judgment of 27 June 2000, *Salman*, para. 104; judgment of 10 May 2001, *Cyprus v. Turkey*, para. 425; judgment of 23 May 2001, *Denizci*, para. 378; judgment of 10 July 2001, *Avşar*, para. 393.
33 Judgment of 28 May 1998, *McShane*, para. 94.
34 See, *e.g.*, Appl. 788/60, *Austria v. Italy*, Yearbook IV (1961), p. 116 (138 and 140): "Whereas, therefore, in becoming a Party to the Convention, a State undertakes, *vis-à-vis* the other High Contracting Parties, to secure the rights and freedoms defined in Section I to every person within

more, it is irrelevant whether they have their residence inside or outside the territory of that State.[35] Moreover, in several cases the Commission and the Court held that although Article 1 sets limits on the scope of the Convention, the concept of 'jurisdiction' under this provision does not imply that the responsibility of the Contracting Parties is restricted to acts committed on their territory.

In the same vein the Court held that the extradition or expulsion of a person by a Contracting Party to a country where there is a serious risk of torture or inhuman or degrading treatment or punishment, may give rise to an issue under Article 3, and hence engage responsibility of that State under the Convention.[36] In cases where provisions other than Article 3 are at stake, the extraditing State may equally be held responsible for acts which take place thereafter in another country.[37]

In the *Assanidze* Case the Government, in their preliminary objections, accepted that the Ajarian Autonomous Republic was an integral part of Georgia and that the matters complained of were within the jurisdiction of the Georgian State. However, consideration should be given to the difficulties encountered by the central State authorities in exercising their jurisdiction in the Ajarian Autonomous Republic. As a general rule, the notion of 'jurisdiction' within the meaning of Article 1 of the Convention must be considered as reflecting the position under public international law. That notion is 'primarily' or 'essentially' territorial.[38] The Court held that the Ajarian Autonomous Republic is indisputably an integral part of the territory of Georgia and subject to its competence and control. In other words, there is a presumption of competence. In that connection, the Court noted, firstly, that Georgia had ratified the Convention for the whole of its territory. Furthermore, it was common ground that the Ajarian

its jurisdiction, regardless of their nationality or status; whereas, in short, it undertakes to secure these rights and freedoms not only to its own nationals and those of other High Contracting Parties, but also to nationals of States not parties to the Convention and to stateless persons."

35 The Consultative Assembly had proposed in the draft of the Convention the words 'all persons residing within the territories of the signatory States', but these were changed by the Committee of Experts in the sense mentioned. See report of the Committee of Experts to the Committee of Ministers, Council of Europe, *Collected Edition of the 'Travaux Préparatoires' of the European Convention on Human Rights*, Vol. IV, The Hague, 1977, p. 20: "It was felt that there were good grounds for extending the benefits of the Convention to all persons in the territories of the signatory States, even those who could not be considered as residing there in the legal sense of the word." See also Appl. 1611/62, *X v. Federal Republic of Germany*, Yearbook VIII (1965), p. 158 (168), where the Commission held: "in certain respects the nationals of a Contracting State are within its jurisdiction even when domiciled or resident abroad." See also *infra* 1.4.3.

36 Judgment of 7 July 1989, *Soering*, para. 90; judgment of 20 March 1991, *Cruz Varas and Others*, para. 69; judgment of 30 October 1991, *Vilvarajah*, para. 103; judgment of 23 March 1995, *Loizidou* (preliminary objections), para. 62. See also *infra* 7.6.

37 Appl. 10427/83, *X v. the United Kingdom*, D&R 47 (1986), p. 85 (95-96), where the applicant, a suspected deserter from the Indian army, had been extradited to India and claimed that he had been deprived of a fair trial within a reasonable time.

38 Decision of 12 December 2001, *Bankovic*, paras 59-61.

Autonomous Republic had no separatist aspirations and that no other State exercised effective overall control there. On ratifying the Convention, Georgia did not make any specific reservation under Article 57 of the Convention with regard to the Ajarian Autonomous Republic or to difficulties in exercising its jurisdiction over that territory.[39]

The Court went on by stating that: "Unlike the American Convention on Human Rights of 22 November 1969 (Article 28), the European Convention does not contain a 'federal clause' limiting the obligations of the federal State for events occurring on the territory of the states forming part of the federation. Moreover, since Georgia is not a federal State, the Ajarian Autonomous Republic is not part of a federation. It forms an entity which – like others (the Autonomous Republic of Abkhazia and, before 1991, the Autonomous District of South Ossetia) – must have an autonomous status, which is a different matter. Besides, even if an implied federal clause similar in content to that of Article 28 of the American Convention were found to exist in the European Convention (which is impossible in practice), it could not be construed as releasing the federal State from all responsibility, since Article 28 of the American Convention requires the federal State to "immediately take suitable measures, in accordance with its constitution ..., to the end that the [states forming part of the federation] may adopt appropriate provisions for the fulfillment of [the] Convention." The Court, therefore, found that the actual facts out of which the allegations of violations arose were within the 'jurisdiction' of the Georgian State within the meaning of Article 1 of the Convention.[40]

In the *Ilascu* Case the Court considered that the Moldovan Government, the only legitimate government of the Republic of Moldova under international law, did not exercise authority over part of its territory, namely that part which was under the effective control of the 'MRT'. However, even in the absence of effective control over the Transdniestrian region, Moldova still had a positive obligation under Article 1 of the Convention to take the measures in its power and in accordance with international law to secure the rights guaranteed by the Convention. Consequently, the applicants were within the jurisdiction of the Republic of Moldova for the purposes of Article 1, but its responsibility for the acts complained of was to be assessed in the light of its positive obligations under the Convention. These related both to the measures needed to re-establish its control over Transdniestrian territory, as an expression of its jurisdiction, and to measures to ensure respect for the applicants' rights, including attempts to secure their release. As regards the applicants' situation, the Court noted

39 Such a reservation would in any event have been ineffective, as the case-law precludes territorial exclusions other than in the instance referred to in Article 56(1) of the Convention (dependent territories); see the judgment of 18 February 1999, *Matthews*, para. 29.

40 Judgment of 8 April 2004, paras 139-143.

that before ratification of the Convention in 1997 and even after that date the Moldovan authorities had taken a number of measures to secure the applicants' rights. On the other hand, it did not have any evidence that since Mr. Ilaşcu's release in May 2001 effective measures had been taken to put an end to the continuing infringements of their Convention rights complained of by the other applicants. In their bilateral relations with the Russian Federation the Moldovan authorities had not been any more attentive to the applicants' fate; the Court had not been informed of any approach by the Moldovan authorities to the Russian authorities after May 2001 aimed at obtaining the remaining applicants' release. Even after Mr. Ilaşcu's release in May 2001, it had been within the power of the Moldovan Government to take measures to secure to the other applicants their rights under the Convention. The Court accordingly concluded that Moldova's responsibility was capable of being engaged on account of its failure to discharge its positive obligations with regard to the acts complained of which had occurred after May 2001.

With respect to the Russian Federation, the Court observed that during the Moldovan conflict in 1991-92 forces of the former Fourteenth Army (which owed allegiance to the USSR, the CIS and the Russian Federation in turn, and later became the ROG) stationed in Transdniestria, an integral part of the territory of the Republic of Moldova, fought with and on behalf of the Transdniestrian separatist forces. Moreover, large quantities of weapons from the stores of the Fourteenth Army were voluntarily transferred to the separatists, who were also able to seize possession of other weapons unopposed by Russian soldiers. The Court noted that from December 1991 onwards the Moldovan authorities systematically complained, to international bodies among others, of what they called 'the acts of aggression' of the former Fourteenth Army against the Republic of Moldova and accused the Russian Federation of supporting the Transdniestrian separatists. Throughout the clashes between the Moldovan authorities and the Transdniestrian separatists the leaders of the Russian Federation supported the separatist authorities through political declarations. The Russian Federation drafted the main lines of the ceasefire agreement of 21 July 1992, and moreover signed it as a party.

In the light of all these circumstances the Court considered that the Russian Federation's responsibility was engaged in respect of the unlawful acts committed by the Transdniestrian separatists, regard being had to the military and political support it gave them to help them set up the separatist regime and the participation of its military personnel in the fighting. In acting thus the authorities of the Russian Federation contributed both militarily and politically to the creation of a separatist regime in the region of Transdniestria, which was part of the territory of the Republic of Moldova. The applicants were arrested in June 1992 with the participation of soldiers of the Fourteenth Army. The first three applicants were then detained on Fourteenth Army premises and guarded by Fourteenth Army troops. During their detention these three applicants were interrogated and subjected to treatment which

could be considered contrary to Article 3 of the Convention. They were then handed over to the Transdniestrian police. The Court considered that on account of these events the applicants came within the jurisdiction of the Russian Federation within the meaning of Article 1 of the Convention, although at the time when these events occurred the Convention was not in force with regard to the Russian Federation. The events which gave rise to the responsibility of the Russian Federation must be considered to include not only the acts in which the agents of that State participated, like the applicants' arrest and detention, but also their transfer into the hands of the Transdniestrian police and regime, and the subsequent ill-treatment inflicted on them by the police, since in acting in that way the agents of the Russian Federation were fully aware that they were handing them over to an illegal and unconstitutional regime. The Court considered that there was a continuous and uninterrupted link of responsibility on the part of the Russian Federation for the applicants' fate, as the Russian Federation's policy of support for the regime and collaboration with it continued beyond 5 May 1998,[41] and after that date the Russian Federation made no attempt to put an end to the applicants' situation brought about by its agents, and did not act to prevent the violations allegedly committed after 5 May 1998. In conclusion, the applicants came within the "jurisdiction" of the Russian Federation for the purposes of Article 1 of the Convention and its responsibility was engaged with regard to the acts complained of.[42]

A Contracting State is responsible for acts or omissions on its territory only to the extent that those are the responsibility of its own organs. Thus it was decided that the alleged violations of the Convention by the Supreme Restitution Court could not be held against the Federal Republic of Germany, even though this tribunal had its sessions on West German territory. It was to be considered as an international tribunal, in respect of which Germany had neither legislative nor supervisory powers.[43]

1.4.2 TERRITORIES FOR WHOSE INTERNATIONAL RELATIONS A STATE IS RESPONSIBLE

Article 56 contains a *lex specialis* in respect of the principle of Article 1 according to which the Convention is applicable to everyone within the jurisdiction of the Contracting States. According to general international law a treaty is applicable to the

41 On that date the Convention entered into force with respect to Russia.

42 Judgment of 8 July 2004, paras 380-385.

43 Appl. 2095/63, *X v. Sweden, Federal Republic of Germany and other States*, Yearbook VIII (1965), p. 272 (282). See also Appl. 235/56, *X v. Federal Republic of Germany*, Yearbook II (1958-1959), p. 256 (304), where the Commission reached the same conclusion with respect to the American Court of Restitution Appeals in Germany.

whole territory of a Contracting State, including those territories for whose international relations the State in question is responsible.[44] This is different only when a reservation has been made for one or more of those territories in the treaty itself, or at the time of its ratification. Under Article 56(1), however, the European Convention applies to the latter territories only when the Contracting State concerned has agreed to this *via* a declaration to that effect addressed to the Secretary General of the Council of Europe. Such declarations were made in due course by Denmark with respect to Greenland,[45] by the Netherlands with respect to Suriname[46] and the Netherlands Antilles[47] and by the United Kingdom with respect to most of the non-self-governing territories belonging to the Commonwealth.[48]

The question of what has to be understood by the words 'territory for whose international relations a State is responsible' was raised in a case concerning the former Belgian Congo. The applicants submitted that their complaint related to a time when this area formed part of the national territory of Belgium, and that accordingly the Convention, including the Belgian declaration under Article 25 [the present Article 34], was applicable to the Belgian Congo even though Belgium had not made any declaration as referred to in Article 56 with reference thereto. The Commission, however, held that the Belgian Congo had to be regarded as a territory for whose international relations Belgium was responsible in the sense of Article 56. It reached the conclusion that the complaint was not admissible *ratione loci*, since Belgium had not made any declaration under Article 56 with reference to this territory.[49]

According to paragraph 3, the provisions of the Convention are applied to the territories referred to in Article 56 [former Article 63] with due regard to local requirements. In the *Tyrer* Case the British Government submitted in this context that corporal punishment on the Isle of Man was justified as a preventive measure based on public opinion on the island. The Court, however, held that "for the application of Article 63(3), more would be needed: there would have to be positive and conclusive proof of a requirement, and the Court could not regard beliefs and local 'public' opinion on their own as constituting such proof."[50]

44 See Article 29 of the 1969 Vienna Convention on the Law of Treaties, ILM 8, (1969), p. 679.
45 Since 1953 Greenland has been an integral part of Denmark.
46 Suriname became independent in 1975.
47 The reservation made with respect to the Netherlands Antilles with reference to Article 6(3)(c) has since been withdrawn.
48 See Council of Europe, *Collected Texts*, Strasbourg, 1994, p. 88.
49 Appl. 1065/61, *X v. Belgium*, Yearbook IV (1961), p. 260 (266-268).
50 Judgment of 25 April 1978, paras 36-40, from which it likewise appears that, even apart from the correctness of public opinion, the Court does not wish to regard corporal punishment itself, intended as a preventive measure, as a local requirement in the sense of Article 63(3), which would have to be taken into account in the application of Article 3. See also Appl. 7456/76, *Wiggins v. the United Kingdom*, D&R 13 (1979), p. 40 (48).

In the *Piermont* Case a German member of the European Parliament had been expelled from French Polynesia and had been prohibited from returning, while a decision was taken prohibiting her from entering New Caledonia, because of certain statements which she had made at a demonstration in Tahiti. The applicant complained that these orders infringed, amongst others, her right to freedom of expression. The French Government submitted that the 'local requirements' of French Polynesia made the interference legitimate. According to the Government the 'local requirements' were the indisputable special features of protecting public order in the Pacific territories, namely their island status and distance from metropolitan France and also the especially tense political atmosphere. The Court noted that the arguments put forward by the Government related essentially to the tense local political atmosphere taken together with an election campaign and, therefore, emphasised circumstances and conditions rather than requirements. A political situation, which admittedly was a sensitive one but also one which could occur in the mother country, did not suffice to interpret the phrase 'local requirements' as justifying an interference with the right secured in Article 10.[51]

When territories become independent, a declaration under Article 56 automatically ceases to apply because the Contracting State which made it is no longer responsible for the international relations of the new State.[52] This new State does not automatically become a Party to the Convention. In the majority of cases[53] it will not even be able to become a Party, since Article 59(1) makes signature possible only for member States of the Council of Europe and membership of the latter organisation is open only to European States.[54]

1.4.3 STATE RESPONSIBILITY FOR ACTS OF ITS ORGANS THAT HAVE BEEN COMMITTED OUTSIDE ITS TERRITORY

The fact that the Convention is applicable only to the territory of the Contracting States, with the qualification of Article 56, does not imply that a Contracting State cannot be responsible under the Convention for acts of its organs that have been committed outside its territory. Thus the Commission decided that in principle the acts of functionaries of the German embassy in Morocco might involve the responsibility

51 Judgment of 27 April 1995, para. 59.
52 See, *e.g.*, Appl. 7230/75, *X v. the Netherlands*, D&R 7 (1977), p. 109 (110-111).
53 This was different in the cases of Cyprus and Malta only, which after their independence became members of the Council of Europe and Parties to the Convention.
54 Article 4 of the Statute of the Council of Europe.

of the Federal Republic of Germany.[55] Switzerland was deemed responsible for acts committed under a treaty of 1923 concerning the incorporation of Liechtenstein into the Swiss customs area. The Commission held that acts of Swiss authorities having effect in Liechtenstein place all those to whom these acts are applicable under Swiss jurisdiction in the sense of Article 1 of the Convention.[56]

In the *Loizidou* Case the Court held Turkey responsible for alleged violations of Article 8 of the Convention and Article 1 of Protocol No. 1, which took place in the northern part of Cyprus, because that part was under control of Turkish forces in Cyprus which exercised overall control in that area. The Court held that the responsibility of a Contracting Party might also arise when as a consequence of military action, 'whether lawful or unlawful', it exercises effective control of an area outside its national territory. The obligation to secure, in such an area, the rights and freedoms set out in the Convention, derives from the fact of such control whether it is exercised directly, through its armed forces, or through a subordinate local administration.[57]

In *Cyprus v. Turkey* the Court held more generally that "It is of course true that the Court in the *Loizidou* Case was addressing an individual's complaint concerning the continuing refusal of the authorities to allow her access to her property. However, it is to be observed that the Court's reasoning is framed in terms of a broad statement of principle as regards Turkey's general responsibility under the Convention for the policies and actions of the 'TRNC' authorities. Having effective overall control over northern Cyprus, its responsibility cannot be confined to the acts of its own soldiers or officials in northern Cyprus but must also be engaged by virtue of the acts of the local administration which survives by virtue of Turkish military and other support. It follows that, in terms of Article 1 of the Convention, Turkey's 'jurisdiction' must be considered to extend to securing the entire range of substantive rights set out in the Convention and those additional Protocols which she has ratified, and that violations of those rights are imputable to Turkey."[58]

The responsibility of Contracting Parties can also be incurred by acts or omissions of their authorities, whether performed within or outside national boundaries, which

55 Appl. 1611/62, *X v. Federal Republic of Germany*, Yearbook VIII (1965), p. 158 (163).

56 Appls 7289/75 and 7349/76, *X* and *Y v. Switzerland*, D&R 9 (1978), p. 57 (73). In this context see, however, Appl. 6231/73, *Ilse Hess v. Federal Republic of Germany*, Yearbook XVIII (1975), p. 146 (174-176), where the British Government was not held responsible in terms of the Convention for alleged violations in Spandau Prison, because the Commission concluded that the responsibility for the prison was exercised on a Four-Power basis and that the United Kingdom acted only as a partner in the joint responsibility. Since decisions could only be taken unanimously, the prison was not under the jurisdiction of the United Kingdom in the sense of Art. 1.

57 Judgment of 23 March 1995 (preliminary objections), para. 62. See in this respect also the judgment of 8 July 2004, *Ilascu and Others*, paras 386-394.

58 Judgment of 10 May 2001, para. 77.

produce effects outside their own territory.[59] The Court noted, however, in the *Al-Adsani* Case that liability is incurred in such cases by an action of the respondent State *vis à vis* a person who is at the relevant moment on its territory and clearly within its jurisdiction, and that such cases do not concern the actual exercise of a State's competence or jurisdiction abroad.[60]

In the *Drozd and Janousek* Case the applicants complained that they had not had a fair trial before the *Tribunal de Corts* of the Principality of Andorra. They held France and Spain responsible at the international level for the conduct of the Andorran authorities. As regards the objection of lack of jurisdiction *ratione loci*, the Court agreed in substance with the Governments' arguments and the Commission's opinion that the Convention was not applicable to the territory of Andorra, notwithstanding its ratification by France and Spain. It took into consideration various circumstances: the Principality was not a member of the Council of Europe, which prevented it from being a Party to the Convention in its own right, and appeared never to have taken any steps to seek admission as an 'associate member' of the organisation. The territory of Andorra was not an area common to France and Spain or a Franco-Spanish condominium. Next the Court examined whether the applicants came under the jurisdiction of one of the Contracting States separately. The Principality's relations with France and Spain did not follow the normal pattern of relations between sovereign States and did not take the form of international agreements, even though the development of the Andorran institutions might, according to the French Co-Prince, allow Andorra to 'join the international community'. The objection of lack of jurisdiction *ratione loci* was considered well-founded. The Court also noted that judges from France and Spain sat as members of the Andorran courts, and but did not do so in their capacity as French or Spanish judges. Those courts, in particular the *Tribunal de Corts*, exercised their functions in an autonomous manner, while their judgments were not subject to supervision by the authorities of France or Spain. There was nothing in the case-file to suggest that those authorities had attempted to interfere with the applicants' trial.[61]

In sum, the case law of the Court demonstrates that its recognition of the exercise of extra-territorial jurisdiction by a Contracting State is exceptional: it has done so when the respondent State, through the effective control of the relevant territory and its inhabitants as a consequence of military occupation, or through the consent, invitation or acquiescence of the authorities of that territory, exercises all or some of the public powers normally exercised by the latter. In addition, the Court held in the *Banković* Case that other recognised instances of the extraterritorial exercise of jurisdiction by a State include cases involving the activities of its diplomatic or consular agents abroad

59 Judgment of 26 June 1992, *Drozd and Janousek*, para. 91.

60 Judgment of 21 November 2001, para. 39.

61 Judgment of 26 June 1992, paras 84-98.

and on board aircraft and vessels registered in, or flying the flag of, that State. In these specific situations, customary international law and treaty provisions have recognised the extraterritorial exercise of jurisdiction by the relevant State.[62] In contrast, the Court fairly recently found that the participation of a State in the defence of proceedings against it in another State does not, without more, amount to an exercise of extra-territorial jurisdiction. The Court considered that, in the particular circumstances of the case, the fact that the United Kingdom Government raised the defence of sovereign immunity before the Irish courts, where the applicant had decided to sue, does not suffice to bring them within the jurisdiction of the United Kingdom within the meaning of Article 1 of the Convention.[63]

In the *Öcelan* Case, the applicant maintained that there was prima facie evidence that he had been abducted by the Turkish authorities operating overseas, beyond their jurisdiction, and that it was for the Government to prove that the arrest was not unlawful. The fact that arrest warrants had been issued by the Turkish authorities and a red notice had been circulated by Interpol, did not give officials of the Turkish State jurisdiction to operate overseas. The applicant pointed out that no proceedings had been brought for his extradition from Kenya, whose authorities had denied all responsibility for his transfer to Turkey. Mere collusion between Kenyan officials operating without authority and the Turkish Government could not constitute inter-State co-operation. The Kenyan Minister of Foreign Affairs had stated that the Kenyan authorities had played no role in the applicant's departure and that there had been no Turkish troops on Kenyan territory. The applicant further alleged that the Kenyan officials implicated in his arrest had been bribed. The Turkish Government on their part maintained that the applicant had been arrested and detained in accordance with a procedure prescribed by law, following co-operation between two States, Turkey and Kenya. They said that the applicant had entered Kenya not as an asylum-seeker, but by using false identity papers. Since Kenya was a sovereign State, Turkey had no means of exercising its authority there. The Government also pointed to the fact that there was no extradition treaty between Kenya and Turkey. The Court held that the applicant was arrested by members of the Turkish security forces inside an aircraft in the international zone of Nairobi Airport. Directly after he had been handed over by the Kenyan officials to the Turkish officials the applicant was effectively under Turkish authority and was, therefore, brought within the 'jurisdiction' of that State for the purposes of Article 1 of the Convention, even though in this instance Turkey exercised its authority outside its territory. The Court considered that the circumstances of this case were distinguishable from those in the *Bankovic* Case, notably in

62 Decision of 12 December 2001, para. 73

63 Judgment of 21 November 2001, *McElhinney*, para. 39.

that the applicant was physically forced to return to Turkey by Turkish officials and was subject to their authority and control following his arrest and return to Turkey.[64]

1.5 TEMPORAL SCOPE OF THE CONVENTION

1.5.1 GENERAL OBSERVATIONS

By virtue of a generally accepted principle of international law a treaty is not applicable to acts or facts that have occurred, or to situations that have ceased to exist, before the treaty entered into force and was ratified by the State in question.[65] This also applies to the European Convention.[66] In the *Pfunders* Case the Commission inferred from the nature of the obligations under the Convention that the fact that the respondent State (in this case Italy) was a party to the Convention at the time of the alleged violation was decisive, without it being necessary for the applicant State (in this case Austria) to have ratified the Convention at that time.[67]

1.5.2 CONTINUING VIOLATIONS

Of particular note is the case law developed by the Commission concerning complaints which relate to a continuing situation, i.e. to violations of the Convention which are caused by an act committed at a given moment, but which continue owing to the consequences of the original act. Such a case occurred with respect to a Belgian national who lodged a complaint concerning a conviction by a Belgian court for treason during the Second World War. The verdict had been pronounced before Belgium had ratified the Convention, but the situation complained about, *viz.* the punishment in the form of, *inter alia*, a limitation of the right of free expression, continued after the Convention had become binding upon Belgium. According to the Commission the latter fact was decisive and the complaint accordingly was declared admissible.[68]

64 Judgment of 12 March 2003, paras 93-94; see also the judgment of 30 March 2005, *Issea*, para. 38.

65 See Art. 28 of the Vienna Convention on the Law of Treaties, ILM 8 (1969), p. 679.

66 Judgment of 16 December 1997, *Proszak*, para. 31; judgment of 8 July 2004, *Ilascu and Others*, para. 400; judgment of 23 September 2004, *Dimitrov*, para. 54.

67 Appl. 788/60, *Austria v. Italy*, Yearbook IV (1961), p. 116 (142).

68 Appl. 214/56, *De Becker*, Yearbook II (1958-1959), p. 214 (244). See also Appl. 7031/75, *X v. Switzerland*, D&R 6 (1977), p. 124; Appl. 7202/75, *X v. the United Kingdom*, D&R 7 (1977), p. 102; and Appl. 8701/79, *X v. Belgium*, D&R 18 (1980), p. 250 (251) concerning disfranchise. See, however, the decision of the Commission on the joined Appls 8560/79 and 8613/79, *X and Y v. Portugal*, D&R 16 (1979), p. 209 (211-212), in which two servicemen complained that their transfer had taken place in contravention of Art. 6.

Similarly the Court held in the *Papamichalopoulos* Case that the expropriation of land amounted to a continuing violation of Article 1 of Protocol No. 1. The alleged violations had begun in 1967. At that time Greece had already ratified the Convention and Protocol No. 1, and their denunciation by Greece from 13 June 1970 until 28 November 1974 during the military regime had not released it from its obligations under them "in respect of any act which, being capable of constituting a violation of such obligations, [might] have been performed by it" earlier, as stated in Article 58(2) of the Convention. Greece had, however, not recognised the Commission's competence to receive individual petitions until 20 November 1985 and then only in relation to acts, decisions, facts and events subsequent to that date. However, the Government had not raised any preliminary objection in that regard and the Court held that the question did not call for consideration by the Court on its own motion. The Court merely noted that the applicants' claim related to a continuing situation.[69]

In the *Stamoulakatos* Case the applicant had been convicted, *in absentia*, by the Greek criminal courts on several occasions. The Government's preliminary objection was that the applicant's complaints did not come within the Court's jurisdiction *ratione temporis* because they related to events which had taken place before 20 November 1985, when Greece's acceptance of the right of individual complaint took effect. The breach which the applicant complained of originated from three convictions dating from 1979 and 1980. The fact that he had subsequently lodged appeals could not affect the period that the Court had to consider in order to rule on the objection. The Court found that the events which gave rise to the proceedings against the applicant, together with the three judgments, were covered by the time-limit in Greece's declaration in respect of [the old] Article 25 of the Convention. As to his appeals and applications against those judgments, the applicant only complained that they were ineffective in that they did not enable him to obtain from a court which had heard him, as he was entitled to under the Convention, "a fresh determination of the merits of the charges on which he had been tried *in absentia*". Thus, although those appeals and applications were lodged after the 'critical' date of 19 November 1985, according to the Court they were closely bound up with the proceedings that had led to his conviction. The Court was of the opinion that divorcing these appeals and applications from the events which gave rise to them would, in the instant case, be tantamount to rendering Greece's aforementioned declaration nugatory. It was reasonable to infer from that declaration that Greece could not be held to have violated its obligation for not affording any possibility of a retrial to those who had been convicted *in absentia*

[69] Judgment of 24 June 1993, para. 40; Judgment of 22 May 1998, *Vasilescu*, para. 49; judgment of 10 May 2001, *Cyprus v. Turkey*, para. 189; Judgment of 31 July 2003, *Eugenia Michaelidou Developments Ltd. and Michael Tymvios*, para. 31.

before 20 November 1985. The objection was well-founded and the Court found it could not deal with the merits of the case.[70]

In the cases of *Yağci and Saragin*, and *Mansur* the Court rejected the preliminary objection of the Turkish Government that the Court's jurisdiction was excluded in respect of events subsequent to the date of the acceptance by Turkey of the Court's compulsory jurisdiction but which by their nature were merely "extensions of ones occurring before that date". According to the Court, having regard to the wording of the declaration Turkey made under [the old] Article 46 of the Convention, it could not entertain complaints about events which occurred before the acceptance of the Court's compulsory jurisdiction. However, when examining the complaints relating to Articles 5(3) and 6(1) of the Convention – the articles in question – the Court took account of the state of proceedings at the time when the declaration was deposited. It, therefore, could not accept the Government's argument that even facts subsequent to the date of the Turkey's declaration were excluded from its jurisdiction if they were extensions of an already existing situation. 'From the critical date onwards all the State's acts and omissions not only must conform to the Convention but are also undoubtedly subject to review by the Convention institutions.'[71]

In the *Ilascu* Case the Court held that, insofar the complaint concerned Article 6(1), it did not have jurisdiction *ratione temporis*, since the proceedings ended with the judgment of 9 December 1993. However, the applicants also submitted that their detention was not lawful, since the judgment pursuant to which they had been detained, and in three cases still were detained, had not been given by a competent court. Furthermore, they alleged that while in prison they had not been able to correspond freely or receive visits from their families. They also complained about their conditions of detention. The Court noted that those alleged violations concerned events which began with the applicants' incarceration in 1992 and were still going on. The Court, therefore, had jurisdiction *ratione temporis* to examine the complaints made insofar as they concerned events subsequent to 12 September 1997 as regards the Republic of Moldova and 5 May 1998 as regards the Russian Federation, the dates on which the Convention entered into force with respect to those States.[72]

1.5.3 DENUNCIATION OF THE CONVENTION

Even after a State has denounced the Convention in accordance with Article 58(1), the Convention remains fully applicable to that State for another six months (Article 58(2)). A complaint submitted between the date of denunciation of the Convention

[70] Judgment of 26 October 1993, paras 13-14. See also decision of 9 July 2002, *Kresović*.

[71] Judgments of 8 June 1995, para. 40 and para. 44. See also the decision of 7 March 2002, *Trajkovski*.

[72] Judgment of 8 July 2004, paras 401-403.

and that on which that denunciation becomes effective thus falls within the scope of the Convention *ratione temporis*. This occurred in the case of the second complaint, of April 1970, by Denmark, Norway and Sweden against Greece. On 12 December 1969 Greece had denounced the Convention. This denunciation was, therefore, to become effective on 13 June 1970. The Commission decided that in virtue of Article 65(2) [the present Article 58(2)] Greece was still bound, at the time of the complaint, to comply with the obligations ensuing from the Convention, and that consequently the Commission could examine the complaint.[73]

1.6 EFFECT OF THE CONVENTION WITHIN THE NATIONAL LEGAL SYSTEMS

It is primarily the task of the national authorities of the Contracting States to secure the rights and freedoms set forth in the Convention. To what extent the national courts can play a part in this, by reviewing the acts and omissions of those national authorities, depends mainly on the question of whether the provisions of the Convention are directly applicable in proceedings before those national courts. The answer to this question depends in turn on the effect of the Convention within the national legal system concerned. The Convention does not impose upon the Contracting States the obligation to make the Convention part of domestic law or otherwise to guarantee its domestic applicability and supremacy over national law.

In the context of the relationship between international law and municipal law there are two contrasting views. According to the so-called *dualistic* view the international and the national legal system form two separate legal spheres and international law has effect within the national legal system only after it has been 'transformed' into national law via the required procedure. The legal subjects depend on this transformation for the protection of the rights laid down in international law; their rights and duties exist only under national law. This is the case, for instance, in the United Kingdom; only recently has the Convention been incorporated, under the Human Rights Act. It is only through this Act that the rights and freedoms in the Convention can be invoked. However, under this Human Rights Act, the British courts are not allowed to disapply an (other) Act of Parliament, which they consider to conflict with the Convention / Human Rights Act. They can only go so far as to give a declaratory judgment, leaving it to the legislature to remedy the situation of conflict

[73] Appl. 4448/70, *Denmark, Norway and Sweden v. Greece*, Yearbook XIII (1970), p. 108 (120). After the admissibility declaration the Commission desisted from further examination. However, on 18 November 1974 Greece became a Party again to the Convention, and the Commission then resumed its examination of the complaint. Finally, on 4 October 1976, after both the applicant States and the defendant State had intimated that they were no longer interested in proceeding with the case, the Commission struck the case off the list; D&R 6 (1977), p. 6 (8).

between the two Acts of Parliament. In another dualistic system, that of the Federal Republic of Germany, the Convention has been transformed by a federal law (*Zustimmungsgesetz*) according to Article 59(2) of the Constitution, thereby becoming part of the domestic law of the Federal Republic.

In a dualistic system, after the Convention has been approved and transformed into domestic law, the question remains as to what status it has within the national legal system. The answer to this question is to be found in national constitutional law and practice. Under German constitutional law, for instance, the Convention has no priority over the Federal Constitution nor is it of equal rank. It has, however, the rank of a federal statute. The consequences of this have been mitigated by interpreting German statutes in line with the Convention; the German *Bundesverfassungsgericht* has even decided that priority should be given to the provisions of the Convention over subsequent legislation unless a contrary intention of the legislature could be clearly established. Even provisions of the Federal Constitution have to be interpreted in light of the Convention. As pointed out above, the British courts cannot disapply Acts of Parliament considered not to be in conformity with the Human Rights Act. However, it can be safely assumed that many discrepancies can and will be resolved by interpreting the conflicting Act of Parliament in conformity with the Human Rights Act, meaning conformity with the Convention and the accompanying case law of the Court.

According to the so-called *monistic* view, on the other hand, the various domestic legal systems are viewed as elements of the all-embracing international legal system, within which the national authorities are bound by international law in their relations with individuals as well, regardless of whether or not the rules of international law have been transformed into national law. In this view the individual derives rights and duties directly from international law, so that in national proceedings he may directly invoke rules of international law, which must be applied by the national courts and to which the latter must give priority over any national law conflicting with it.

However, even among the monistic systems many differences exist. Although as a general rule they accept the domestic legal effect of (approved) international treaties, the scope of this acceptance varies considerably. In the Netherlands self-executing provisions of treaties and of decisions of international organisations (i.e. written international law) may be invoked before domestic courts and may set aside conflicting (*anterior* and *posterior*) statutory law, including provisions in the Constitution. In fact, the Dutch courts have actively made use of the Convention in setting aside or interpreting Acts of Parliament. In France the *Cour de Cassation*, relying upon Article 55 of the French Constitution, has accepted the prevalence of treaties (including EC-law) over national *lois* since 1975. The *Conseil d'Etat* has been much more hesitant, but finally, in 1989, accepted the supremacy of treaties over domestic legislation.

The prevailing opinion is that the system resulting from the monistic view is not prescribed by international law at its present stage of development. International law leaves the States full discretion to decide for themselves in what way they will fulfil their international obligations and implement the pertinent international rules within their national legal system; they are internationally responsible only for the ultimate result of this implementation. This holds good for the European Convention as well,[74] although the Court indicated that the system according to which the Convention has internal effect is a particularly faithful reflection of the intention of the drafters.[75] The consequence is that there is no legal obligation to assign internal effect to the Convention nor to afford it prevalence over national law. However, the great majority of Contracting States have provided for internal effect; many also accept that the Convention prevails over national legislation.

In States in which the Convention has internal effect one must ascertain for each provision separately whether it is directly applicable (i.e. is self-executing), so that individuals may directly invoke such a provision before the national courts. The self-executing character of a Convention provision may generally be presumed when the content of such a provision can be applied in a concrete case without there being a need for supplementary measures on the part of the national legislative or executive authorities.

1.7 *DRITTWIRKUNG*

Drittwirkung is a complicated phenomenon about which there are widely divergent views. Here only those general aspects which are directly connected with the Convention will be dealt with. Hereafter, in the discussion of the separate rights and freedoms, certain aspects of *Drittwirkung* will be discussed insofar as the case law of the Commission and the Court calls for it. For a detailed treatment of *Drittwirkung*, in particular also as to its recognition and effect under national law, reference may be made to the literature.[76]

74 See the judgment of 6 February 1976, *Swedish Engine Drivers' Union*, para. 50, in which the Court held that "neither Article 13 nor the Convention in general lays down for the Contracting States any given manner for ensuring within their internal law the effective implementation of any of the provisions of the Convention." Similary, see the judgment of 23 July 1968, *Belgian Linguistic* Case, section 2, para. 11 and the judgment of 27 October 1975, *National Union of Belgian Police*, para. 38. See also the dissenting opinion of the Commission members Sperduti and Opsahl in the report of the Commission in *Ireland v. the United Kingdom*, B.23-I (1980), pp. 503-505.

75 Judgment of 18 January 1978, *Ireland v. the United Kingdom*, para. 239.

76 See, *e.g.*, E.A. Alkema, "The third-party applicability or "Drittwirkung" of the ECHR", in: *Protecting Human Rights; The European Dimension*, Köln, 1988, pp. 33-45; A. Clapham, 'The "Drittwirkung" of the Convention', in: R.St.J. McDonald, F. Matscher, H. Petzold (eds.), *The European System for the Protection of Human Rights*, Dordrecht/Boston/London, 1993, pp. 163-206; A. Drzemczewski, 'The domestic status of the European Convention on Human Rights; new dimensions', *Legal Issues of European Integration*, No. 1, 1977, pp. 1-85; M.A. Eissen, 'La convention et les devoirs des individus', in: *La protection des droits de l'homme dans le cadre européen*, Paris, 1961, pp. 167-194; H. Guradze, 'Die Schutzrichtung der Grundrechtsnormen in der Europäischen Menschenrechtskonvention', *Festschrift Nipperdy*, Vol. II, 1965, pp. 759-769; M.M. Hahne, *Das Drittwirkungsproblem in der Europäischen Konvention zum Schutz der Menschenrechte und Grundfreiheiten*, Heidelberg, 1973; D.J. Harris, M. O'Boyle, C. Warbrick, *Law of the European Convention of Human Rights*, London/Dublin/Edinburgh 1995, pp. 19-22; D.H.M. Meuwissen, *De Europese Conventie en het Nederlandse Recht* [The European Convention and Dutch Law], Leyden, 1968, pp. 201-211.

What does the term *Drittwirkung* mean? Two views in particular must be distinguished. According to the first view, *Drittwirkung* of provisions concerning human rights means that these provisions also *apply* to legal relations between private parties and not only to legal relations between an individual and the public authorities. According to the second view, *Drittwirkung* of human rights provisions is defined as the possibility for an individual to *enforce* these rights against another individual. Advocates of the latter view consider that *Drittwirkung* of human rights is present only if an individual in his legal relations with other individuals is able to enforce the observance of the law concerning human rights via some procedure or other.

As to the latter view it may at once be pointed out that no *Drittwirkung* of the rights and freedoms set forth in the Convention can be directly effectuated via the procedure set up by the Convention. In fact in Strasbourg it is possible to lodge complaints only about violations of the Convention by one of the Contracting States; a complaint directed against an individual is inadmissible for reason of incompatibility with the Convention *ratione personae*. This follows from Articles 19, 32, 33 and 34 of the Convention and has also been confirmed by the Strasbourg case law.[77] As a consequence, an individual can bring up an alleged violation of his fundamental rights and freedoms by other individuals in Strasbourg only indirectly, *viz.* when a Contracting State can be held responsible for the violation in one way or another.[78] In that case the supervision in the Strasbourg procedure concerns the responsibility of the State and not that of the private actor. It is, therefore, no surprise that the Strasbourg case law provides little clarity as far as *Drittwirkung* is concerned. Any urgency for a more straightforward approach is not felt. In the *Verein gegen Tierfabriken* Case the Court even explicitly stated that it does not consider it desirable, let alone necessary, to elaborate a general theory concerning the extent to which the Convention guarantees should be extended to relations between private individuals *inter se*.[79] At best a kind of 'indirect *Drittwirkung*'[80] is recognised in cases where from a provision of the Convention – notably Articles 3, 10 and 11 – rights are inferred for individuals which, on the basis of a positive obligation on the part of Contracting States to take measures

77 See *infra* 2.2.11.8.2.

78 As a rule a State is not internationally responsible for the acts and omissions of its nationals or of individuals within its jurisdiction; on this, see *infra* 2.2.11.8.2.

79 Judgment of 28 June 2001, para. 40.

80 See Alkema, *supra* note 76, p. 33.

in order to make their exercise possible, must also be enforced vis-à-vis private third parties.[81]

The fact that in Strasbourg no complaints can be lodged against individuals need not, however, bar the recognition of *Drittwirkung* of the Convention, not even in the second sense referred to above. The possibility of enforcement, which in this view is required, does not necessarily have to be enforcement under international law, but may also arise from national law.[82] In that context two situations must be distinguished. In the first place there are States where those rights and freedoms included in the Convention, which are self-executing, can be directly applied by the national courts.[83] In those States the relevant provisions of the Convention can be directly invoked by individuals against other individuals insofar as their *Drittwirkung* is recognised by the national courts. Judgments of these national courts which conflict with the Convention, for which indeed the Contracting State concerned is responsible under the Convention, may then be submitted to the Strasbourg Court via the procedure under Article 34 or via the procedure under Article 33. In addition, there are those States in whose national legal systems the provisions of the Convention are not directly applicable. Those States are also obliged under the general guarantee clause of Article 1 of the Convention to secure the rights and freedoms set forth in the Convention. If one starts from the principle of *Drittwirkung*, such States also have to secure for individuals protection against violations of their fundamental rights by other individuals in their national legal system. If the competent national authorities default in this respect or if the applicable provisions of national law are not enforced, responsibility arises for the State concerned, a responsibility which may be invoked via the procedure under Article 34 or Article 33 of the Convention.[84]

At the same time the existence of a supervisory system as described above does not in itself imply *Drittwirkung*. It does not necessarily imply that the Convention is applicable to legal relations between private parties if, in a given State, individuals may directly invoke the Convention before the courts. And the nature of the obligation arising from Article 1 of the Convention for those States in whose legal system the Convention is not directly applicable, is also in itself not decisive for the question concerning that type of *Drittwirkung*. In fact one cannot deduce from Article 1 whether the Contracting States are obliged to secure the rights and freedoms only in relation to the public authorities or also in relation to other individuals. For a possible *Drittwirkung*, therefore, other arguments have to be put forward.

81 For an elaborate survey of such cases of 'indirect *Drittwirkung*' and other comparable cases of 'private abuse of human rights', see Clapham, *supra* note 76.

82 See Hahne, *supra* note 76, pp. 81-94.

83 That this so-called 'internal effect' of the Convention does not necessarily follow from international law according to its present state, has been explained *supra* 1.6.

84 For the above, see Hahne, *supra* note 76, pp. 89-90.

What arguments for *Drittwirkung* can be inferred from the Convention itself? It is beyond doubt that the issue of *Drittwirkung* was not taken into account when the Convention was drafted, if it played any part at all in the discussions. One can infer from the formulation of various provisions that they were not written with a view to relations between private parties. On the other hand, the subject-matter regulated by the Convention – fundamental rights and freedoms – lends itself eminently to *Drittwirkung*. It is precisely on account of the fundamental character of these rights that it is difficult to appreciate why they should deserve protection in relation to public authorities, but not in relation to private parties.

It is submitted that it is not very relevant whether the drafters of the Convention had *Drittwirkung* in mind. Of greater importance is what conclusions may be drawn for the present situation from the principles set forth in the Convention, and specifically in its Preamble. In the Preamble the drafters of the Convention gave evidence of the great value they attached to general respect for the fundamental rights and freedoms.[85] From this emphasis on general respect an argument pro rather than contra *Drittwirkung* can be inferred. But, as has been observed above, the drafters dit not make any pronouncement on this.

Neither do the separate provisions of the Convention provide any clear arguments for or against *Drittwirkung*. Article 1 has already been discussed above. Article 13 is also mentioned in this context. From the last words of this article, *viz.* 'notwithstanding that the violation has been committed by persons in their official capacity', it is inferred by some that the Convention evidently also intends to provide a remedy against violations by individuals,[86] whereas others assert that those words merely indicate that the State is responsible for violations committed by its officials,[87] or that Article 13 does not afford an independent argument for *Drittwirkung*.[88] In addition, it is sometimes inferred from Article 17 that the Convention has *Drittwirkung*. It is, however, doubtful whether such a general conclusion may be drawn from Article 17.[89] That provision forbids not only public authorities, but also individuals from invoking the Convention for the justification of an act aimed at the destruction of fundamental rights of other persons. Such a prohibition of abuse of the Convention is quite another matter than a general obligation for individuals to respect the fundamental rights of other persons in their private legal relationships.

85 It states, among other things, that the Universal Declaration, of which the Convention is an elaboration, "aims at securing universal and effective recognition and observance of the rights therein declared", while the Contracting States affirm "their profound belief in those Fundamental Freedoms which are the foundation of justice and peace in the world."

86 See Eissen, *supra* note 76, pp. 177 *et seq.*

87 See Guradze, *supra* note 76, p. 764.

88 See Meuwissen, *supra* note 76, p. 210.

89 *Ibidem.*

In summary, one may conclude that *Drittwirkung* does not imperatively ensue from the Convention. On the other hand, nothing in the Convention prevents the States from conferring *Drittwirkung* upon the rights and freedoms laid down in the Convention within their national legal systems insofar as they lend themselves to it. In some States *Drittwirkung* of the rights and freedoms guaranteed by the Convention is already recognised, whilst in other States this *Drittwirkung* at least is not excluded in principle.[90] Some have adopted the view that it may be inferred from the changing social circumstances and legal opinions that the purport of the Convention is *going to be* to secure a certain minimum guarantee for the individual as well as in his relations with other persons.[91] It would seem that with regard to the spirit of the Convention a good deal may be said for this view, although in the case of such a subsequent interpretation one must ask oneself whether one does not thus assign to the Convention an effect which may be unacceptable to (a number of) the Contracting States, and consequently is insufficiently supported by their implied mutual consent.

At the same time, whether *Drittwirkung* can be assigned to the Convention at all also depends in particular on the nature and formulation of each separate right embodied in the Convention. In this context Alkema warns us that the nature of the legal relations between private parties may be widely divergent and that consequently *Drittwirkung* is a multiform phenomenon about which general statements are hardly possible.[92]

1.8 THE SUPERVISORY MECHANISM UNTIL 1998

1.8.1 THE SYSTEM BEFORE PROTOCOL NO. 11

In order to ensure the rights and freedoms laid down in the Convention, two bodies were originally established: the European Commission of Human Rights and the European Court of Human Rights. Furthermore, the Committee of Ministers of the Council of Europe and the Secretary General of the Council of Europe played a part in the supervisory mechanism. The European Commission of Human Rights and the European Court of Human Rights were set up specifically to ensure the observance of the engagements undertaken by the Contracting States under the Convention (Article 19 old). The other two organs were established by the Statute of the Council of Europe and not by the Convention.

90 See Drzemczewski, *supra* note 76, p. 63 et seq.

91 See Meuwissen, *supra* note 76, p. 211; and Clapham, *supra* note 76, in particular pp. 200-206.

92 See Alkema, *supra* note 76, pp. 254-255.

1.8.2 THE EUROPEAN COMMISSION ON HUMAN RIGHTS

The individual complaints procedure covered the following two phases:

1. *The decisions on admissibility.* After the Secretariat of the Commission had decided to register an application, the Commission examined the admissibility of the complaint. If the application was ruled inadmissible, the procedure ended.
2. *The examination of the merits.* If the application was declared admissible, the Commission examined the merits of the case. The procedure could, at this point, end in a friendly settlement or some other arrangement. If no settlement was reached, the Commission stated its opinion in a report. The case could subsequently be submitted to the Court,[93] which then gave the final decision on the merits. If a case was not submitted to the Court, the Committee of Ministers gave the final decision on the merits.

The Commission did not sit permanently. After the entry into force of Protocol No. 8 in 1990, Chambers were set up which exercised all the powers of the plenary Commission relating to individual complaints which could be dealt with on the basis of established case law or which raised no serious questions affecting the interpretation or application of the Convention. Each Chamber was composed of at least seven members. The Protocol, in addition, opened up the possibility of setting up Committees, each composed of at least three members, with the power to unanimously declare inadmissible or strike off its list of cases applications submitted under (the old) Article 25 when such a decision could be taken without further examination.

The most important decisions of the Commission on admissibility as well as the great majority of its reports have been published.[94]

93 According to article 48 (old) of the Convention "The following may bring a case before the Court, provided that the High Contracting Party concerned, if there is only one, or the High Contracting Parties concerned, if there is more than one, are subject to the compulsory jurisdiction of the Court, failing that, with the consent of the High Contracting Parties concerned, if there is only one, or of the High Contracting Parties concerned if there is more than one:
(a) the Commission;
(b) a High Contracting Party whose national is alleged to be a victim;
(c) a High Contracting Party which referred the case to the Commission;
(d) a High Contracting Party against which the complaint has been lodged."

94 The publication system of the Commission was rather complicated and therefore requires some elucidation. Not all decisions of the Commission were published, especially not those taken after summary proceedings. A number of the decisions concerning admissibility are to be found in the *Yearbook of the European Convention on Human Rights* and in the *Collection of Decisions*, continued after 1975 as *Decisions and Reports*. The reports of the Commission were published separately; in addition they were sometimes included in the *Yearbooks* and in the *Decisions and Reports*. Sometimes a decision was included in the *Yearbooks* but not in the *Collection of Decisions/Decisions and Reports* and vice versa. In the *Digest of Strasbourg case-law relating to the European Convention on Human Rights*, published by Carl Heymans Verlag, the case law of the Commission and the Court has been incorporated. For those cases that were referred to the Court, the main parts of the reports of the Commission were since 1985 also published as an Annex to the judgment of the Court (Series A),

1.8.3 THE EUROPEAN COURT OF HUMAN RIGHTS

As with the Commission, the European Court of Human Rights was specifically set up to supervise the observance by the Contracting States of their engagements arising from the Convention (under the old Article 19). Unlike the Commission, the number of members of the Court was not related to the number of the Contracting States, but to the number of Member States of the Council of Europe which originally was not the same number, as the Member States were not obliged to accede to the Convention.

For the consideration of each case a Chamber composed of nine judges was constituted from the Court (under the old Article 43). Persons sitting as *ex officio* members of the Chambers were those judges who were elected in respect of the States Parties to the case. If such a judge was not available, the place was taken by a judge *ad hoc*; a person chosen by the State in question. In addition, either the President or the Vice-President sat as an *ex officio* member of the Chamber. The other members of the Chamber were chosen by lot. For that purpose the judges were divided into three regional groups. The Chamber thus constituted was able, or was obliged, under certain conditions, to relinquish jurisdiction in favour of, originally, the plenary Court, and later a Grand Chamber of 17 judges.[95] To prevent inconsistencies in the case law, the Court, in its Rules, had assigned to the Chambers the right to relinquish jurisdiction in favour of the plenary Court/Grand Chamber when a case pending before a Chamber raised serious questions affecting the interpretation of the Convention. A Chamber was obliged to do so where the resolution of such questions might have a result inconsistent with a judgment previously delivered by a Chamber or by the plenary Court/Grand Chamber. According to Rule 51(5) of the old Rules of Court the Grand Chamber could exceptionally, when the issues raised were particularly serious or involved a significant change of existing case law, relinquish jurisdiction in favour of the plenary Court.

No case could be brought before the Court unless it had been declared admissible by the Commission, and the Commission had stated its opinion on the merits in a report.

All the judgments of the Court were published, as were the documents relating to the proceedings, including the report of the Commission, but excluding any document which the President considered unnecessary to publish.[96]

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while before 1985 they were included in the materials published in Series B. As from 1996 the case law of the Commission was and that of the Court still is published in *Reports of Judgments and Decisions*.

95 On 27 October 1993 the Court decided to establish a Grand Chamber to exercise the jurisdiction of the plenary Court in most cases.

96 The judgments and decisions of the Court were published in the *Publications of the European Court of Human Rights, Series A*. The documents of the case, including the report of the Commission, were published in the *Publications of the European Court of Human Rights, Series B*. Since 1985, the main parts of reports of the Commission were also published as an annex to the Court judgments in Series

1.8.4 THE COMMITTEE OF MINISTERS OF THE COUNCIL OF EUROPE

Unlike the Commission and the Court, the Committee of Ministers was not set up by the Convention. Here a supervisory function had been entrusted to an already existing body of the Council of Europe. Accordingly, the composition, organisation, and general functions and powers of the Committee of Ministers are not regulated in the Convention, but by the Statute of the Council of Europe.[97]

The function assigned to the Committee of Ministers in the Convention was the result of a compromise. On the one hand, during the drafting of the Convention there was a body of opinion which wished to institute, in addition to the Commission, a Court with compulsory jurisdiction. Others, however, held that it was preferable to entrust supervision, apart from the Commission, only to the Committee of Ministers. Ultimately the two alternatives were combined by making the jurisdiction of the Court optional and granting the Committee the power, in those cases that were not, or could not be, submitted to the Court, to decide on the question of whether there had been a violation of the Convention.

1.9 THE SUPERVISORY MECHANISM SINCE 1998

1.9.1 THE REVISED SYSTEM UNDER PROTOCOL NO. 11

Since 1982 several proposals had been forwarded concerning the possibility of 'merging' the Commission and the Court into a single body. Apart from the idea of 'merging' there was a Dutch-Swedish initiative in 1990 which proposed making the opinions of the Commission under (the old) Article 31 – in so far as individual applications were concerned – legally binding decisions. Thus, there would be a two-tier judicial system, where the Commission would operate as a court of first instance from which individual applicants and States might be granted a right of appeal to the Court. In both proposals no role was left for the Committee of Ministers under (the old) Article 32 in respect of individual applications. As no consensus could be reached on either proposal, they were referred to the Committee of Ministers in order to obtain a clear mandate for further work on the reform. At the Vienna Summit of October 1993, the Council of Europe's Heads of State and Government adopted the 'Vienna

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A. In addition, a summary was published in the *Yearbook of the European Convention on Human Rights*. In 1996 the Series A ceased to exist. Subsequently the judgments of the Court were published in *Reports of Judgments and Decisions*.

97 See Articles 13-21 of the Statute of the Council of Europe.

Declaration' of 9 October 1993, which finally resulted in the reform enshrined in Protocol No. 11.

One of the most important reasons that prompted the revision of the supervisory system was the increasing workload of the existing institutions. For example, the yearly number of individual applications registered had grown from 1,013 in 1988 to 4,721 in 1997, and the number of judgments – including decisions rejecting applications submitted under Protocol No. 9 – delivered by the Court had risen from 19 in 1988 to 150 in 1997. Another important reason was the increasing length of time needed to deal with applications.

The entry into force of Protocol No. 11 on 1 November 1998 meant a considerable alteration of the supervisory mechanism under the Convention. A new, permanent Court took the place of the European Commission of Human Rights and the European Court of Human Rights. In addition, the role of the Committee of Ministers of the Council of Europe in the individual complaint procedure was dropped. Under Article 42, para 2, the Committee of Ministers has, however, retained its supervisory role with respect to the execution of the Court's judgments. The European Commission of Human Rights continued to function until 1 November 1999, in order to handle the cases that were still in progress. The new Court handled the cases of the old Court that were still pending on 1 November 1998. The secretariat of the Commission was combined with the registry to form the registry of the new Court. Another important change was that the individual right of complaint was no longer dependent on the optional recognition by the State. Henceforth ratification of the Convention automatically entailed recognition of the individual right of complaint.[98] Acceptance of the Court's jurisdiction by the State was also no longer required. The new system provides for the Court's jurisdiction as the only and compulsory jurisdiction. The State's right of complaint continues to exist in addition to that of the individual.[99]

1.9.2 THE FUTURE SYSTEM UNDER PROTOCOL NO. 14

The reform under Protocol No. 11 has, however, proven to be insufficient to cope with the prevailing situation. Since 1998 the number of applications increased from 18,164 to 34,546 in 2002, while at the end of 2003 approximately 65,000 applications were pending before the Court. The problem of the excessive case-load is characterized by two phenomena in particular: i. The number of inadmissible applications, and ii. the number of repetitive cases following a so-called 'pilot judgment'. In 2003 some 17,270 applications were declared inadmissible (or struck off the list of cases) and 753 cases were declared admissible. With respect to the remaining cases, the Court delivered

98 Article 34 of the Convention.
99 Article 33 of the Convention.

703 judgments in 2003, of which some 60% concerned repetitive cases.[100] As a result of the massive increase of individual applications, the effectiveness of the system and thus the credibility and authority of the Court are seriously endangered.

In order to cope with this problem, Protocol No. 14 was drafted to amend the control system of the Convention. It was opened for signature on 13 May 2004, but has not entered into force yet. Unlike Protocol No. 11, Protocol 14 makes no radical changes to the control system. The changes it does make relate more to the functioning of the system rather than to its structure. Its main purpose is to improve the system, giving the Court the procedural means and flexibility it needs to process all applications in a timely fashion, while allowing it to concentrate on the most important cases which require in-depth examination.

The amendments concern the following aspects: (a) reinforcement of the Court's filtering capacity in respect of the flux of unmeritorious applications; (b) a new admissibility criterion concerning cases in which the applicant has not suffered a significant disadvantage; (c) measures for dealing with repetitive cases. Together these elements of the reform seek to reduce the time spent by the Court on clearly inadmissible, repetitive and less important applications, in order to enable the Court to concentrate on those cases that raise important human rights issues.[101]

1.9.3 THE EUROPEAN COURT OF HUMAN RIGHTS

The European Court of Human Rights, set up under the Convention as amended by Protocol No. 11, is composed of a number of judges equal to that of the Contracting States.[102] The Court functions on a permanent basis. Judges sit on the Court in their individual capacity and do not represent any State. They cannot engage in any activity which is incompatible with their independence or impartiality or with the demands of full-time office.

The purpose of Protocol No. 11 was to streamline procedures rather than to change substantive matters. Thus the Court now also exercises the filter function that in the past was performed by the Commission. The Court consists of Committees, Chambers and the Grand Chamber. Subject to powers specifically attributed to the Committees and the Grand Chamber, Chambers have inherent competence to examine the admissibility and the merits of all individual and interstate applications. The Committees only play a role at the admissibility stage of the proceedings, and only in respect of cases brought by individuals. In accordance with Article 28, a Committee may, by unanimous vote, declare an application inadmissible or strike a case off its list of cases

100 Explanatory Report to Protocol No. 14, para. 7.
101 See *infra* 1.9.6.
102 Article 20 of the Convention.

where such a decision can be taken without further examination. The decision is final. According to Article 29(2) a Chamber is to decide on the admissibility (and the merits) of inter-state complaints.

When Protocol No. 14 will enter into force, paragraphs 1 and 2 of Article 28 will be amended. On the basis of the new paragraph 1.b of Article 28, the Committee may also, in a joint decision, declare individual applications admissible and decide on their merits, when the questions they raise concerning the interpretation or application of the Convention are covered by well-established case law of the Court. The Committees may rule on all aspects of the case (admissibility, merits, just satisfaction) in a single judgment or decision. Unanimity is required on each aspect. Failure to reach a unanimous decision counts as no decision, in which event the Chamber procedure applies (Article 29). It will then fall to the Chamber to decide whether all aspects of the case should be covered in a single judgment. Even when the Committee initially intends to apply the procedure provided for in Article 28(1)(b), it may declare an application inadmissible under Article 28(1)(a). This may happen, for example, if the respondent Party has persuaded the Committee that domestic remedies have not been exhausted.

When a three-judge Committee gives a judgment on the merits, the judge elected in respect of the High Contracting Party concerned will not be an *ex officio* member of the decision-making body, in contrast with the situation under the Convention as it stands. According to the *Explanatory Report to Protocol No. 14* the presence of this judge would not appear necessary, since Committees will deal with cases on which well-established case law exist. However, paragraph 3 of Article 28 provides that a Committee may invite the judge elected in respect of the High Contracting Party concerned to replace one of its members. In certain circumstances it may, in particular, be useful to do so if questions relating to the domestic legal system concerned need to be clarified. Article 28(3) explicitly mentions as one of the factors which a Committee may take into account in deciding whether to invite the judge elected in respect of the Respondent Party to join it, the situation where the Party has contested the applicability of paragraph 28(1)(b). The *Explanatory Report to Protocol No. 14* mentions in this respect that it was considered important to have at least some reference in the Convention itself to giving respondent Parties the opportunity to contest the application of the simplified procedure.[103]

After the entry into force of Protocol No. 14, a new Article 27 containing provisions defining the competence of the new single-judge formation will be inserted into the Convention. Paragraph 1 specifies that the competence of the single judge is limited to taking decisions of inadmissibility or decisions to strike cases off the list "where such a decision can be taken without further examination". This means that the judge will take such decisions only in clear-cut cases, where the inadmissibility of the application is manifest from the outset. The single-judge formations will be assisted by rapporteurs

[103] Explanatory Report to Protocol No.14, para. 71.

from the Registry with knowledge of the language and the legal system of the respondent Party concerned (Article 24(2) (new)). The decision itself remains the sole responsibility of the judge. In case of doubt the judge will refer the application to a Committee or a Chamber.[104]

Under Protocol No. 14, Article 29 needed to be amended to take into account the new provisions in Articles 27 and 28. Paragraph 1 of the amended Article 29(1) reads as follows:

> *If no decision is taken under Article 27 or 28, or no judgment rendered under Article 28, a Chamber shall decide on the admissibility and merits of individual applications submitted under Article 34. The decision on admissibility may be taken separately.*

The text of the old Article 29(3) will be included in the new paragraph 2 of Article 29 which will read as follows:

> *A Chamber shall decide on the admissibility and merits of inter-State applications submitted under Article 33. The decision on admissibility shall be taken separately unless the Court, in exceptional cases, decides otherwise.*

1.9.4 ELECTION OF THE MEMBERS OF THE COURT

For the election of the judges every member of the Council of Europe nominates three candidates of whom two at least must be its nationals. The third candidate may be a national of another Contracting State, any other State, or stateless. There is no longer a provision that no two judges may be of the same nationality. From the list thus produced the Parliamentary Assembly elects the members of the Court by a majority of the votes cast (Article 22(1)).

Article 22(2) provides that the same procedure must be followed when new members are admitted to the Council of Europe and in filling interim vacancies. In the former case the new Member State puts forward the three candidates and in the latter case this is done by the State which had nominated the candidate to whose resignation or death the vacancy is due. After the entry into force of Protocol No. 14, Article 22(2) shall be deleted since it will no longer serve any useful purpose in view of the changes made to Article 23.

According to the present Article 23(1) judges will be elected for a period of six years, and may be re-elected. However, the terms of office of half of the judges elected at the first election expired at the end of three years. The judges whose term of office expired at the end of the initial period of three years were chosen by lot by the Secretary General of the Council of Europe immediately after their election. Judges may be re-

[104] *Ibidem*, para. 67.

elected. Article 23(6) (the new Article 23(2) provides that the term of office of the judges shall expire when they reach the age of 70. The members of the Court hold office until replaced. After having been replaced they continue to deal with such cases as they already had under consideration (Article 23(7) (the new Article 23(3)). The end of the terms of office is staggered in the sense that, as far as possible, every three years half of the terms of office expire (Article 23(1) and (3)).

After the entry into force of Protocol 14 the term of office will be nine years and the judges may not be re-elected. (Article 23(1) (new). The system whereby large groups of judges were renewed at three-year intervals will be abolished. This will be brought about by the new wording of paragraph 1 and the deletion of paragraphs 2 to 4 of Article 23. In addition, paragraph 5 of the old Article 23 will be deleted so that, in the event of an interim vacancy, a judge will no longer be elected to hold office for the remainder of his or her predecessor's term. Judges will hold office until replaced, while they will continue to deal with such cases as they already have under consideration. Paragraph 4 will read that no judge may be dismissed from office unless the other judges decide by a majority of two-thirds that that judge has ceased to fulfil the required conditions.

The Court functions on a permanent basis.[105] The judges have a full-time office (Article 21, paragraph 3), and have their home basis in Strasbourg.

The Plenary Court elects its President, two Vice-Presidents and three Presidents of Section for a period of three years (Article 26).

1.9.5 REQUIREMENTS FOR MEMBERSHIP OF THE COURT

The Convention lays down certain requirements for members of the Court. Candidates must be of high moral character and must either possess the qualifications required for appointment to high judicial office or be jurisconsults of recognised competence (Article 21(1)). The judges shall sit on the Court in their individual capacity (Article 21(2)). During their term of office the judges shall not engage in any activity which is incompatible with their independence, impartiality, or with the demands of a full-time office (Article 21(3)). According to Rule 3 of the Rules of Court,[106] before taking up their duties, the judges must take an oath or make a declaration to the effect that they will exercise their function independently and impartially. Similarly, a judge may not exercise his function when he is a member of a government or holds a post or exercises a profession which is incompatible with his independence and impartiality (Rule 4 of the Rules of Court).

105 Article 19.

106 http://www.echr.coe.int/Eng/EDocs/RulesOfCourt.html.

Article 51 provides that the members of the Court, during the exercise of their functions, are entitled to the privileges and immunities provided for in Article 40 of the Statute of the Council of Europe and in the agreements made thereunder,[107] which furthers the independent exercise of their function.

1.9.6 SESSIONS OF THE COURT

The seat of the Court is in Strasbourg, but if it considers it expedient, the Court may exercise its functions elsewhere in the territories of the Member States of the Council of Europe (Rule 19 of the Rules of Court). Rule 20 of the Rules of Court provides that the President convenes the Court whenever the performance of its functions under the Convention and under these Rules so requires in a plenary session and also at the request of at least one-third of the members. The quorum for the sessions of the plenary Court is two-thirds of the judges (Rule 20(2) of the Rules of Court).

In order to consider cases brought before it, the Court shall sit in Committees, Chambers and the Grand Chamber.[108] In plenary the Court will only deal with administrative matters, such as the election of the President, the Vice-Presidents and the Presidents of the Chambers, and the adoption of the Rules of Procedure (Article 26) (new Article 25). After the entry into force of Protocol No. 14 a new paragraph will be added in order to reflect the new function attributed to the plenary Court. Under new Article 26(2) the Committee of Ministers may, by a unanimous decision and for a fixed period, at the request of the plenary Court, reduce the number of judges of the Chambers to five.

The Chambers, consisting of seven judges, as provided for in Article 26(b) of the Convention, shall be set up by the plenary Court. In fact the Court divides its membership into Sections. There shall be at least four Sections. Each judge shall be a member of a Section. The composition of the Sections shall be geographically and gender balanced and shall reflect the different legal systems of the Contracting Parties. Where a judge ceases to be a member of the Court before the expiry of the period for which the Section has been constituted, the judge's place in the Section shall be taken by his or her successor as a member of the Court. The President of the Court may exceptionally make modifications to the composition of the Sections if circumstances so require. On the basis of a proposal by the President the plenary Court may constitute an additional Section (Rule 25). Meanwhile, a fifth Section has been constituted.

The Committees, as provided for in Article 27(1) of the Convention, are composed of three judges belonging to the same Section. The Committees are constituted for a period of twelve months by rotation among the members of each Section, excepting

107 See Sixth Protocol to the General Agreement on Privileges and Immunities of the Council of Europe, Strasbourg, 5 March 1996, ETS, No. 162.

108 Article 27(1) of the Convention.

the President of the Section. The judges of the Section who are not members of a Committee may be called upon to take the place of members who are unable to sit. Each Committee shall be chaired by the member having precedence in the Section.[109]

The Grand Chamber, consisting of seventeen judges, includes the President of the Court, the Vice-Presidents, the Presidents of the Chambers and other judges chosen in accordance with the Rules of Court. There shall sit as an *ex officio* member of the Chamber and the Grand Chamber the judge elected in respect of the State Party concerned or, if there is none or if he or she is unable to sit, a person of that State's choice. To make sure that the Grand Chamber looks into the matter afresh when it examines a case referred to it under Article 43, judges from the Chamber which rendered the judgment are excluded, with the exception of the President of the Chamber and the judge who sat in respect of the State concerned (Article 27).

For the consideration of a case a Chamber is constituted from the Section (Article 27(1) and Rule 26(1)). Persons sitting as *ex officio* members of the Chambers are the President of the Section and those judges who are elected in respect of any State Party to the case. If such a judge is unable to sit or withdraws, the President of the Chamber shall invite that Party to indicate within thirty days whether it wishes to appoint to sit as judge either another elected judge or, as an *ad hoc* judge, any other person possessing the qualifications required by Article 21(1) of the Convention and, if so, to state at the same time the name of the person to be appointed. The Contracting Party concerned shall be presumed to have waived its right of appointment if it does not reply within thirty days (Rule 29). The other members of the Chamber are chosen by lot (Rule 21 of the Rules of Court).

In order to prevent inconsistencies in the Court's case law, according to the Rules, the Chambers have the right to relinquish jurisdiction in favour of the Grand Chamber. Rule 72(1) provides in that respect that in accordance with Article 30 of the Convention, where a case pending before a Chamber raises a serious question affecting the interpretation of the Convention or the Protocols thereto or where the resolution of a question before it might have a result inconsistent with a judgment previously delivered by the Court, the Chamber may, at any time before it has rendered its judgment, relinquish jurisdiction in favour of the Grand Chamber, unless one of the parties to the case has objected in accordance with paragraph 2 of this Rule. Reasons need not be given for the decision to relinquish. The Registrar shall notify the parties of the Chamber's intention to relinquish jurisdiction. The parties shall have one month from the date of that notification within which to file at the Registry a duly reasoned objection. An objection which does not fulfil these conditions shall be considered invalid by the Chamber.[110]

[109] Rule 27 of the Rules of Court.

[110] See for an overview of judgments, in which Rule 72 of the Rules has been applied: Appendix IV.

Judges may not take part in the consideration of any case in which they have a personal interest or with respect to which they have previously acted as agent, advocate, or adviser of a party or of a person having an interest in the case, or as a member of a tribunal or commission of enquiry, or in any other capacity. If a judge considers that he or she should not take part in the consideration of a particular case, he or she informs the President, who shall exempt the judge concerned from sitting. The initiative may also be taken by the President, when the latter considers that such a withdrawal is desirable. In case of disagreement the Court decides (Rule 28(2), (3) and (4) of the Rules of Court).

The hearings of the Court are public, unless the Court decides otherwise in exceptional circumstances (Rule 33 of the Rules of Court). This publicity is a logical implication of the judicial character of the procedure. The deliberations of the Court, on the other hand, are in private (Rule 22 of the Rules of Court).

The Court takes its decisions by a majority of votes of the judges present. If the voting is equal, the President of the (Grand) Chamber has a casting vote (Rule 23 of the Rules of Court).

In accordance with Article 44(3) of the Convention final judgments of the Court shall be published, under the responsibility of the Registrar, in an appropriate form. The Registrar shall in addition be responsible for the publication of official reports of selected judgments and decisions and of any document which the President of the Court considers useful to publish.[111]

After the entry into force of Protocol No.14 the following changes will be brought about. The present Article 25 will become Article 24 and will be amended in two respects. First of all, the second sentence of Article 25 will be deleted since the legal secretaries, created by Protocol 11, have in practice never had an existence of their own, independent from the registry. Secondly, a new paragraph 2 will be added so as to introduce the function of rapporteur as a means of assisting the new single judge formation as provided for in the new Article 27.

Article 27 will become Article 26 and its text will be amended in several respects. In paragraph 1 a single judge formation will be introduced in the list of judicial formations of the Court and a new rule will be inserted in a new paragraph 3 to the effect that a single judge shall not sit in cases concerning a High Contracting Party in respect of which he or she has been elected. A new paragraph 2 will be introduced as regards a possible reduction of the size of the Court's Chambers. Application of this paragraph by the Committee of Ministers at the request of the Court will reduce to five the number of judges of the Chambers. It will not allow, however, for setting up a system of Chambers of different sizes which would operate simultaneously for different types

[111] Rule 78 of the Rules of Court.

of cases.[112] Finally, paragraph 2 of Article 27 will be amended to make provision for a new system of *ad hoc* judges. Under the new rule, contained in paragraph 4 of the new Article 26, each High Contracting Party is required to draw up a reserve list of *ad hoc* judges from which the President of the Court shall choose someone when the need arises to appoint an *ad hoc* judge.

Under Protocol No. 14 an amendment of Article 31 concerning the powers of the Grand Chamber will be needed. A new paragraph will be added to this Article in order to reflect the new function attributed to the Grand Chamber by this Protocol, namely to decide on issues referred to the Court by the Committee of Ministers under the new paragraph 4 of Article 46 of the Convention. This concerns the question whether a High Contracting Party has failed to fulfill its obligations to comply with a judgment. Finally, in Article 32 of the Convention concerning the jurisdiction of the Court a reference will be inserted to the new procedure provided for in the amended Article 46. According to the amended Article 46 the Committee of Ministers may, if it considers that the supervision of the execution of a final judgment is hindered by a problem of interpretation of the judgment, refer the matter to the Court for a ruling on the question of interpretation.

1.10 THE COMMITTEE OF MINISTERS

1.10.1 GENERAL OBSERVATIONS

Unlike the Court, the Committee of Ministers was not set up by the Convention. Here a function was entrusted to an already existing body of the Council of Europe. Accordingly, the composition, organisation, general functions and powers, and procedure of the Committee of Ministers are not regulated by the Convention, but by the Statute of the Council of Europe.[113] After the entry into force of Protocol No. 11, under Article 46 (2) the Committee of Ministers retained its function of supervising the execution of judgments of the Court, while its power under former Article 32 in respect of individual applications was abolished.

Under Protocol No. 14, Article 46 will be amended. Article 46(3) will empower the Committee of Ministers to ask the Court to interpret a final judgment, for the purpose of facilitating the supervision of its execution. The Court's reply will settle any argument concerning a judgment's exact meaning. According to Article 46(3) a referral decision shall require a majority vote of two thirds of the representatives entitled to sit on the Committee. According to the Explanatory Report to this Protocol the aim of the new paragraph 3 is to enable the Court to give an interpretation of a

[112] Explanatory Report to Protocol No. 14, 194, para. 63.
[113] See Articles 13-21 of the Statute of the Council of Europe.

judgment, not to pronounce on the measures taken by the High Contracting Parties to comply with that judgment. No time-limit will be set for making requests for interpretation, since a question of interpretation may arise at any time during the Committee of Ministers' examination of the execution of a judgment.[114]

Paragraphs 4 and 5 of Article 46 will empower the Committee of Ministers to bring infringement proceedings before the Court.[115] On the basis of paragraph 4 the Committee of Ministers may – if it considers that a High Contracting Party has refused to abide by a final judgment in a case to which it is a party, after serving formal notice on that Party and by decision adopted by a majority vote of two thirds of the representatives entitled to sit on the Committee – refer to the Court the question of whether that Party has failed to fulfil its obligation under paragraph 1. If the Court finds a violation of paragraph 1, it shall refer the case to the Committee of Ministers for consideration of the measures to be taken. If the Court finds no violation of paragraph 1, it shall return the case to the Committee of Ministers, which shall close its examination of the case.[116] The new Article 46 thus introduces a wider range of measures of bringing pressure to secure execution of judgments. Currently the ultimate measure available to the Committee of Ministers is recourse to Article 8 of the Statute of the Council of Europe (suspension of voting rights in the Committee of Ministers or even expulsion from the Council of Europe), which in most cases would be an overkill.

1.10.2 COMPOSITION OF THE COMMITTEE OF MINISTERS

The Committee of Ministers consists of one representative from each Member State of the Council of Europe – as a rule the Minister for Foreign Affairs. In case of the latter's inability to be present, or if other circumstances make it desirable, an alternate may be nominated, who shall, whenever possible, be a member of government (Article 14 of the Statute). In practice the Committee has sessions only twice annually (see Article 21(c) of the Statute). In the intervening periods its duties are discharged by the so-called 'Committee of the Ministers' Deputies', consisting of high officials who are generally the permanent representatives of their governments to the Council of Europe. Every representative on the Committee of Ministers appoints an alternate (Rule 14 of the Rules of the Committee of Ministers).

[114] Explanatory Report to Protocol No. 14, para. 97.
[115] According to Article 35(b) (new), the Court sit as a Grand Chamber, having first served the State concerned with notice to comply.
[116] Article 46(5) of the Convention.

1.10.3 SESSIONS OF THE COMMITTEE OF MINISTERS

The sessions of the Committee of Ministers are not public, unless the Committee decides otherwise (Article 21(a) of the Statute). In principle the rules of procedure that apply to the Committee as executive organ of the Council of Europe are equally applicable to its functions within the context of the Convention.

1.11 THE SECRETARY GENERAL OF THE COUNCIL OF EUROPE

The Secretary General of the Council of Europe also plays a part within the framework of the Convention. The Secretary General is the highest official of the Council of Europe and is elected for a period of five years by the Parliamentary Assembly from a list of candidates which is drawn up by the Committee of Ministers (Article 36 of the Statute of the Council of Europe).

The Secretary General is involved in the Convention system in various ways, on the one hand by reason of his administrative functions as they result from the Statute of the Council of Europe, and on the other hand in connection with a specific supervisory task created by the Convention.

Ratifications of the Convention must be deposited with the Secretary General (Article 59(1)), who has to notify the Members of the Council of Europe of the entry into force of the Convention and keep them informed of the names of the States which have become parties to the Convention (Article 59(4)).[117] A denunciation of the Convention must also be notified to the Secretary General, who informs the other Contracting States (Article 58). Deposition with the Secretary General is also required for the notification by which a State declares that the Convention extends to a territory for whose international relations that State is responsible (Article 56(1)).

Moreover, the Secretary General fulfils an important administrative function under Article 15(3) of the Convention. Any State availing itself under Article 15 of the right to derogate from one or more provisions of the Convention in time of war or another emergency threatening the life of the nation, must keep the Secretary General fully informed of the measures taken in that context and the reasons therefore. It must also inform him when such measures have ceased to operate.

The most important function assigned to the Secretary General in the Convention, however, is of quite a different nature. Under Article 52 he has the task of supervising the effective implementation by the Contracting States of the provisions of the Convention. This supervisory task of the Secretary General will be dealt with in chapter 4.

[117] The same applies for Protocols to the Convention.

1.12 THE RIGHT OF COMPLAINT OF STATES

1.12.1 INTRODUCTION

What is called here the 'right of complaint' under the Convention is the right to take the initiative for the supervisory procedure provided for in the Convention on the ground that the Convention has allegedly been violated by a Contracting State. The Convention differentiates between the right of complaint for States on the one hand (Article 33) and that for individuals on the other hand (Artice 34).

When the Convention enters into force for a State, that State acquires the right to lodge, through the Secretary General, an application with the Court on the ground of an alleged violation of one or more provisions of the Convention by another Contracting State.

1.12.2 OBJECTIVE CHARACTER

This right of complaint for States constitutes an important divergence from the traditional principles of international law concerning inter-State action. According to these principles a State can bring an international action against another State only when a right of the former is at stake, or when that State takes up the case of one of its nationals whom it considers to have been treated by the other State in a way contrary to the rules of international law – so-called 'diplomatic protection'.

Under the Convention a State may also lodge a complaint about violations committed against persons who are not its nationals or against persons who are not nationals of any of the Contracting States or are stateless, and even about violations against nationals of the respondent State. States may equally lodge a complaint about the incompatibility with the Convention of legislation or an administrative practice of another State without having to allege a violation of a right of any specified person – the so-called 'abstract applications'. Thus the right of complaint for States assumes the character of an *actio popularis*: any Contracting State has the right to lodge a complaint about any alleged violation of the Convention, regardless of whether there is a special relationship between the rights and interests of the applicant State and the alleged violation.

In the *Pfunders* Case between Austria and Italy, the Commission stressed that a State which brings an application under Article 33, "is not to be regarded as exercising a right of action for the purpose of enforcing its own rights, but rather as bringing

before the Commission an alleged violation of the public order of Europe."[118] The Court similarly held that, unlike international treaties of the classic kind, "the Convention comprises more than mere reciprocal engagements between Contracting States. It creates, over and above a network of mutual, bilateral undertakings, objective obligations which, in the words of the Preamble, benefit from a 'collective enforcement'."[119] The supervisory procedure provided for in the Convention, therefore, has an objective character; its aim is to protect the fundamental rights of individuals against violations by the Contracting States, rather than to implement mutual rights and obligations between those States. This objective character of the procedure is also reflected in other respects, which will be mentioned later.[120]

Clear examples of inter-State applications within the framework of the 'collective enforcement' mentioned by the Court are the applications of Denmark, Norway, Sweden and the Netherlands of September 1967 and the joint application of the three Scandinavian countries of April 1970 against Greece,[121] and the application of the Scandinavian countries, France and the Netherlands of July 1982 against Turkey.[122] The complaints against Greece were in fact lodged at the instance of the Parliamentary Assembly, which considered it the duty of the Contracting States to lodge an application under Article 33 in the case of an alleged serious violation.[123]

1.12.3 CASES IN WHICH A SPECIAL INTEREST OF THE CONTRACTING STATE IS INVOLVED

The Convention, of course, at the same time protects the particular interests of the Contracting States when they claim that the rights set forth in the Convention must be secured to their nationals coming under the jurisdiction of another Contracting State. And even though States have the right to initiate a procedure in which they have no special interest, in practice they will more readily be inclined to bring an application

118 Appl. 788/60, *Austria v. Italy*, Yearbook VI (1961), p. 116 (140). See also Appls 9940/82-9944/82, *France, Norway, Denmark, Sweden and the Netherlands v. Turkey*, D&R 35 (1984), p. 143 (169); joined Appls 15299/89, 15300/89 and 15318/89, *Chrysostomos, Papachrysostomou* and *Loizidou*, D&R 68 (1991), p. 216 (242).

119 Judgment of 18 January 1978, *Ireland v. the United Kingdom*, para. 239; report of 4 October 1983, *Cyprus v. Turkey*, D&R 72 (1992), p. 5 (19), where the Commission further noted that a Government cannot avoid this collective enforcement by not recognising the Government of the applicant State.

120 See *infra* 1.13.3.1.

121 Appls 3321-3323 and 3344/67, *Denmark, Norway, Sweden and the Netherlands v. Greece*, Yearbook XI (1968), p. 690, and Appl. 4448/70, *Denmark, Norway and Sweden v. Greece*, Yearbook XIII (1970), p. 108.

122 Appls 9940-9944/82, *France, Norway, Denmark, Sweden and the Netherlands v. Turkey*, D&R 35 (1984), p. 143.

123 Res. 346 (1967), 'On the situation in Greece', Council of Europe, Cons. Ass., Nineteenth Ordinary Session, Second Part, 25-28 September 1967, *Texts Adopted*.

when there has been a violation against persons who are their nationals or with whom they have some other special link.

A case in which the applicant State's own nationals were involved occurred for the first time when Cyprus brought applications against Turkey concerning the treatment of nationals of Cyprus during the Turkish invasion and the subsequent occupation of that island.[124] In total three applications emanated from this dispute.[125] In November 1994 Cyprus lodged another complaint against Turkey. The Court found that several Articles of the Convention had been violated.[126]

Examples of applications concerning persons with whom the applicant State had a special relationship other than the link of nationality are the applications of Greece against the United Kingdom, which concerned the treatment of Cypriots of Greek origin.[127] Further, Austria lodged a complaint in the so-called *Pfunders* Case in connection with the prosecution of six young men by Italy for the murder of an Italian customs officer in the boundary region of Alto Adige (South Tyrol) disputed by both States.[128] Finally, the applications of Ireland against the United Kingdom concerned the treatment of, and the legislation concerning Roman Catholics in Northern Ireland, who aspire for union with the Irish Republic.[129]

1.12.4 REQUIREMENTS OF ADMISSIBILITY

In order for State complaints to be admissible hardly any *prima facie* evidence is required. The Commission deduced from the English text (alleged breach) and from the French wording (*qu'elle croira pouvoir être imputé*) that the mere allegation of such a breach was, in principle, sufficient under this provision (Article 24; the present Article 33).[130] The Commission based this point of view on the fact that the provisions of Article 27(2) [the present Article 34(3)] "empowering it to declare inadmissible any petition submitted under Article 25 [the present Article 34], which it considers either incompatible with the provisions of the Convention or "manifestly ill-founded" apply, according to their express terms, to individual applications under Article 25 [the present Article 34] only, and that, consequently, any examination of the merits of State applications must in such cases be entirely reserved for the post-admissibility stage".[131]

124 Appls 6780/74 and 6950/75, *Cyprus v. Turkey*, Yearbook XVIII (1975), p. 82.

125 See also: Appl. 8007/77, *Cyprus v. Turkey*, Yearbook XX (1977), p. 98.

126 Judgment of 10 May 2001, *Cyprus v. Turkey*.

127 Appls 176/56 and 299/57, *Greece v. the United Kingdom*, Yearbook II (1958-1959), pp. 182 and 186, respectively.

128 Appl. 788/60, *Austria v. Italy*, Yearbook IV (1961), p. 116.

129 Appls 5310/71 and 5451/72, *Ireland v. the United Kingdom*, Yearbook XV (1972), p. 76.

130 Appls 9940/82-9944/82, *France, Norway, Denmark, Sweden and the Netherlands v. Turkey*, D&R 35 (1984), p. 143 (161).

131 *Ibidem*.

On the other hand, the Commission was of the opinion that Article 27 [the present Article 35] did not exclude the application of the general rule according to which an application under Article 24 [the present Article 33] may be declared inadmissible if it is clear from the outset that it is wholly unsubstantiated or otherwise lacking the requirements of a genuine allegation in the sense of Article 24 [the present Article 33] of the Convention.[132]

The Commission held, on the other hand, that the rule requiring the exhaustion of domestic remedies applied not only to individual applications lodged under Article 34 but also to cases brought by States under Article 33 of the Convention.[133]

1.12.5 THE PRACTICE OF INTER-STATE COMPLAINTS

Up to January 2006 a total of 19 applications had been lodged by States. Even this very low number provides a distorted picture. In fact only six situations in different States have been put forward in Strasbourg by means of an inter-State application. In the 1950s Greece complained twice about the conduct of the United Kingdom in Cyprus; Austria filed a complaint in 1960 about the course of events during proceedings against South Tyrolean activists in Italy; the five applications of the Scandinavian countries and the Netherlands concerned the situation in Greece during the military regime; Ireland lodged two applications against the United Kingdom about the activities of the military and the police in Ulster; and all four applications of Cyprus were connected with the Turkish invasion of that island, while the five applications in 1982 all related to the situation in Turkey under the military regime.

Given the number of violations that have occurred during the more than 50 years that the Convention has been in force, it is evident that the right of complaint of States has not proved to be a very effective supervisory tool. The idea contained in the Preamble – as it was also formulated by the Commission in the *Pfunders* Case and by the Court in *Ireland v. the United Kingdom*, *viz.* that the Contracting States were to guarantee the protection of the rights and freedoms collectively – has hardly materialised. Save for two instances,[134] the Contracting States have not been willing to lodge complaints about situations in other States where no special interest of their own was involved. Such a step is generally considered to run counter to their interest in that charging another State with violating the Convention is bound to be considered an unfriendly act by the other party, with all the political repercussions that may be

132 *Ibidem*, p. 162.

133 Appl. 25781/94, *Cyprus v. Turkey*, D&R 86-B (1996), p. 104 (139).

134 The applications of the Scandinavian countries and the Netherlands against Greece in 1967 and 1970 and the applications of France, the Netherlands and the Scandinavian countries against Turkey in 1982.

involved. Moreover, an application by a State that does have a special interest of its own may create negative effects in that it may stir up the underlying conflict.

In comparison with inter-State applications individual complaints have the advantage that in general political considerations will not play as important a part.[135] For this reason as well it is of the utmost importance that individual complaints may now be lodged against all Contracting States. At the time when some Contracting States had not recognised the individual right of complaint, the inter-State procedure – apart from the remedy of Article 52, which so far has not functioned very adequately – was the only mechanism for supervising the observance by all Contracting States of their obligations under the Convention. That situation was far from satisfactory.

1.13 THE RIGHT OF COMPLAINT OF INDIVIDUALS

1.13.1 INTRODUCTION

Article 34 undoubtedly constitutes the most progressive provision of the Convention. It has removed the principal limitation by which the position of the individual in international law was traditionally characterised. One improvement as compared to the traditional practice of diplomatic protection, mentioned above, was brought about by the elimination of the condition of the link of nationality in the case of an action by a State. However, the individual right of complaint, despite its limitations, constituted an even greater improvement over the classic system. It is precisely because States are generally reluctant to submit an application against another State that the individual right of complaint constitutes a necessary expedient for achieving the aim of the Convention. to secure the rights and freedoms of individuals against the States.

The importance of the individual right of complaint for the functioning of the supervisory system under the European Convention becomes clear from the large number of individual applications that have been submitted. On 31 December 2005 a total of 201,072 applications had been registered, on 145,706 of which a decision had been taken with respect to admissibility. However, to put these figures within the right context, it should be pointed out that a great many cases were immediately declared inadmissible. Of the remaining cases, the majority were declared inadmissible after having been transmitted to the government concerned for its observations. In the course of the examination of the merits an additional number of cases were subsequently rejected. Only a total of 10,676 cases were ultimately declared admissible. It is significant that the annual number of provisional applications grew from 4,044

135 Here, too, political motives may sometimes constitute the real incentive for an application, while even if that is not the case, the application may have some political implications.

in 1988 to 41,516 in 2005, i.e. by some 1.026% over the full period. The annual number of registered applications grew from 1,013 in 1988 to 35,402 in 2003. Since the new Court commenced its activities in November 1998, its 'productivity' has significantly increased. In 1999 the Court rendered 4,251 decisions, while in 2005 this number increased to 28,648. The number of judgments in the same period increased from 177 to 1,105.[136]

1.13.2 WHO MAY LODGE A COMPLAINT?

Anyone who in a relevant respect is subject to the jurisdiction of a State Party and is allegedly a victim of a violation of the Convention by that State may lodge an application. The nationality of the applicant is irrelevant. This means that the right of complaint is conferred not only on the nationals of the State concerned, but also on those of other Contracting States, on the nationals of States which are not Parties to the Convention, and on stateless persons, provided that they satisfy the condition referred to in Article 1, *viz.* that they were subject to the jurisdiction of the respondent State at the moment the violation allegedly took place. Lack of legal capacity does not affect the natural person's right of complaint. In several cases the Court held thats minors have the right, of their own accord and without being represented by their guardians, to lodge a complaint.[137] In the *Scozzari and Giunta* Case the Court held that "In particular, minors can apply to the Court even, or indeed especially, if they are represented by a mother who is in conflict with the authorities and criticizes their decisions and conduct as not being consistent with the rights guaranteed by the Convention. Like the Commission, the Court considers that in the event of a conflict over a minor's interests between a natural parent and the person appointed by the authorities to act as the child's guardian, there is a danger that some of those interests will never be brought to the Court's attention and that the minor will be deprived of effective protection of his rights under the Convention. Consequently, as the Commission observed, even though the mother has been deprived of parental rights – indeed that is one of the causes of the dispute which she has referred to the Court – her standing as the natural mother suffices to afford her the necessary power to apply to the Court on the children's behalf, too, in order to protect their interests."[138] The same

136 See Council of Europe, *Survey of Activities and Statistics*, 2005.

137 See, *e.g.*, the judgment of 28 November 1988, *Nielsen*, para. 58.

138 Judgment of 13 July 2000, *Scozzari and Giuntay*, para. 138; judgment of 24 January 2002, *Covezzi and Morseli*, paras 103-105.

applies to persons who have lost their legal capacity after being committed to a psychiatric hospital.[139]

Besides individuals, non-governmental organisations and groups of persons may also file an application. With respect to the last-mentioned category the Commission decided during its first session that these must be groups which have been established in a regular way according to the law of one of the Contracting States. If that is not the case, the application must have been signed by all the persons belonging to the group.[140] As to the category of non-governmental organisations the Commission decided that they must be *private* organisations, and that municipalities, for instance, cannot be considered as such.[141] In the *Danderyds Kommun* Case the Court held in this respect that it is not only the central organs of the State that are clearly governmental organisations, as opposed to non-governmental organisations, but also decentralised authorities that exercise public functions, notwithstanding the extent of their autonomy vis-à-vis the central organs. This is the case even if the municipality is claiming that in this particular situation it is acting as a private organ.[142]

A wide range of organisations, such as newspapers,[143] churches and other religious institutions,[144] associations,[145] political parties[146] and companies[147] have submitted applications. Although the rights and freedoms laid down in the Convention apply to individuals as well as to non-governmental organisations, some of the rights and freedoms are by their nature not susceptible of being exercised by a legal person. Insofar as Article 9 is concerned, the Commission made a distinction between the freedom of conscience and the freedom of religion. In contrast to freedom of

139 Judgment of 24 October 1979, *Winterwerp*, para. 10; judgment of 21 February 1990, *Van der Leer*, para. 6; judgment of 24 September 1992, *Herczegfalvy*, para. 13; Decision of 15 June 1999, *Croke*; Decision of 16 March 2000, *Valle*.

140 See the report of the session: DH(54)3, p. 8.

141 Joined Appls 5767/72, 5922/72, 5929-5931/72, 5953-5957/72, 5984-5988/73 and 6011/73, *Austrian municipalities*, Yearbook XVII (1974), p. 338 (352); Appl. 15090/89, *Ayuntamiento M. v. Spain*, D&R 68 (1991), p. 209 (214); Appls 26114/95 and 26455/95, *Consejo General de Colegios Oficiales de Economistas de Espaòa*, D&R 82 (1995), p. 150.

142 Decision of 7 June 2001.

143 Judgment of 17 July 2001, *Association Ekin*, para. 38; Judgment of 11 July 2002, *Alithia Publishing Company*, para. 1.

144 Appl. 28626, *Christian Association Jehovah's Witnesses*; Judgment of 9 December 1994, *Holy Monasteries*, paras 48-49; judgment of 13 December 2001, *Metropolotan Church of Bessarabia*, para. 101.

145 Judgment of 2 July 2002, *Wilson, National Union of Journalists and Others*, para. 41.

146 Judgment of 8 December 1999, *Freedom and Democracy Party (Özdep)*; judgment of 31 July 2001, *Refah Partisi (Prosperity Party)*.

147 Judgment of 24 October 1986, *AGOSI*, para. 25; judgment of 7 July 1989, *Tre Traktörer AB*, para. 35.

religion,[148] freedom of conscience cannot be exercised by a legal person.[149] The right not to be subjected to degrading treatment and punishment can also not be exercised by a legal person[150] and the same holds good for respect to the right to education.[151] The Court and the Commission have also examined complaints brought by a trade union concerning collective aspects of trade union freedom[152] including strike action.[153]

In other cases, too, it was stressed that some of the rights and freedoms included in the Convention apply only to natural persons. In the Case of *X Union v. France* the Commission stated: "In the present case, the applicant union as a legal person does not itself claim to be the victim of an infringement of the right to free choice of residence guaranteed by Article 2 of Protocol No. 4, since the legislative restrictions in question are only applicable to natural persons. (...) It might however be considered that the application really emanates from the members of the union, which is empowered (...) to initiate proceedings on behalf of its members. (...) However, it is noted in this context that the petition does not mention any specific case of one or more teachers alleged to be subjected to a measure constituting an infringement."[154]

In the Case of *Asselbourg and 78 Others and Greenpeace Association* the Court held with regard to the association Greenpeace-Luxembourg, that a non-governmental organisation cannot claim to be the victim of an infringement of the right to respect for its "home", within the meaning of Article 8 of the Convention, merely because it has its registered office close to the steelworks that it is criticising, where the infringement of the right to respect for the home results, as alleged in this case, from nuisances or problems which can be encountered only by natural persons. In so far as Greenpeace-Luxembourg sought to rely on the difficulties suffered by its members or employees working or spending time at its registered office, the Court considered that the association may only act as a representative of its members or employees, in the same way as, for example, a lawyer represents his client, but cannot itself claim to be the victim of a violation of Article 8.[155]

Obviously, other rights or freedoms are clearly applicable to legal persons. In the Case of *A Association and H v. Austria*, lodged by a political party and its chairman/legal representative alleging violation of Article 11 because of the prohibition

148 Judgment of 13 December 2001, *Metropolitan Church of Bessarabia*, para 101; Appl. 27417/95, *Cha'are Shalom Ve Tsedek*, para 72.

149 Appl. 11921/86, *Verein Kontakt Information Therapie and Hagen*, D&R 57 (1988), p. 81 (88).

150 *Idem.*

151 Appl. 11533/85, *Ingrid Jordebo Foundation of Christian Schools and Ingrid Jordebo*, D&R 51 (1987), p. 125 (128).

152 Judgment of 27 October 1975, *National Union of Belgian Police*, paras 38-42; judgment of 6 February 1976, *Swedish Engine Drivers' Union*, paras 35-43; Decision of 27 June 2002, *Federation of Offshore Workers' Trade Union.*

153 Appl. 53574/99, *UNISON v. the United Kingdom.*

154 Appl. 9900/82, *X Union v. France*, D&R 32 (1983), p. 261 (264).

155 Decision of 29 June 1999, 29121/95, *Asselbourg and 78 Others and Greenpeace Association.*

of a meeting, the Commission held that, as the right invoked could be exercised by both the organiser of a meeting, even if it is a legal person as in the present case, and by individual participants, both applicants could claim to be victims of a violation of their rights under Article 11.[156]

1.13.3 THE VICTIM REQUIREMENT

1.13.3.1 General

Whereas States may complain about 'any alleged breach of the provisions of the Convention and the Protocols thereto by another High Contracting Party' (Article 33), and consequently also about national legislation or administrative practices *in abstracto*, individuals must claim 'to be the victim of a violation by one of the High Contracting Parties of the rights set forth in this Convention and the Protocols thereto' (Article 34). The special relationship required is that the individual applicant himself is the victim of the alleged violation.[157] He may not bring an *actio popularis*, nor may he submit abstract complaints.[158] The Commission held that the mere fact that trade unions considered themselves as guardians of the collective interests of their members, did not suffice to make them victims within the meaning of Article 34, of measures affecting those members.[159]

The Commission has, however, declared admissible individual applications which had a *partly* abstract character. Thus, a number of Northern Irishmen complained, on the one hand, about torture to which they had allegedly been subjected by the British during their detention, while they claimed, on the other hand, that this treatment formed part of "a systematic administrative pattern which permits and encourages brutality." They requested the Commission, *inter alia*, to conduct "a full investigation of the allegations made in the present application as well as of the system of interrogation currently employed by security forces under the control of the United Kingdom in Northern Ireland, for the purpose of determining whether or not such specific acts and administrative practices are incompatible with the European Convention for the Protection of Human Rights and Fundamental Freedoms."[160] The British Government submitted that the second part of the application was not

156 Appl. 9905/82, *A Association and H v. Austria*, D&R 36 (1984), p. 187 (191-192).

157 This question remains relevant throughout the examination of the application: Appl. 9320/81, *D. v. Federal Republic of Germany*, D&R 36 (1984), p. 24 (30-31).

158 Judgment of 6 September 1978, *Klass*, para. 33; judgment of 13 June 1979, *Marckx*, para. 27; Appl. 31924/96, *Di Lazzaro*, D&R 90, p. 134; judgment of 27 June 2000, *Ilhan*, para 52; decision of 6 November 2001, *Christian Federation of Jehova's Witnesses.*

159 Appl. 15404/89, *Purcell*, D&R 70 (1991), p. 262 (273); Appl. 24581/94, *Greek Federation of Custom Officers, Gialouris and Others*, D&R 81, p. 123.

160 Appls 5577-5583/72, *Donnelly*, Yearbook XVI (1973), p. 212 (216).

admissible and referred to the case law of the Commission with respect to abstract complaints. The Commission held, however, that "neither Article 25[the present Article 34], nor any other provisions in the Convention, *inter alia* Article 27(1)(b)[the present Article 35(2)(b)], prevent an individual applicant from raising before the Commission a complaint in respect of an alleged administrative practice in breach of the Convention provided that he brings *prima facie* evidence of such a practice and of his being a victim of it."[161]

An individual application may, therefore, be concerned not only with the personal interest of the applicant, but also with the public interest. Consequently, the procedure that originates from an individual complaint may in some respects also assume an objective character. Thus the Commission adopted the view that, on the ground of the general function assigned to it in Article 19 [old] 'to ensure the observance of the engagements undertaken by the High Contracting Parties in the present Convention', it was competent to examine *ex officio*, also in case of an application by an individual, whether there had been a violation. It did not need to confine itself to an examination of the violations expressly alleged by the applicant.[162]

Another implication of this objective character was manifested in the Commission's view that, when an applicant withdraws his application or no longer shows any interest in the case, the procedure does not necessarily come to an end, but might be pursued in the public interest. Thus, in its decision in the *Gericke* Case, the Commission expressly held "that the interests served by the protection of human rights and fundamental freedoms guaranteed by the Convention extend beyond the individual interests of the persons concerned; (...) whereas, consequently, the withdrawal of an application and the respondent Government's agreement thereto cannot deprive the Commission of the competence to pursue its examination of the case."[163]

For his application to be admissible the applicant is not required to *prove* that he is the victim of the alleged violation. Article 34 only provides that the applicant must be a person 'claiming to be the victim' (*qui se prétend victime*).[164] However, this does not mean that the mere submission of the applicant that he is a victim, is in itself sufficient. The test is whether, assuming that the alleged violation has taken place, it is

161 *Ibidem*, p. 260. In the second instance, via application of Art. 29 [the present Article 35(4)], the said complaints were declared inadmissible, because of non-exhaustion of domestic remedies: Yearbook XIX (1976), p. 82 (252-254).

162 See, *e.g.*, Appl. 202/56, *X v. Belgium*, Yearbook I (1955-1957), p. 190 (192) and the joined Appls 7604/76, 7719/76 and 7781/77, *Foti, Lentini* and *Cenerini v. Italy*, D&R 14 (1979), p. 133 (143).

163 Appl. 2294/64, Yearbook VIII (1965), p. 314 (320). See also Appl. 2686/65, *Heinz Kornmann v. Federal Republic of Germany*, Yearbook IX (1966), p. 494 (506-508).

164 An amendment to replace these words by 'which has been the victim', tabled at the Consultative Assembly, was withdrawn after discussion, because it was recognised that this was a 'right to complain from the point of view of procedure' and not a 'substantial right of action': Council of Europe, Cons. Ass., First Session, Fourth Part, *Reports*, 1949, pp. 1272-1274.

to be deemed plausible that the applicant is a victim, on the basis of the facts submitted by the applicant and the facts, if any, advanced against them by the defendant State. If this is not the case, the application is declared 'incompatible with the provisions of the present Convention' and, on the ground of Article 27(2) [the present Article 35(2)], pronounced inadmissible.[165] On the other hand, even if the applicant does not expressly submit that he is the victim of the challenged act or omission, the application may still be declared admissible if there appears to be sufficient ground for this.[166]

In the *Gayduk* Case the applicants alleged a violation of Article 1 of Protocol I. However, the Court held that it did not appear from the material in the case file that any of them had sought to exercise a property right. On the contrary, some of the applicants had stated that they had no need of the initial deposits and had emphasised that the main purpose of their applications was to recover the indexed amounts. In these circumstances, and in so far as the applications concerned repayment of the deposits themselves, the Court found that the applicants could not claim to have standing as "victims" within the meaning of Article 34 of the Convention.[167]

In the *Lacko* Case the applicants complained that by publicly and formally referring to certain persons as *Roma*, i.e. their ethnic identity, by singling out such persons for special treatment, by prohibiting them from entering and settling in the respective municipalities and by publicly threatening to enforce such exclusion orders through physical expulsion the Slovakian authorities discriminated against them on the grounds of their race and ethnicity in a manner which constituted degrading treatment. The Court noted that the third applicant had not alleged that he lived or intended to live in the settlements and it did not appear from the documents submitted that he needed to visit those municipalities and was prevented from doing so. In these circumstances, the Court considered that the third applicant could not claim to be a victim of a violation of his rights under Article 2 of Protocol No. 4, taken alone or in conjunction with Article 14 of the Convention. As regards the first and the second applicant the Court recalled that a decision or measure favourable to the applicant is not in principle sufficient to deprive the applicant of his or her status as a 'victim' unless the national authorities have acknowledged, either expressly or in substance, and then afforded

165 See, *e.g.*, Appl. 1983/63, *X v. the Netherlands*, Yearbook IX (1966), p. 286 (304). In a few cases the Commission declared the application 'manifestly ill-founded' because in its view the applicant could not be regarded as a victim: see, *e.g.*, Appl. 2291/64, *X v. Austria*, Coll. 24 (1967), p. 20 (33 and 35); and Appl. 4653/70, *X v. Federal Republic of Germany*, Yearbook XVII (1974), p. 148 (178). This also leads to a declaration of inadmissibility, but the ground was indicated wrongly here, since the question of whether the application is well-founded depends on whether there has been a violation of the Convention, not on the question of the effect of such a violation, if any, for the applicant. See also the decision of 25 November 1999, *Očić*, where the Court observed that there was no sufficiently direct connection between the applicant as such and the injury he maintained he suffered as a result of the alleged breach of the Convention.

166 See, *e.g.*, Appl. 99/55, *X v. Federal Republic of Germany*, Yearbook I (1955-1957), p. 160 (161).

167 Decision of 2 July 2002.

redress for, the breach of the Convention. In the present case the resolutions in question were quashed by unanimous vote of the municipal councils concerned. In the Court's view these actions, considered as a whole, could be qualified as acknowledgement by the Slovakian authorities, at least in substance, of a violation of the rights of the *Romani* families affected by the municipal resolutions in question including the first and the second applicant. Having regard to the particular circumstances of the case, the Court was satisfied that in doing so the domestic authorities provided the first and the second applicant with adequate redress for the breach of their rights under Article 2 of Protocol No. 4 and under Article 14 of the Convention which they alleged before the Court. In this respect they could, therefore, no longer claim to be victims within the meaning of Article 34 of the Convention.[168]

1.13.3.2 Personally affected

The requirement of "victim" implies that the violation of the Convention must have *affected* the applicant in some way. According to the Court's well-established case law "the word 'victim' in Article 34 refers to the person directly affected by the act or omission at issue."[169] To this the Court usually adds, however, a phrase of the sort that "the existence of a violation being conceivable even in the absence of prejudice; prejudice is relevant only in the context of Article 41."[170] In the *Gayduk* Case the Court held that the issue of whether of an applicant may claim to be a 'victim' within the meaning of Article 34 of the Convention does not turn on the substance or content of the right in issue, but solely on the question of whether it is linked to the person who relies on it.[171]

The requirement that the applicant be *personally* affected by the alleged violation was stressed by the Commission right from the beginning. Thus, an application in which it was submitted that the Norwegian legislation concerning *abortus provocatus* conflicted with Article 2(1) of the Convention, was declared inadmissible because of the fact that the applicant had not alleged that he himself was the victim of this legislation, but had lodged his application on behalf of parents who without their own consent or knowledge (...) have or will have their offspring taken away by abortus provocatus, and on behalf of those taken away by such operations "all unfit or unable to plead on their own behalf."[172]

168 Decision of 2 July 2002.

169 Judgment of 15 June 1992, *Lüdi*, para. 34. See also the judgment of 28 March 1990, *Groppera Radio AG*, para. 47; judgment of 25 September 1996, *Buckley*, paras 56-59; judgment of 23 March 1999, *Valmont*; Decision of 6 April 2004, *Skubenko*.

170 Judgment of 27 June 2000, *İlhan*, para. 52.

171 Decision of 2 July 2002.

172 Appl. 867/60, *X v. Norway*, Yearbook IV (1961), p. 270 (276).

In an almost identical case an Austrian applicant submitted that the abortion legislation of his country conflicted with Articles 2 and 8 of the Convention. His application was also not admitted, because the Commission held that it was "not competent to examine *in abstracto* its [the disputed legislation's] compatibility with the Convention." According to the Commission the applicant had meant to bring an *actio popularis*. He had submitted that the legislation in question actually concerned every Austrian citizen "because of its effects for the future of the nation and for the moral and legal standard of the nation", and had declared himself willing "to be nominated curator to act on behalf of the unborn in general".[173]

A somewhat divergent view was taken by the Commission in some other decisions concerning cases in which abortion legislation was involved. A German Act of 1974, which removed penalties for abortion, had been declared by the *Bundesverfassungsgericht* to conflict with the German Constitution. A regulation concerning abortion was subsequently enacted which met the requirement laid down in this judicial decision and was incorporated into a new Act of 1976. With respect to the judgment of the *Bundesverfassungsgericht* and its consequences, an application was lodged on the ground of alleged violation of Article 8 of the Convention by an organisation, a man and two women. The application of the organisation was declared inadmissible by the Commission, which was fully in line with its decision in the above-mentioned Norwegian case, because it did not concern a physical, but a legal person; the abortion legislation could not be applicable to the organisation, and the latter could not, therefore, itself be considered the victim. The same also applied to the application of the man; the law had not been applied to him and according to the Commission he had not proved at all that the mere existence of the law had injured him to such an extent that he could claim to be the victim of a violation of the Convention.[174] However, the Commission here seemed to leave open the possibility that the bare existence of abortion legislation would injure a man to such an extent that he must be considered its victim.

This impression is corroborated by the decision of the Commission with respect to the two women. According to their submissions they themselves were not pregnant nor had an interruption of pregnancy been refused to them, and they had not been prosecuted for illegal abortion either. However, they were of the opinion that the Convention had been violated with regard to themselves because in consequence of the legislation in question they were obliged to either abstain from sexual relations or use contraceptives of which they disapproved for several reasons, including health,

173 Appl. 7045/75, *X v. Austria*, D&R 7 (1977), p. 87 (88). See also Appl. 7806/77, *Webster v. the United Kingdom*, D&R 12 (1978), p. 168 (174).

174 Report of 12 July 1977, *Brüggemann and Scheuten v. Federal Republic of Germany*, D&R 10 (1978), p. 100 (117-118).

or become pregnant against their will. The Commission recognised that both women were victims in the sense of Article 25 [the present Article 34] on the following ground: "The Commission considers that pregnancy and the interruption of pregnancy are part of private life and also in certain circumstances of family life. It further considers that respect for private life comprises also, to a certain degree, the right to establish and develop relationships with other human beings, especially in the emotional field, for the development and fulfilment of one's own personality (...) and that therefore sexual life is also part of private life; and in particular that legal regulation of abortion is an intervention in private life which may or may not be justified under Article 8(2)."[175]

The Commission thus took the position that a legal regulation of abortion constituted an interference with private life and under certain circumstances with family life as well, which might or might not be justified on the ground of Article 8(2). Women may allege to be the victims of that regulation even if it has not actually been enforced against them. The consideration quoted above is formulated in very general terms and leaves scope for the interpretation that in certain cases men may also be considered victims because of the mere existence of abortion legislation. As said before, the application of the man was not admitted, because the victim-requirement was not satisfied as he had lodged his application in his capacity as chairman of the above-mentioned organisation. The decision, therefore, does not exclude that a man's application be declared admissible if he complains about abortion legislation in his capacity as a husband or partner. In a case in 1980 the Commission confirmed this interpretation. There the applicant challenged the English legislation under which his wife had undergone *abortus provocatus*. According to the Commission the requirement of Article 25 [the present Article 34] had been satisfied on the simple consideration that "the applicant, as potential father, was so closely affected by the termination of his wife's pregnancy that he may claim to be a victim."[176]

In a case where a journalist and two newspapers alleged violation of their right to receive and impart information as a result of a ruling by the House of Lords that a lawyer had acted in contempt of court because she had allowed inspection of confidential documents by the journalist after these had been read out in the course of a public hearing, the Commission took a more restrictive position. It declared the application inadmissible because it did "not consider that the concept of 'victim' in Article 25(1) [the present Article 34] may be interpreted so broadly, in the present case, as to encompass every newspaper or journalist in the United Kingdom who might

[175] Appl. 6959/75, *Brüggemann and Scheuten*, D&R 5 (1976), p. 103 (115).

[176] Appl. 8416/78, *X v. the United Kingdom*, D&R 19 (1980), p. 244 (248). See also Appl. 17004/90, *Hercz*, D&R 73 (1992), p. 155 (166).

conceivably be affected by the decision of the House of Lords. The form of detriment required must be of a less indirect and remote nature."[177]

This decision would seem to deviate from the Commission's above-mentioned case law, as the ruling by the House of Lords clearly implied a restraint for the applicants. Furthermore, the reasoning upon which it was based is not very convincing. The argument that the applicants remained free to publish articles on the disputed subject overlooked that not only the right to impart but also the right to receive information was invoked. Similarly, the fact that the decision of the House of Lords was, according to the Commission, "one which affected every interested journalist in the United Kingdom", does not justify the conclusion that, therefore, the applicants cannot be considered victims within the meaning of Article 34. In fact, a year later, in a case where the applicants, an editor of a newspaper and a journalist, complained that the law of contempt of court prevented the preparation of a newspaper article on a case which was *sub judice*, the Commission considered that in view of the applicants' professional activities, the applicants might be directly affected by the Contempt of Court Act 1981 and, therefore, might claim to be victims in respect of this legislation.[178]

1.13.3.3 Potential victim

The Commission and the Court have accepted as victims in the sense of Article 34 a category of persons of whom it could not be ascertained with certainty that they had suffered an injury. The reason for this acceptance was due to the fact that the applicants could not know whether the challenged legislation had or had not been applied to them. This matter came up in the *Klass* Case.[179] Three lawyers, a judge and a public prosecutor alleged violation of the secrecy of their mail and telecommunications by the authorities. The measures concerned were secret insofar that the persons in question were not informed of them in all cases, and if they were informed, then only afterwards. The Commission settled the matter of the victim-requirement in a brief consideration, stressing the secret character of the measures and concluding as follows: "In view of this particularity of the case the applicants have to be considered as victims for purposes of Article 25."[180]

The Court dealt with the matter much more in detail. It stated at the outset that according to Article 25 [the present Article 34] individuals in principle may neither

[177] Appl. 10039/82, *Leigh and Others*, D&R 38 (1984), p. 74 (78).

[178] Appl. 10243/83, *Times Newspapers Ltd, Giles, Knightly and Potter v. the United Kingdom*, D&R 41 (1985), p. 123 (130).

[179] For the examination of the merits, see *infra* 10.4.6.6.

[180] Appl. 5029/71, *Klass v. Federal Republic of Germany*, Yearbook XVII (1974), p. 178 (208).

bring an *actio popularis* nor complain about legislation *in abstracto*.[181] The principle of effectiveness (*l'effet utile*), however, according to the Court, calls for exceptions to this rule. This principle implies that the procedural provisions of the Convention are to be applied in such a way as to contribute to the effectiveness of the system of individual applications. All this induced the Court to conclude that "an individual may, *under certain conditions*, claim to be the victim of a violation occasioned by the mere existence of secret measures or of legislation permitting secret measures, without having to allege that such measures were in fact applied to him. "[182] Such conditions were satisfied in the case under consideration since "the contested legislation institutes a system of surveillance under which all persons in the Federal Republic of Germany can potentially have their mail, post and telecommunications monitored, without their even knowing this unless there has been either some indiscretion or subsequent notification."[183]

This may be summarised to imply that in case of the existence of secret measures (whether based on legislation or not) the victim-requirement under Article 34 may already be satisfied when the applicant is a *potential* victim. A comparable line of reasoning was followed by the Commission in the *Malone* Case, in which it found that the "applicant is directly affected by the law and practice in England and Wales (...) under which the secret surveillance of postal and telephone communications on behalf of the police is permitted and takes place. His communication has at all relevant times been liable to such surveillance without his being able to obtain knowledge of it. Accordingly (...) he is entitled to claim (...) to be a victim (...) irrespective of whether or to what extent he is able to show that it has actually been applied to him."[184]

The reasoning of the Court in the *Klass* Case was relied upon by two mothers who submitted, on behalf of their children, violation of Article 3 of the Convention on the ground of the existence of a system of corporal punishment at the schools in Scotland attended by their children. According to the Commission there was no direct analogy with the *Klass* Case, but it did refer to the criterion of effectiveness relied upon by the Court in that case and held as follows: "that in order to be accepted as victims under Article 25 [the present Article 34] of the Convention, individuals must satisfy the Commission that they run the risk of being directly affected by the particular matter

181 Judgment of 6 September 1978, para. 33. On this see also the judgment of 4 May 2000, *Rotaru*, para 35; Decision of 23 May 2002, *Segi and Others*; decision of 6 November 2001, *Christian Federation of Jehova's Witnesses.*

182 Judgment of 6 September 1978, para. 34.

183 *Ibidem*, para. 37

184 Report of 17 December 1982, para. 114. See also the report of 9 May 1989, *Hewitt and Harman v. the United Kingdom*, D&R 67 (1991), p. 89 (98); Appl. 10799/84, *Radio X, S, W & A v. Switzerland*, D&R 37 (1984), p. 236 (239).

which they wish to bring before it."[185] Thus, here again, the mere fact of running a risk was deemed sufficient to be considered as 'victims'. According to the Commission it would be too restrictive an interpretation of Article 25 [the present Article 34] to require that the children had in actual fact been subjected to corporal punishment. It, therefore, considered the children as victims because they "may be affected by the existence of physical violence around them and by the threat of a potential use on themselves of corporal punishment."[186]

Shortly afterwards, in the *Marckx* Case, the Court adopted the same approach by express reference to the *Klass* Case. In the *Marckx* Case it had been advanced that the Belgian legislation concerning illegitimate children conflicted with the Convention. The Belgian Government submitted that this was in reality an abstract complaint, since the challenged legislation had not been applied to the applicant. The Court held that: "Article 25 [the present Article 34] of the Convention entitles individuals to contend that a law violates their rights by itself, in the absence of an individual measure of implementation, if they run the risk of being directly affected by it."[187] This was considered to be the case here. According to the Court the question of whether the applicant has actually been placed in an unfavourable position is not a criterion of the victim-requirement: "the question of prejudice is not a matter for Article 25 [the present Article 34] which, in its use of the word 'victim', denotes 'the person directly affected by the act or omission which is in issue'."[188]

In the *Dudgeon* Case, and later in the *Norris* Case and the *Modinos* Case, the applicants complained about the existence of laws which had the effect of making certain homosexual acts, between consenting adult males, criminal offences. The Court held that "in the personal circumstances of the applicant, the very existence of this legislation continuously and directly affects his private life."[189]

In the *Rekvéni* Case a police officer complained about a constitutional prohibition preventing members of the police force from joining political parties or engaging in

185 Report of 16 May 1980, *Campbell and Cosans*, B.42 (1985), p. 36. However, in a case where a mother and her son complained about the existence of corporal punishment for breach of school discipline the Commission held that having failed to inquire about the disciplinary methods when she put her child in a private school, a mother cannot claim to be a victim, direct or indirect, of a violation of the rights guaranteed in the Convention in respect of corporal punishment inflicted on the child for a breach of school discipline; Appl. 13134/87, *Costello-Roberts v. the United Kingdom*, D&R 67 (1991), p. 216 (224).

186 *Ibidem*, pp. 36-37. The Court in its judgment of 25 February 1982 did not deal with this question, as it had concluded that Art. 3 of the Convention had not been violated, (para. 31). See also the judgment of 29 October 1992, *Open Door and Dublin Well Woman*, para. 44; decision of 18 January 2000, *Association Ekin;* Decision of 19 February 2002, *Rosca Stanescu and Ardeleanu.*

187 Judgment of 13 June 1979, para. 27.

188 *Ibidem.*

189 Judgment of 22 October 1981, para. 41; judgment of 26 October 1988, paras 31-34; judgment of 22 April 1993, para. 24. See also the judgment of 19 February 1998, *Bowman*, para. 29; decision of 22 November 2001, *S.L. v. Austria*; decision of 19 February 2002, *Bland.*

political activities. The Government submitted that the applicant had failed to specify the political activities which he felt he was prevented from pursuing. In their view the applicant had thus failed to substantiate his complaint for the purposes of admissibility. In these circumstances the Government raised the question of whether the applicant could claim to be a victim of any breach of his Convention rights, within the meaning of Article 25 [the present Article 34] of the Convention. The Commission held that it was true that, notwithstanding the impugned provision of the Constitution, in the relevant period the applicant was not completely prevented from engaging in political activities. There was no indication that he could not nominate a third person as a candidate for the elections by submitting his nomination coupon. Moreover, he was free to accept a nomination as a candidate for the elections on condition that, if elected, he would resign from any position incompatible with his mandate. Furthermore, neither the impugned constitutional prohibition nor the other relevant laws entailed any formal sanction for illegitimate political activities potentially assumed by the applicant. However, the Commission, having regard to the limited nature of these possibilities to articulate political preferences and, in particular, to the circular letters issued by the Head of the National Police, considered that the applicant could be reasonably concerned by the consequences of his expression of political views. In these circumstances the Commission found that the applicant could claim to be a victim within the meaning of Article 34 of the Convention.[190]

In the *Segi* Case the applicant organisations complained that they had been described by the fifteen member States of the European Union as terrorist organisations. The applications concerned the ways in which the applicants were affected, allegedly in a manner incompatible with certain rights guaranteed by the Convention, by Common Position 2001/930/CFSP on combating terrorism and Common Position 2001/931/CFSP on the application of specific measures to combat terrorism, both adopted by the Council of the European Union on 27 December 2001. The applicants claimed to be both direct and potential victims of the texts concerned. The Court noted that the two common positions were adopted in the context of implementation of the CFSP by the member States of the European Union and consequently came within the field of intergovernmental cooperation. With regard, firstly, to Common Position 2001/930/CFSP, the Court observed that this contains measures of principle to be taken by the European Union and its member States to combat terrorism. To that end Article 14 recommended that member States became parties as soon as possible to the international conventions and protocols relating to terrorism listed in an annex. The Court noted that this common position was not directly applicable in the member States and could not form the direct basis for any criminal or administrative proceedings against individuals, especially as it did not mention any particular organisation or person. As such, therefore, it does not give rise to legally binding obligations for the applicants. The mere fact that the names of two of the applicants (*Segi* and *Gestoras Pro-Amnistía*) appeared in the list referred to in that provision as "groups or entities involved in terrorist acts" might be embarrassing, but the link was much too tenuous to justify application of the Convention. Consequently, the Court considered that the situation complained of did not give the applicant associations, and *a fortiori* their spokespersons, the status of victims of a violation of the Convention within the meaning of Article 34 of the Convention.[191]

In the Case of *The Christian Federation of Jehova's Witnesses* the Court pointed out that the applicant association complained of a series of hostile reactions to Jehovah's Witnesses (a press campaign, the establishment of civic action groups, the holding of public debates on sects, etc.) and measures such as judicial or administrative decisions allegedly affecting certain Jehovah's Witnesses individually or associations of Jehovah's Witnesses. The Court held that, even supposing that the applicant association could claim to be directly affected by the measures in question, as the federal body of all Jehovah's Witnesses with responsibility for protecting their interests, some of the measures were not based on the report complained of and, where reference was made to the report, it was merely a passing mention which could not in any way be regarded as the reason for taking the measures. The Court noted, moreover, that a parliamentary report had no legal effect and could not serve as the basis for any criminal or administrative proceedings. As to the Law of 12 June 2001, the Court noted that its aim, as its title indicated, is to strengthen preventive and punitive action against sectarian movements infringing human rights and fundamental freedoms. The Court held, furthermore, that the impugned law provided for the possibility of dissolving sects, a term which it did not define, but that such a measure could be ordered only by the courts when certain conditions were satisfied, in particular where there had been final convictions of the sect concerned or of those in control of it for one or more of an exhaustively listed set of offences – a situation in which the applicant association should not normally have any reason to fear finding itself. Impugning Parliament's motives for passing this legislation, when it was concerned to settle a burning social issue, did not amount to proof that the applicant association was likely to run any risk. Moreover, it would be inconsistent for the latter to rely on the fact that it was not a movement that infringed freedoms and at the same time to claim that it is, at least potentially, a victim of the application that might be made of the law concerned. It followed that the applicant association could not claim to be a victim within the meaning of Article 34 of the Convention.[192]

[190] Appl. 25390/94, *Rekvényi v. Hungary*, D&R 89 (1997), p. 47 (51-52).

[191] Decision of 23 May 2002, *Segi and Others*.

[192] Decision of 6 November 2001.

1.13.3.4 Future victim

The question of whether applicants having a *future* interest may also be considered victims in the sense of Article 34 was avoided by the Commission in a case concerning Article 2 of Protocol No. 1. In this case forty mothers claimed that, in consequence of an Act on pre-school education promulgated in Sweden on 21 December 1973, they had been deprived of the right to send their children to the school of their choice. As to the admissibility of their application, the Commission divided the mothers into three groups. The mothers from the first group could not be regarded as victims, because their children had passed the pre-school age at the moment of the Act's effective date. The second group consisted of mothers whose children had not yet reached pre-school age at that moment. With respect to this group the Commission held as follows: "The Commission understands that these applicants consider themselves to be victims of a violation of the Convention in that the Act on Pre-School Activities may affect them in the future. The Commission notes that the children of these applicants in some cases might have reached pre-school age in the course of proceedings before the Commission. However, having regard to the fact that the applicants in Group 3 [the mothers of children that had pre-school age at the moment referred to] can be considered to be victims within the meaning of Article 25 [the present Article 34] of the Convention for the purpose of the present application, the Commission can abstain from examining as to whether the applicants in Group 2 also can be so considered."[193]

From an earlier decision of the Commission in a similar case, however, one may infer that the Commission was indeed prepared to recognise a future interest in certain cases. In that case two parents complained about legal and administrative measures concerning sexual instruction at primary schools. The measures were not yet applicable to their school-age daughter. Nevertheless, the Commission admitted their application. Curiously enough, however, it did not mention the victim-requirement at all.[194] The admissibility of the application may have been justified on the ground that in cases like this one, the alleged violation – in this case the application of the said measures to the child – would certainly take place in the near future. It is particularly in cases where the interests of the applicant would otherwise be irreparably prejudiced, that admissibility ensues imperatively from the purpose of the legal protection envisaged by the Convention and the requirement of effectiveness.[195]

In the *Kirkwood* Case such a situation was at stake. The case concerned a man who complained that his envisaged extradition from the United Kingdom to California would amount to inhuman and degrading treatment contrary to Article 3 of the

193 Appl. 6853/74, *40 Mothers v. Sweden*, Yearbook XX (1977), p. 214 (236).
194 Appl. 5095/71, *V. and A. Kjeldsen v. Denmark*, Yearbook XV (1972), pp. 482-502.
195 Decision of 23 May 2002, *Segi and Others*.

Convention since, if extradited, he would be tried for two accusations of murder and one of attempt to murder, and would very probably be sentenced to death. He argued that the circumstances surrounding the implementation of such a death penalty would constitute inhuman and degrading treatment. He referred in particular to the 'death row' phenomenon of excessive delay due to a prolonged appeal procedure which might last several years, during which he would be gripped with uncertainty as to the outcome of his appeal and, therefore, as to his fate. The Commission held as follows with respect to the victim-requirement: "In these circumstances, faced with an imminent act of the executive, the consequences of which for the applicant will allegedly expose him to Article 3 treatment, the Commission finds that the applicant is able to claim to be a victim of an alleged violation of Article 3."[196]

In several cases where a decision had been taken to expel a person to a country where he claimed he risked being treated contrary to Article 3, the Commission has held that a person who is about to be subjected to a violation of the Convention may claim to be a victim.[197] If, however, the order to leave the territory of the State concerned is not enforceable, the person concerned may not yet claim to be a victim. Only the notification of an expulsion order to him, with reference to the country of destination, can confer on him the status of victim, provided that domestic remedies have been exhausted. Thus, in the *Vijayanthan and Pusparajah* Case the Court made a distinction between, on the one hand, the *Soering* Case, where the Home Secretary had signed the warrant for the applicant's extradition, and that of *Vilvarajah*, where the deportation of the applicants to Sri Lanka had taken place during the proceedings before the Commission and, on the other hand, that of *Vijayanthand and Pusparajah*. In respect of the latter case, the Court found that, despite the direction to leave French territory, not enforceable in itself, and the rejection of their application for exceptional leave to remain, no expulsion order had been made with respect to the applicants. If the Commissioner of Police were to decide that they should be removed, the appeal provided for in French law would be open to the applicants, with all its attendant safeguards, but at the moment here at issue such an appeal would probably have been declared inadmissible as premature or devoid of purpose by the competent court. The applicants could not, as matters stood, claim 'to be the victim(s) of a violation' within the meaning of Article 25(1) [the present Article 34].[198]

In a case where the applicants complained about the decision of the French President to resume nuclear testing on Mururoa and Fangataufa atolls in French Polynesia, which allegedly violated their rights under Articles 2, 3 and 8 of the Convention and Article 1 of Protocol No. 1, the Commission found the consequences, if any, of the

196 Appl. 10479/83, D&R 37 (1984), p. 158 (182).
197 Appl. 17262/90, *A. v. France*, D&R 68 (1991), p. 319 (334); Appls 17550/90 and 17825/91, *V. and P. v. France*, D&R 70 (1991), p. 298 (314); Appl. 19373/92, *Voulfovitch and Oulianova*, D&R 74 (1993), p. 199 (207).
198 Judgment of 27 August 1992, para. 46.

resumption of the tests at issue too remote to affect the applicants' personal situation directly. Therefore, they could not claim to be a victim under Article 25 [the present Article 34].[199] In a case where the complaint concerned restrictions on the exercise of the right of ownership the Commission held that the only subject of the proceedings was whether or not a particular prefectoral order was lawful. The Commission recalled that is was only in highly exceptional circumstances that an applicant may claim to be a victim of a violation of the Convention owing to the risk of a future violation. An example of this would be a piece of legislation which, while not having been applied to the applicant personally, subjects him to the risk of being directly affected in specific circumstances of his life. In the instant case the Commission noted that the applicants, taken individually, had not submitted any evidence in support of their allegations, such as their title-deeds to property or documents relating to the consequences or losses they had allegedly suffered as a result of the implementation of the prefectoral order.[200]

In the Case of *Asselbourg and 78 Others and Greenpeace Association* the Court considered that the mere mention of the pollution risks inherent in the production of steel from scrap iron was not enough to justify the applicants' assertion that they were the victims of a violation of the Convention. They should be able to assert, arguably and in a detailed manner, that for lack of adequate precautions taken by the authorities the degree of probability of the occurrence of damage was such that it could be considered to constitute a violation, on condition that the consequences of the act complained of were not too remote. In the Court's opinion it was not evident from the file that the conditions of operation imposed by the Luxembourg authorities and in particular the norms dealing with the discharge of air-polluting wastes were so inadequate as to constitute a serious infringement of the principle of precaution.[201]

1.13.3.5 Indirect victim

It is conceivable that an individual may experience a personal injury owing to a violation of the Convention against another person. Under certain circumstances, therefore, an individual may lodge an application on his own account concerning a violation of the Convention against another person, without the applicant himself having directly suffered a violation of one of his rights or freedoms. In such a case the applicant must have so close a link with the direct victim of the violation that he himself is also to be considered a victim. On that basis the Commission developed in its case law the concept of 'indirect victim', meaning that a near relative of the victim or certain other third parties can refer the matter to the Commission on their own

199 Appl. 28204/95, *Tauira and 18 Others v. the United Kingdom*, D&R 83 (1995), p. 112 (131-133). See also decision of 6 November 2001, *Christian Federation of Jehova's Witnesses*.

200 Appl. 38912/97, *Association des Amis de Saint Raphaël et de Fréjus and Others*, D&R 94 (1998), p. 124 (132).

201 Decision of 29 June 1999.

initiative insofar as the violation concerned is (also) prejudicial to them or insofar as they have a personal interest in the termination of that violation.[202] Thus, a spouse was considered a victim in view of the fact that she had suffered financial and moral injury in consequence of a violation of the Convention committed against her husband.[203] Another applicant was regarded as an indirect victim because he had submitted that his twin brother had wrongfully been detained in a State institution, in which he had later died.[204] That a purely non-material interest is sufficient for the admissibility of the action of an applicant as the indirect victim becomes evident, for example, from the decision by the Commission that a complaint of a mother about the treatment of her detained son was admissible.[205] And in the Case of *X, Cabales and Balkandali* the Commission held: "When the alleged violation concerns a refusal of a leave to remain or an entry clearance, the spouse of the individual concerned can claim to be a victim, even if the individual concerned is in fact staying with her, but unlawfully and under constant threat of deportation."[206]

The father of a hostage-taker killed by special police was considered as an indirect victim of an alleged violation of Article 2. The same applied to the deceased's sister, notwithstanding the fact that under national law the deceased's children, who where not among the applicants, were his heirs.[207] On the other hand, an applicant was not admitted who submitted that his sisters had wrongfully failed to receive compensation for their sufferings during the Nazi regime and who now claimed this as yet in his own name. This compensation related only to the sufferings of the sisters, not to those of the applicant, so that the latter could not be considered as a victim himself.[208] In the Case of *Becker v. Denmark* a German journalist, who was director of a body called Project Children's Protection & Security International, challenged the repatriation of 199 Vietnamese children, proposed by the Danish Government, as contrary to Art. 3 of the Convention. It was held that he was not a direct victim but considered to be an indirect victim because the children depended on him and he had been entrusted with at least the care of the children by the Vietnamese authorities on behalf of their parents.[209] And in the Case of *D v. Federal Republic of Germany* the Commission held: "The answer to this question (whether an applicant could claim to be a victim) depended largely on the legal interest which the applicant has in a determina-

202 Appl. 100/55, *X v. Federal Republic of Germany*, Yearbook I (1955-1957), p. 162 (162-163); decision of 26 January 1999, *Hibbert*; decision of 22 June 1999, *Çelikbilek*.

203 Appl. 1478/62, *Y v. Belgium*, Yearbook VI (1963), p. 590 (620).

204 Appl. 7467/76, *X v. Belgium*, D&R 8 (1978), p. 220 (221).

205 Appl. 898/60, *Y v.* Austria, Coll. 8 (1962), p. 136.

206 Appls 9214/80, 9473/81 and 9474/81, *X, Cabales and Balkandali v. the United Kingdom*, D&R 29 (1982), p. 176 (182).

207 Appl. 25952/94, *Andronicou Constantinou v. Cyprus*, D&R 85-A (1996), p. 102.

208 Appl. 113/55, *X v. Federal Republic of Germany*, Yearbook I (1955-1957), p. 161 (162). See also Appl. 9639/82, *B., R. and J. v. Federal Republic of Germany*, D&R 36 (1984), p. 139.

209 Appl. 7011/75, *Becker v. Denmark*, Yearbook XIX (1976), p. 416 (450).

tion of his allegations of Convention breaches. In assessing this interest, any material or immaterial damage suffered (...) as a result of the alleged violation must be taken into account."[210]

In the Case of *A. V. v. Bulgaria* the Government contended that the applicant had no standing to bring an application, as she was never married to Mr T. The only legal heirs of Mr T., who had twice been married and divorced, were his seven children. The Court first noted that the Bulgarian Supreme Court had recognised the right of an unmarried partner to damages in tort in respect of the wrongful killing of the other partner on the basis of the understanding, notably, that such a partner 'sustains moral damages' and that awarding compensation is 'just'. Moreover, none of the domestic authorities which were involved in the applicant's complaints in respect of Mr T.'s death questioned her *locus standi.* The prosecution authorities examined and ruled on her appeal against the suspension of the criminal proceedings. The Court recalled that a couple who have lived together for many years constitutes a 'family' for the purposes of Article 8 of the Convention and is entitled to its protection notwithstanding the fact that their relationship exists outside marriage. In the present case the applicant raised complaints in respect of the death of Mr T., with whom she had lived for more than 12 years. They had three children together. In these circumstances the Court had no doubt that the applicant could claim to be personally affected by, and, therefore, be a victim of, the alleged violations of the Convention in respect of the death of Mr T. and the subsequent investigation into this event. There was no valid reason for the purposes of *locus standi* to distinguish the applicant's situation from that of a spouse. The Court found, therefore, that the applicant had standing to bring an application under Article 34 of the Convention in respect of the death of Mr T. and the ensuing investigation.[211]

In the Case of *Open Door Counselling Ltd. and Dublin Well Women Centre Ltd.* the Court extended the group of persons who may claim to be indirect victims. The applications concerned restrictions imposed on the two applicant companies as a result of a court injunction prohibiting them from providing information to pregnant women as to the location or identity of, or method of communication with, abortion clinics in Great Britain. The applicant companies were engaged at the time in non-directive counselling of pregnant women. The other applicants were two of the counsellors employed by one of the companies and two women of child-bearing age. The Government argued that the complaint submitted by the two women of child-bearing

210 Appl. 9320/81, *D. v. Federal Republic of Germany*, D&R 36 (1984), p. 24 (31). See also Appl. 9348/81, *W v. the United Kingdom*, D&R 32 (1983), p. 190 (198-200) and Appl. 9360/81, *W v. Ireland*, D&R 32 (1983), p. 211 (212-216); Appl. 20948/92, *Işiltan*, D&R 81(1995) p. 35 where the father of a minor who died following an operation could claim to be an indirect victim of an alleged violation of Article 2.

211 Decision of 18 May 1999.

age amounted to an *actio popularis*, since they could not claim to be victims of an infringement of their Convention rights. The Court held: "Although it has not been asserted that Mrs X and Mrs Geragthy are pregnant, it is not disputed that they belong to a class of women of child-bearing age which may be adversely affected by the restrictions imposed by the injunction. They are not seeking to challenge *in abstracto* the compatibility of Irish law with the Convention since they run a risk of being directly prejudiced by the measures complained of. They can thus claim to be 'victims' within the meaning of Article 25(1) [the present Article 34]."[212]

Although the Court's reasoning seems to relate rather to the concept of 'potential victim', in fact the concept of 'indirect victim' is also at issue here, and has been considerably extended. A measure may be challenged not only by the persons to whom it is directed, but also by those who may be affected by it in another way.

This extension was foreshadowed by the judgment in the *Groppera Radio AG* Case. A company which owned a radio station, its sole shareholder and two of its employees complained about an Ordinance adopted by the Federal Council prohibiting Swiss cable companies which had a community-antenna licence, from re-broadcasting programmes from transmitters which did not satisfy the requirement of the international agreements on radio and telecommunications. Groppera Radio did not satisfy these requirements. The applicants alleged a violation of Article 10. The Court dismissed the Government's preliminary objection that the applicants were not 'victims' within the meaning of Article 34 of the Convention since the Ordinance was not directed against them.[213]

Finally, it should be mentioned that in certain cases the Commission considered shareholders as victims of alleged violations of rights and freedoms of the company. It appears from its case law that the Commission did not regard shareholders in such cases as indirect but as direct victims.[214] In the cases concerned the applicant held a majority share in the company. On the other hand, in the *Yarrow* Case, the Commission held that a minority shareholder of Company A could not claim to be a victim of an interference with property rights of Company B, all the securities in which were owned by Company A, because the nationalisation measure complained of did not involve him personally. In the view of the Commission it was only open to Company A to lodge a complaint under the Convention.[215]

In the Case of *Wasa Liv Ömsesidigt* the Commission found that a group of persons who were policyholders in an insurance company, could not be considered as victims,

212 Judgment of 29 October 1992, para. 44.

213 Judgment of 28 March 1990, paras 48-51.

214 Appl. 1706/62, *X v. Austria*, Yearbook IX (1966), p. 112 (130) and the report of 17 July 1980, *Kaplan v. the United Kingdom*, D&R 21 (1981), p. 5 (23-24); Appl. 14807/89, *Agrotexim Hellas S.A. v. Greece*, D&R 72 (1992), p. 148 (155).

215 Appl. 9266/81, D&R 30 (1983), p. 155 (184-185).

since the policyholders did not have any legal claim to direct ownership of the company's assets as such.[216]

In the *Agrotexim Hellas* Case the Commission found that the question of whether a shareholder could claim to be a victim of measures against a company, could not be determined on the basis of the sole criterion of whether the shareholders held the majority of the company shares. The Commission took into account, in addition to the fact that the applicants as a group held the majority of the shares in the company, that they had a direct interest in the subject matter of the application. Moreover, the company was in liquidation and was under a special regime of effective State control. Consequently, the company could not reasonably be expected to lodge an application with the Commission against the State. In these specific circumstances, the Commission found that the applicant shareholders were entitled, by lifting the veil of the company's legal personality, to claim that they were victims of the measures affecting the company's property, within the meaning of Article 25 [new Article 34].[217]

The Court did not share the view of the Commission. In the first place, when the applicant companies lodged their application with the Commission in 1988, Fix Brewery, although in the process of liquidation, had not ceased to exist as a legal person. It was at that time represented by its two liquidators, who had legal capacity to defend its rights and, therefore, to apply to the Convention institutions, if they considered it appropriate. There was no evidence to suggest that at the material time it would have been impossible as a matter of fact or of law for the liquidators to do so. The Court concluded that it had not been clearly established that at the time when the application was lodged with the Commission it was not possible for Fix Brewery to apply through its liquidators to the Convention institutions in respect of the alleged violation of Article 1 of Protocol No. 1 which was the basis of the applicant companies' complaint. It followed that the latter companies could not be regarded as being entitled to apply to the Convention institutions.[218]

In the *Ankarcrona* Case the applicant submitted that he and his business were in practice the same and that he had, therefore, to be regarded as a victim within the meaning of Article 34 of the Convention. The Court recalled that the applicant was the sole owner of Skyddsvakt Herbert Ankarcrona AB. Consequently, there was no risk of differences of opinion among shareholders or between shareholders and a board of directors as to the reality of infringements of the rights protected under the Convention and its Protocols, or concerning the most appropriate way of reacting to such infringements. Having regard to the absence of competing interests which could create difficulties, for example, in determining who was entitled to apply to the Court, and in the light of the circumstances of the case as a whole, the applicant could, in the

216 Appl. 13013/87, D&R 58 (1988), p. 163(183-185).
217 Appl. 14807/89, D&R 72 (1992), p. 148 (156).
218 Judgment of 24 October 1995, paras 68-70.

Court's opinion, reasonably claim to be a victim within the meaning of Article 34 of the Convention, in so far as the impugned measures taken with regard to his company were concerned.[219]

In the Case of *CDI Holding Aktiengeschellschaft and Others* the Court held that it had found earlier that disregarding an applicant company's legal personality in similar cases could be justified only in exceptional circumstances, in particular where it was clearly established that it was impossible for the company to apply to the Convention institutions through the organs set up under its articles of incorporation or – in the event of liquidation – through its liquidators, as in the *Agrotexim Hellas* Case. However, no such exceptional circumstances had been established in the present case. The Court further found that the applicants could not claim to be victims of a violation of Article 10 of the Convention as a result of the termination of the applicant company's broadcasts as any rights susceptible of attracting the protection of Article 10 in the present case were linked to the applicant company as such and not to its shareholders or official representatives.[220] In the *Lebedev* Case the Court reiterated that the piercing of the 'corporate veil' or the disregarding of a company's legal personality would be justified only in exceptional circumstances, in particular where it was clearly established that it was impossible for the company to apply to the Court through the organs set up under its articles of incorporation.[221]

From the above it may be concluded that the doctrine of 'indirect victim' has not yet been established with full clarity in the case law as far as holders of financial interests in a company are concerned.

1.13.3.6 The alleged violation must still exist

Cases may occur in which the violation complained of has meanwhile been terminated or at least no longer exists at the moment the Court examines the case. The applicant will then not be admitted, because he can no longer allege to be a victim.[222] If, for instance, in the meantime the violation of the Convention complained of has been recognised by the authorities and the applicant has received sufficient redress, he can no longer claim to be a victim of that violation.[223] In the *Amuur* Case the Court consi-

219 Decision of 27 June 2000.
220 Decision of 18 October 2001.
221 Decision of 25 November 2004.
222 See, *e.g.*, the report of 15 October 1980, *Foti*, B.48 (1986), p. 30; report of 6 July 1983, *Dores and Silveira*, D&R 41 (1985), p. 60 (19-20); Appl. 10103/82, *Faragut*, D&R 39 (1984), p. 186 (207); judgment of 25 September 2001, *Gulsen and Haul Yasin Ketenoglou*, paras 36-37.
223 Appl. 8865/80, *Verband Deutscher Flugleiter and Others v. Federal Republic of Germany*, D&R 25 (1982), p. 252 (254-255); Appl. 10092/82, *Baraona v. Portugal*, D&R 40 (1985), p. 118 (137); Appl. 10259/83, *Anca and Others v. the United Kingdom*, D&R 40 (1985), p. 170 (177-178); Appl. 13156/87, *Byrn v. the United Kingdom*, D&R 73 (1993), p. 5 (9), and as regards 'reasonable time': Appl. 8858/80, *G. v. Federal Republic of Germany*, D&R 33 (1983), p. 5 (6-7).

dered that the notion of 'victim' within the meaning of Article 34 of the Convention denotes the person directly affected by the act or omission in issue, the existence of a violation of the Convention being conceivable even in the absence of prejudice; prejudice is relevant only in the context of Article 41 of the Convention. Consequently, a decision or measure favourable to the applicant is not in principle sufficient to deprive him of his status as 'victim', unless the national authorities have acknowledged, either expressly or in substance and have afforded redress for, the breach of the Convention.[224]

In the Case of *Aydin and 10 Others* the first applicant submitted that the *ex gratia* financial aid he had received had no connection with the disappearance of his father and, therefore, could not form a basis of a finding that he could no longer claim to be a victim within the meaning of Article 34 of the Convention. The Court held that since it did not appear that the financial aid, which had in fact been paid to the first applicant, was based on an acknowledgement, either expressly or in substance, and since the first applicant's rights under the Convention had been disrespected by the authorities, the financial aid at issue could not be regarded as sufficient for a deprivation of the first applicant's status as a 'victim' in respect of his material losses. The Court, therefore, accepted that the first applicant could claim to be a victim.[225]

In the *Burdov* Case the Court held that a decision or measure favourable to the applicant was in principle not sufficient to deprive him of his status as a 'victim' unless the national authorities have acknowledged, either expressly or in substance, and then afforded redress for, the breach of the Convention.[226] In the *Doubtfire* Case the Court noted that the applicant's conviction was quashed on the grounds that the proceedings had been unfair because of the lack of full disclosure by the prosecution. It was open to the applicant to apply for compensation in respect of his conviction and imprisonment. In these circumstances, the applicant could no longer claim to be a victim of the alleged violation of Article 6 of the Convention.[227]

As to the question of whether the applicant may continue to claim to be a victim of a violation of Article 6(1) of the Convention on the grounds of the length of the criminal proceedings against him, the Court has held that the mitigation of a sentence on the ground of the excessive length of proceedings does not in principle deprive the individual concerned of his status as a victim within the meaning of Article 34 of the Convention. However, according to the Court, this general rule is subject to an exception when the national authorities have acknowledged in a sufficiently clear way the

224 Judgment of 25 June 1996, para. 36.
225 Decision of 1 February 2000.
226 Judgment of 7 May 2002, para. 31. See also decision of 6 April 2004, *Skubenko*.
227 Decisions of 23 April 2002.

failure to observe the reasonable time requirement and have afforded redress by reducing the sentence in an express and measurable manner.[228]

In the *Wejrup* Case the Court noted that the High Court expressly stated that it concurred entirely with the comments stated by the City Court concerning the penal merits of the counts adjudicated and the other circumstances emphasised in the sentencing (which did not entail considerations about the length of the proceedings). Moreover, the Court noted that in finding a violation of the Convention in respect of the three accountants, the High Court mitigated the sentences as such with regard to two accountants and upheld the sentence with regard to one, despite the fact that this accountant was convicted of a longer sentence than before the City Court, in addition to exempting them from paying costs. When reducing the applicant's and the co-accuseds' share of costs, the High Court had partly taken into account the proportion between the charge and the outcome of the judgment and, in the light of the quite extraordinary level of legal costs in the case, all the accused's circumstances together with the fact that the consolidation of the cases against the applicant and the two top executives and the cases against the accountants should not be detrimental to them. However, the High Court had also partly and particularly taken into account its statement as to the length of the proceeding. As regards the applicant it was unclear how much of the reduction of the costs were attributable to the length of the proceedings alone. Having regard to the above, the Court was not convinced that the national authorities, in view of their initial finding that the Convention could not be considered violated, nevertheless in a sufficiently clear way acknowledged a failure to comply with the 'reasonable time' requirement within the meaning of Article 6(1) of the Convention. Neither was the Court convinced that the national authorities afforded the applicant redress therefore by reducing the sentence in an express and measurable manner or exempted the applicant from paying such an amount of costs that it constitutes a redress in relation to the alleged violation of the Convention thereby precluding the examination of the application. Accordingly, the Court found that the applicant might claim to be a victim of a violation of his right to trial within a reasonable time as guaranteed by Article 6(1) of the Convention.[229]

In a case where applicants submitted that the authorities' recording of their telephone conversations with counsels was contrary to the Convention, the records in question had since been destroyed. In view of this the German Government advanced that the alleged violation had become a moot point. The Commission, however, decided that since the destruction had not taken place in response to a request from the applicants and the latter had not received reparation otherwise, "the applicants still have to be considered as victims although the records in question no

228 Judgment of 26 June 2001, *Beck*, para. 27; decision of 20 September 2001, *Jansen*; decision of 7 March 2002, *Wejrup*.
229 Decision of 7 March 2002.

longer exist."[230] In a case where a settlement between the parties had been reached which disposed of previous applications to the Commission and the Court concerning criminal proceedings against the applicant, the Commission found that the declaration made by the applicant in the context of those applications were unequivocal in that it was intended to prevent him from bringing further applications before the Convention organs.[231]

In the *Caraher* Case the Court held that the possibility of obtaining compensation for the death of a person will generally, and in normal circumstances, constitute an adequate and sufficient remedy for a substantive complaint of an unjustified use of lethal force by a State agent in violation of Article 2 of the Convention. Separate procedural obligations may also arise under Article 2 concerning the provision of effective investigations into the use of lethal force. Where a relative accepts a sum of compensation in settlement of civil claims and renounces further use of local remedies, he or she will generally no longer be able to claim to be a victim in respect of those matters.[232] However, in the Case of *Z.W. v. the United Kingdom* the Court observed that the compensation accepted by the applicant was not in settlement of her civil claims and not part of the process of exhaustion of domestic remedies. Her claims in the civil court were struck out and the award of GBP 50,000 was made as compensation for criminal injuries. This statutory scheme was not concerned with any alleged failings by the local authority in their duty to protect the applicant, which was being the essence of the complaint raised by her under Article 3 of the Convention, but rather with the injuries attributable to her as a victim of a criminal offence committed by her foster parents. The Court, therefore, found that the applicant might still claim to be a victim of a violation of Article 3 of the Convention in respect of her complaints against the local authority.[233]

In the cases of *Van den Brink* and *Zuiderveld and Klappe* the respondent Government contended before the Court that the applicants could not claim to be victims of a breach of Article 5(3) as the time each one spent in custody on remand was deducted in its entirety from the sentence ultimately imposed on them. According to the Court the relevant deduction did not *per se* deprive the individual concerned of his status as an alleged victim within the meaning of Article 34 of a breach of Article 5(3). The Court added that "the position might be otherwise if the deduction from sentence had been based upon an acknowledgement by the national courts of a violation of the Convention."[234]

230 Appl. 8290/78, *A, B, C and D v. Federal Republic of Germany*, D&R 18 (1980), p. 176 (180).
231 Appl. 22634/93, *Mlynek v. Austria*, D&R 79 (1994), p. 103 (107).
232 Decision of 11 January 2000, *Caraher*.
233 Decision of 27 November 2001.
234 Judgments of 22 May 1984, para. 41 and para. 37 respectively.

Similarly, in the *Inze* Case the fact that a judicial settlement had been reached between the parties that might have mitigated the disadvantage suffered by the applicant, was considered insufficient reason to deprive the applicant of his status as victim. Here again the Court added: "The position might have been otherwise if, for instance, the national authorities had acknowledged either expressly or in substance, and then afforded redress for, the alleged breach of the Convention."[235]

Indeed, in cases where the applicant's sentence had been reduced in an express and measurable manner after a judicial finding concerning the undue length of the proceedings, the Commission took the position that he could no longer be considered to be a victim of a violation of Article 6(1).[236]

In the *East African Asians* Cases the Commission held that where Article 3 is violated by a State's exclusion from its territory of a person on the ground of race, the violation is substantially terminated, but not redressed, by that person's admission. Such a person can claim to be a victim of a violation notwithstanding admission.[237]

In the *Moustaquim* Case the applicant, a Moroccan national living in Belgium, had been deported by the Belgian authorities in 1984. The deportation order was suspended in 1989 for a trial period of two years during which the applicant was authorised to reside in Belgium. The applicant alleged that his deportation had violated, *inter alia*, Article 8. The Belgian Government submitted that the application had become devoid of purpose in that the deportation order had been suspended for a trial period of two years and the applicant was thus authorised to reside in Belgium. Since the new order had only suspended the deportation order and had not made reparation for the consequences which the applicant had suffered for more than five years, the Court did not consider that the case had become devoid of purpose. According to the Court there had been an interference with the right to respect for his family life.[238]

In the *Hamaïdi* Case the applicant submitted that the decision of 5 March 1998 dismissing his application for the exclusion order to be lifted, infringed his right to respect for his private and family life. The Court noted that the applicant was deported to Tunisia in 1995 and that the exclusion order did not expire until 18 July 1998, which was eight months after the application had been lodged and four months after the decision of 5 March 1998 dismissing his application to the Court of Appeal for the order to be lifted. Consequently, the Court concluded that the applicant did not lose his 'victim' status on account of the exclusion order expiring on 18 July 1998.[239]

235 Judgment of 28 October 1987, para. 32.
236 Appl. 17669/91, *Van Laak v. the Netherlands*, D&R 74 (1993), p. 156 (158); report of 16 February 1993, *Byrn v. the United Kingdom*, D&R 74 (1993), p. 5 (9).
237 Report of 14 December 1973, D&R 78-A (1994), p. 5 (63).
238 Judgment of 18 February 1991, para. 33.
239 Decision of 6 March 2001.

In the *Ilaşcu* Case the Moldovan Government asked the Court to dismiss Mr. Ilaşcu's application on the ground that he had ceased to be a victim in view of his release on 5 May 2001. The Court noted, firstly, that the applicant's conviction was still in existence and that there was accordingly a risk that the sentence would be executed. Furthermore, the Court had not been informed of any pardon or amnesty to which the applicant's release might have been due. It noted, secondly, that the applicant complained not only of his death sentence but also of the unlawfulness of his detention, the unfairness of the proceedings which led to his conviction, the conditions in which he was held from 1992 to 5 May 2001, and the confiscation of his possessions. In conclusion, the Court considered that Mr. Ilaşcu could still claim to be a 'victim' within the meaning of Article 34 of the Convention.[240]

1.13.4 REPRESENTATION OF AN APPLICANT; SUBSTITUTION FOR A DECEASED VICTIM

The requirement that the violation of the Convention must have caused the applicant a personal injury does not, of course, prevent an application from being lodged by his representative.[241] Furthermore, if the victim himself is not able, or is not adequately able, to undertake an action – for example a detained person, a patient in a mental clinic, a very young person – a close relative, a guardian, a curator, or another person may act on his behalf. In that case the name of the victim must be made known and, if possible, he must have given his consent to lodging the application.[242]

In case of the death of the victim his heir may lodge an application or uphold a previously lodged application only if the allegedly violated right forms part of the estate or if on other grounds he himself is to be considered the (direct or indirect) victim.[243] In the *Kofler* Case the Commission stated that "the heirs of a deceased applicant cannot claim a general right that the examination of the application introduced by the *de cujus* be continued by the Commission". The nature of the complaint (which concerned

240 Decision of 4 July 2001.

241 Appl. 282/57, *X v. Federal Republic of Germany*, Yearbook I (1955-1957), p. 164 (166).

242 See, *e.g.*, Appl. 5076/71, *X v. the United Kingdom*, Coll. 40 (1972), p. 64 (66); decision of 26 June 2001, *Saniewski*.

243 See, on the one hand, Appl. 282/57, *X v. Federal Republic of Germany*, Yearbook I (1955-1957), p. 164 (166), and on the other hand Appl. 1706/62, *X v. Austria*, Yearbook IX (1966), p. 112 (124). See also Appls 7572/76, 7586/76 and 7587/76, *Ensslin, Baader and Raspe v. Federal Republic of Germany*, Yearbook XXI (1978), p. 418 (452). See, however, Appl. 6166/73, *Baader, Meins, Meinhof, Grundmann*, Yearbook XVIII (1975), p. 132 (142); Appl. 12526/86, *Björkgren and Ed v. Norway*, D&R 68 (1991), p. 104 (105), where the Commission recognised the right of action of a widow and sole heir with regard to an action relating to property; Appl. 16744/90, *Dujardin v. France*, D&R 72 (1992), p. 236 (243).

the duration of the proceedings that resulted in the applicant's conviction and sentence) did not allow that complaint to be considered as transferable because the complaint was closely linked with the late applicant personally and his heirs "cannot now claim (...) to have themselves a sufficient legal interest to justify the further examination of the application on their behalf". Interestingly, from the viewpoint of the issue of 'abstract complaints', the Commission considered next whether any question of general interest would justify a further examination of the application. It stated: "Such a situation can arise in particular where an application in fact concerns (...) the legislation or a legal system or practice of the defendant State". The Commission concluded that in this case such a general interest did not exist.[244]

Accordingly, the issue is whether the widow(er) or heir can claim that the applicant's original interest in having the alleged violation of the Convention established might be considered as an interest vested in them. Such an interest was found to exist in a case where the deceased applicant had complained about his criminal conviction. In particular he had claimed that he had not had a 'fair hearing' nor had he benefited from the 'presumption of innocence'. The Commission emphasised that, by their very nature, complaints relating to Article 6 were closely linked to the person of the deceased applicant. However, the Commission continued by saying that "this link is not exclusive and it cannot be claimed that they have no bearing at all on the person of the widow." The widow could claim to be a victim, since she suffered the effects of the decisions concerning the seizure of property and a daily fine and civil imprisonment, both of which were enforceable against her.[245] In *X v. France* the Court took an even more liberal position. In this case the applicant, who was given a number of blood transfusions, was found to have been infected with HIV. The applicant died shortly after the referral of his case to the Court, but his parents expressed the wish to continue the proceedings. The Court accepted that they were entitled to take Mr X's place in the proceedings before it.[246] Also, in other cases concerning the length of proceedings the Court without restrictions showed itself to be willing to continue the proceedings at the wish of the heirs of the deceased applicant.[247]

If the death of the direct victim is the result of the alleged violation, *e.g.* in the case of torture, his relatives will as a rule qualify as indirect victims.[248] This was, however, different in the *Scherer* Case where the applicant's executor had not expressed any intention whatsoever of seeking, on Mr Scherer's behalf, to have the criminal procee-

244 Report of 9 October 1982, D&R 30 (1983), p. 5 (9-10). See also the report of 7 March 1984, *Altun*, D&R 36 (1984), p. 236 (259-260) and the judgment of 25 August 1987, *Nölkenbockhoff*, para. 33.

245 Appl. 10828/84, *Funke*, D&R 57 (1988), p. 5 (25-26).

246 Judgment of 31 March 1992, para. 25.

247 Judgment of 24 May 1991, *Vocaturo*, para. 2 and judgment of 27 February 1992, *G v. Italy*, paras. 2-3. See also Appl. 14660/89, *Prisca and De Santis*, D&R 72 (1992), p. 141 (147).

248 Judgment of 24 May 1991, *Vocaturo*, para. 2; judgment of 27 February 1992, *G. v. Italy*, para. 2; Judgment of 22 February 1994 *Raimondo*, para. 2; judgment of 2 September 1998, *Yaşa*, para. 66; judgment of 23 September 1998, *Aytekin*; Decision of 4 September 2001, *Kakoulli*.

dings reopened in Switzerland or to claim compensation for non-pecuniary damage in Strasbourg. Under these circumstances Mr Scherer's death could be held to constitute a "fact of a kind to provide a solution of the matter".[249]

In the *Scozzari and Giunta* Case the Italian Government contested the first applicant's standing to also act on behalf of her children, because, as her parental rights had been suspended, there was a conflict of interest between her and the children, and criminal proceedings were pending against her for offences against her children. The Court pointed out that in principle a person who is not entitled under domestic law to represent another may nevertheless, in certain circumstances, act before the Court in the name of the other person. In particular, minors can apply to the Court even, or indeed especially, if they are represented by a mother who is in conflict with the authorities and criticises their decisions and conduct as not being consistent with the rights guaranteed by the Convention. The Court considered that in the event of a conflict over a minor's interests between a natural parent and the person appointed by the authorities to act as the child's guardian, there is a danger that some of those interests will never be brought to the Court's attention and that the minor will be deprived of effective protection of his rights under the Convention. Consequently, even though the mother had been deprived of parental rights – indeed that was one of the causes of the dispute which she had referred to the Court – her standing as the natural mother sufficed to afford her the necessary power to apply to the Court on the children's behalf as well, in order to protect their interests. Moreover, the conditions governing individual applications are not necessarily the same as national criteria relating to *locus standi*. National rules in this respect may serve different purposes from those contemplated by Article 34 of the Convention and, whilst those purposes may sometimes be analogous, they need not always be so.[250]

In the Case of *P., C. and S. v. the United Kingdom* the applicants P. and C. complained on behalf of their daughter S. concerning the failure to make post-adoption provision for any form of direct contact with her and the reduction in indirect contact. The Government disputed that the applicants – the natural parents – could claim to bring an application on behalf of S. as they retained no residual parental authority over her and had no standing domestically to represent S. The Court reiterated the principle that the object and purpose of the Convention as an instrument for the protection of individual human beings requires that its provisions, both procedural and substantive, be interpreted and applied so as to render its safeguards both practical and effective. The Court held that a restrictive or technical approach in this area is to be avoided. The Court found that the key consideration in such a case is that any serious issues concerning respect for a child's rights should be examined.

[249] Judgment of 25 March 1993, paras 31-32.
[250] Judgment of 13 July 2000, paras 135-139.

It was claimed on behalf of S. that since the freeing for adoption proceedings she had been deprived of the opportunity to maintain a meaningful relationship with her birth parents. It could not be disputed that this was a right which S. should enjoy without unjustified interference. The necessity and proportionality of the interference had been put in issue in this application. The adoptive parents had, according the Government, objected to direct contact between P. and C. and S., and it was their decision to restrict indirect contact to one letter per year. In the circumstances it could not be expected that they introduce an application on behalf of S. raising the point. Therefore, given the issues raised in this application and the standing of P. and C. as S.'s natural parents, P. and C. might apply to the Court on her behalf in order to protect her interests.[251]

In the *Petersen* Case the applicant raised several complaints about German court decisions concerning his parental rights in his own name, but also on behalf of his child. The Court held that the case related to disputes between the mother, who had custody over the child, and the applicant, its natural father. Such conflicts concerning parental rights other than custody do not oppose parents and the State on the question of deprivation of custody where the State as holder of custodial rights cannot be deemed to ensure the children's Convention rights. In cases arising out of disputes between parents it is the parent entitled to custody who is entrusted with safeguarding the child's interests. In these situations the position as natural parent cannot be regarded as a sufficient basis to also bring an application on behalf of a child. Consequently, the applicant had no standing to act on the child's behalf.[252]

1.13.5 CONTRACTING PARTIES MAY NOT HINDER THE RIGHT OF INDIVIDUAL COMPLAINT

According to the last sentence of Article 34 the Contracting States undertake not to interfere in any way with the exercise of the individual right of complaint. In this respect the Court held in the *Cruz Varas* Case that Article 25 [the present Article 34] imposes an obligation not to interfere with the right of the individual to effectively present and pursue his complaint with the Commission. Although such a right is of a procedural nature distinguishable from the substantive rights contained in the Convention, it must be open to individuals to complain of alleged infringements of it in Convention proceedings. In this respect also the Convention must be interpreted as guaranteeing rights which are practical and effective as opposed to theoretical and illusory.[253]

[251] Decision of 11 December 2001; decision of 26 September 2002, *Sylveste.*
[252] Decision of 6 December 2001.
[253] Judgment of 20 March 1991, para. 99. See also the Commission in Appl. 14807, *Agrotexim Hellas v. Greece*, D&R 72 (1992), p. 148 (156).

In the *Cruz Varas* Case the question arose of whether the failure on the part of the respondent State to comply with the Commission's indication of provisional measures under Rule 36 of the Rules of Procedure of the Commission[254] amounted to a violation of the obligation not to hinder the effective exercise of the right of individual petition. The Court took the position that the Convention did not contain any provision empowering the Convention organs to order interim measures. In the absence of a specific provision for such a power a Rule 36 indication could not give rise to a binding obligation.[255] In the subsequent Cases of *Öcalan*[256] and *Mamatkulov and Abdurasulovic*[257] the Court changed its position and held that its interim measures under Rule 39 of the Rules of Court are legally binding. That position was confirmed by the Grand Chamber after a referral (by virtue of Article 43 of the Convention).[258]

In the *Akdivar* Case concerning the alleged burning of houses by security forces in south-east Turkey, the question arose whether the Turkish authorities had hindered the effective exercise of the right of individual petition. Some of the applicants, or persons thought to be applicants, had been directly interrogated by the Turkish authorities about their applications to the Commission and had been asked to sign statements declaring that no such applications had been made. Furthermore, in the case of two of the applicants the interview had been filmed. The Court found a violation of Article 25(1) [the present Article 34] in this respect. It held that the applicants must be able to communicate freely with the Commission without being subjected to any form of pressure from the authorities to withdraw or modify their complaints. Given their vulnerable position and the reality that in south-east Turkey complaints against the authorities might well give rise to a legitimate fear of reprisals, the matters complained of amounted to a form of illicit and unacceptable pressure on the applicants to withdraw their applications. Moreover, it could not be excluded that the filming of the two persons, who were subsequently declared not to be applicants, could have contributed to this pressure. The Court also held that the fact that the applicants actually pursued their application to the Commission did not prevent such behaviour on the part of the authorities from amounting to a hindrance in respect of the applicants in breach of this provision.[259]

In the *Kurt* Case the Court held that the threat of criminal proceedings against an applicant's lawyer concerning the contents of a statement drawn up by him must be

254 See 2.2.8.2.
255 See judgment of 20 March 1991, para. 98.
256 Decision of 14 December 2000.
257 Judgment of 6 February 2003, paras 94-96.
258 See 2.2.8.2.
259 Judgment of 16 September 1996, para. 105; judgment of 25 May 1998, *Kurt*, para. 165; judgment of 18 June 2002, *Orhan*, para. 406; judgment of 30 January 2001, *Dulaş*, para. 79.

considered as interfering with the exercise of the applicant's right of petition.[260] The same was the case as regards the institution of criminal proceedings against a lawyer involved in the preparation of an application to the Commission.[261] In the *McShane* Case the Court considered that the threat of disciplinary proceedings may also infringe this guarantee of free and unhindered access to the Convention system.[262]

In the *Tanrıkulu* Case the Court observed that it was of the utmost importance for the effective operation of the system of individual petition instituted under Article 34, not only that applicants or potential applicants should be able to communicate freely with the Convention organs without being subject to any form of pressure from the authorities, but also that States should furnish all necessary facilities to make possible a proper and effective examination of applications. According to the Court it is inherent in proceedings relating to cases of this nature, where an individual applicant accuses State agents of violating rights under the Convention – his own or someone else's – that in certain instances solely the respondent Government have access to information capable of corroborating or refuting these allegations. A failure on a Government's part to submit such information which is in their hands without a satisfactory explanation may not only give rise to the drawing of inferences as to the well-foundedness of the applicant's allegations, but may also reflect negatively on the level of compliance by a respondent State with its obligations under Article 38(1)(a) of the Convention.[263] The same applies to delays by the State in submitting information which prejudices the establishment of facts in a case.[264]

In the *Tepe* Case the Court concluded that the Government had failed to provide any convincing explanation for its delays and omissions in response to the Court's requests for relevant documents, information and witnesses. The Court considered, therefore, that it could draw inferences from the Government's conduct in the instant case. Bearing in mind the difficulties arising from a fact-finding exercise of this nature and in view of the importance of a respondent Government's co-operation in Convention proceedings, the Court found that the Government had failed to furnish all necessary facilities to the Court in its task of establishing the facts within the meaning of Article 38(1) (a) of the Convention. Accordingly, it did not consider it necessary to also examine these matters under Article 34 of the Convention.[265]

In the *Salman* Case the Court found that the document recording the first interview showed that the applicant was questioned, not only about her declaration of means, but also about how she introduced her application to the Commission and with whose

260 Judgment of 25 May 1998, paras 164-165.
261 Judgment of 22 May 2001, *Şarlı*, paras 85-86; judgment of 13 November 2003, *Elci*, para. 711.
262 Judgment of 28 May 2002, para. 149.
263 Judgment of 8 July 1999, paras 66 and 70.
264 Judgment of 18 June 2002, *Orhan*, para. 266; judgment of 24 April 2003, *Aktas*, para. 341.
265 Judgment of 9 May 2003, para. 135; See also the judgment of 8 April 2004, *Tahsin Acar*, para. 254.

assistance. Furthermore, the Government had not denied that the applicant was blindfolded while at the Adana anti-terrorism branch headquarters. The Court found that blindfolding had increased the applicant's vulnerability, causing her anxiety and distress, and disclosed, in the circumstances of this case, oppressive treatment. Furthermore, there was no plausible explanation as to why the applicant was questioned twice about her legal aid application and in particular why the questioning was conducted on the first occasion by police officers of the anti-terrorism branch, whom the applicant had claimed were responsible for the death of her husband. The applicant must have felt intimidated by these contacts with the authorities. This constituted undue interference with her petition to the Convention organs.[266]

In the *Dulaş* Case the Court recalled that the Government had not provided any information to the Commission about the authorities' contacts with the applicant and that the Commission reached its finding of undue interference on the basis of the oral testimony of the applicant and her son. The statement provided to the Court indicated that the applicant was shown the statement made by her to the Human Rights Association (HRA) and the letter of authority concerning her legal representation before the Commission. It also appeared that she was asked to verify her thumbprint and to verify the contents of the statement as accurate. The text of the statement also implied that the applicant was questioned as to whether she wanted to maintain an application to the Commission in Europe and whether she wished to pursue a complaint against the HRA lawyer. Though the applicant maintained that her statement to the HRA was accurate and repeated the substance of her allegation against the security forces, it did not appear that the public prosecutor pursued any questions with a view to adding to the factual details of the applicant's complaints. In these circumstances the Court was not satisfied that the interview related solely to the public prosecutor's duty to collect information about the applicant's complaints for the purpose of his own investigation. It also trespassed into verifying the authenticity of the applicant's application and whether she wanted to continue it. The applicant not unreasonably must have felt intimidated by this interview and felt under pressure to withdraw complaints considered as being against the State. This constituted undue interference with her petition to the Convention organs.[267]

In the *Orhan* Case the Government submitted that the purpose of the applicant's summons was to question him about his recollection of his apprehension and to verify the authenticity of the power of attorney he had signed in favour of English lawyers. The Court emphasised that 'pressure' included not only direct coercion and flagrant acts of intimidation but also other improper indirect acts or contacts designed to dissuade or discourage applicants from pursuing a Convention remedy. The fact that the individual actually managed to pursue his application did not prevent an issue

[266] Judgment of 27 June 2000, paras 131-132.
[267] Judgment of 30 January 2001, paras 80-81.

arising under Article 34: should the Government's action make it more difficult for the individual to exercise the right of petition, this amounted to 'hindering' his rights under Article 34.[268] The Court further emphasised that it was inappropriate for the authorities of a respondent State to enter into direct contact with an applicant even on the pretext of verifying whether an applicant had, in fact, signed a form of authority in favour of legal representatives before the former Commission or the Court. Even if a Government had reason to believe that in a particular case the right of individual petition was being abused, the appropriate course for that Government was to alert the Court and inform it of their misgivings. To proceed as the Government had done in the present case was reasonably interpreted by the applicant as an attempt to intimidate him. In addition, the Court held that an attempt was made by the authorities to cast doubt on the validity of the application and thereby on the credibility of the applicant. These actions could only be interpreted as a bid to try to frustrate the applicant's successful pursuance of his claims, which also constituted a negation of the very essence of the right of individual petition.[269]

In the *Ilascu* Case the applicants submitted in the first place that they had not been permitted to apply to the Court from prison so that their wives had had to do that on their behalf. They also alleged that they had been persecuted in prison because they had tried to apply to the Court. They further submitted that the statement by the President of Moldova, that the applicant's refusal to withdraw his application had been the cause of the remaining applicants' continued detention, had been a flagrant interference with their right of individual petition. Lastly, they submitted that the note from the Russian Ministry of Foreign Affairs had been a serious interference with their right of individual petition. The Court reiterated that the expression 'any form of pressure' must be taken to cover not only direct coercion and flagrant acts of intimidation but also improper indirect acts or contacts designed to dissuade or discourage applicants from pursuing a Convention remedy. Moreover, the question whether contacts between the authorities and an applicant constitute unacceptable practices from the standpoint of Article 34 must be determined in the light of the particular circumstances of the case. In that connection the Court must assess the vulnerability of the complainant and the risk of his being influenced by the authorities.

The Court had also regard to the threats made against the applicants by the Transdniestrian prison authorities and the deterioration in their conditions of detention after their application was lodged. It took the view that such acts constituted an improper and unacceptable form of pressure which hindered their exercise of the right of individual petition. In addition the Court noted with concern the content of the diplomatic note of 19 April 2001 sent by the Russian Federation to the Moldovan authorities. It appeared from that note that the Russian authorities requested the

[268] Judgment of 18 June 2002, para. 406.
[269] *Ibidem*, paras 409-410.

Republic of Moldova to withdraw the observations they had submitted to the Court in so far as these implied responsibility for the alleged violations on the part of the Russian Federation on account of the fact that its troops were stationed in Moldovan territory in Transdniestria. Subsequently, at the hearing, the Moldovan Government did indeed declare that it wished to withdraw the part of its observations concerning the Russian Federation. The Court considered that such conduct on the part of the Government of the Russian Federation represented a negation of the common heritage of political traditions, ideals, freedom and the rule of law mentioned in the Preamble to the Convention and were capable of seriously hindering its examination of an application lodged in exercise of the right of individual petition and thereby interfering with the right guaranteed by Article 34 of the Convention itself. There had, therefore, been a breach by the Russian Federation of Article 34 of the Convention. The Court further noted that after the applicant's release he spoke to the Moldovan authorities about the possibility of obtaining the release of the other applicants, and that in that context the President of Moldova publicly accused the applicant of being the cause of his comrades' continued detention, through his refusal to withdraw his application against Moldova and the Russian Federation. In the Court's opinion, such remarks by the highest authority of a Contracting State, that improvement in the applicants' situation depended on withdrawal of the application lodged against that State or another Contracting State, represented direct pressure intended to hinder the exercise of the right of individual petition. That conclusion held good whatever real or theoretical influence that authority might have on the applicants' situation. Consequently, the remarks amounted to an interference by the Republic of Moldova with the applicants' exercise of their right of individual petition, in breach of Article 34.[270]

In practice, difficulties arise particularly with respect to persons who have been deprived of their liberty in one way or another. The Court does not regard every form of monitoring of the mail of detained persons addressed to it as unlawful, although it considers it more in conformity with the spirit of the Convention that the letters are forwarded unopened. According to the Court there is a conflict with Article 34 only when an applicant cannot freely submit his grievances in a complete and detailed way.[271] In the *Manoussos* Case the applicant complained that he was not allowed to send telegrams or make telephone calls to the Court's Registry, and that letters sent to him by the latter were opened on several occasions. The Court considered that such complaints fell to be examined under Article 8 of the Convention rather than under Article 34. In particular, the voluminous correspondence which the applicant had sent to the Court confirmed that he was able to submit all his complaints to the Court by ordinary mail, and there was no indication that the correspondence between the Court

[270] Judgment of 8 July 2004, paras 476-482.

[271] Judgment of 8 February 2000, *Cooke*, para. 48: decision of 30 April 2002, *Salapa*.

and the applicant was unduly delayed or tampered with. Finally, the Court noted that the applicant was granted free legal aid under the legal aid scheme funded by the Council of Europe, and that the Czech Bar Association recommended a lawyer who was willing to represent the applicant in the proceedings before the Court following his failure to appoint a lawyer. However, the applicant declined the lawyer's assistance for reasons which the Court considered groundless. Accordingly, he bore full responsibility for any alleged inadequacies in the presentation of his case to the Court. In view of the above facts and considerations the Court found that the alleged violation of Article 34 of the Convention had not been established.[272]

In this context the European Agreement relating to persons participating in proceedings before the European Court of Human Rights is also of interest.[273] In Article 3(2) of this Agreement States undertake to guarantee also to detained persons the right to free correspondence with the Court. This means that, if their correspondence is at all examined by the competent authorities, this may not entail undue delay or alteration of the correspondence. Nor may detained persons be subjected to disciplinary measures on account of any correspondence with the Court. Finally, they have a right to speak, out of hearing of other persons, with their lawyer concerning their application to the Court, provided that the lawyer is qualified to appear as a barrister before the courts of the State concerned. With respect to these provisions the authorities may impose limitations only insofar as they are in accordance with the law and are necessary in a democratic society in the interests of national security, for the detection and prosecution of a crime, or for the protection of health. Despite the fact that individuals cannot rely directly on this Agreement in the form of separate application, it is of importance for the promotion of an undisturbed exercise of the individual right of complaint, because the Court can take its provisions into account in connection with Article 34. The scope of the State's obligation under Article 34, however, is not necessarily confined to the provisions of this Agreement.

In the *Klyakhin* Case the issue concerned the alleged refusal of the prison authorities to forward the applicant's letters to the Court, delays in posting the letters and an alleged failure of the authorities to give the incoming letters from the Court to the applicant. While there was no allegation of undue pressure, interception of letters by prison authorities can hinder applicants in bringing their cases to the Court. As to exhaustion of domestic remedies in this respect, the Court observed that Article 34 of the Convention imposes an obligation on the Contracting States not to interfere with the right of the individual effectively to present and pursue his application before the Court. Such an obligation confers upon the applicant a right distinguishable from

[272] Decision of 9 July 2002.

[273] This agreement entered into force on 1 January 1999. This agreement replaces the 1969 Agreement. For the text see: Council of Europe, *European Treaty Series*, No. 161. For ratifications, see Appendix I.

the rights set out in Section I of the Convention or its Protocols. In view of the nature of this right the requirement to exhaust domestic remedies does not apply to it. Given the importance attached to the right of individual petition it would be unreasonable to require the applicant to make recourse to a normal judicial procedure within the domestic jurisdiction in every event where the prison authorities interfere in his correspondence with the Court. In these circumstances, the Court considered that the applicant's complaint under Article 34 could not be rejected for failure to exhaust domestic remedies. It found that this part of the application raised complex questions of fact and law, the determination of which should depend on an examination of the merits.[274]

Finally, it deserves attention that neither the Convention nor the above-mentioned European Agreement impose an obligation on the Contracting States to inform private parties of the possibility of filing an application with the Court after they have exhausted the domestic remedies. At any rate, according to the Commission, such an obligation could not be inferred from the words 'not to hinder in any way the effective exercise of this right' of Article 25 [present Article 34].[275] Considering the text of Article 34 this interpretation is not incomprehensible. Still, it would be in keeping with the spirit of the Convention if, in appropriate cases, after the domestic remedies have been exhausted, the attention of individuals were drawn to the possibility of lodging a complaint with the Court. After all, a State, which by becoming a party to the Convention recognises the right of complaint under Article 34, may be expected to assure the effective exercise of this right by giving adequate publicity to the existence of the right of complaint.

Correspondence with the Court in which the applicants complain about interference with the exercise of the right of complaint is not considered as a separate 'application' or '*requête*' to which the rules of admissibility are applicable. As a rule the case will be settled between the Court and the Contracting State concerned on an administrative basis, the applicant being permitted to react to any observations which a State may make. However, if along with another complaint such a complaint is also lodged, the Court appears to be prepared to examine the latter together with the first complaint.[276]

274 Decision of 14 October 2003.
275 See, *e.g.*, Appl. 1877/63, *X v. Austria*, 22 July 1963 (not published).
276 Judgment of 24 July 2001, *Valasinas*, para. 134; judgment of 20 January 2004, *D.P. v. Poland*, para. 92.

1.13.6 CO-EXISTENCE OF THE EUROPEAN CONVENTION AND THE UN COVENANT ON CIVIL AND POLITICAL RIGHTS

The co-existence of the possibilities of an individual right of complaint under the UN Covenant on Civil and Political Rights and the Convention raises two questions in particular. Is an individual, when he considers that one or more of his rights and freedoms, laid down in both treaties, has been violated, allowed to choose which action to institute? And may he also bring both actions for the same matter, either simultaneously or successively?

The first question may at once be answered in the affirmative. An individual who regards himself as the victim of a violation of one of the rights and freedoms guaranteed in the Convention as well as in the UN Covenant on Civil and Political Rights, must be considered free to use the procedure which he regards as the most favourable for his case, since neither of the two treaties prohibits this choice.[277] This freedom of choice does not apply with respect to inter-State complaints, since Article 55 of the Convention provides that the Contracting Parties agree that, except by special agreement, they will not avail themselves of treaties, conventions or declarations in force between them for the purpose of submitting, by way of petition, a dispute arising out of the interpretation or application of the Convention to a means of settlement other than those provided for in the Convention.

With respect to the second question, three situations may arise: (1) identical applications are lodged at the same time under both instruments; (2) the applicant first tries the procedure of the UN Covenant on Civil and Political Rights and then, if he is not satisfied with the outcome, that of the Convention; and (3) the applicant applies first to the European Court and subsequently, if he is not satisfied with the outcome, to the Human Rights Committee.

In the first case the applicant incurs the risk of being received by neither the Court nor the Committee. According to Article 35(2)(b) the Court cannot consider an application which is substantially the same as a matter which has already been submitted to another procedure of international investigation or settlement and if it contains no relevant new information.[278] On its part, Article 5(2) of the Optional Protocol of the UN Covenant on Civil and Political Rights provides that the Committee shall not consider any communication from an individual unless it has

277 See *Secretariat Memorandum prepared by the Directorate of Human Rights on the effects of the various international human rights instruments providing a mechanism for individual communications on the machinery of protection established by the European Convention on Human Rights*, H(85)3, No. 23, p. 9.
278 On this, see 2.2.12.4.

ascertained that the same matter is not being examined under another procedure of international investigation or settlement. From these provisions it appears that there is a real possibility that the application may be rejected by both organs. Such a highly unsatisfactory situation may be avoided if the Commission and the Committee pursue a flexible policy on this point. They might postpone consideration so as to enable the applicant to withdraw one of the two complaints. However, the situation where two applications are lodged at the same moment is likely to occur only rarely.

It is more likely that applications in Geneva and Strasbourg are lodged successively. If, as in the case mentioned above sub (2), the second application is lodged in Strasbourg, this leads to its being declared inadmissible under Article 35(2)(b), unless relevant new information is put forward. In the opposite case, that of sub. (3), such a conclusion does not follow imperatively from the text of Article 5(2)(a) of the Protocol. This provision provides for inadmissibility of a matter which is 'being examined under another procedure'. It is thus only the fact that the matter *is being* examined elsewhere which bars its admissibility, not the fact that the matter *has been* examined elsewhere. The Human Rights Committee, therefore, has actually taken the view that no complaint submitted to it is inadmissible merely on account of the fact that this case has already been examined in another procedure.[279]

It is questionable whether it is desirable that cases dealt with in Strasbourg may afterwards be brought up before the Committee again. An argument against this is that such a form of 'appeal' against decisions of the Strasbourg organs is contrary to the intention of the drafters of the Convention that the outcome of the procedure provided there is final. This intention may be inferred from Articles 35 and 42 of the Convention. Moreover, reasons of procedural economy may be advanced against renewed consideration of the same case by the Human Rights Committee. In general it takes a number of years for a case to pass through the Strasbourg procedure and the preceding national procedures. One may well wonder whether after such a long procedure the case should be reopened again.

In any event the Committee of Ministers of the Council of Europe has answered that question in the negative. In 1970 it urged those Contracting States, which were to ratify the Optional Protocol to the UN Covenant on Civil and Political Rights, to attach to their ratification a declaration denying the competence of the Human Rights Committee to receive communications from individuals concerning matters which have already been or are being examined in a procedure under the Convention, unless rights or freedoms not set forth in the Convention are invoked in such communications.[280] Several of the Contracting States which are also parties to the Protocol, have followed up this suggestion by making a declaration or a reservation. The Netherlands,

[279] See *Report of the Human Rights Committee of 1978*, General Assembly Official Records (A/33/40), p. 100.

[280] See Yearbook XIII (1970), pp. 74-76.

however, has refrained from making such a declaration or reservation. In the opinion of the Dutch Government there are indeed some practical objections to possible double procedures concerning the same matter, but they constitute an insufficient argument for preventing individuals from applying to the Human Rights Committee after having done so to the European Commission. Moreover, the Dutch Government submits that the Committee and the Commission/Court have different powers in a number of respects. Finally, the making of declarations as suggested by the Committee of Ministers might be imitated in other regional arrangements, which might be detrimental to the worldwide system for the protection of human rights.[281] For individuals subject to the jurisdiction of the Netherlands, therefore, it is possible to initiate, after the Strasbourg procedure, the procedure provided for in the Optional Protocol to the UN Covenant on Civil and Political Rights.

As regards the relevant practice of the two bodies concerned, the following may be observed. Only a few cases have been rejected by the European Commission under Article 35(2)(b) of the European Convention. The Secretariat usually prevents this by advising an applicant, who lodges a complaint already brought before the Committee, about the content of Article 35(2)(b). In a case where two members of the *Grapo* (an anti-fascist revolutionary group) had brought a complaint before the Commission, the Commission noted that it appeared from their letters to the Commissions that, before bringing his complaint in Strasbourg, the first applicant had brought a communication to the Human Rights Committee. The second applicant had joined this individual communication after having brought his complaint before the Commission. The Commission noted that in the relevant part of their application form the applicants omitted to mention the existence of the communication in question, then pending before the Human Rights Committee. Therefore, the Commission took the view that a situation of this type was incompatible with the spirit and letter of the Convention, which seeks to avoid a plurality of international proceedings relating to the same cases. According to the Commission the application was substantially the same as the petition submitted by the applicants to the Human Rights Committee, which was still pending before that Committee and was, therefore, inadmissible under Article 27(1)(b) [new Article 35(2)(b)].[282] The Commission also noted that a request for suspension of the proceedings before an international body (the applicants had requested the Human Rights Committee to grant such a suspension) did not have the same effect as a complete withdrawal of the application, which was the only step allowing the Commission to examine an application also brought before it.[283]

[281] Second Chamber, Session 1975-1976, 13 932 (R 1037), Nos 1-6, p. 42.

[282] Appl. 17512/90, *Calcerrada Fornielles and Cabeza Mato*, D&R 73 (1992), p. 214 (223-224).

[283] *Ibidem*, p. 224.

An interesting issue came up in the case of *A.N. v. Denmark*. Denmark had made a reservation, with reference to Article 5(2)(a) of the Optional Protocol, in respect of the competence of the Committee to consider a communication from an individual if the matter has already been considered under other procedures of international investigation. The author of the communication had already filed an application concerning the same matter with the Commission, which was declared inadmissible as manifestly ill-founded. On the basis of these facts but without any further argument the Committee concluded that it was not competent to consider the communication. It thus implicitly dismissed the position taken by one of its members in his individual opinion, who argued that an application that had been declared inadmissible had not, in the meaning of the Danish reservation, been 'considered' in such a way that the Human Rights Committee was precluded from it. According to this point of view, the reservation aims at preventing a review of cases but does not seek to limit the competence of the Human Rights Committee merely on the ground that the rights of the UN Covenant on Civil and Political Rights allegedly violated may also be covered by the European Convention and its procedural requirements since it concerns a separate and independent international instrument.[284]

In the Case of *Pauger* the Committee decided that, irrespective of whether the State party has invoked its reservation to article 5, paragraph 2 (a), of the Optional Protocol or not, the European Court has based the decision of inadmissibility solely on procedural grounds, rather than on reasons that include a certain consideration of the merits of the case. This meant that the same matter had not been 'examined' within the meaning of the Austrian reservation to article 5, paragraph 2 (a), of the Optional Protocol.[285] In the Case of *Franz and Maria Deisl* the Committee noted that the European Court declared the authors' application inadmissible for failure to comply with the six-month rule, and that no such procedural requirement existed under the Optional Protocol. In the absence of an 'examination' of the same matter by the European Court, the Committee concluded that it was not precluded from considering the authors' communication by virtue of the Austrian reservation to article 5, paragraph 2 (a), of the Optional Protocol.[286]

In the Case of *Rupert Althammer* the Committee recalled that it on earlier occasions had already decided that the independent right to equality and non-discrimination embedded in article 26 of the Covenant provides a greater protection than the

[284] *Report of the Human Rights Committee of 1982*, General Assembly Official Records (A/37/40), p. 213, and the individual opinion of the East German expert, Mr Graefrath, appended to this decision, p. 214. See also Communication No. 168/1984, *Report of the Human Rights Committee of 1985*, General Assembly Official Records (A/40/40), p. 235; see also Communication No. 744/1997, *Linderholm*, decision on admissibility adopted on 23 July 1999, UN Doc. CCPR/C/66/D/744/1997, at para. 4.2. where the Committee decided in the same way.

[285] Communication No. 716/1996, *Pauger*, Views adopted on 25 March 1999, at para. 6.4.

[286] Communication No. 1069/202, Views adopted on 27 July 2004 at para. 10.2.

accessory right to non-discrimination contained in article 14 of the European Convention. The Committee had taken note of the decision taken by the European Court on 12 January 2001 rejecting the authors' application as inadmissible as well as of the letter from the Secretariat of the European Court explaining the possible grounds of inadmissibility. It noted that the authors' application was rejected because it did not disclose any appearance of a violation of the rights and freedoms set out in the Convention or its Protocols as it did not raise issues under the right to property protected by article 1 of Protocol No. 1. As a consequence, in the absence of an independent claim under the Convention or its Protocols, the Court could not have examined whether the authors' accessory rights under article 14 of the Convention had been breached. In the circumstances of the case, therefore, the Committee concluded that the question of whether or not the authors' rights to equality before the law and non-discrimination had been violated under article 26 of the Covenant was not the same matter that was before the European Court. The Committee, therefore, decided that the communication was admissible.[287] The outcome will now be different in respect of those States which have ratified Protocol No. 12.

[287] Communication No. 998/2001, Views adopted on 8 August 2003 at para 7.1.

CHAPTER 2
THE PROCEDURE BEFORE THE EUROPEAN COURT OF HUMAN RIGHTS

REVISED BY LEO ZWAAK

CONTENTS

2.1 INTRODUCTION

As stated above, a year after Protocol No. 11 to the Convention entered into force the Commission ceased to exist. Its functions have been merged with those of the Court in the newly established Court. In its sifting task the Court has until now followed the previous practice of the Commission. The Registry of the Court establishes all necessary contacts with the applicants and, if necessary, requests further information. Next, the application is registered and assigned to one of the Sections of the Court. A judge-rapporteur is designated by the President of the Section, who may refer the application to a three-judge committee, which may include the judge-rapporteur. The committee may, by unanimous decision, declare the application inadmissible. Such a decision is final. When the judge-rapporteur considers the application to be not inadmissible or when the committee does not unanimously reject the complaint, the application will be examined by a Chamber.

2.2 THE EXAMINATION OF ADMISSIBILITY

2.2.1 REGISTRATION OF AN APPLICATION

A complaint usually reaches the Registry of the Court by way of a letter. As a rule such letters have the character of a first contact and not of a formal application. They do not (yet) lend themselves to official registration. Applicants may approach the Registry by sending a letter by facsimile ('fax'). However, they must send the signed original by post within 5 days following the dispatch by fax. The Registry makes a provisional file for each case in order to obtain at the earliest possible stage as complete a picture as possible of any complaint. It is in the interest of the applicant to be diligent in conducting the correspondence with the Registry. Any delay in replying or failure to

reply is likely to be regarded as a sign that the applicant is not or is no longer interested in having his case dealt with. Thus, if he does not answer a letter sent to him by the Registry within one year of its dispatch to him, his file will be destroyed.

The applicant receives a form for him to fill out which should be returned to the Registry within six weeks at the latest. He may also submit documents in addition to this form. The application, which must bear his signature, must contain: the name, age, occupation and address of the applicant; the name, occupation and address of his representative, if any; the name of the Contracting State against which the application is lodged; as specific as possible, the object of the application and the provision(s) of the Convention allegedly violated; a statement of the facts and arguments on which the application is based; and finally any relevant documents, and in particular any judgments or other act relating to the object of the application.[1] Moreover, in his application the applicant must provide information showing that the conditions laid down in Article 35(1) concerning the exhaustion of domestic remedies and the six-month time-limit for filing the application have been complied with. In general, procedural rules are not treated in Strasbourg with the same rigidity as they are by national courts.[2] However, a communication containing only an allegation that a particular act violates one or more provisions of the Convention was considered by the Commission insufficient to constitute a full application, unless this communication sets out summarily the object of the application.[3]

If the above-mentioned requirements are satisfied and the complaint, *prima facie*, discloses a violation of the Convention, it will in general be entered in the official register of the Court. Registration has no other meaning than that the complaint is pending before the Court; no indications as to its admissibility may be inferred from it.

Until 1 January 2002 registration of a complaint – save in the event of failure to supply certain documents or information – was not refused if the party submitting it insisted on registration. Nevertheless, only a small part of all complaints received were actually registered.[4] The other cases were withdrawn during the phase of the first correspondence with the Registry of the Court. The Registry had been instructed to draw the attention of potential applicants to the possibility of rejection of the complaint in cases where the existing case law pointed in that direction. The Registry did so by means of standard letters. At present, however, in the interest of efficiency, the Court has decided to dispense with the warning letter. In accordance with Rule 49 of

1 Rule 47(1) of the Rules of Court of the European Court of Human Rights, Strasbourg, November 2003 (hereafter: the Rules of Court). See: http://www.echr.coe.int/Eng/EDocs/RULES%20OF%20COURTNOV2003.htm.
2 For the Commission, see Appl. 332/57, *Lawless v. Ireland*, Yearbook II (1958-1959), p. 308 (326).
3 Appl. 18660/91, *Bengtsston v. Sweden*, D&R 79-A (1994), p. 11 (19).
4 In 2005, the Registry of the Court received 41,510 communications, 35,402 of which were registered; *Survey of Activities and Statistics*, 2005.

the Rules of Court once the case is ready, the President of the Section to which the case is assigned shall designate a judge as rapporteur, who will examine the application and decide whether it should be considered by a Committee or a Chamber.[5]

2.2.2 LANGUAGES

The official languages for the Court are English and French, but the President of the Chamber may permit the parties to use another language. In connection with individual complaints, and for as long as no Contracting Party has been given notice of such an application, all communications with and oral and written submissions by applicants or their representatives, if not in one of the Court's official languages, will be in one of the official languages of the Contracting Parties. If a Contracting Party is informed or given notice of an application, the application and any accompanying documents will be communicated to that State in the language in which they were lodged with the Registry by the applicant. In practice this means that the parties may also use any of the other languages of the Contracting States, and that the correspondence may also be conducted in those languages.

All communications with and pleadings by such applicants or their representatives in respect of a hearing, or after a case has been declared admissible, will be in one of the Court's official languages, unless the President of the Chamber authorises the continued use of the official language of a Contracting Party. If such leave is granted, the Registrar will make the necessary arrangements for the interpretation and translation into English or French of the applicant's oral and written submissions, respectively, in full or in part, where the President of the Chamber considers it to be in the interests of the proper conduct of the proceedings. Exceptionally the President of the Chamber may make the grant of leave subject to the condition that the applicant bears all or part of the costs of making such arrangements. Unless the President of the Chamber decides otherwise, any decision made in this respect will remain valid in all subsequent proceedings in the case, including those in respect of requests for referral of the case to the Grand Chamber and requests for interpretation or revision of a judgment.

All communications with and oral and written submissions by a Contracting Party which is a party to the case will be in one of the Court's official languages. The President of the Chamber may grant the Contracting Party concerned leave to use one of its official languages for its oral and written submissions. If such leave is granted, it is the responsibility of the requesting Party to file a translation of its written submissions into one of the official languages of the Court within a time-limit fixed

[5] See in this respect: Reflection Group on the Reinforcement of the Human Rights Protection Mechanism, CDDH-GDR (2001) 010, 15 June 2001, p. 9.

by the President of the Chamber. Should that Party not file the translation within that time-limit, the Registrar may make the necessary arrangements for such translation, the expenses to be charged to the requesting Party. The Contracting Party will bear the expenses of interpreting its oral submissions into English or French. The Registrar is responsible for making the necessary arrangements for such interpretation.

The President of the Chamber may direct that a Contracting Party which is a party to the case will, within a specified time, provide a translation into, or a summary in, English or French of all or certain annexes to its written submissions or of any other relevant document, or of extracts therefrom. The President of the Chamber may invite the respondent Contracting Party to provide a translation of its written submissions in the or an official language of that Party in order to facilitate the applicant's understanding of those submissions. Any witness, expert or other person appearing before the Court may use his or her own language if he or she does not have sufficient knowledge of either of the two official languages. In that event the Registrar shall make the necessary arrangements for interpreting or translation.[6]

2.2.3 REPRESENTATION

States are represented before the Court by their Agents, who may be assisted by advocates or advisers.[7] Individuals, non-governmental organisations, or groups of individuals may present and conduct applications before the Court on their own behalf, but may also be represented or assisted by an advocate authorised to practice in any of the Contracting Parties and residing in the territory of one of them, or any other person approved by the President of the Chamber. The President of the Chamber may, where representation would otherwise be obligatory, grant leave to the applicant to present his or her own case, subject, if necessary, to being assisted by an advocate or other approved representative. In exceptional circumstances and at any stage of the procedure, the President of the Chamber may, where he or she considers that the circumstances or the conduct of the advocate or other person appointed so warrant, direct that the latter may no longer represent or assist the applicant and that the applicant should seek alternative representation.[8] The advocate or other approved representative, or the applicant in person who seeks leave to present his or her own case, must even if leave is granted to use one of the (other) languages of the Contracting States, have an adequate understanding of one of the Court's official languages. In case he or she does not have sufficient proficiency to express himself or herself in the

[6] Rule 34 of the Rules of Court.
[7] Rule 35 of the Rules of Court.
[8] Rule 36(4)(b) of the Rules of Court.

Court's official languages, leave may be given to use one of the official languages of the Contracting States.[9]

2.2.4 COSTS OF THE PROCEEDINGS

The procedure before the Court is free of charge for the parties; the expenses are accounted for by the Council of Europe.[10] Where a witness, expert or other person is summoned at the request or on behalf of a Contracting Party, the costs of their appearance shall be borne by that Party unless the Chamber decides otherwise. The costs of the appearance of any such person who is in detention in the Contracting Party on whose territory on-site proceedings before a delegation takes place, shall be borne by that Party unless the Chamber decides otherwise. In all other cases, the Chamber shall decide whether such costs are to be borne by the Council of Europe or awarded against the applicant or third party at whose request or on whose behalf the person appears. In all cases, such costs will be taxed by the President of the Chamber.[11] Finally, at every stage of the procedure, after the written observations of the respondent government concerning the admissibility have been received or the time-limit for this has expired, the President of the Chamber may grant the applicant free legal aid if he deems this necessary for the proper conduct of the case before the Chamber and the applicant does not have sufficient means.[12]

The President of the Chamber will conclude that free legal aid is necessary when it is evident that the applicant has had no legal training, or when it appears from the written documents submitted by him that he is unable to defend his case adequately before the Court. In order to establish that he does not have sufficient means, the applicant must submit a declaration to that effect, certified by the appropriate domestic authorities.[13]

Free legal aid may comprise not only lawyer's fees but also the travelling and subsistence expenses and any other necessary expenses incurred by the applicant and his lawyer.[14]

9 Rule 36(5) of the Rules of Court.
10 Art. 50 of the Convention.
11 Rule A5(6) of the Annex to the Rules of Court.
12 Rules 91-96 of the Rules of Court.
13 Rule 93 of the Rules of Court.
14 Rule 94 of the Rules of Court.

2.2.5 HANDLING OF THE CASE AFTER THE APPLICATION HAS BEEN RECEIVED

Any individual application will be assigned to a Section of a Chamber by the President of the Court. If the application is brought by a State, the President gives notice of the application to the State against which the claim is made and assigns the application to one of the Sections. The President of the Section constitutes the Chamber and invites the respondent State to submit written observations on admissibility.[15]

In the case of a (registered) individual complaint the President of the Section to which the case has been assigned by the President of the Court nominates a member of the Section to act as judge-rapporteur, who examines the application. The latter will thereafter work in close co-operation with the case-processing lawyer to whom the case has been allocated. The rapporteur may request relevant further information on the complaint as well as documents and other material from the applicant and/or the State concerned.[16] He communicates any information obtained from the State to the applicant for comments. The same holds good with respect to the information obtained from the applicant, which will be communicated to the State for comment. The tasks of the judge-rapporteur cover examination and preparation of the case, channelling it towards a Committee of three judges or a Chamber of seven judges and making proposals as to its processing. The judge-rapporteur will seize one of the Committees (at present twelve have been constituted) of the case if it is not complex and appears to be inadmissible *de plano*.[17] This procedure is known as the 'summary procedure', by which the Committee of three, by unanimous vote ('global formula'), may declare an application inadmissible or strike it off the list, when such a decision can be taken without further examination.[18] In 1999, 79% of all inadmissibility decisions were taken by Committees; that percentage had increased to 92% in 2000.[19] Since January 2002 the applicant no longer receives a copy of the decision. He or she will receive a letter from the Registry stating that the application has been declared inadmissible and a brief outline of the grounds. The letter states that the Registry is not able to give any further information or reasons in connection with the decision. This decision is final.[20]

If the application is not declared inadmissible by unanimous vote of the Committee of three, the case will be examined by a Chamber. It is for the judge-rapporteur to prepare a report summarising the facts of the case, indicating the issues which it raises

15 Rule 51 of the Rules of Court.
16 Rule 49(2)(a) of the Rules of Court.
17 Rule 49(2) of the Rules of Court.
18 Rule 53(2) of the Rules of Court.
19 Reflection Group on the Reinforcement of the Human Rights Protection Mechanism, CDDH-GDR (2001) 010, 15 June 2001, p. 11.
20 Art. 28 of the Convention.

and making a proposal as to the procedure to be followed. The Chamber may request additional relevant information from the applicant or the State concerned and/or give notice of the application to the State and invite the State to present written observations on the admissibility of the application.[21] The information and/or observations of the State are communicated to the applicant, so that the latter may comment on it. The same holds true with respect to the information and/or observations obtained from the applicant, which will be communicated to the respondent State. After receipt of the observations of the State against which the application is brought, the application is examined by the judge-rapporteur. Before deciding upon the latter's report on admissibility, the Chamber may invite the parties to submit further observations in writing or orally.[22] If the Chamber decides to hold a hearing in this phase, the parties are also invited to plead on the merits. Such a combined procedure is intended to save time.[23]

The above-mentioned difference in treatment between individual applications and applications by States as far as referring the application to the defendant State is concerned, would seem to be justified. A State may be assumed not to lodge an application lightly, on account of the political complications which such a step may involve. In the case of individual applications the chances for this to happen are greater. It would, therefore, not be right to also communicate for comments to the governments concerned those numerous applications which, *prima facie*, fail to satisfy the admissibility conditions. Nor does it appear to be objectionable that among individual applications a first selection is made via a simplified procedure, provided that the legal position of the applicant is not negatively affected by such a procedure. It is, therefore, of the greatest importance that the rapporteur be obliged to transmit any information he obtains from a Government to the applicant, upon which the latter may comment. Thus, the equality of the parties is secured. It would seem less satisfactory that the outcome of the simplified procedure is not communicated to the applicant in the form of a decision, signed by the President of the Committee concerned, with a specification of the ground(s) of inadmissibility. The letter, signed by a member of the Registry, and which is not in the applicant's own language, is far from a public and reasoned decision and is often experienced as a denial of justice.

In the event that the application is handled by a Chamber, the latter decides on the admissibility and the merits.[24] At this stage of the proceedings an oral hearing will be held if necessary. The Chamber may declare the case inadmissible at any stage of the proceedings, even if the case was initially declared admissible.[25] The decision on

21 Rule 54(2) of the Rules of Court.
22 Rule 54(2)(c) of the Rules of Court.
23 Rules 54(3) and 54 A of the Rules of Court.
24 Article 29(1) of the Convention.
25 Article 35(4) of the Convention.

admissibility must be reasoned and as a rule is taken separately.[26] According to the Explanatory Report to Protocol 11, in its decision declaring the application admissible the Chamber may give the parties an indication of its opinion on the merits. A separate decision on admissibility is important to the parties if they are considering starting negotiations to reach a friendly settlement. There may, however, be situations in which the Court does not take a separate admissibility decision. This could occur, for example, where a State does not object to a case being declared admissible.[27] In fact, joint decisions on admissibility and merits have become more and more common.

The entry into force of Protocol No. 14 will change the procedure considerably. The main aim of this Protocol is to reduce the time spent by the Court on clearly inadmissible applications and repetitive applications. The filtering capacity will be increased by making a single judge competent to declare inadmissible or to strike out an individual application. This new mechanism maintains the judicial character of decision-making on admissibility. The single judges will be assisted by non-judicial rapporteurs, who will be staff members of the Registry. Former Article 25 will be renumbered as Article 24 and will be amended in two respects. The legal secretaries as created by Protocol No.11 will cease to exist, since they never had an existence of their own. A new paragraph 2 will be added so as to introduce the function of rapporteur to assist the new single-judge formation provided for in the new Article 27. The work of rapporteurs will be carried out by persons other than judges in order to achieve a significant potential increase in the filtering capacity which the institution of single-judge formations aims at. It will be for the Court to implement the new paragraph 2 by deciding in particular on the number of rapporteurs needed and the manner and duration of appointment. The *Explanatory Report* to the Protocol points out that it would be advisable to diversify the recruitment channels for Registry lawyers and rapporteurs. Without prejudice to the possibility of entrusting existing Registry lawyers with rapporteur functions, it is deemed desirable to reinforce the Registry, for fixed periods, with lawyers who have an appropriate practical experience in the functioning of their respective domestic legal systems. Moreover, it is understood that the new function of rapporteur should be conferred on persons with solid legal experience, expertise in the Convention and its case law and a very good knowledge of at least one of the two official languages of the Council of Europe, and who meet the requirements of independence and impartiality.[28] According to Article 26(3)(new) the single judge shall not sit in cases concerning the High Contracting Party in respect of which he or she has been elected.

26 Article 45(1) of the Convention.
27 Protocol No. 11 to the European Convention on Human Rights and Explanatory Report, para 77 and 78, Council of Europe, Strasbourg May 1994, H(94)5, (hereinafter: Explanatory Report).
28 *Explanatory Report to Protocol No. 14*, para. 59.

The establishment of this system will lead to a significant increase in the Court's filtering capacity, on the one hand, on account of the reduction, compared to the old Committee practice, of the number of actors involved in the preparation and adoption of decisions (one judge instead of three; the new rapporteurs may combine the function of case-lawyer and rapporteur), and on the other hand because judges will be relieved of the rapporteur role when sitting in a single-judge formation. As a result there will be a multiplication of filtering formations operating simultaneously.

Article 26(1)(new) sets out the competence of the single-judge formations. Their competence will be limited to taking decisions of inadmissibility and decisions to strike a case off the list "where such a decision can be taken without further examination". The purpose of this amendment is to provide the Court with an additional tool which should assist it in its filtering work and allow it to devote more time to cases which warrant examination on the merits, whether seen from the perspective of the legal interest of the individual applicant or considered from the broader perspective of the law of the Convention and the European public order to which it contributes. The latter point is important with regard to the new admissibility criterion introduced in Article 35, and which relates to the interest of the applicant and the interest of respect for human rights, but in respect of which the Court's Chambers and Grand Chamber will have to develop case-law at first.[29] In case of doubt as to admissibility, the judge will refer the application to a Committee or Chamber.

Finally, paragraph 2 of Article 27 will be amended to make a provision for a new system of appointment of *ad hoc* judges. This new system is a response to criticism of the old system, which allowed the High Contracting Party to choose an *ad hoc* judge after the beginning of proceedings.[30] Under the new rule contained in Article 26(4)(new), each High Contracting Party will be required to draw up a reserve list of *ad hoc* judges from which the President of the Court shall choose someone when the need arises to appoint an *ad hoc* judge. It is understood that the list of potential *ad hoc* judges may include names of judges elected in respect of other High Contracting Parties. More detailed rules on the implementation of this new system may be included in the Rules of Court.

Paragraphs 1 and 2 of the amended Article 28 will extend the powers of three-judge Committees. Under the present system these committees may unanimously declare applications inadmissible. Under paragraph 28(1)(b)(new), they may also, in a joint decision, declare individual applications admissible and decide on the merits, when the questions raised concerning the interpretation and application of the Convention are covered by well-established case law of the Court. 'Well-established case-law' normally means case law which has been consistently applied by a Chamber. Exceptionally, however, it is conceivable that a single judgment on a question of principle may constitute 'well-established case law', particularly when rendered by the Grand Chamber. This new competence will apply, in particular, to repetitive cases, which account for a significant proportion of the Court's judgments (in 2003, approximately 60%). Parties may, of course, contest the 'well-established' character of the case law before the Committee.[31]

The new procedure concerning admissible repetitive cases will be both simplified and accelerated, although it preserves the adversarial character of proceedings and the principle of judicial and collegiate decision-making on the merits. It will be simplified in that the Court will bring the case (or possibly a group of similar cases) to the attention of the respondent Party, pointing out that it concerns an issue which is already the subject of well-established case law holding a violation. Should the respondent Party agree with the Court's position, the latter will be able to give its judgment very rapidly. The respondent Party may contest the application, for example, if it considers that domestic remedies have not been exhausted or that the case at issue differs from applications which have resulted in well-established case law. However, it may not veto the use of this procedure which lies within the Committee's sole competence. The Committee will rule on all aspects of the case (admissibility, merits and just satisfaction) in a single judgment or decision. The procedure still requires unanimity on each aspect. Failure to reach a unanimous decision counts as no decision, in which event the Chamber procedure will apply.[32] It will then fall to the Chamber to decide whether all aspects of the case should be covered in a single judgment. Even when the Committee initially intends to apply the procedure provided for in Article 28(1)(b), it may still declare an application inadmissible under Article 28(1)(a). This may happen, for example, if the respondent Party has persuaded the Committee that domestic remedies have not been exhausted. The implementation of the new procedure will substantially increase the Court's decision-making capacity and effectiveness, since many cases can be decided by three judges, instead of the seven currently required for admissible applications.

Even when, in the new procedure, a three-judge Committee gives a judgment on the merits, the judge elected in respect of the High Contracting Party concerned will not be an *ex officio* member of the Committee, in contrast with the situation with regard to judgments on the merits under the Convention as it stands. The presence of this judge would not appear necessary, since the Committee will deal with cases on which well-established case law exists. However, a Committee may invite the judge elected in respect of the High Contracting Party concerned to replace one of its members, if it deems the presence of this judge to be useful. For example, it may be felt that this judge, who is familiar with the legal system of the respondent Party,

29 See *infra*, 2.2.9.
30 *Ibidem*, para. 64.
31 *Ibidem*, para. 68.
32 Article 29 (1) of the Convention.

should be involved in taking the decision, particularly when such questions as the exhaustion of domestic remedies need to be clarified. One of the factors which a Committee may consider relevant in this respect is whether the respondent Party has contested the applicability of Article 28(1)(b).[33] According to the *Explanatory Report* the reason why this factor has been explicitly mentioned in Article 28(3) is that it was considered important to have at least some reference in the Convention itself to the possibility for respondent Parties to contest the application of the simplified procedure.[34] A respondent Party may contest the new procedure, for example, on the basis that the case in question differs in some material respect from the established case law cited. It is likely that the expertise that the national judge has in domestic law and practice will be relevant to this issue and, therefore, helpful to the Committee. Should this judge be absent or unable to sit, the procedure provided for in Article 26(4)(new) *in fine* will apply.[35]

While separate decisions on admissibility were the rule before the entry into force of Protocol No. 11, joint decisions on the admissibility and merits of individual applications has become more and more common, which allows the registry and judges to process faster while respecting fully the principle of adversarial proceedings. This practice will be formalised in the amended Article 29.[36] However, the Court may always decide that it prefers to take a separate decision on the admissibility of a particular application. According to the second paragraph of Article 29 (new) separate decisions are the rule in the case of inter-State applications.

2.2.6 RELINQUISHMENT OF JURISDICTION IN FAVOUR OF THE GRAND CHAMBER

Where cases pending before a Chamber raise serious questions affecting the interpretation of the Convention or its Protocols, or where the resolution of a question before the Chamber might have a result inconsistent with a judgment previously delivered by the Court, the Chamber may, at any time before it has rendered its judgment, relinquish jurisdiction in favour of the Grand Chamber, unless one of the parties to

[33] Article 28(3) (new) of the Convention.

[34] *Explanatory Report to Protocol No. 14*, CETS 194, para. 71.

[35] "If there is none or if the judge is unable to sit, a person chosen by the President of the Court from a list submitted in advance by that Party shall sit in the capacity of judge".

[36] This Article reads as follows:

1 If no decision is taken under Article 27 or 28, or no judgment rendered under Article 28, a Chamber shall decide on the admissibility and merits of individual applications submitted under Article 34. The decision on admissibility may be taken separately.

2 A Chamber shall decide on the admissibility and merits of inter-State applications submitted under Article 33. The decision on admissibility shall be taken separately unless the Court, in exceptional cases, decides otherwise.

the case objects.[37] The Chamber may take this decision of its own motion and does not have to give reasons for it. The Registrar notifies the parties of the Chamber's intention to relinquish jurisdiction. The parties will have one month from the date of that notification within which to file at the Registry a duly reasoned objection. An objection which does not fulfil these conditions will be considered invalid by the Chamber.[38]

2.2.7 PUBLIC CHARACTER OF THE HEARING

In accordance with Rule 63 of the Rules of Court the hearings are public unless, in accordance with paragraph 2 of that Rule, the Chamber in exceptional circumstances decides otherwise, either of its own motion or at the request of a party or another person concerned. Paragraph 2 provides that the press and the public may be excluded from all or part of a hearing in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the private life of the parties so require, or to the extent strictly necessary in the opinion of the Chamber in special circumstances where publicity would prejudice the interests of justice. In accordance with paragraph 3, any request for a hearing to be held in camera must include reasons and specify whether it concerns all or only part of the hearing.

Rule 33 provides that all documents deposited with the Registry in connection with an application, with the exception of those deposited within the framework of friendly-settlements negotiations, must be accessible to the public unless the President of the Chamber decides otherwise, either of his own motion or at the request of a party or another person concerned. According to its paragraph 2, public access to a document or to any part of it may be restricted in the interests 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 to the extent strictly necessary in the opinion of the President in special circumstances where publicity would prejudice the interests of justice.

Decisions and judgments given by a Chamber are accessible to the public. The Court periodically makes accessible to the public general information about decisions taken by the Committees.[39] According to Rule 77(2) the judgment may be read out at a public hearing.

[37] Article 30 of the Convention.

[38] Rule 72(2) of the Rules of Court.

[39] Rule 33(4) of the Rules of Court.

2.2.8 MEASURES IN URGENT CASES

2.2.8.1 Interim measures

The Convention does not provide for applications for measures in urgent cases. This is regulated under Rules 39, 40 and 41 of the Rules of Court. The Chamber or, when appropriate, its President may, at the request of a party or of any other person concerned, or of his own motion, indicate to the parties any interim measure which it considers should be adopted in the interests of the parties or of the proper conduct of the proceedings before it. Notice of these measures is given to the Committee of Ministers.[40] In any case of urgency the Registrar, with the authorisation of the President of the Chamber, may, without prejudice to the taking of any other procedural steps and by any available means, inform a Contracting Party concerned in an application of the introduction of the application and of a summary of its objects.[41] Finally, in urgent cases the Chamber or its President may decide to give priority to a particular application, thus derogating from its normal procedure, according to which applications are dealt with in the order in which they become ready for examination.[42]

2.2.8.2 Legal character of interim measures

In the *Cruz Varas* Case the Court had to decide on the argument that the failure to comply with the Commission's indication of an interim measure amounted to a violation of Sweden's obligation under Article 25 [the present Article 34] not to hinder the effective exercise of the right of individual petition. The Court took the position that the Convention did not contain any provision empowering the Convention organs to order interim measures.[43] The Court further noted that the practice of States revealed almost total compliance with the indications of interim measures. Subsequent practice could indeed be taken as establishing the agreement of States regarding the interpretation of a Convention provision, but not to create new rights and obligations which were not included in the Convention at the outset. The practice of complying with Rule 36 [the present Rule 39] was rather based on good faith co-operation with the Commission. Furthermore, no assistance could be derived from general principles of international law since no uniform legal rule existed on the matter. Accordingly, the Court found that the power to order binding interim measures could not be inferred from Article 25 [the present Article 34] or from other sources. According to the Court it was within the province of the Contracting Parties to decide whether it

40 Rule 39 of the Rules of Court.
41 Rule 40 of the Rules of Court.
42 Rule 41 of the Rules of Court.
43 Judgment of 20 March 1991, para. 102.

was expedient to remedy this situation. However, the Court observed that where a State decides not to comply with a Rule 36 [the present Rule 39] indication, it knowingly assumes the risk of being found in breach of Article 3 by the Convention organs.[44] This interpretation by the Court of Article 25 [the present Article 34], which deviated from that of the majority of the Commission, was adopted by ten to nine votes. The Court confirmed this interpretation in the Case of *Conka*. The applicants, who were of Slovak origin, were victims of a number of assaults by skinheads in Slovakia and were unable to obtain police protection. In November 1998 they arrived in Belgium, where they sought political asylum. On 18 June 1999 the General Commissioner for Refugees and Stateless Persons refused asylum and ordered them to leave the territory within five days of being put on notice. On 5 October 1999 the applicants and 74 other gypsy refugees who had been refused asylum, were put on board a plane bound for Slovakia notwithstanding the Court's interim measure under Rule 39 of the Rules of Court.[45]

In subsequent cases, i.e. in the *Mamatkulov and Abdurasulovic* Case and in the *Ocalan* Case, however, the Court changed its position and held that its interim measures under Rule 39 of the Rules of Court are legally binding. In the *Mamatkulov and Abdurasulovic* Case the Court held for the first time that a State Party to the Convention to which interim measures have been indicated in order to avoid irreparable harm being caused to the victim of an alleged violation must comply with those measures and refrain from any act or omission that will undermine the authority and effectiveness of the final judgment.[46] If a State does not comply with an interim measure, this can lead to a violation of the right of individual application (under Article 34 ECHR), at least if the contested act – *in casu* an extradition – has affected the core of the right of individual application.[47] In this case the applicants, two Uzbek nationals who were members of an opposition party, were arrested at Istanbul airport with an international arrest warrant on suspicion of involvement in terrorist activities in their home country. The Uzbek authorities asked for their extradition. The applicants claimed, *inter alia*, that, if extradited to Uzbekistan, their lives would be at risk and they would be in danger of being subjected to torture. They asked the Court under Rule 39 of the Rules of Court to indicate an interim measure to Turkey not to extradite them to Uzbekistan. The President of the Chamber indicated to the Turkish Government that it was desirable in the interest of the parties and the proper conduct of the proceedings before the Court not to extradite the applicants to Uzbekistan until the Court had had an opportunity to examine the applications further at the forthcoming sessions of the Chamber on 23 and 30 March 1999. On 19 March 1999, the Turkish Cabinet issued a decree for the applicants' extradition and handed

44 *Ibidem*, para. 103.
45 Decision of 13 March 2001.
46 Judgment of 6 February 2003, 110.
47 *Ibidem*, para. 96.

information to the Court regarding guarantees obtained from the Uzbek Government. Notwithstanding the decision of the Chamber of 23 March to extend the interim measures until further notice, the applicants were extradited on 27 March.[48] The Court recalled that the object and purpose of the Convention as an instrument for the protection of individual human beings require that its provisions be interpreted and applied so as to make its safeguards practical and effective, as part of the system of individual applications. It also reiterated that the Convention is a living instrument which must be interpreted in the light of the present-day conditions. Next, it stressed that it is of utmost importance for the effective operation of the system of individual applications instituted under Article 34, that applicants or potential applicants should be able to communicate freely with the Court without being subjected to any form of pressure from the authorities to withdraw or modify their complaints. It noticed in that connection that the applicants, once extradited, were unable to remain in contact with their representatives, while it is implicit in the notion of the effective exercise of the right of individual application that for the duration of the proceedings in Strasbourg the principle of equality of arms should be observed and an applicant's right to sufficient time and necessary facilities in which to prepare his or her case respected. With reference to its previous case law the Court observed that it is not formally bound by it, although in the interests of legal certainty and foreseeability it should not depart, without good reasons, from its own precedents. Re-examining the problem, and also taking account of the jurisprudence of other international courts on the matter, the Court reached the conclusion that since the applicants' extradition, in disregard of the indications given under Rule 39, had rendered nugatory their right to individual application, it amounted to a breach by Turkey of its obligations under Article 34 of the Convention by failing to comply with the interim measures.[49]

If a State decides not to comply with an interim measure, this will not amount automatically to a violation of Article 34. The Court will decide on a case-by-case basis as to what the effect of the refusal has been on the exercise of the right of individual application. This is demonstrated by the *Öcalan* Case. In this case the Court asked Turkey, *inter alia*, to take all necessary measures to protect the rights under Article 6 of the Convention of PKK leader Öcalan, who had been arrested in Kenya and brought before a court where he faced the death penalty. This request was set aside by the Turkish Government. In its judgment the Court, without prejudice to its view on the binding nature of interim measures, did not find a violation of the right of individual petition. For this the Court gave the following reasons. The Government had later on furnished the information requested by the Court, as part of their observations on the admissibility of the application. Furthermore, the Government's refusal to supply that information earlier had not prevented the applicant from making

[48] *Ibidem*, paras 1-5 and 25-36.
[49] *Ibidem*, paras 93-111.

out his case on the complaints concerning the criminal proceedings that had been brought against him.[50]

Both cases were referred to the Grand Chamber of the Court for a 're-hearing' by virtue of Article 43 of the Convention. In the *Mamatkulov and Abdurasulovic* Case, the Grand Chamber agreed with the line of reasoning of the Chamber and also found that Turkey had failed to comply with its obligations under Article 34.[51]

2.2.8.3 Practice

In the majority of cases the interim measures are taken seriously by the national authorities. In fact it is only in cases of extreme urgency that interim measures are indicated: the facts must *prima facie* point to a violation of the Convention, and the omission to take the proposed measures must result or threaten to result in irreparable injury to certain vital interests of the parties or to the progress of the examination. Such would be the case, for instance, if an expulsion threatens to constitute a violation of Article 3 of the Convention, in view of a serious risk that the person concerned will be exposed to torture or inhuman treatment or punishment. In that case a stay of expulsion may be requested until the Court has had the opportunity to investigate the case. However, it will do so only if there is a high degree of probability that a violation of Article 3 is likely to occur.[52] This requires that the applicant state his case in a convincing manner and possibly also presents some evidence showing the danger to life or limb to which he may be exposed if expelled or extradited to a particular country. It is not sufficient for the applicant to provide information about the danger or uncertain situation in the country of destination and/or his being an opponent of the ruling Government.

Interim measures cannot only be indicated to the respondent State but also to the applicant. The *Altun* Case concerned a pending extradition from Germany to Turkey. The Commission gave an indication to the German Government to suspend the applicant's extradition until it had had the opportunity to examine the case. The Government complied but urged the Commission to decide quickly as it was no longer possible under German law to keep the applicant in detention pending extradition. The Government maintained that, if released, the applicant would abscond. In these circumstances the Commission gave an indication to the applicant, that if he was released, he should remain at the disposal of the German authorities pending the decision which the Commission was to take at its next session. During the domestic

[50] Judgment of 12 March 2003, para. 241.
[51] Judgment of 4 February 2005, para. 132.
[52] Appl. 29966/96, *Venezia v. Italy*, D&R 87, p. 140 (150).

proceedings in this case the applicant committed suicide. The Commission decided that no general interest existed for further examination of the case.[53]

In the *Urrutikoetxea* Case the Commission decided to indicate an interim measure to uphold the expulsion of the applicant until it had had the opportunity to make a more thorough examination of the application. A letter from the applicant's lawyer informed the Commission that the expulsion order had been enforced. The Commission referred to its earlier case law in this respect and held that when a Contracting Party expels an alien from its territory, its responsibility is engaged under Article 3. It declared the application, however, inadmissible noting that the French Government, having taken note of the recommendations made by the European Commission for the Prevention of Torture, Inhuman or Degrading Treatment or Punishment (CPT), considered that there were no substantial grounds for believing that the applicant would be subjected to treatment in Spain contrary to Article 3. Furthermore, the applicant had not suffered any inhuman or degrading treatment since his arrival in Spain.[54]

In the *Soering* Case the applicant argued that, notwithstanding the assurance given to the United Kingdom Government, there was a serious likelihood that he would be sentenced to death if extradited to the United States of America. He maintained that in the circumstances and, in particular, having regard to the 'death row phenomenon', he would thereby be subjected to inhuman and degrading treatment and punishment contrary to Article 3 of the Convention. He also submitted that his extradition to the United States would constitute a violation of Article 6(3)(c), because of the absence of legal aid in the State of Virginia to pursue various appeals. Finally he claimed that, in breach of Article 13, he had no effective remedy under United Kingdom law in respect of his complaint under Article 3. The President of the Commission indicated to the United Kingdom Government, in accordance with Rule 36 [the present Rule 39], that it was desirable, in the interests of the parties and the proper conduct of the proceedings, not to extradite the applicant to the United States until the Commission had had an opportunity to examine the application. This indication was subsequently prolonged by the Commission on several occasions until the case was referred to the Court, which in turn indicated an interim measure.[55]

In the *Nivette* Case the Court even went one step further by applying Rule 36 [the present Rule 39] in a case where an American national ran the risk of being extradited and, according to the applicant, was in danger of having to serve a full life sentence.[56]

53 Report of 7 March 1984, D&R 36 (1984), p. 236 (259-260).

54 Appl. 31113/96, D&R 87 (1996), p. 151(158). See also Appl. 22742/93, *Aylor-Davis v. France*, D&R 76 (1994), p. 164 (172).

55 Judgment of 7 July 1989, paras 4 and 77.

56 Decisions of 14 December 2000 and 3 July 2001, *Nivette*. See also Information Note No. 25, 8-9.

In the *Einhorn* Case, having received information that the applicant had tried to commit suicide, the acting President of the Chamber decided to indicate interim measures, under Rule 39 of the Rules of Court, "in the interests of the proper conduct of the proceedings before the Court". Specifically, the acting President asked the French Government to provide information about the applicant's state of health and not to extradite him prior to 19 July 2001, when a further decision was to be taken. A medical report dated 12 July was sent to the Court by the French Government on 17 July 2001, indicating that the applicant was fit to travel to the US by plane under medical and police supervision. In his application before the Court the applicant complained, among other things, that his extradition was granted despite the risk of his facing the death penalty and being exposed to inhuman and degrading conditions on "death row". However, it appeared from the documents submitted to the Court, in particular from the decision of the *Conseil d'Etat*, that satisfactory assurances had been provided by various US authorities that the applicant would not face the death penalty in any circumstances. Thereupon the Court lifted the interim measure. The applicant was extradited to the United States on the same day. In its decision on admissibility the Court noted that the circumstances of the case and the assurances obtained by the Government were such as to remove the danger of the applicant's being sentenced to death in Pennsylvania. Since, in addition, the decree of 24 July 2000 granting the applicant's extradition expressly provided that "the death penalty may not be sought, imposed or carried out in respect of Ira Samuel Einhorn", the Court considered that the applicant was not exposed to a serious risk of treatment or punishment prohibited under Article 3 of the Convention on account of his extradition to the United States.[57]

In the *Azzouza Rachid* Case the applicant, who was a member of the Islamic Liberation Front (FIS), which was outlawed in Algeria after having won the general elections, alleged that he ran the danger of being maltreated or killed in Algeria upon his deportation. Thereupon, the President of the Commission asked the Belgian State (one day prior to the expulsion) to suspend the implementation of the decision in view of the fact that the person concerned risked losing his life if he were sent back to Algeria. The request was honoured.[58]

In the *Poku* Case the applicant alleged that her deportation posed an immediate threat to her health and the life of her unborn child. The Commission indicated to the United Kingdom that it was desirable in the interests of the parties and the proper conduct of the proceedings before the Commission not to deport the applicant.[59] In the cases of *Ammouche* and *Lenga* an interim measure was given not because the applicants, if extradited, ran the risk of being tortured or losing their lives, but because

57 Decision of 16 October 2001.

58 Appl. 27276/95, D&R 82 A (1995), pp. 156-157.

59 Appl. 26985/95.

they were suffering from AIDS and ran the risk of being exposed to a lack of adequate medical treatment and living conditions.[60] In the *Bodika* Case the applicant, an Angolan national, stated that following a failed coup d'Etat led by a Government Minister, who he claimed was his uncle, there had been severe reprisals in his village in which his mother and sisters were killed. He said that he then joined an Angolan liberation group but was taken prisoner by Government forces, convicted, imprisoned and brutally treated. He succeeded in escaping and entered France in 1983. He was granted political asylum. After various criminal convictions in France his refugee status had been withdrawn in the light of the seriousness of his offences. His application to have the exclusion orders lifted was dismissed. The applicant maintained that if he was sent back to his country of origin, he would be at risk of treatment contrary to Article 3, and requested a Rule 39 indication. The Chamber considered that it was necessary, on the facts, to apply Rule 39.[61]

In the *Jabari* Case the applicant alleged that her expulsion to Iran would constitute a breach of Article 3 of the Convention. She maintained that she risked ill-treatment and death by stoning on account of her adultery. The Commission decided that it was desirable in the interests of the parties and the proper conduct of the proceedings not to return the applicant to Iran until the Commission had had an opportunity to examine the application. It further decided to bring the applicant's complaints under Article 3 of the Convention to the notice of the respondent Government and to invite them to submit written observations on their admissibility and merits.[62] The Court, when dealing with the case, confirmed the application of Rule 39 until further notice.[63]

In the Cases of *Venkadajalasarma* and *Thampibillai* a provisional measure was indicated in response to complaints under Articles 2 and 3 of the Convention that the expulsion of the applicants, Sri Lankan Tamils, to Sri Lanka would expose them to a real risk of death and torture in the hands of the authorities, due to hostilities between the Tamil Tigers and Sri Lankan Government forces. The cases were declared admissible under Article 3 and are still pending.[64]

Recently, in a number of cases an interim measure was indicated against the Netherlands concerning the envisaged expulsion of asylum seekers to Somalia. In one case concerning the expulsion of the applicant via Abu Dhabi, the President asked the Government to submit information on the following issues: 1 the actual situation in Somalia, including UNHCR's most recent view on forced repatriation to that country, and 2 the likelihood of the applicant being sent to Somalia by the Abu Dhabi authorities.[65] In a subsequent case the President had regard to the current situation

60 Appl. 29481/95, 12 September 1996; App. 30011/96, 25 October 1996.
61 Decision of 18 May 1999; See also Decision of 28 June 2001, *Amrollahi*, Information Note 18.
62 Decision of 28 October 1999.
63 Judgment of 11 July 2000, para. 6.
64 Decisions of 9 July 2002.
65 Note Verbale of 21 January 2004, 2683/04.

in Northern Somalia and in particular to the absence of an effective public authority capable of providing protection to the applicant, who submitted that he belonged to a minority and had no family or clan ties in Northern Somalia. The President further noted that there was no guarantee that the applicant would be admitted to Northern Somalia.[66] At present, these cases are still pending and the Dutch Government has adhered to the interim measures.

If the expulsion allegedly violates Article 8 of the Convention (respect for family life), an interim measure will not readily be indicated because the damage can easily be reversed by allowing the expelled person's re-entry into the State concerned.

So far there have been only a few situations in which an indication was given in circumstances other than expulsion or extradition. In one case it was deemed necessary by the Commission in order to secure evidence. After the death of three members of the RAF, who had brought claims before the Commission concerning their treatment in prison, the President of the Commission decided that a delegation of the Commission should visit the prison concerned. This visit was intended to examine, on the spot, the conditions in which the applicants had been detained.[67] The other situation arose in the case of *Patane v. Italy*, where the Commission was faced with an application of a person serving a five-year prison sentence. This person was suffering from a severe state of depression and her health was, according to medical certificates, continuously deteriorating to the point where an acute threat to her life existed. In this case the Commission gave an indication to the Italian Government that it was desirable to take at once all necessary measures to preserve the applicant's health, either by transferring her to an institution better suited for her or by granting her provisional release. The Government informed the Commission that the applicant had been released from detention by order of an Italian court. As the applicant subsequently disappeared, the Commission decided to strike the case off its list.[68]

In the *Ilijkov* Case the applicant complained that he was subjected to torture and inhuman and degrading treatment contrary to Article 3. He claimed that the forced feeding during his hunger strike was administered by unqualified personnel through a dirty rubber hose, in a manner which caused violent pain and a sense of helplessness, and represented a serious risk for his life. In particular, according to independent medical advice obtained from the London Medical Foundation for the Care of Victims of Torture, forced feeding administered without qualified medical supervision on persons on hunger strike might result in cardiac arrest and death. The Commission also decided to indicate to the Government of Bulgaria that it was desirable in the

66 Note Verbale of 3 May 2004, 15243/04.
67 Appls 7572/76, 7586/76, 7587/76, *Ensslin, Baader and Raspe v. Federal Republic of Germany*, Yearbook XVIII (1975), p. 132.
68 Appl. 11488/85.

interest of the parties and the proper conduct of the proceedings before the Commission that all necessary steps be taken by the Government to preserve the applicant's health. The Commission decided to invite the applicant to stop his hunger strike.[69]

In the *Öcalan* Case the Chamber, which had initially held that it was unnecessary to apply Rule 39, had nonetheless decided, under Rule 54(3)(a), to request the Turkish authorities to clarify a number of points concerning the conditions of the applicant's arrest and detention and had indicated that it considered respect of the applicant's rights to put forward his case both in the criminal proceedings and in the proceedings concerning his application to the Court to be of particular importance. It accordingly sought information about whether the applicant would be permitted to receive assistance by counsel in both sets of proceedings. The Government provided certain information concerning the applicant's detention and the circumstances in which he received a visit from two lawyers. On 4 March 1999 the Court asked the respondent Government to take interim measures within the meaning of Rule 39, with particular regard to compliance with the requirements of Article 6 in the proceedings brought against the applicant in the National Security Court and the effective use by the applicant of his right to lodge an individual petition with the Court through lawyers of his choice. On 23 March 1999 the Court requested the Government to supply further information on particular points concerning the measures taken in application of Rule 39 of the Rules of Court. On 9 April 1999 the legal adviser to the Turkish Permanent Delegation indicated that the Government were not prepared to answer the Court's questions on the ground that these went well beyond the scope of interim measures within the meaning of Rule 39. On 2 July 1999 one of the applicant's representatives asked the Court to request the Government "to suspend execution of the death sentence imposed on 29 June 1999 until the Court [had] decided on the merits of his complaints". On 6 July 1999 the Court decided that the request for application of Rule 39 could be allowed if the applicant's sentence were to be upheld by the Court of Cassation. By a judgment of 25 November 1999 the Court of Cassation dismissed the applicant's appeal on points of law and upheld the judgment of 29 June 1999. On the same day one of the applicant's representatives asked the Court to apply Rule 39 and to request the Government to stay execution of the death sentence imposed on the applicant until the end of the proceedings concerning his application to the Court. On 30 November 1999 the Court decided to indicate to the Government the following interim measure: "The Court requests the respondent Government to take all necessary steps to ensure that the death penalty is not carried out so as to enable the Court to proceed effectively with the examination of the admissibility and merits of the applicant's complaints under the Convention." On 12 January 2000 the Turkish Prime Minister announced that the applicant's file was to be transmitted to the Turkish Grand National Assembly (which is empowered to approve or disapprove

[69] Appl. 33977/96.

enforcement of the death penalty) when the proceedings before the Court were over. The application was declared admissible with respect to the complaints under Articles 2, 3, 6 and 34.[70] In its subsequent judgment the Court stated that, in the special circumstances of the case, the Government's refusal to provide the Court with the requested information did not amount to a violation for the following reasons: firstly, the Government had furnished the information later as part of their observations on the admissibility of the application, and secondly and above all, the refusal to supply that information earlier had not prevented the applicant from making out his case on the complaints concerning the criminal proceedings that had been brought against him. Indeed, these complaints, which mainly concerned Article 6, were examined by the Court, which subsequently found a violation. The Court also reiterated in that connection that the information requested from the Government concerned the fairness of the proceedings that could have led to the death penalty imposed on the applicant being carried out. That risk had now effectively disappeared following the abolition of the death penalty in peacetime in Turkey.[71]

An indication under Rule 39 will not be given if it is still possible to apply for domestic remedies with suspensive effect. The Commission has also never given an indication under Rule 36 [the present Rule 39] if in the case of an expulsion or extradition the receiving State was a Member State of the Council of Europe and had recognised the right of individual complaint. Apparently, the Commission was of the opinion that in such a case there was a sufficient guarantee that the Convention – in particular Articles 2, 3, 5 and 6 – would be respected by the receiving State, if necessary through a new application under Article 25 [the present Article 34], this time directed against the latter State.

As regards the manner in which requests under Rule 39 are to be presented, the following points are the most important to be mentioned. Firstly, the request should be submitted as soon as the final domestic decision has been taken, and sufficiently in advance of the execution of the decision, for instance an expulsion order, so that an intervention by the Court is still possible. A certain time is required for the Registry to prepare the case and, when necessary, to communicate with the President of the Chamber. The Chamber or its President should also have sufficient time to obtain information on the matter, for instance by contacting the Agent of the Government to inquire about the Government's intentions. For these reasons, making a preliminary request under Rule 39 pending the decision of the domestic authorities or courts might be advisable.

[70] Decision of 14 December 2000, *Öcalan*.
[71] Judgment of 12 March 2003, *Öcalan*, paras 241-242.

Secondly, the request must be in writing and should contain the required information. A telephone conversation might serve as an announcement of the request but it cannot as such set in motion the procedure under Rule 39. On the other hand communication by e-mail or fax is sufficient provided it contains adequate information. In this connection it is also very important to provide the Chamber with copies of relevant national judgments and decisions showing the arguments which have been put before the domestic authorities and courts and the reasons for the refusal to grant the claim.[72]

2.2.8.4 Urgent notification

According to Rule 40, in case of urgency the Registrar, with the authorisation of the President of the Chamber, may inform the respondent State of the introduction of the application and of a summary of its objects. The purpose of this provision is to prevent surprise on the part of the Contracting State concerned if afterwards any interim measures prove desirable.

2.2.8.5 Case priority

According to Rule 41 of the Rules of Court the Chamber shall deal with applications in the order in which they become ready for examination. It may, however, decide to give priority to a particular application. In the Case of *X v. France* the applicant was a haemophiliac who had undergone several blood transfusions and was discovered to be HIV positive. He started proceedings for indemnity. He lodged his application with the Commission on 19 February 1991, alleging that his case had not been heard within a reasonable time as required under Article 6(1) of the Convention. The Commission found a violation of Article 6(1) on 17 October 1991. The Court was prepared to give priority to the case and delivered its judgment on 31 March 1992, finding a violation of Article 6(1).[73] However, in February 1992 the applicant had died.

In the Case of *D. v. the United Kingdom* the applicant, who suffered from AIDS, maintained that his removal from the United Kingdom to St Kitts would expose him to inhuman and degrading treatment. His case was dealt with by the Court with priority.[74] In a case where the application had been brought by the pretender to the Italian throne, who had been excluded from Italy for fifty-three years, the Court

[72] See C.A. Nørgaard and H. Krüger, "Interim and Conservatory Measures under the European System of Protection of Human Rights", in: Manfred Nowak, Dorothea Steurer and Hannes Tretter (eds.), *Progress in the Spirit of Human Rights*, Festschrift für Felix Ermacora, Kehl am Rhein, 1998, pp. 114-115. On this more recently: Yves Haeck and Clara Burbano Herrera, *Interim Measures in the Case-Law of the European Court of Human Rights*, NQHR, Vol. 21/4, 2003, pp. 625-675.

[73] Judgment of 31 March 1992.

[74] Judgment of 2 May 1997.

decided that, although the application was unquestionably important, there was no reason to give it priority or, *a fortiori*, to communicate it as a matter of urgency.[75] With respect to the disappearance of two members of a Kurdish political party the Court applied Rule 41.[76] In a case against Moldova and the Russian Federation concerning the responsibility for violations of the Convention in Transdniestria, a region which was separated from Moldova and was under the control of the Russian Federation, the Court decided to give priority to the examination.[77]

The *Pretty* Case concerned an applicant who was dying of motor neurone disease, a degenerative disease affecting the muscles, for which there is no cure. The disease was at an advanced stage and the applicant's life expectancy was very poor. Given that the final stages of the disease were distressing and undignified, she wished to be able to control how and when she would die and be spared suffering and indignity. Although it is not a crime to commit suicide in English law, the applicant was prevented by her disease from taking such a step without assistance. It is, however, a crime to assist another to commit suicide under Section 2 para. 1 of the Suicide Act 1961. Ms Pretty wished to be assisted by her husband, but the Director of Public Prosecutions had refused her request to guarantee her husband freedom from prosecution if he did so. Her appeals against that decision were unsuccessful. The applicant complained of a violation amongst others of Articles 2 and 3 of the Convention. The application was registered on 18 January 2002. On 22 January 2002 the Court decided to apply Rule 41 and to give the case priority, and to apply Rule 40 concerning an urgent notification to the application to the Respondent Government. On 29 April 2002 the Court gave its judgment in the case and found no violation of the Convention.[78] Ms Pretty died afterwards in a natural way.

2.2.9 THE ADMISSIBILITY CONDITIONS

Two of the admissibility conditions set forth in the Convention apply to applications submitted by States as well as to those submitted by individuals. These are the condition that all remedies within the legal system of the respondent State must have been exhausted before the case is submitted to the Court, and the condition that the application must have been submitted within a period of six months from the date on which the final national decision was taken (Article 35(1)). For the admissibility of an individual application additional requirements are that the application is not anonymous; that the application is not substantially the same as a matter that has

[75] Appl. 53360/99, *VittorioEmanuele Di Savoia v. Italy*, Information Note 16.

[76] Appl. 65899/01, *Tanis and Deniz v. Turkey*, Information Note 27.

[77] Decision of 4 July 2001, *Ilaşcu, Leşco, Ivanşoc and Petrov-Popa*.

[78] Judgment of 29 April 2002 , para. 42.

already been examined by the Court or has already been submitted to another proc... dure of international investigation or settlement and contains no relevant new infor... mation; that the application is not incompatible with the provisions of the Convention... or the Protocols thereto; that the application is not manifestly ill-founded; and tha... the application does not constitute an abuse of the right to lodge an application (Article... 35(2) and (3)).

Paragraph 4 of Article 35 provides that the Court may reject an application which... it considers inadmissible under this Article at any stage of the proceedings. Thus, it... may do so also after having declared the case admissible at an earlier stage. This com... petence of the Court resembles the competence of the former Commission under... Article 29 (old) to reject a case if in the course of the examination of a petition it found... that the existence of one of the grounds for non-acceptance had been established.

Strictly speaking, one ought to differentiate between applications which are... inadmissible and applications falling outside the competence of the Court, even though... the Convention does not provide a clear basis for such a distinction. Applications by... States may only be rejected on the grounds mentioned in Article 35(1), and not on... the ground of incompatibility with the Convention mentioned in Article 35(2), a... ground on which the Commission sometimes rejected individual applications with... respect to which it had no jurisdiction.[79] All the same, it is evident that applications... by States may also fall outside the jurisdiction of the Court, for instance when the... application relates to a period in which the Convention was not yet binding upon the... respondent State. The Court will have to reject such an application, but in this case,... properly speaking, on account of lack of jurisdiction, not on account of inadmissibility,... the grounds for which are enumerated exhaustively in the Convention. The practice... concerning individual applications, however, shows that the Court usually rejects... applications outside its competence *ratione personae*, *ratione materiae*, *ratione loci*, or... *ratione temporis* on account of inadmissibility. That is why issues relating to the... jurisdiction of the Court will here be discussed under the heading of admissibility... conditions.

In practice the Court applies a particular sequence in the admissibility conditions... by reference to which an application is examined. This sequence is based partly on... logical and partly on practical grounds. But on the ground of practical considerations... the case law of the Court diverges from this sequence on numerous occasions. The... use of the so-called 'global formula' is especially striking.[80] The Court uses this formula... for rejecting an application, which contains various separate complaints, as a whole... on account of its manifestly ill-founded character, although the separate complaints...

[79] See, *e.g.*, Appl. 473/59, *I. v. Austria*, Yearbook II (1958-1959), p. 400 (406) and Appl. 1452/62, *X v. Austria*, Yearbook VI (1963), p. 268 (276).

[80] This is often formulated as follows: 'An examination by the Court of this complaint as it has been submitted does not disclose any appearance of a violation of the rights and freedoms set out in the Convention.'

might be inadmissible on different grounds. The Court bases this approach on the fact that it does not consider it necessary in such a case to make a detailed examination of the separate elements of the application. Although according to Article 45, paragraph 1, reasons must be given for judgments in which an application is declared admissible or inadmissible, the Explanatory Report points out that such reasons can be given in summary form.[81]

Protocol No. 14, once it has entered into force, might change the procedure considerably. This Protocol will introduce a new admissibility criterion to the criteria laid down in Article 35. Paragraph 3 of Article 35 will be amended and read as follows:

> *The Court shall declare inadmissible any individual application submitted under Article 34 if it considers that:*
>
> *a the application is incompatible with the provisions of the Convention or the Protocols thereto, manifestly ill-founded, or an abuse of the right of individual application; or*
>
> *b the applicant has not suffered a significant disadvantage, unless respect for human rights as defined in the Convention and the Protocols thereto requires an examination of the application on the merits and provided that no case may be rejected on this ground which has not been duly considered by a domestic tribunal.*

This new admissibility requirement provides the Court with an additional tool which should assist it in concentrating on cases which warrant an examination on the merits, by empowering it to declare inadmissible applications where the applicant has not suffered any significant disadvantage, and which in terms of respect for human rights do not otherwise require an examination on the merits by the Court. Furthermore, the new admissibility criterion contains an explicit exception to ensure that it does not lead to the rejection of cases which have not been duly considered by a domestic tribunal. In the *Explanatory Report to Protocol No. 14* it is stressed that the new criterion does not restrict the right of individuals to apply to the Court or alter the principle that all individual applications are examined on their admissibility. While the Court alone is competent to interpret the new admissibility requirement and decide on its application, its terms should ensure that rejection of cases requiring an examination on the merits is avoided. The latter will notably include cases which, notwithstanding their trivial nature, raise serious questions affecting the application or interpretation of the Convention or important questions concerning national law.[82]

The new criterion is meant as a tool for the Court in its filtering capacity. It was introduced in Protocol No. 14 to allow the Court to devote more time to cases which warrant examination on the merits. Its introduction was considered necessary in view of the ever increasing caseload of the Court. According to the *Explanatory Report to*

[81] *Explanatory Report to Protocol No. 11*, para 105.

[82] *Explanatory Report to Protocol No. 14*, CETS 194, para. 39.

Protocol No. 14 it was necessary to give the Court some degree of flexibility in addition to that already provided for by the existing admissibility criteria. The interpretation of these criteria has been established in the case law that has been developed over several decades and is, therefore, difficult to change. It further pointed out that it is very likely that the numbers of individual applications to the Court will continue to increase, up to a point where other measures set out in this Protocol may well prove insufficient to prevent the Convention system from becoming totally paralysed and unable to fulfil its central mission of providing legal protection of human rights at the European level, thus rendering the right of individual application illusory in practice.[83]

In our opinion the new criterion may have a filtering effect only after the Court has developed clear-cut jurisprudential criteria of an objective character capable of straightforward application. The terms 'has not suffered a significant disadvantage' are open to interpretation. Like many other terms used in the Convention, they are legal terms capable of, and indeed requiring, interpretation establishing objective criteria through gradual development of the case law of the Court. Moreover, even in a case where the applicant has not suffered any significant disadvantage, the application will not be declared inadmissible if respect for human rights as defined in the Convention or the Protocols thereto requires an examination on the merits.[84] This exception also requires clear and objective criteria. Furthermore, it will never be possible for the Court to reject an application on account of its trivial nature if the case has not been duly considered by a domestic tribunal.[85] It might be questioned if this element of subsidiarity could ever be applied in a consistent and well-balanced way, given the considerable differences between the domestic legal systems and judicial practices of the High Contracting Parties. In any case it is to be expected that examination of whether this exception clause does apply, will require a thorough examination of the part of the file concerning domestic proceedings, and consequently reduce the gain of time that the application of the new admissibility criteria is meant to produce. On the other hand, the psychological costs on the part of the applicant of seeing his or her application being declared inadmissible for lack of significant disadvantage should not be underestimated.

It may be expected that it will take quite some time before the Court's Chambers and Grand Chamber will have developed case law in so-called 'pilot cases'. From the wording of articles 27 and 28 it may be clear that single-judge formations and Committees will not be able to apply the new criterion in absence of such guidance. The drafters of Protocol No. 14 were rather optimistic about the time needed to examine sufficient "pilot cases", since in Article 20(2), second sentence, single-judge

[83] *Ibidem*, para. 78.
[84] Compare with Article 37(1) of the Convention.
[85] *Explanatory Report to Protocol No. 14*, CETS 194, paras 81-82.

formations and Committees will be prevented from applying the new criterion for a period of two years following the entry into force of Protocol No. 14. According to the transitional rule set out in Article 20(2), first sentence, the new admissibility criterion may not be applied to applications declared admissible before the entry into force of Protocol No. 14.

Protocol No. 14 will also amend Article 38 of the Convention, which according to its wording was intended to apply after a case had been declared admissible. In its new wording the text will read as follows:

> *The Court shall examine the case together with the representatives of the parties and, if need be, undertake an investigation, for the effective conduct of which the High Contracting Parties concerned shall furnish all necessary facilities.*

The changes are intended to allow the Court to examine cases together with the Parties' representatives, and to undertake an investigation, not only when the decision on admissibility has been taken, but at any stage of the proceedings. Since this provision even applies before the decision on admissibility has been taken, High Contracting Parties are required to provide the Court with all necessary facilities prior to that decision. Any problem which the Court might encounter in this respect can be brought to the attention of the Committee of Ministers so that the latter can take any step it deems necessary.[86]

The separate admissibility conditions are discussed here in the sequence referred to above.

2.2.10 THE OBLIGATION TO EXHAUST DOMESTIC REMEDIES

2.2.10.1 General

Article 35(1) provides:

> *The Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law, and within a period of six months from the date on which the final decision was taken.*

This is the so-called rule of the 'exhaustion of local remedies' (*épuisement des voies de recours internes*) (hereafter: the local remedies rule), which is to be regarded as a general rule of international procedural law.

[86] *Ibidem*, para 90.

It should be mentioned at the outset that the local remedies rule does not apply to procedures for affording satisfaction under Article 41 of the Convention.[87] In fact such procedures do not ensue from a new application, but constitute a continuation of the original application after a violation has been found by the Court. Questions of admissibility are not involved here at all.[88] Article 35(1) refers expressly to the general rules of international law in the matter, and in its case law the Commission was indeed frequently guided by international judicial and arbitral decisions with respect to this rule. It, for instance, referred expressly to the judgment of the International Court of Justice in the *Interhandel* Case concerning the rationale of the local remedies rule.[89] In the *Nielsen* Case the Commission formulated this rationale as follows: "The Respondent State must first have an opportunity to redress by its own means within the framework of its own domestic legal system the wrong alleged to have been done to the individual."[90]

In the *Akdivar* Case the Court recalled that the rule of exhaustion of domestic remedies obliges those seeking to bring their case against the State before an international judicial or arbitral organ to use first the remedies provided by the national legal system. Consequently, States are dispensed from answering before an international body for their acts before they have had an opportunity to put matters right through their own legal systems. The rule is based on the assumption, reflected in Article 13 of the Convention – with which it has close affinity – that there is an effective remedy available in respect of the alleged breach in the domestic system whether or not the provisions of the Convention are incorporated in national law. In this way it is an important aspect of the principle that the machinery of protection established by the Convention is subsidiary to the national systems safeguarding human rights.[91]

The local remedies rule applies in principle to applications by States as well as to individual applications. This ensues from the wording of Article 35(2) and (3) as compared to that of Article 35(1). The second and third paragraphs of Article 35 expressly declare the admissibility conditions mentioned therein to be applicable only to applications lodged under Article 34, while the first paragraph of Article 35, where the local remedies rule is laid down, is formulated in a general way and is, therefore, also applicable to applications by States. The same conclusion flows from the fact that the local remedies rule is a general rule of international procedural law.

87 On this, see *infra* 2.6.2.

88 Judgment of 10 March 1972, *De Wilde, Ooms and Versyp ('Vagrancy' Cases)*, para 16.

89 *ICJ Reports*, 1959, p. 6 (27).

90 Appl. 343/57, *Schouw Nielsen v. Denmark*, Yearbook II (1958-1959), p. 412 (438). See also Appl. 5964/72, *X v. Federal Republic of Germany*, D&R 3 (1976), p. 57 (60); Appl. 12945/87, *Hatjianastasiou v. Greece*, D&R 65 (1990), p. 173 (177); judgment of 20 September 1993, *Saïdi*, para 38.

91 Judgment of 16 September 1996, para. 65; judgment of 18 December 1996, *Aksoy*, para. 51; judgment of 27 June 2000, *Ilhan*, para. 61; judgment of 14 May 2002, *Şenmse Öner*, para. 77; judgment of 26 July 2002, *Horvath*, para. 37.

While in the case of an individual application the local remedies must have been exhausted by the applicant himself, with respect to applications by States the rule implies that the local remedies must have been exhausted by those individuals in respect to whom, according to the allegation of the applicant State, the Convention has been violated.[92]

In the *Pfunders* Case Austria submitted that, since the right of complaint of States is based on the principle of the collective guarantee and the public interest, and since an applicant State need not prove that an injury has been sustained, the local remedies rule does not hold for States.[93] The Commission, however, rejected this line of reasoning by referring to the terms of Articles 26 and 27 [the present Article 35 (1), (2) and (3)], and held that the principle on which the local remedies rule is based should be applied *a fortiori* in an international system which affords protection not only to the applicant State's own nationals, but to everyone who is in one way or another subject to the jurisdiction of the respondent State.[94] By this statement the Commission confirmed its earlier point of view in the second *Cyprus* Case.[95] The Court followed this approach.[96]

The local remedies rule is not an admissibility condition of an *absolute* character. In the *Aksoy* Case the Court held that the rule of exhaustion is neither absolute nor capable of being applied automatically.[97] On the basis of the reference in Article 35(1) to the 'generally recognised rules of international law', this rule is applied with flexibility.[98] One point of departure is that each concrete case should be judged 'in the light of its particular facts'.[99] According to the Court this means, amongst other things, that it must take realistic account not only of the existence of formal remedies in the legal system of the Contracting Party concerned but also of the general legal and political context in which they operate, as well as the personal circumstances of the applicants.[100] In this respect the Court noted in the *Akdivar* Case that "the situation

92 The condition applies in international law only when the action of a State is concerned with the treatment of individuals. If a State puts forward its own legal position, the condition is not applied, since as a rule a State cannot be subjected against its will to the jurisdiction of another State.

93 Appl. 788/60, Yearbook IV (1961), p. 116 (146-148); judgment of 2 September 1998, *Yasa v. Turkey*, para. 64; judgment of 27 June 2000, *Ilhan*, para 51.

94 Ibidem, pp. 148-152. See also Appls 6780/74 and 6950/75, *Cyprus v. Turkey*, Yearbook XVIII (1975), p. 82 (100).

95 Appl. 299/57, Yearbook II (1958-1959), p. 186 (190-196).

96 See the judgment of 10 May 2001, *Cyprus v. Turkey*, para 102.

97 Judgment of 18 December 1996, para. 53; judgment of 28 July 1999, *Selmouni*, para. 77.

98 The Court has frequently stated that Article 35 must be applied with some degree of flexibility and without excessive formalism. See *e.g.* judgment of 19 March 1991, *Cardot*, para. 36; judgment of 16 September 1996, *Akdivar*, para. 69; judgment of 29 August 1997, *Worm*, para 33; judgment of 27 June 2000, *Ilhan*, para. 51.

99 Appl. 343/57, *Schouw Nielsen v. Denmark*, Yearbook II (1958-1959), p. 412 (442-444).

100 Judgment of 16 September 1996, *Akdivar*, para. 69.

existing in South-East Turkey at the time of the applicants' complaints was – and continued to be – characterised by significant civil strife due to the campaign of terrorist violence waged by the PKK and the counter-insurgency measures taken by the Government in response to it. In such a situation it must be recognised that there may be obstacles to the proper functioning of the system of the administration of justice. In particular, the difficulties in securing probative evidence for the purposes of domestic legal proceedings, inherent in such a troubled situation, may make the pursuit of judicial remedies futile and the administrative inquiries on which such remedies depend may be prevented from taking place."[101]

2.2.10.2 Measures and practices to which the local remedies rule does not apply

2.2.10.2.1 Inter-State complaints

The rule does not apply when a State brings up the legislation or administrative practice of another State without the complaint being related to one or more concrete persons as victims of this legislation or administrative practice (the so-called 'abstract' complaints). In such a case individuals are not required to have exhausted the local remedies, while the applicant State itself cannot be expected to institute proceedings before the national authorities of the respondent State. An example is the first *Cyprus* Case where Greece submitted that a number of emergency acts which were in force in Cyprus at that time conflicted with the provisions of the Convention. In this case the Commission decided that "the provision of Article 26 [the present Article 35(1)] concerning the exhaustion of domestic remedies (...) does not apply to the present application, the scope of which is to determine the compatibility with the Convention of legislative measures and administrative practices in Cyprus."[102]

Later case law concerning inter-State applications has confirmed this position.[103] According to the case law an administrative practice comprises two elements: repetition of acts and official tolerance. The first element is defined as: "an accumulation of identical or analogous breaches which are sufficiently numerous and interconnected to amount not merely to isolated incidents or exceptions but to a pattern or system."[104] By official tolerance it is meant that "though acts of torture or ill-treatment are plainly

[101] *Ibidem*, para. 70; See also judgment of 28 November 1997, *Mentes and Others*, para. 58; judgment of 30 January 2001, *Dulas*, para. 45; judgment of 8 January 2004, *Ayder*, para. 89.

[102] Appl. 176/56, *Greece v. the United Kingdom*, Yearbook II (1958-1959), p. 182 (184).

[103] See, *e.g.*, Appl. 5310/71, *Ireland v. the United Kingdom*, Yearbook XV (1972), p. 76 (242); Appl. 4448/70, *Second Greek* Case, Yearbook XIII (1970), p. 108 (134-136); and Appls 9940-9944/82, *France, Norway, Denmark, Sweden and the Netherlands v. Turkey*, D&R 35 (1984), p. 143 (162-163); Appl. 25781/94 *Cyprus v. Turkey*, D&R 86A p. 104(138). See also the judgment of 16 September 1996, *Akdivar*, para. 67.

[104] Judgment of 18 January 1978, *Ireland v. the United Kingdom*, para 159; judgment of 16 September 1996, *Akdivar*, para. 67.

illegal, they are tolerated in the sense that the superiors of those immediately responsible, though cognisant of such acts, take no action to punish them or to prevent their repetition; or that a higher authority, in face of numerous allegations, manifests indifference by refusing any adequate investigation of their truth or falsity, or that in judicial proceedings a fair hearing of such complaints is denied."[105] In the Case of *France, Norway, Denmark, Sweden and the Netherlands v. Turkey* the Commission added that for it to reach the conclusion that there was no official tolerance, "any action taken by the higher authority must be on a scale which is sufficient to put an end to the repetition of acts or to interrupt the pattern or system."[106]

A condition is always that the applicant State should give 'substantial evidence' of the existence of the national legislation or administrative practice concerned. This requirement of 'substantial evidence' may take on a different meaning depending on whether the admissibility stage or the examination of the merits is concerned. According to the Commission: "The question whether the existence of an administrative practice is established or not can only be determined after an examination of the merits. At the stage of admissibility *prima facie* evidence, while required, must also be considered as sufficient. (...) There is *prima facie* evidence of an alleged administrative practice where the allegations concerning individual cases are sufficiently substantiated, considered as a whole and in the light of the submissions of the applicant and the respondent Party. It is in this sense that the term 'substantial evidence' is to be understood."[107] If the applicant State does not succeed in doing so, the local remedies rule applies.

2.2.10.2.2 Individual complaints

In the case of individual applicants there can be no question of a completely abstract complaint about an administrative practice. The applicant must submit that he is the victim of the alleged violation, which means that he is at the same time the person who must have exhausted all available local remedies.

When an applicant submitted that no local remedy had been available to him, because his complaint concerned the compatibility of Belgian divorce legislation with the Convention, the Commission decided that nothing had prevented him from submitting this question to the Belgian Court of Cassation.[108] And in the case of an application against the Netherlands concerning the discriminatory character of fiscal legislation with respect to married women, the Commission pointed out that the applicant could have submitted the question of the compatibility of the challenged

[105] Report of 5 November 1969, *Greek* Case, Yearbook XII (1969), p. 196.

[106] Appl. 9940-9944/82, D&R 35 (1984), p. 143 (164).

[107] *Ibidem*, pp. 164-165.

[108] Appl. 1488/62, *X v. Belgium*, Coll. 13 (1964), p. 93 (96).

provisions with the Convention, under (the then) Article 66 of the Dutch Constitution to the Dutch courts.[109] Both applications were declared inadmissible under Article [the present Article 35(1)].[110] It may be assumed that the Court will take a simil position when, in the case of an application by a State, certain legislation or an admin strative practice is submitted for review, but the complaint at the same time concern concrete persons to whom an effective and adequate local remedy is available. Th latter must than have exhausted these remedies.

As has been mentioned above, however, a legislative measure or administrativ practice may indeed be challenged by an individual applicant, provided that he prove satisfactorily that he himself is the victim of it. A legislative measure or administrativ practice may be of such a nature as to justify the presumption that the remedies of th State in question offer no prospects of effective redress. This is clearly the case if th situation complained of specifically involves the absence of an effective judicial remedy required by one of the provisions of the Convention. Thus, in *G. v. Belgium* th Commission concluded that "as far as Article 5(4) is concerned, the question o exhaustion of domestic remedies does not arise." The reason, according to the Com mission, was "that Belgian law does not provide for a judicial remedy which would make it possible to take a speedy decision as to the lawfulness of the detention of a person placed at the Government's disposal." The procedures referred to by the Belgian Government did not fulfil the requirement of effectiveness.[111]

Ineffectiveness of remedies may particularly occur in the case of practices of torture and inhuman treatment. On that ground, in the *Donnelly* Case the Commission took the view that in such a situation the local remedies rule is not applicable, provided that the applicant gives *prima facie* evidence that such a practice has occurred and that he was the victim of it.[112] Unlike in the above-mentioned inter-State applications here the rule is not inapplicable because the application is assumed to have an abstract character, but as a result of the principle, also recognised in general international law, that remedies which in advance are certain not to be effective or adequate need not be exhausted.[113] This became quite clear when in the next stage of the same *Donnelly*

109 Appl. 2780/66, *X v. the Netherlands* (not published).

110 The two applications mentioned were rejected on the ground of Article 35(1), but might also have been declared inadmissible on the ground of Article 35(3). In both cases the applicants had not submitted that they were victims of the alleged violation, so that these cases in reality concerned completely abstract complaints, which the Commission usually rejected on account of incompatibility with the provisions of the Convention.

111 Appl. 9107/80, D&R 33 (1983), p. 76 (79).

112 Appls 5577-5583/72, Yearbook XVI (1973), p. 212 (262). See also the report of the Commission of 5 November 1969 in the *Greek* Case, Yearbook XII (1969), p. 194. Cf. Appls 9911/82 and 9945/82, *R, S, A and C v. Portugal*, D&R 36 (1984), p. 200 (207), in which the Commission stated that the applicant must provide detailed allegations, if the remedy is to be considered ineffective.

113 For this principle, see with respect to inter-State applications Appl. 299/57, *Greece v. the United Kingdom*, *Yearbook* II (1958-1959), p. 186 (192-194), and with respect to individual applications Appl. 5493/72, *Handyside v. the United Kingdom*, Yearbook XVII (1974), p. 228 (288-290).

Case the Commission, quite unexpectedly, on the basis of its examination of the facts concluded that effective possibilities of redress were indeed present, and on that ground, by applying former Article 29, declared the application inadmissible because the local remedies rule had not been complied with.[114] A given administrative practice may, therefore, give rise to the presumption that the local remedies are not effective, but whether that is indeed the case is a question subject to investigation by the Strasbourg organs.[115]

Several cases have been submitted by Kurdish citizens alleging that an administrative practice existed on the part of the Turkish authorities of tolerating abuses of human rights in relation to persons in police custody.[116] In one case an applicant had been killed following the submission of his application to the Commission and there were indications that to pursue the available remedies might have entailed serious risks for other applicants. The Commission held that in these circumstances it was not necessary to resolve the question if an administrative practice existed, because the applicants had done all that could be expected in the circumstances in relation to the local remedies. In the *Aksoy* Case the Commission noted the applicant's declaration that he had told the public prosecutor that he had been tortured. Moreover, when asked to sign a statement, he had answered that he could not sign because he could not move his hands. Although it was found that it was not possible to establish in detail what had happened during the applicant's meeting with the public prosecutor, the Commission found no reason to doubt that during their conversation there were elements which should have made the public prosecutor initiate an investigation or, at the very least, try to obtain further information from the applicant about his state of health or about the treatment to which he had been subjected. The Commission further noted that, after his detention, the applicant was in a vulnerable position, if he had, as he stated, been subjected to torture during his detention. The threats to which the applicant claimed to have been exposed after he had complained to the Commission, as well as his tragic death in circumstances which had not been fully clarified, were further elements which could at least support the view that the pursuance of remedies was not devoid of serious risks. The applicant could be said to have complied with the domestic remedies rule.[117] The Court accepted the facts as they had been established by the Commission and, on that basis, held that these constituted special circumstances

114 Appls 5577-5583/72, Yearbook XIX (1976), p. 84 (248-254).

115 Cf. also Appl. 9471/81, *X and Y v. the United Kingdom*, D&R 36 (1984), p. 49 (61). Here the Commission simply concluded that, since there was no dispute between the parties as far as compliance with Article 26 was concerned, it was not necessary to go into the question of whether Article 26 was inapplicable in the present case because of the existence of a State practice.

116 Appl. 21987/93, *Aksoy v. Turkey*, D&R 79-A (1994), p. 60 (70-71); Appl. 21893/93, *Akdivar v. Turkey*; Appl. 21895/93, *Çagirga*.

117 Appl. 21987/93, *Aksoy v. Turkey*, D&R 79-A (1994), p. 60 (70-71).

which absolved Mr Aksoy from the obligation to exhaust the local remedies. Having reached that conclusion the Court did not find it necessary to pronounce on whether an administrative practice existed obstructing applications being made.[118]

On an earlier occasion three applicants who had been placed in police custody suspected of an offence coming within the jurisdiction of the State Security Council alleged violations of Article 3 in that they were subjected to torture while held incommunicado in police custody. The Commission held that the Government had not mentioned any domestic remedy available to the applicants with regard to their detention incommunicado by the police as such. Apparently this particular form of detention was an administrative practice.[119] In the *Akdivar* Case the applicants maintained their allegations before the Court, which they had already made before the Commission, that the destruction of their homes was part of a State-inspired policy. That policy, in their submissions, was tolerated, condoned and possibly ordered by the highest authorities in the State aimed at massive population displacement in the emergency region of South-East Turkey. There was thus an administrative practice which rendered any remedies illusory, inadequate and ineffective. The Court concluded that there were special circumstances absolving the applicants from the obligation to exhaust their domestic remedies. The Court also emphasised that its ruling was confined to the particular circumstances of that case. It was not to be interpreted as a general statement that remedies were ineffective in that area of Turkey.[120]

2.2.10.3 Available remedies; procedural requirements

In connection with the local remedies rule it is first of all important to know what remedies are available. That question is to be answered on the basis of national law. It is for the respondent State to introduce any objection that the applicant has not exhausted domestic remedies[121] and to meet the burden of proving the existence of available and sufficient domestic remedies.[122] The respondent State also has the burden of proving that the existing remedies are effective, albeit only in cases where there is 'serious doubt'.[123]

118 Judgment of 18 December 1996, paras 55-57.
119 Appls 16311/90 and 16313/90, *Hazar and Acik v. Turkey*, D&R 72 (1992), p. 200 (208).
120 Judgment of 16 September 1996, para. 77.
121 Appl. 9120/80, *Unterpertinger v. Austria*, D&R 33 (1983), p. 80 (83); Appl. 25006/94, *I.S. v. Slovak Republic*, D&R 88-A, p. 34 (39); judgment of 28 July 1999, *Selmouni*, para. 76.
122 Appl. 9013/80, *Farrel v. the United Kingdom*, D&R 30 (1983), p. 96 (101-102); Judgment of 9 December 1994, *Stran Greek Refineries and Stratis Andreadis*, para. 35; judgment of 16 September 1996, *Akdivar*, para. 68; judgment of 20 February 2003, *Djavit*, para. 29.
123 Appls 8805/79 and 8806/79, *De Jong and Baljet v. the Netherlands*, D&R 24 (1981), p. 144 (150); Judgment of 16 September 1996, *Akdtvar*, para. 68; judgment of 29 June 2004, *Dogan and Others*, para. 102.

No definition of the term 'remedy' is to be found in the case law. In various places there are, however, indications as to its meaning. The concept of 'remedy' in any event does not cover those procedures in which one does not claim a right, but attempts to obtain a favour. Examples are the action for rehabilitation in Belgium,[124] the so-called 'petition to the Queen' in England,[125] the right of petition under Article 5 of the Dutch Constitution,[126] application to the Principal State Counsel at the Court of Cassation in Turkey,[127] and request for supervisory review.[128]

It is not only the *judicial* remedies which must be sought, but every remedy available under national law which may lead to a decision that is binding on the authorities,[129] including the possibility of appeal to administrative bodies, provided that the remedy concerned is adequate and effective. In a case concerning the nationalisation of *Yarrow Shipbuilders* under the British Aircraft and Shipbuilding Industries Act 1977, the Commission had to face the question of whether the reference of a dispute on compensation to an arbitration tribunal provided for in the 1977 Act constituted an effective remedy to be exhausted. According to the Commission the tribunal had jurisdiction to determine the amount of compensation under the statutory formula, but did not sit as a tribunal of appeal pronouncing on the adequacy of the offers made in the negotiations by the Secretary of State. It thus represented an alternative means of assessing the compensation due under the statutory formula, if agreement as to the appropriate amount could not be reached. As the substance of the applicant company's complaint was not that it received less than the Act entitled it to, but that the very nature of the statutory compensation formula was such that it inevitably failed to reflect the company's proper value, the Commission held that resort to arbitration would not have constituted an effective and sufficient remedy.[130]

The question of whether extraordinary remedies must also have been sought cannot be answered in a general way.[131] In the *Nielsen* Case the Commission required such exhaustion, insofar as this could be expected to produce an effective and adequate result. It must be decided for each individual case whether the remedy is effective and adequate. The Commission considered an application to the Special Court of Revision as a remedy that should be exhausted.[132] In subsequent case law, however, applications for reopening of the proceedings were not regarded as 'domestic remedies' in the sense

124 Appl. 214/56, *De Becker v. Belgium*, Yearbook II (1958-1959), p. 214 (236-238).
125 Appl. 299/57, *Greece v. the United Kingdom*, Yearbook II (1958-1959), p. 186 (192).
126 See the report of the Budget Committee for Foreign Affairs of the Dutch Parliament, Yearbook II (1958-1959), p. 566.
127 Judgment of 28 October 1998, *Çiraklar*, paras 29-32.
128 Decision of 8 February 2001, *Pitkevich*.
129 Appl. 332/57, *Lawless v. Ireland*, Yearbook II (1958-1959), p. 308 (322-324); judgment of 29 July 1999, *Selmouni*, para. 75.
130 Appl. 9266/81, *Yarrow P.L.C. and Others v. the United Kingdom*, D&R 30 (1983), p. 155 (188-190).
131 Appl. 20471/92, *Kustannus Oy Vapaa Ajattelija and Others v. Finland*, D&R 85 A (1996), p. 29(39).
132 Appl. 343/57, Yearbook II (1958-1959), p. 412 (438-442).

of Article 26 [the present Article 35(1)] of the Convention,[133] unless it was established under domestic law that such a request in fact constituted an effective remedy.[134] An application for retrial or similar extraordinary remedies cannot, as a general rule, be taken into account for the purpose of applying Article 35 of the Convention.[135]

When the applicant has sought an apparently effective remedy in vain, he cannot be required to try others which may be available but are probably ineffective.[136] Moreover, for a remedy to be considered effective it must be capable of directly remedying the situation complained of.[137]

With respect to the way in which and the time-limits within which proceedings must be instituted, national law is decisive. If in his appeal to a national court an applicant has failed to observe the procedural requirements or the time-limits, and his case accordingly has been rejected, the local remedies rule has not been complied with and his application is declared inadmissible.[138] However, non-exhaustion of domestic remedies cannot be held against the applicant if in spite of the latter's failure to observe the forms prescribed by law, the competent authority nevertheless examined the appeal.[139] It may be necessary for the applicant to call in the assistance of counsel to correctly exhaust the local remedies, if national law requires this.[140]

In some legal systems, such as that of Italy, individuals have no direct access to the constitutional court; they are dependent on a decision of the ordinary court to refer the issue of constitutionality of a specific law to the constitutional court. In such a case, according to the Commission, the individual applicant is required to have raised the question of that constitutionality in the proceedings before the ordinary court. If he has not done so, he cannot claim that he had no access to the constitutional court.[141]

The interpretation and application of the relevant provisions of national law in principle belong to the competence of the national authorities concerned. The Court, on the other hand, is competent to judge whether, as a result of such an interpretation

133 See, *e.g.*, Appl. 2385/64, *X v. Norway*, Coll. 22 (1967), p. 85 (88). In a case which was practically identical to the *Nielsen* Case, with regard to the future the Commission expressly left open the question of whether a petition to the Danish Special Court of Revision constitutes an effective remedy: Appl. 4311/69, *X v. Denmark*, Yearbook XIV (1971), p. 280 (316-320); Appl. 23949/94 *Pufler v. France* D&R 77 B, (1994) p. 140 (142).

134 Appl. 19117/91, *K. S. and K. S. AG v. Switzerland*, D&R 78-A (1994), p. 70 (74).

135 Decision of 22 June 1999, *Tumilovich;* decision of 29 January 2004, *Berdzehnishvili*.

136 Appl. 9248/81, *Leander v. Sweden*, D&R 34 (1983), p. 78 (33); Appl. 14838/89, *A. v. France*, D&R 69 (1991), p. 286 (302); decision of 25 April 2002, *Günaydin*; decision of 29 April 2004, *Moreira Barbosa*.

137 Appl. 11650/85, *X v. Portugal*, D&R 59 (1983), p. 85 (92); judgment of 16 September 1996, *Akdivar*, para. 66; judgment of 28 July 1999, *Selmouni*, para. 66.

138 See, *e.g.*, Appl. 2854/66, *X and Y v. Austria*, Coll. 26 (1968), p. 46 (53-54).

139 Appl. 12784/87, *Huber v. Switzerland*, D&R 57 (1988), p. 251 (259).

140 Appl. 6878/75, *Le Compte v. Belgium*, Yearbook XX (1977), p. 254 (274).

141 See Appl. 6452/74, *Sacchi v. Italy*, D&R 5 (1976), p. 43 (51).

or application, the applicant has become the victim of a denial of justice. In the *Akdivar* Case the Court held that this means, amongst other things, that it must take realistic account not only of the existence of formal remedies in the legal system of the Contracting Party concerned, but also of the general legal and political context in which they operate, as well as the personal circumstances of the applicants.[142]

A question which for a long time had been left undecided in the case law is what an applicant should do when different remedies are open to him. Must he pursue them all, or may he confine himself to bringing the action which in his view is most likely to be successful? The text of Article 35(1) appears to suggest the former, because it refers to 'all domestic remedies'. The Commission, in a 1974 decision, seemed to take a less stringent approach. It held that, where there is a single remedy it should be pursued up to the highest level. The position is not so certain where the domestic law provides a number of different remedies. In such cases the Commission tends to admit that Article 26 [the present Article 35(1)] has been complied with if the applicant exhausts only the remedy or remedies which are reasonably likely to prove effective.[143] In a later case the Commission added: "Where (...) there is a choice of remedies open to the applicant to redress an alleged violation of the Convention, Article 26 [the present Article 35(1)] of the Convention must be applied to reflect the practical realities of the applicant's position in order to ensure the effective protection of the rights and freedoms guaranteed by the Convention."[144]

In the *Airey* Case the Court held that it was primarily for the applicant to select which legal remedy to pursue.[145] It is up to the applicant in those cases to indicate which remedy he has chosen and for what reasons. These grounds have to be objective and reasonable.[146]

2.2.10.4 Dispensation for remedies which are not effective and adequate

2.2.10.4.1 Introduction

Another important question in connection with Article 35(1) is whether all the available legal remedies must have been pursued. Here, too, a good deal depends on the relevant national law, and the answer to this question can only be given on a case-

142 Judgment of 16 September 1996, para. 69; See also: judgment of 28 July 1999, *Selmouni*, para. 77.

143 Appl. 5874/72, *Monika Berberich v. Federal Republic of Germany*, Yearbook XVII (1974), p. 386 (418).

144 Appl. 9118/80, *Allgemeine Gold- und Silberscheideanstalt A.G. v. the United Kingdom*, D&R 32 (1983), p. 159 (165).

145 Judgment of 9 October 1979, para. 23.

146 *Idem.*

by-case basis.[147] From the very voluminous and rather casuistic case law, the following trends may be inferred.

In the *Nielsen* Case the Commission stated quite generally that "the rule governing the exhaustion of the local remedies, as they are generally recognised today, in principle require that recourse should be had to all legal remedies available under the local law which are in principle capable of providing an effective and sufficient means of redressing the wrongs for which, on the international plane, the Respondent State is alleged to be responsible."[148]

2.2.10.4.2 Effective and adequate remedies

An individual is dispensed from the obligation to exhaust certain local remedies, if in the circumstances of his case these remedies are ineffective or inadequate.[149] In the same vein the answer to the question of whether non-judicial procedures belong to the local remedies that have to be exhausted depends on whether those procedures are provided with sufficient guarantees to ensure an effective legal protection against the authorities.[150] Recourse to an organ which supervises the administration but cannot take binding decisions, such as an ombudsman, does not constitute an adequate and effective remedy in the sense of Article 35(1).[151]

For a given local remedy to be considered adequate and effective it is, of course, not required that the claim in question would actually have been recognised by the

147 See Appl. 343/57, *Schouw Nielsen v. Denmark*, Yearbook II (1958-1959), p. 412 (442-444): "the competence which the Commission has in every case to appreciate in the light of its particular facts whether any given remedy at any given date appeared to offer the applicant the possibility of an effective and sufficient remedy."

148 Appl. 343/57, Yearbook II (1958-1959), p. 412 (440). See also Appl. 10092/82, *Baraona v. Portugal*, D&R 40 (1985), p. 118 (136), where the Commission held that "the crucial point is (...) whether an appeal might have secured redress in the form of direct, rather than indirect, protection of the rights laid down in (...) the Convention." See also see the judgment of 18 September 1996, *Aksoy*, paras 51-52, and the judgment of 16 September 1996, *Akdivar*, paras 65-67.

149 See, *e.g.*, Appl. 7011/75, *Becker v. Denmark*, D&R 4 (1976), p. 215 (232-233); Appl. 7465/76, *X v. Denmark*, D&R 7 (1977), p. 153 (154). A special case is Appl. 7397/76, *Peyer v. Switzerland*, D&R 11 (1978), p. 58 (75-76), in which in the opinion of the Commission the applicant did not need to appeal, since he could not rely on the Convention before the national court, as it had not yet entered into force with respect to Switzerland, while in addition there was no legal ground on which such an appeal could be based. See also joint Appls 8805/79 and 8806/79, *De Jong and Baljet v. the Netherlands*, D&R 24 (1981), p. 144 (150), in which the action for damages of Art. 1401 of the Netherlands Civil Code was not considered effective to question a detention which was in conformity with domestic law. Similarly, in the case of *Z v. the Netherlands*, the appeal to the Judicial Division of the Council of State against the Deputy Minister of Justice was considered not effective because such proceedings did not suspend the execution of the decision to deport the applicant; See also judgment of 9 October 1997, *Andronicou and Constantinou*, para 159.

150 See, *e.g.*, Appl. 155/56, *X v. Federal Republic of Germany*, Yearbook I (1955-1957), p. 163 (164).

151 Appl. 11192/84, *Montion v. France*, D&R 52 (1987), p. 227 (235); judgment of 23 May 2001, *Denizci*, para. 362.

national court. In this stage of the examination by the Court the question of whether the application is well-founded is not at issue, but only the question of whether, assuming that the complaint is well-founded, this particular remedy would have provided the applicant the possibility of redress.[152] In this context it must be noted that the applicant's personal view of the effectiveness or ineffectiveness of a given remedy is in itself not decisive.[153]

Where the national authorities remain passive in the face of serious allegations of misconduct or infliction of harm by State agents, this is a relevant criterion in absolving the applicant from the obligation to exhaust domestic remedies. The speed with which a remedy can be exercised may also be a relevant factor in assessing its effectiveness.[154]

In the *Tsomtsos* Case the Court reiterated that the only remedies Article 35 of the Convention requires to be exhausted are those that are available and sufficient and relate to the breaches alleged.[155] In the *Iatridis* Case the Court observed that the applicant made a special application – provided for in section 2(3) of Law no. 263/1968 – to the Athens Court of First Instance, specifically seeking to have the administrative eviction order quashed. The court found in his favour, holding that the conditions for issuing such an order had not been satisfied. The Minister of Finance, however, refused to give approval for the cinema to be returned to him. In light of the Minister's stance, an action under Articles 987 and 989 of the Civil Code – assuming it had succeeded – would in all probability not have led to a different outcome from that of the application to have the eviction order quashed. The applicant could not, therefore, be criticised for not having made use of a legal remedy which would have been directed to essentially the same end and which moreover would not have had a better prospect of success. As regards the second limb of the objection, the Court considered that an action for damages might sometimes be deemed a sufficient remedy, in particular where compensation is the only means of redressing the wrong suffered. In the instant case, however, compensation would not have been an alternative to the measures which the Greek legal system should have afforded the applicant to overcome the fact that he was unable to regain possession of the cinema despite a court decision quashing the eviction order. Furthermore, the various proceedings pending in the Athens Court of First Instance were decisive only in respect of an award of just satisfaction under Article 41 of the Convention. As to the third limb of the objection, the Court reiterated that Article 35 only requires the exhaustion of remedies that relate to the breaches

152 Appl. 1474/62, *Belgian Linguistic* Case, Coll. 12 (1964), p. 18 (27).

153 Appl. 289/57, *X v. Federal Republic of Germany*, Yearbook I (1955-1957), p. 148 (149). See also Appl. 6271/73, *X v. Federal Republic of Germany*, D&R 6 (1976), p. 62 (64); Appl. 7317/75, *Lynas v. Switzerland*, Yearbook XX (1977), p. 412 (442); and Appl. 10148/82, *Garcia v. Switzerland*, D&R 42 (1985), p. 98 (122).

154 App. 25803/94, *Selmouni v. France*, D&R 88 B (1997), p. 55 (62-63).

155 Judgment of 15 November 1996, para. 32.

alleged: sueing a private individual cannot be regarded as such a remedy in respect of an act on the part of the State, in this instance the refusal to implement a judicial decision and return the cinema to the applicant.[156]

The Commission and the Court have built up a voluminous case law concerning what may be regarded as an effective and adequate remedy. From this case law the following elements emerge as the most important.

In the first place the applicant must have used the remedies provided for up to the highest level, only if and insofar as the appeal to a higher tribunal can still substantially affect the decision on the merits.[157] In addition any procedural means which might have prevented a breach of the Convention should have been used.[158] An applicant may of course refrain from an appeal if the tribunal in question is not competent in the matter of his claim.[159] In some legal systems a higher or the highest court has jurisdiction only with respect to legal issues and cannot pronounce on the facts. If the application submitted to the Commission specifically concerns facts, the applicant need not have previously applied to such a court.[160] The same holds good with respect to the possibility of appeal to a constitutional court from a decision of another court. Such an appeal belongs to the remedies that must have been exhausted if and insofar as the decision of the constitutional court may have any impact on the situation about which a complaint is lodged with the Commission.[161] In Slovakia a petition to the Constitutional Court is not an effective remedy, in so far as the formal institution of the proceedings depends on a decision of that court and the court cannot interfere with or quash decisions of the ordinary courts.[162] In Ireland the granting of leave for appeal to the Supreme Court lies at the discretion of the Attorney-General and in Denmark it is the Minister of Justice who has wide discretion in granting leave for appeal. In both legal systems, moreover, such a leave is granted only exceptionally. With respect to both cases the Commission has decided that the appeal to the Supreme

156 Judgment of 25 March 1999, para. 47.

157 Appl. 788/60, *Austria v. Italy*, Yearbook IV (1961), p. 116 (172) and Appl. 2690/65, *Televizier v. the Netherlands*, Yearbook IX (1966), p. 512 (548). See also Appl. 6289/73, *Airey v. Ireland*, Yearbook XX (1977), p. 180 (200); Appl. 6870/75, *Y v. the United Kingdom*, D&R 10 (1978), p. 37 (67); Appls 9362/81, 9363/81 and 9387/81, *Van der Sluijs, Zuiderveld and Klappe v. the Netherlands*, D&R 28 (1982), p. 212 (219); Appl. 16839/90, *Remli v. France*, D&R 77-A (1994), p. 22 (29); judgment of 19 March 1991, *Cardot*,, para. 39.

158 Judgment of 6 December 1988, *Barberà, Messegué and Jarbardo*, para 59; judgment of 19 March 1991, *Cardot*, para. 36.

159 See, *e.g.*, Appl. 7598/76, *Kaplan v. the United Kingdom*, D&R 15 (1979), p. 120 (122). Thus also the Court: judgment of 6 November 1980, *Guzzardi*, para 69.

160 See, *e.g.*, Appl. 1437/62, *X v. Belgium* (not published) and Appl. 10741/84, *S v. the United Kingdom*, D&R 41 (1985), p. 226 (231).

161 See, *e.g.*, Appl. 1086/61, *X v. Federal Republic of Germany*, Yearbook V (1962), p. 149 (154); Appls 5573 and 5670/72, *Adler v. Federal Republic of Germany*, Yearbook XX (1977), p. 102 (132).

162 Appl. 26384/95, *Šamková v. Slovak Republic*, D&R 86 A (1997) p. 143 (151-152).

Court does not constitute an effective remedy in the sense of Article 26.[163] In the *Brozicek* Case the Court observed that in the Italian legal system an individual was not entitled to apply directly to the Constitutional Court for review of a law's constitutionality. Only a court trying the merits of a case has the right to make a reference to the Constitutional Court, either of its own motion or at the request of a party. Accordingly, such an application cannot be a remedy whose exhaustion is required under Article 35 of the Convention.[164]

In the *Boyle and Rice* Case the Court held that recourse to the administrative bodies could be considered an effective remedy in respect of complaints concerning the application or implementation of prison regulations.[165] In the *Cenbauer* Case the Court considered that it had not been demonstrated that an appeal to the administrative bodies or to a judge responsible for supervising the execution of sentences offered the applicant the possibility of securing redress for his complaints. In particular, the Court noted that section 15 para. 1 of the amended Act on Enforcement of Prison Terms refers to a complaint concerning the "acts or decisions of a prison employee" and accordingly did not provide a remedy in respect of complaints relating to the general conditions in prison.[166] In the *Tumilovich* Case the Court held that an application for retrial or similar extraordinary remedies could not, as a general rule, be taken into account for the purpose of applying Article 35 of the Convention.[167] With regard to the right to have a court decide speedily on the lawfulness of detention, an action for damages against the State is not a remedy which has to be exhausted, because the purpose of an action for damages on the ground of the defective operation of the machinery of justice is to secure compensation for the prejudice caused by deprivation of liberty, not to assert the right to have the lawfulness of that deprivation of liberty decided speedily by that court.[168]

With regard to the length of detention in Turkey in the case of a complaint about violation of Article 5 of the Convention the Commission noted that on a number of occasions the martial law court had considered whether to continue the applicants'

163 Appl. 9136/80, *X v. Ireland*, D&R 26 (1982), p. 242 (244); and Appl. 8395/78, *X v. Denmark*, D&R 27 (1982), p. 50 (52). Cf. also Appl. 8950/80, *H v. Belgium*, D&R 37 (1984), p. 5 (13); Appls 14116/88 and 14117/88, *Sargin and Yağci v. Turkey*, D&R 61 (1989), p. 250; Appl. 12604/86, *G. v. Belgium*, D&R 70 (1991), p. 125 (136); Appl. 20471/92, *Kustannus Oy Vapaa Ajattelija and others v. Finland*, D&R 85 (1996), p. 29 (39).

164 Judgment of 19 December 1989, para. 34; decision of 6 March 2003, *De Jorio*.

165 Judgment of 27 April 1988, para. 65.

166 Decision of 5 February 2004.

167 Decision of 22 June 1999; decision of 29 January 2004, *Berdzenishvili*; decision of 4 May 2004, *Denisov*.

168 Appl. 10868/84, *Woukam Moudefo v. France*, D&R 51 (1987), p. 62 (81); Appl. 11256/84, *Egue v. France*, D&R 57 (1988), p. 47 (67); Appl. 13190/87, *Navarra v. France*, D&R 69 (1991), p. 165 (171); Appls 16419/90 and 16426/90, *Yağci and Sargin v. Turkey*, D&R 71 (1991), p. 253 (268); judgment of 27 August 1992, *Tomasi*, para. 81; judgment of 23 November 1993, *Navarra*, para. 24.

detention on remand and refused their conditional release. It followed that the judicial authorities had the opportunity to put an end to the applicants' allegedly excessive detention. The Commission further noted that no appeal was possible against decisions by a martial law court which refused to grant conditional release. In connection with this it pointed out that in Turkish law there is a distinction between an order remanding the accused in custody and an order to continue detention on remand, the latter being issued at final instance by the court dealing with the case. With regard to the length of the criminal proceedings, for the purposes of Article 6(1) of the Convention, the Commission referred to previous decisions in which it had held that having regard to the relatively protracted duration of proceedings, it was not bound to reject a complaint for failure to exhaust domestic remedies because appeals were still pending at the time when an application was introduced. The Commission further observed that the respondent Government had not established that the applicants had an effective remedy in Turkish law to expedite the proceedings whose length they complained of. The judgment to be given by the Military Court of Cassation, to which the Government alluded, was not as such a remedy capable of affording the applicants redress for the situation they complained of. Therefore, there was no effective remedy available.[169]

In a case where the applicant complained about the conditions of detention, the Government in question observed that she had not exhausted the domestic remedies, since she had not requested a transfer to another prison. The Commission, however, opined that even if this might have led to an improvement in the conditions of her detention, it would by no means have enabled her to assert her rights under the Convention, and in particular to raise her complaint under Article 3. Consequently, the Commission considered that these steps could not be taken into account for the purpose of deciding whether domestic remedies had been exhausted as required.[170]

The Commission held in respect of alleged ill-treatment contrary to Article 3, that raising criminal charges against the officials concerned, or filing a civil action for compensation, are effective remedies to be examined pursuant to Article 35(1).[171] However, in a case against Turkey the Commission observed that, under Turkish law, the applicants were entitled to complain at the trial if their statements to the police had been made under torture and that ill-treatment of prisoners by police officers was to be prosecuted *ex officio*. The Commission was, therefore, satisfied that the applicants had availed themselves of a proper remedy under Turkish law in that they had raised

[169] Appls 15530/89 and 15531/89, *Mitap and Müftüoglu v. Turkey*, D&R 72 (1992), p. 169 (189). See also Appls 16419/90 and 16426/90, *Yağci and Sargin v. Turkey*, D&R 71 (1991) p. 253 (267).

[170] Appl. 14986/89, *Kuijk v. Greece*, D&R 70 (1991), p. 240 (250).

[171] Appl. 10078/82, *M v. France*, D&R 41 (1985), p. 103 (119); Appl. 11208/84, *McQuiston v. the United Kingdom*, D&R 46 (1986), p. 182 (187); Appl. 17544/90, *Ribitsch v. Austria*, D&R 74 (1993), p. 129 (133).

their complaint of ill-treatment at their trial, first with the Public Prosecutor and subsequently before the State Security Court and the Court of Cassation. It concluded from the Government's submissions that the Public Prosecutor did not refer the complaint to the competent local Public Prosecutor, because he did not consider the allegations to be credible, and that, for the same reason, the court did not discard the evidence obtained during the applicant's detention incommunicado. The Commission subsequently examined whether the applicants were nevertheless required to avail themselves of the further remedy indicated by the Government by addressing a complaint of criminal behaviour to the competent Public Prosecutor. The Commission here observed that the complaint concerned primarily a question of evidence and that the reason why the applicants were unsuccessful in raising it at their trial was that the State Security Court and the Public Prosecutor did not find that there was sufficient evidence to support their detailed allegations. The Commission, therefore, assumed that the applicants, if they had availed themselves of the remedy indicated by the Government, would have been faced with the same problem of proving that they had in fact been ill-treated. For this reason the applicants were not obliged to exhaust the said remedy in order to comply with Article 35(1) of the Convention.[172]

In another case against Turkey the Commission observed in this respect, however, that the legal authorities to which the complaint of criminal behaviour was referred had held the decisions on detention to be in conformity with law and procedure. According to the case law quoted by the Government, Turkish courts only grant compensation in cases where those responsible for criminal acts of the kind in question have previously been found guilty in a criminal prosecution. In these circumstances the Commission was of the opinion that the applicants were not bound to attempt the means of redress indicated by the Government, given that the legal authorities to which the question of the lawfulness of their detention was referred had already taken a position and rejected the claim that the applicants' deprivation of freedom was illegal. In the circumstances it would have served no purpose had the applicants undertaken proceedings for compensation.[173]

In the *Akdivar* Case the applicants alleged that there was no effective remedy available for obtaining compensation before the administrative courts in respect of injuries or damage to property arising out of criminal acts of members of the security forces. In order to demonstrate that the available remedies were not ineffective, the Turkish Government referred to a number of judgments of the administrative courts. Some of these decisions concerned cases in which the State Council had awarded compensation to individuals for damage inflicted by public officials or by terrorists, or suffered

[172] Appls 16311/90 and 16313/90, *Hazar and Acik v. Turkey*, D&R 72 (1992), p. 200 (207-208); Appls 14116/88 and 14117/88, *Sargin and Yağci v. Turkey*, D&R 61 (1989), p. 250 (280).

[173] Appls 14116/88 and 14117/88, *Sargin and Yağci v. Turkey*, D&R 61 (1989), p. 250 (278).

in the course of confrontations between the Government, the public and the
According to the Government, claims for compensation could also have been
in the ordinary civil courts. The Court considered it significant that the Govern
despite the extent of the problem of village destruction, had not been able to
to examples of compensation being awarded in respect of allegations that
had been purposely destroyed by members of the security forces or to
having been brought against them in respect of such allegations. In this
the Court noted the evidence referred to by the Delegate of the Commission as
the general reluctance of the authorities to admit that this type of illicit behaviour
members of the security forces had occurred. It further noted the lack of any
investigation, any offer to co-operate with a view to obtaining evidence or any
payments made by the authorities to the applicants. Moreover, the Court did
consider that a remedy before the administrative courts could be regarded as
and sufficient in respect of the applicants' complaints, since it was not satisfied
a determination could be made in the course of such proceedings concerning the
that their property was destroyed by members of the gendarmerie.[174] As regards
civil remedy invoked by the respondent Government, the Court attached
significance to the absence of any meaningful investigation by the authorities into
applicants' allegations and of any official expression of concern or assistance
standing the fact that statements by the applicants had been given to various
officials. It appeared to have taken two years before statements were taken from
applicants by the authorities about the events complained of, which was probably
in response to the communication of the complaint by the Commission to
Government.[175]

In the *Egmez* Case the applicant made a complaint to the Ombudsman
resulted in a report naming some of the officers responsible for the alleged ill-
ment of the applicant. Having regard to the Attorney-General's refusal to take
action the Court decided that the applicant's complaint to the Ombudsman had
discharged the authorities of the Republic of Cyprus of the duty to "undertake
investigation capable of leading to the punishment (as opposed to the mere
tion) of those responsible".[176] The same was true in the *Denizci Case*, where
Attorney-General refrained from taking any action despite the power he had
conduct an *ex officio* enquiry and where, under Cypriot law, the Ombudsman
have had no power to order any measures or impose any sanctions. In those
stances the Court considered that the applicants were justified in considering
other legal remedy on the national level would be effective in respect of

174 Judgment of 16 September 1996, paras 71-72.
175 *Ibidem*, para. 73.
176 Judgment 21 December 2000, para 67.

complaints.[177] In the *Yasa* Case the Court held that with respect to an action in administrative law under Article 125 of the Turkish Constitution based on the authorities' strict liability, that a Contracting State's obligation under Articles 2 and 13 of the Convention to conduct an investigation capable of leading to the identification and punishment of those responsible in cases of fatal assault might be rendered illusory if in respect of complaints under those Articles an applicant were to be required to exhaust an administrative-law action leading only to an award of damages. Consequently, the applicant was not required to bring the administrative proceedings in question.[178]

In the *Dogan* Case the Court stated that, when an individual formulates an arguable claim in respect of forced eviction and destruction of property involving the responsibility of the State, the notion of an 'effective remedy' in the sense of Article 13 of the Convention, entails, in addition to the payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of those responsible and including effective access by the complainant to the investigative procedure. Otherwise, if an action based on the State's strict liability were to be considered a legal action that had to be exhausted in respect of complaints under Article 8 of the Convention or Article 1 of Protocol No. 1, the State's obligation to pursue those guilty of such serious breaches might thereby disappear. As regards a civil action for redress for damage sustained through illegal acts or patently unlawful conduct on the part of State agents, the Court recalled that a plaintiff must, in addition to establishing a causal link between the tort and the damage he had sustained, identify the person believed to have committed the tort. In the instant case, however, the identity of those responsible for the forced eviction of the applicants from their village were still not known. Accordingly, the Court did not consider that a remedy before the administrative or civil courts could be regarded as adequate and effective in respect of the applicants' complaints, since it was not satisfied that a determination could be made in the course of such proceedings concerning the allegations that villages were forcibly evacuated by members of the security forces.[179]

In the *Hobbs* Case the Court held that a declaration of incompatibility issued by a British court to the effect that a particular legislative provision infringed the Convention cannot be regarded as an effective remedy within the meaning of Article 35(1). It stated: "In particular, a declaration is not binding on the parties to the proceedings in which it is made. Furthermore, by virtue of section 10(2) of the 1998 Act, a declaration of incompatibility provides the appropriate minister with a power, not a duty, to amend the offending legislation by order so as to make it compatible with the

177 Judgment of 21 May 2001, paras 362-363.
178 Judgment of 2 September 1998, para. 74.
179 Judgment of 18 November 2004, paras 106-108.

Convention. The minister concerned can only exercise that power if he considers
there are 'compelling reasons' for doing so."[180] Thus a remedy which is not enforce
or binding, or which is dependent on the discretion of the executive, falls outside
concept of effectiveness as established in the Convention case law, notwithstand
that it may furnish adequate redress in cases in which it has a successful outcome

In a case against Ireland the Court held that in a legal system which provi
constitutional protection for fundamental rights, it is incumbent on the aggrieve
individual to test the extent of that protection and, in a common law system, to allo
the domestic courts to develop those rights by way of interpretation. In this respe
it was recalled that a declaratory action before the High Court, with a possibility
an appeal to the Supreme Court, constitutes the most appropriate method under Iri
law of seeking to assert and vindicate constitutional rights.[182]

The possibility of obtaining compensation may in some circumstances constitu
an adequate remedy, in particular where it is likely to be the only possible or practica
means whereby redress can be given to the individual for the wrong he has suffered.[183]
Applying this case law, the Commission declared an application concerning th
dismissal of police officers inadmissible under the local remedies rule since the police
officers' action for compensation was pending before the Greek courts and th
compensation capable of being awarded was potentially substantial enough to remedy
the alleged violations.[184] However, the Commission has also held that compensation
machinery could only be seen as an adequate remedy in a situation where the autho
rities had taken reasonable steps to comply with their obligations under the Conven
tion.[185]

The personal appearance of the applicant before the court taking the decision may
constitute so substantial an element of the procedure that the rejection of a request
to that effect renders the procedure ineffective.[186]

In the *Tomé Mota* Case the Court supported the Government's view that an application
against the administration's failure to decide constituted an effective remedy. In
particular, the Government had pointed out that administrative authorities are under
an obligation to decide on any request made by a party within six months. In
proceedings under the Tax Offences Act where no other remedy, such as a request for
a transfer of jurisdiction, lies against the failure to decide within the general six-month

180 Decision of 18 June 2002; decision of 16 March 2004, *Walker*; decision of 27 April 2004, *Pearson*
181 Decision of 29 June 2004, *B. and L. v. the United Kingdom*.
182 Decision of 19 June 2003, *Independent News and Media plc and Independent Newspapers (Ireland) Limited*.
183 Appl. 12719/87, *Frederiksen and Others v. Denmark*, D&R 56 (1988), p. 237 (244).
184 Appl. 18598/91, *Sygounis, Kotsis and 'Union of Police Officers' v. Greece*, D&R 78-B (1994), p. 71 (80).
185 Appl. 12719/87, *Frederiksen and Others v. Denmark*, D&R 56 (1988), p. 237 (244).
186 Appl. 434/58, *X v. Sweden*, Yearbook II (1958-1959), p. 354 (374-376).

time-limit, the party is entitled to lodge an application directly with the Administrative Court against the administration's failure to decide under Article 132 of the Federal Constitution.[187] The Court relied in essence on the Commission's case law according to which measures available to an individual which might speed up the proceedings are matters which fall to be considered in the context of the merits of an application relating to the length of proceedings rather than in the context of the exhaustion of domestic remedies.[188] In the *Basic* Case the Court referred to its decision in the *Tomé Mota* Case, where it had found that a request under Articles 108 and 109 of the Portuguese Code of Criminal Procedure to speed up the proceedings was an effective remedy. As there were a number of similarities between this remedy and the remedy at issue in the present case, the Court found that it was required to review the question whether the application against the administration's failure to decide under Article 132 of the Federal Constitution constituted an effective remedy. The Court noted that Portuguese law provided time-limits within which each stage of the criminal proceedings had to be completed. If they were not complied with, the person concerned might file a request to speed up the proceedings which, if successful, might, *inter alia*, result in a decision fixing a time-limit within which the competent court or public prosecutor had to take a particular procedural measure, such as closing the investigations or setting a date for a hearing. Given the strict time-limits within which the authorities had to decide upon a request to speed up the proceedings, the use of this remedy did not itself contribute to the length of the proceedings. Similarly, Austrian law provided in the field of administrative proceedings that the competent authority had, unless provided otherwise, to decide within six months upon any request by a party. If this time-limit was not complied with, the party might – in a case like the present one where the possibility to request a transfer of jurisdiction to the higher authority was excluded – lodge an application under Article 132 of the Federal Constitution with the Administrative Court. If deemed admissible, it resulted in an order addressed to the authority to give the decision within three months, a time-limit which could be extended only once. The Court further noted the information given by the Government and not contested by the applicant, namely, that in the vast majority of cases the use of the application under Article 132 of the Federal Constitution did not cause a further delay in the proceedings, as the Administrative Court usually takes no more than a month to issue its order. The Court found that there were no fundamental differences which would distinguish the application under Article 132 of the Austrian Federal Constitution under review in the present case from the remedy which was at issue in *Tomé Mota*. The Court concluded that this application

187 Decision of 16 March 1999, judgment of 26 July 2001, *Horvat*, para. 48.
188 Appl. 11296/84, *Moreira de Azevedo v. Portugal*, D&R 56 (1988), p. 126.

constituted an effective remedy as regards a complaint about the length of proceedings.[189]

In the *Horvat* Case the Court noted that proceedings pursuant to section 59(4) of the Constitutional Court Act of Croatia are considered as being instituted only if the Constitutional Court, after a preliminary examination of the complaint, decides to admit it. Thus, although the person concerned can lodge a complaint directly with the Constitutional Court, the formal institution of proceedings depends on the latter's discretion. Furthermore, for a party to be able to lodge a constitutional complaint pursuant to that provision, two cumulative conditions must be satisfied. Firstly, the applicant's constitutional rights have to be grossly violated by the fact that no decision has been issued within a reasonable time and, secondly, there should be a risk of serious and irreparable consequences for the applicant. The Court noted that terms such as 'grossly violated' and 'serious and irreparable consequences' are susceptible to various and wide interpretation. It remained open to what extent the applicant risked irreparable consequences in so far as the case involved her civil claims for repayment. The Government produced before the Court only one case in which the Constitutional Court had ruled under section 59(4) of the Constitutional Court Act to support their argument concerning the sufficiency and effectiveness of the remedy. The absence of further case law did, however, indicate the uncertainty of this remedy in practical terms. In the Court's view the single case cited by the Government did not suffice to show the existence of settled national case law that would prove the effectiveness of the remedy. In light of this the Court considered that a complaint pursuant to section 59(4) of the Constitutional Court Act could not be regarded with a sufficient degree of certainty as an effective remedy in the applicant's case.[190]

Finally, in cases of expulsion, the Commission has constantly held that a remedy which does not suspend execution of a decision to expel an alien to a specified country is not effective for the purposes of Article 26 [new Article 35(1)] and there is no obligation to have recourse to such a remedy.[191] In the *Said* Case the Government argued that the applicant had failed to exhaust domestic remedies in view of the fact that he had independently and voluntarily withdrawn his application for a provisional measure in the proceedings before the Administrative Jurisdiction Division of the Council of State. The Court noted that according to the case law of the President of the Administrative Jurisdiction Division a request for a provisional measure will be declared

189 Judgment of 30 January 2001, paras. 34-39; Judgment of 30 January 2001, *Pallanich*, para. 32.

190 Judgment of 26 July 2001, paras. 42-48.

191 Appl. 10400/83, *Z v. the Netherlands*, D&R 38 (1984), p. 145 (150); Appl. 10760/84, *X v. the Netherlands*, D&R 38 (1984), p. 224 (225); Appl. 10564/83, *X v. Federal Republic of Germany*, D&R 40 (1985), p. 262 (265); joined Appls 17550/90 and 17825/91, *V. and P. v. France*, D&R 70 (1991), p. 298 (315).

inadmissible if the date for the expulsion has not yet been made known. No reproach could, therefore, be made of the applicant for withdrawing his request.[192]

2.2.10.4.3 Remedy and real chance of success

A remedy is ineffective and does not, therefore, have to be sought if, considering well-established case law, it does not offer any real chance of success.[193] In that case, however, the applicant must give some evidence of the existence of such case law.[194] That the Commission was not inclined to accept an argument to that effect easily, if the case law proved not to be as well-established as was alleged, appeared from its decision in the *Retimag* Case. Retimag was a Swiss company, but it was actually controlled by the German Communist Party. The latter was declared unconstitutional by the German courts and consequently the property of Retimag was confiscated. The company invoked before the Commission the right to the peaceful enjoyment of possessions. Article 19 of the German Constitution declares the provisions on fundamental rights to be applicable to *internal* legal persons. As a result Retimag argued that it had not been able to appeal to the *Bundesverfassungsgericht* because it was a Swiss company, and accordingly not an internal legal person. However, after Retimag had lodged its application with the Commission, the *Bundesverfassungsgericht* decided that Article 19 was not to be interpreted *a contrario* and did not exclude an appeal by external legal persons. On this basis the Commission decided that Retimag had not exhausted the local remedies and it declared the application inadmissible under Article 35(1).[195]

A comparable situation presented itself in the *De Varga-Hirsch* Case, which concerned, *inter alia*, the requirement of 'reasonable time' of Article 5(3). The applicant had been held in detention on remand for almost five years. Although he had repeatedly applied to the courts for release on bail, he had not appealed to the Court of Cassation, except in two cases. In these two cases, however, he did not rely on the Convention or on comparable provisions of domestic law. The applicant contended that, because of its limited jurisdiction, the Court of Cassation could not be considered as an effective remedy. The Commission rejected this argument by referring to case law of the Court of Cassation with regard to detention on remand, dating from after

192 Decision of 5 October 2004.

193 Appl. 27/55, *X v. Federal Republic of Germany*, Yearbook I (1955-1957), p. 138 (139). See also Appl. 8378/78, *Kamal v. the United Kingdom*, D&R 20 (1980), p. 168 (170); Appls 9362/81, 9363/81 and 9387/81, *Van der Sluijs, Zuiderveld and Klappe v. the Netherlands*, D&R 28 (1982), p. 212 (219); Appl. 9697/82, *J and others v. Ireland*, D&R 34 (1983) p. 131; Appl. 10103/82, *Farragut v. France*, D&R 39 (1984), p. 186 (205); Appl. 13134/87, *Costello-Roberts v. the United Kingdom*, D&R 67 (1991), p. 216 (224); Appl. 20948/92, *Işiltan v. Turkey*, D&R 81 B (1997), p. 35 (38); judgment of 20 February 1991, *Vernillo*, para. 66; judgment of 19 February 1998, *Dalia*, para. 38; decision of 11 March 2004, *Merger and Cros*.

194 See, *e.g.*, Appl. 788/60, *Austria v. Italy*, Yearbook IV (1961), p. 116 (168); Appl. 15404/89, *Purcell v. Ireland*, D&R 70 (1991), p. 262 (274).

195 Appl. 712/60, Yearbook IV (1961), p. 384 (404-406).

the applicant's detention on remand had ended. It held that the appeal to the Court of Cassation was neither a new remedy nor an appeal likely to be dismissed as inadmissible. The Commission added that, "if there is any doubt as to whether a given remedy is or is not intrinsically able to offer a real chance of success, that is a point which must be submitted to the domestic courts themselves, before any appeal can be made to the international court."[196]

Particularly in a common law system where the courts extend and develop principles through case law, it is generally incumbent on an aggrieved individual to allow the domestic courts the opportunity to develop existing rights by way of interpretation.[197]

It thus appears to be hazardous for an applicant to rely on a particular interpretation if the latter is not supported by clear and constant national case law.[198] Moreover, an applicant cannot rely on case law if the legal provisions on which that case law is based, have meanwhile been altered. Indeed, in such a case there is no certainty that the decision in his case would have been identical with previous decisions, so that the relevant remedy cannot in advance be qualified as ineffective and inadequate.[199]

For a situation where reliance on standing case, law was honoured, reference may be made to the decision of the Commission in the so-called '*Vagrancy*' Cases, where three Belgians claimed that they had been unlawfully detained for vagrancy.[200] Prior to these applications being lodged, it had been established case law of the Belgian Council of State that the latter had no jurisdiction with respect to an appeal against such detention. After the applications had been declared admissible, the Council of State reversed its approach. According to the Commission this was no reason for declaring the applications as yet inadmissible because of non-exhaustion of an effective local remedy.[201]

196 Appl. 23548/94, *E.F. v. Czech Republic*, D&R 78-B (1994), p. 146 (151); Appl. 57039/00, *Epözdemir v. Turkey* and Appl. 20357/92, *Epözdemir v. Turkey;* Appl. 20357/92, *Whiteside v. the United Kingdom*. D&R. 76-A (1994), p. 80 (87); decision of 19 January 1999, *Allaoui*; decision of 26 October 2004, *Storck*.

197 Appl. 20357/92, *Whiteside v. the United Kingdom*, D&R 76-A (1994), p. 80 (88); decision 27 March 2003, *Martin*.

198 See also Appl. 10789/84, *K., F. and P. v. the United Kingdom*, D&R 40 (1985), p. 298 (299).

199 See Appl. 8408/78, *X v. Federal Republic of Germany* (not published), where the Commission also attached importance to the fact that the case law had been formed before the Commission itself had shown in a decision that it took a different view. In other words, the Commission assumes that the relevant national court will take the Commission' view by taking a new case into consideration, and consequently will take a different decision.

200 Appls 2832, 2835 and 2899/66, *De Wilde, Ooms and Versyp v. Belgium*, Yearbook X (1967), p. 420.

201 Report of 19 July 1969, *De Wilde, Ooms and Versyp ('Vagrancy' Cases)*, B.10 (1971), p. 94. See also Appl. 8544/79, *Öztürk v. Federal Republic of Germany*, D&R 26 (1982), p. 55 (69).

2.2.10.4.4 The length of proceedings

Effectiveness is also considered to be lacking when the procedure is exceptionally protracted.[202] However, that is only the case if a given procedure is structurally protracted, i.e. in all cases;[203] the fact that a given procedure is very lengthy in a concrete case does not in itself set aside the condition of the Convention that a remedy in such a procedure must be sought. In fact, in that case the applicant will first of all have to seek redress against that long duration within the national legal system concerned. It was perhaps mainly for this reason that the Commission rejected an application filed by a Belgian as the Court of Appeal had yet to pronounce a verdict, although the applicant had filed his appeal more than six years before. Curiously enough the Commission held: "It is true that the Commission finds that the length of the procedure before Belgian jurisdiction cannot be held against either the applicant or his lawyer. However, the Commission considers that it should put an end to a procedure pending before it for five years."[204]

More sense can be made of the Commission's decision with respect to a complaint concerning the length of criminal proceedings. The question arose whether the accused should have instituted a procedure designed to accelerate proceedings but which could not have led to any other effect. In the Commission's opinion, such a procedure could not be considered an effective and sufficient remedy as required by Article 26 [the present Article 35(1)].[205] The Commission also held that, in case of relatively protracted criminal proceedings, it was not bound to reject a complaint for failure to have exhausted domestic remedies even though appeals were still pending at the moment an application was introduced.[206] In a case against Cyprus, where the Attorney General had refused, in the light of findings by a Commission of Inquiry, to institute criminal proceedings in connection with the killing of two persons by special police, the relatives of the deceased could be considered to have exhausted the domestic remedies, given the fact that the scope of an inquest would not be broader than that of the inquiry and

202 See, *e.g.*, Appl. 222/56, *X v. Federal Republic of Germany*, Yearbook II (1958-1959), p. 344 (350-351); Appl. 7161/75, *X v. the United Kingdom*, D&R 7 (1977), p. 100 (101); Appl. 13156/87, *Byrn v. Denmark*, D&R 73 (1992), p. 5 (12);. Appl. 26757/95, *Wójcik v. Poland*, D&R 90 (1997), p. 24.

203 See, *e.g.*, Appl. 14556/89, *Papamichalopoulos v. Greece*, D&R 68 (1991), p. 261 (270); judgment of 29 April 2004, *Plaksin*, para. 35.

204 Appl. 5024/71, *X v. Belgium*, D&R 7 (1977) p. 5 (7). See, however, Appl. 6699/74, *X v. Federal Republic of Germany*, D&R 11 (1978), p. 16 (23-24), where the Commission found differently, even despite the fact that the applicant had consented to postponement of the national procedure. In this case the Commission evidently reached an 'equity' standpoint in view of the emergency in which the applicant found herself.

205 Appl. 8435/78, *X v. the United Kingdom*, D&R 26 (1982), p. 18 (20); Appl. 24559/94, *Gibas v. Poland*, D&R 82 A (1995), p. 76(81).

206 See, *inter alia*, Appl. 12850/87, *Tomasi v. France*, D&R 64 (1990), p. 128 (131); Appls 15530/89 and 15531/89, *Mitap and Müftüoglu v. Turkey*, D&R 72 (1992), p. 169 (189).

that it was undisputed that civil proceedings normally lasted eight years in a[ll] instances.[207]

In the *Plaskin* Case the Court noted that, according to the Convention organ's constant case law, complaints concerning length of procedure could be brought befo[re] it before the final termination of the proceedings in question.[208]

2.2.10.4.5 Independence of court

The prior exhaustion of local remedies is not required if the competent court is not fully independent, i.e. the necessary guarantees for a fair trial are not present. In the First *Greek* Case where Denmark, Norway, Sweden and the Netherlands complained about the torture of political prisoners in Greece, the applicant States alleged the existence of an administrative practice to which the local remedies rule was not applicable. In the Commission's opinion, however, the applicant States had not given 'substantial evidence' for the existence of such a practice. Nevertheless, the applications were not rejected under Article 26 [the present Article 35(1)]. The Greek Government had discharged several judges for political reasons. Under those circumstances the Commission found that there was insufficient independence of the judiciary. It concluded that the judicial procedures provided for under Greek law no longer constituted effective remedies which should have been exhausted.[209]

A comparable situation arose as a result of the Turkish military action in Cyprus. According to the Commission, the action had "deeply and seriously affected the life of the population in Cyprus and, in particular, that of the Greek Cypriots."[210] The circumstances were such that the existing remedies available in domestic courts in Turkey or before Turkish military courts in Cyprus could be considered as effective remedies which had to be exhausted according to Article 35(1) with respect to complaints of inhabitants from Cyprus, only "if it were shown that such remedies are both practicable and normally functioning in such cases."[211] The Commission found that this had not been proved by the Turkish Government.

In the *Yöyler* Case the Court considered that a complaint to the chief public prosecutor's office could in principle provide redress for the kind of violations alleged by the applicants. However, any prosecutor who receives a complaint alleging a criminal act by a member of the security forces must decline jurisdiction and transfer the file to the Administrative Council. On account of this, the Court reiterated that it had already found in a number of cases that the investigation carried out by the latter

207 Appl. 25052/94, *Andronicou and Constanttinou v. Cyprus*, D&R 82 A (1995), p. 102 (115).
208 Judgment of 29 April 2004, para. 35.
209 Appls 3321-3323 and 3344/67, *Denmark, Norway, Sweden and the Netherlands v. Greece*, Yearbook XI (1968), p. 730 (774).
210 Appls 6780/74 and 6950/75, *Cyprus v. Turkey*, D&R 2 (1975), p. 125 (137).
211 *Ibidem*, pp. 137-138.

body could not be regarded as independent since it was composed of civil servants, who were hierarchically dependent on the governor, while an executive officer was linked to the security forces under investigation.[212] In the *Dogan* Case the Court noted in this connection that the applicants had filed petitions with various administrative authorities complaining about the forced evacuation of their village by the security forces. These proceedings did not result in the opening of a criminal investigation or any inquiry into the applicants' allegations. The Court was, therefore, of the opinion that the applicants were not required to make a further explicit request to this effect by filing a criminal complaint with the chief public prosecutor's office, as this would not have led to different result.[213]

2.2.10.5 Submission in substance of the alleged violations to the competent national authorities

The local remedies rule is considered to be complied with only if the points on which an application is lodged in Strasbourg have also been put forward in the relevant national procedure.[214] That the Commission took a stringent attitude in this respect became clear from the case where a complaint was lodged against Norway on account of the refusal of a Norwegian judicial organ to publish the reasons for its judgment. Since this point had not been put forward before the highest court in Norway, in the opinion of the Commission the local remedies rule had not been complied with, although a number of other objections against the judgment in question had indeed been raised in those proceedings.[215] This decision of the Commission showed at the same time that the injured person cannot rely on an alleged obligation on the part of the national court to supplement the legal grounds *ex officio*.[216] This was expressly confirmed by the Court: "The fact that the Belgian courts might have been able, or even obliged, to examine the case of their own motion under the Convention cannot be regarded as having dispensed the applicant from pleading before them the Convention or arguments to the same or like effect."[217]

In the *Kröcher and Möller* Case the applicants alleged violation of Article 3 because of the conditions imposed on them both during the period of their detention on remand, and during their preventive detention and while serving their sentences. As

212 Judgment of 24 July 2003, para. 93; judgment of 17 February 1994, *Ipek*, para. 207.
213 Judgment of 18 November 2004, para. 109.
214 Appl. 26629/95, *Litwa v. Poland*, D&R 90 A (1997), p. 13(21); judgment of 15 November 1996, *Ahmed Sadik*, para. 30; judgment of 28 July 1999, *Selmouni*, para. 74; decision of 11 December 2003, *Debelic*.
215 Appl. 2002/63, *X v. Norway*, Yearbook VII (1964), p. 262 (266). See also Appl. 11244/84, *Pirotte v. Belgium*, D&R 55 (1988), p. 98 (104).
216 See Appl. 2322/64, *X v. Belgium*, Coll. 24 (1967), p. 36 (42); Appl. 15123/89, *Braithwaite v. the United Kingdom*, D&R 70 (1991), p. 252 (256).
217 Judgment of 6 November 1980, *Van Oosterwijck*, para. 39.

far as the first-mentioned period was concerned, it was not disputed that the applicant had properly exhausted the domestic remedies available. The final national decision, however, referred solely to the conditions of detention on remand. With respect to the last-mentioned period the Commission investigated whether the facts or conditions complained of constituted a mere extension of those complained of at the outset. It concluded that this was not the case and declared the applicants' complaint inadmissible for not having properly exhausted the domestic remedies, since the last-mentioned period had not been expressly at issue in the national proceedings.[218]

The formula used in the case law requires that the point concerned must have been submitted 'in substance' to the national authorities.[219] The precise implications of this requirement will depend on the concrete circumstances of the case. In general the applicant will not be required to have explicitly referred to the relevant articles of the Convention in the national procedure.[220] Thus, in a case where an applicant alleged a violation of Article 3, the Commission concluded that the applicant had in substance raised the argument of degrading treatment in the domestic procedure by alleging that compliance with a court order complained of would bring him into disgrace.[221]

In the Case of *Gasus Dosier- und Fördertechnik GmbH* the Court observed that it was true that Article 1 of Protocol No. 1 was referred to for the first time by the Tax Collector and that the applicant company consistently denied its applicability, and argued it before the Supreme Court only in an alternative submission. Nevertheless, both the Court of Appeal and the Dutch Supreme Court were able to deal with the allegation of a violation of that provision and in fact did so. Accordingly, the applicant company did provide the Dutch courts, and more particularly the Supreme Court, with the opportunity of preventing or putting right the alleged violation of Article 1 of Protocol No. 1.[222]

In the *Cajella* Case the applicant had lodged a constitutional application, in accordance with the relevant domestic rules, in which he alleged a violation of Article 5(3) and Article 6(1) of the Convention on account of the length of his detention on

218 Appl. 8463/78, D&R 26 (1982), p. 24 (48-52).

219 See, *e.g.*, Appl. 9186/80, *De Cubber v. Belgium*, D&R 28 (1982), p. 172 (175); Appl. 16810/90, *Reynjo v. Belgium*, D&R 73 (1992), p. 136 (154); Appl. 14524/89, *Yanasik v. Turkey*, D&R 74 (1993), p. 14 (25); and judgment of 28 August 1986, *Glasenapp*, para. 44; judgment of 16 September 1996, *Akdivar*, paras 65-67; judgment of 18 December 1996, *Aksoy*, paras 51-52.

220 Thus the Court in the *Van Oosterwijck* judgment of 6 November 1980, para. 39. See also the Commission in Appl. 1661/62, *X and Y v. Belgium*, Yearbook VI (1963), p. 360 (366): "whereas an application against a State where the Convention is an integral part of municipal law (...) may thus prove to be inadmissible if the victim of the alleged violation has not given his judges an opportunity to remedy that violation because the Convention was not invoked or no other arguments to the same effect were raised." See also Appl. 9228/80, *X v. Federal Republic of Germany*, D&R 30 (1983), pp. 132 (141-142); Appl. 17128/90, *Erdagöz v. Turkey*, D&R 71 (1991), p. 275 (282).

221 Appl. 11921/86, *Verein Kontakt Information Therapie and Hagen v. Austria*, D&R 57 (1988), p. 81 (89).

222 Judgment of 23 February 1995, para. 49.

remand and of the criminal proceedings concerning the charge of complicity in attempted murder. The application was examined both by the First Hall of the Civil Court and by the Constitutional Court. In the Court's view, by raising the 'reasonable time' issue before the competent domestic courts, the applicant had invited them to examine the length of his trial and of his deprivation of liberty in light of the Court's case law and to determine whether, during the relevant periods, there had been excessive delays for which the authorities might be held responsible. By doing so, he had complied with his obligation to make normal use of the available domestic remedies. Against this background it was considered of little relevance that the applicant might not have explicitly drawn the attention of the Civil Court and of the Constitutional Court to the shortcomings which, according to him, had occurred during a specific stage of the proceedings.[223]

Express reference to provisions of the Convention may, however, be necessary in certain cases: "In certain circumstances it may nonetheless happen that express reliance on the Convention before the national authorities constitutes the sole appropriate manner of raising before those authorities first, as is required by Article 26 [the present Article 35], an issue intended, if need be, to be brought subsequently before the European review bodies."[224] In other words, express reference to the provisions of the Convention is necessary if there is no other possibility of submitting the issue 'in substance' in the appropriate way to the national organs.[225]

The above exposé holds true for those Contracting States where the Convention has internal effect. Things are different, of course, in Contracting States where the Convention has no domestic status and has not been incorporated. Indeed, in such a case, directly invoking the Convention before the national authorities will be of no avail in most cases. Consequently, the Commission decided in a case against the United Kingdom: "Before lodging this application the applicant lodged an appeal against her conviction and sentence. Although in the appeal proceedings she did not invoke the rights guaranteed in Articles 5, 9 and 10, she has to be considered to have exhausted domestic remedies because the Convention which guarantees the said rights is not binding law for the British courts and it is doubtful whether the rights and liberties in question constitute general principles which could successfully be invoked by the

223 Decision of 18 March 2004.

224 Judgment of 6 November 1980, *Van Oosterwijck*, para. 37.

225 See the Court's judgment of the same date, *Guzzard*, para. 72, where it was held: 'However, a more specific reference was not essential in the circumstances since it did not constitute the sole means of achieving the aim pursued (...). He [the applicant] (...) derived from the Italian legislation pleas equivalent, in the Court's view, to an allegation of a breach of the right guaranteed by Article 5 of the Convention.' See also Appl. 8130/78, *Hans and Marianne Eckle v. Federal Republic of Germany*, D&R 16 (1979), p. 120 (127-128); App. 20948/92, *Işiltan v. Turkey*, D&R 81 B (1996), p. 35(39).

defence in criminal proceedings before the British courts."[226] Here again, however, the applicant may be required to have invoked legal rules or principles of domestic law which are 'in substance' the same as the relevant provisions of the Convention.

2.2.10.6 The burden of proof

In general the Court is well informed – especially through its member elected with respect to the State concerned – about the remedies available under the different national systems of law and, in dubious cases, may ascertain their existence via its Registry. If the Court has established which remedies exist under national law, it is for the applicant to prove that these remedies have been exhausted or that they are not effective or adequate.

The main source of information in that respect is the respondent State. However, the Court investigates *ex officio* whether the local remedies rule has been complied with. In many cases of individual applications which were declared inadmissible under this rule, that conclusion was reached on the basis of such an *ex officio* investigation, without the application first having been transmitted to the State against which it was directed. If the application is transmitted to the State concerned – and with inter-State applications this is always the case (Rule 51 of the Rules of Court) – the burden of proof with respect to the local remedies rule is divided as follows: the respondent State which relies on the rule must prove that certain effective and adequate remedies exist under its system of law which should have been sought.[228] In the *Bozano* Case the Court held that the Government had to indicate in a sufficiently clear way the remedies that were open to the applicant: "it is not for the Convention bodies to cure of their own motion any want of precision or shortcomings in respondent States' arguments."[229] If the State succeeds in proving its plea, subsequently it is for the applicant to prove that those remedies have been exhausted or that they are not effective or adequate.[230] In the *Akdivar* Case the Court elaborated this rule of the burden of proof by indicating that there may be special circumstances absolving the applicant from the requirement of exhaustion of domestic remedies. According to the Court one such reason may be constituted by the national authorities remaining totally passive in the face of serious

226 Appl. 7050/75, *Arrowsmith v. the United Kingdom*, Yearbook XX (1977), p. 316 (334-336). See Appl. 6871/75, *Caprino v. the United Kingdom*, Yearbook XXI (1978), p. 284 (286-288).

227 Judgment of 16 December 1992, *Geouffre de la Pradelle*, para. 26.

228 Judgment of 18 June 1971, *De Wilde, Ooms and Versyp* ('*Vagrancy*' Cases), para. 16; judgment of 27 February 1980, *De Weer*, para. 29; judgment of 16 September 1996, *Akdivar*, para. 68; judgment of 28 November 1997, *Mentes and Others*, para. 57; judgment of 29 April 2003, *Dankevich*, para. 107; judgment of 29 June 2004, *Dogan and Others*, para. 102.

229 Judgment of 18 December 1986, para. 46. See also Appl. 14461/88, *Chave née Julien v. France*, D&R 71 (1991), p. 141 (153).

230 See, *e.g.*, Appl. 788/60, *Austria v. Italy*, Yearbook IV (1961), p. 116 (168) and Appl. 4649/70, *X v. Federal Republic of Germany*, Coll. 46 (1974), p. 1 (17).

allegations of misconduct or infliction of harm by State agents, for example where they failed to undertake investigations or offer assistance. In such circumstances it can be said that the burden of proof shifts once again, so that it becomes incumbent on the respondent Government to justify its response in relation to the scale and seriousness of the matters complained of.[231]

2.2.10.7 The moment the preliminary objection must be raised; ex officio inquiry

The Court takes cognisance of preliminary objections concerning the exhaustion of local remedies only insofar as the respondent State has raised them at the stage of the initial examination of admissibility, if their character and the circumstances permitted the State to do so at that moment.[232] The latter qualification was at issue in the *Campbell and Fell* Case. Here the Government raised the plea of non-exhaustion in its observations on the merits after the case had been declared admissible, because new developments had taken place in the relevant English case law only a few days before the Government had submitted its observations on admissibility. According to the Court, the Government could not reasonably have been expected to raise the plea of non-exhaustion at an earlier stage. There was, therefore, no estoppel on its part to do so at this stage of the proceedings. On the other hand, the Court held that it would now be unjust to find these complaints inadmissible for failure to exhaust domestic remedies, because after the Government had raised the issue the Commission had decided on the basis of former Article 29 not to reject the application on this ground. Consequently, the applicant was justified in relying on the Commission's decision by pursuing his case under the Convention instead of applying to the domestic courts.[233]

The question may be raised as to whether the Court should institute *ex officio* an inquiry into the compliance with the local remedies rule after the case has been transmitted to the State, in case the respondent Government has not raised an exception as to the admissibility under Article 35(1). The Commission did not institute an inquiry into the admissibility of the complaint under Article 26 [the present Article 35(1)] if the respondent State expressly waived or had waived its right to rely on the local remedies rule.[234] If the State had not waived this right, the Commission appeared

231 Judgment of 16 September 1996, para. 68; judgment of 18 December 1996, *Aksoy*, paras. 56-57; judgment of 9 December 1994, *Stran Greek Refineries and Stratis Andreadis*, para. 35; decision of 5 February 2004, *Cenbauer*.

232 See, *inter alia*, judgment of 18 June 1971, *De Wilde, Ooms and Versyp* ('*Vagrancy*' Cases), para. 60; judgment of 13 May 1980, *Artico*, para 27; judgment of 6 November 1980, *Guzzardi*, para. 63; and judgment of 10 December 1982, *Foti*, para. 44.

233 Judgment of 28 June 1984, para. 58-63.

234 See, *e.g.*, Appl. 1727/62, *Boeckmans v. Belgium*, Yearbook VI (1963), p. 370 (396); Appl. 1994/63, *Fifty-seven inhabitants of Leuven and environs v. Belgium*, Yearbook VII (1964), p. 252 (258-260); and Appl. 8919/80, *Van der Mussele v. Belgium*, D&R 23 (1981), p. 244 (257). This is different with regard to the six-month rule. There the Commission holds that "in view of the importance of this

prepared to declare an application inadmissible on the ground of non-exhaustion without the respondent State having raised an exception to that effect.[235] Despite the general wording of Article 35(1), one might wonder whether the Commission – and the Court – ought not to take a somewhat more passive attitude in this matter. The local remedies rule is intended primarily to protect the interest of the respondent State. The fact that the latter has failed to rely on that protection may indicate that it does not consider it to be in its interest to raise the exception. After all, the rejection of an application after a thorough investigation may be more convincing and, consequently, more satisfactory for the respondent State than a declaration of inadmissibility on formal grounds.[236] And, indeed, usually in cases which have been communicated to the respondent Government, the Commission has not declared the application inadmissible for failure to exhaust domestic remedies unless this matter had been raised by the Government in their observations. The Commission took the same attitude if the respondent Government had not submitted any observations at all,[237] or if the Government, following extensions of the time-limit, had neither submitted observations nor requested further extension but had raised the question of non-exhaustion in 'preliminary observations' long after the expiry of the time-limits fixed by the Commission.[238] In the *Kurt* Case the Court noted that the Government's objection was not raised in their memorial but only at the hearing and, therefore, outside the time-limit prescribed in Rule 48(1) of Rules of the Court [cf. the present Rule 55], which stipulated: "A Party wishing to raise a preliminary objection must file a statement setting out the objection and the grounds therefore not later than the time when that Party informs the President of its intention not to submit a memorial or, alternatively, not later than the expiry of the time-limit laid down in Rule 37 para. 1 for the filing of its first memorial." The objection was therefore dismissed.[239]

In the *Malama* Case the Court pointed out that according to Rule 55 of the Rules of Court, "[a]ny plea of inadmissibility must, in so far as its character and the circumstances permit, be raised by the respondent Contracting Party in its written or oral observations on the admissibility of the application". It was clear from the case file that that condition had not been satisfied in this instance. The Government were

rule; the Convention system, the Contracting States cannot on their own authority waive compliance with it": Appl. 9587/81, *X v. France*, D&R 29 (1982), p. 228 (240) and Appl. 10416/83, *K v. Ireland*, D&R 38 (1984), p. 158 (160).

235 See Appl. 2547/65, *X v. Austria*, Coll. 20 (1966), p. 79 (83) and Appl. 5207/71, *X v. Federal Republic of Germany*, Yearbook XIV (1971), p. 698 (708-710).

236 The decision on Appl. 9120/80, *Unterpertinger v. Austria*, D&R 33 (1983), p. 80 (83), seems to go in this direction.

237 Appl. 23178/94, *Aydin v. Turkey*, D&R 79-A (1994), p. 116 (119); Appl. 23182/94, *Dündar v. Turkey*; Appl. 23185/94, *Asker v. Turkey*; joined Appls 22947/93 and 22948/93, *Akkoç v. Turkey*, D&R 79-A (1994), p. 108 (115).

238 Appl. 22493/93, *Berktay v. Turkey*, D&R 79-A (1994), p. 97 (102).

239 Judgment of 25 May 1998, para. 81.

consequently estopped from raising this objection. Nor could the Court accept that the applicant had altered the subject matter of her application, since her complaints had manifestly always concerned the absence of fair compensation for the expropriation of her land. The subsequent payment of an amount of compensation contested by the applicant was, admittedly, a new fact, but one which was linked to her original complaints.[240]

2.2.10.8 Moment at which the local remedies must have been exhausted

The Commission has taken a flexible attitude with respect to the moment at which the local remedies must have been exhausted. It considered it sufficient if the decision of the highest national court had been given at the moment when the Commission decided on the admissibility of the application.[241] Thus the Commission held that it was not obliged to reject a complaint for failure to exhaust domestic remedies on account of the fact that appeals were still pending at the time when the application was lodged.[242] And in a case concerning the length of proceedings the Commission held that for the purposes of Article 6(1), having regard to the protracted duration of proceedings, it was not bound to reject a complaint for failure to exhaust domestic remedies because appeals were still pending at the time when the application was introduced.[243]

The Commission's flexible attitude in this respect could, on the other hand, also cause problems for the applicant. The Commission has, for instance, decided that a remedy which was not open to the applicant at the time of the lodging of his application, but became available only afterwards as a result of a change in the case law of the national court concerned, had nevertheless to be exhausted in order to satisfy the requirements flowing from the local remedies rule.[244]

In the *Baumann* Case the Court held that the assessment of whether domestic remedies have been exhausted is normally carried out with reference to the date on which the application was lodged with it.[245] Nevertheless, this rule is subject to exceptions, which may be justified by the particular circumstances of a case. Thus, after the Italian Parliament passed a special act designed to provide a domestic remedy for

240 Judgment of 1 March 2001, para. 40.

241 Appl. 2614/65, *Ringeisen v. Austria*, Yearbook XI (1968), p. 268 (306); Appl. 13370/87, *Deschamps v. Belgium*, D&R 70 (1991), p. 177 (187). See also the judgment of 16 July 1971, *Ringeisen*, para. 91; Appl. 16278/90, *Karaduman v. Turkey*, D&R 74 (1993), p. 93 (106).

242 Appl. 9019/80, *Luberti v. Italy*, D&R 27 (1982), p. 181 (193); Appls 15530/89 and 15531/89, *Mitap and Müftüoglu v. Turkey*, D&R 72 (1992), p. 169 (189); Appl. 16278/90, *Karaduman v. Turkey*, D&R 74 (1993), p. 93 (106).

243 Appl. 12850/87, *Tomasi v. France*, D&R 64 (1990), p. 128; Appls 15530/89 and 15531/89, *Mitap and Müftüoglu v. Turkey*, D&R 72 (1992), p. 169 (189).

244 Appl. 7878/77, *Fell v. the United Kingdom*, D&R 23 (1981), p. 102 (112).

245 Decision of 22 May 2001.

alleged violations of the 'reasonable-time' requirement ('the Pinto Act'), the Court found a departure from that general principle justified because the growing number of identical applications threatened to "affect the operation, at both national and international level, of the system of human-rights protection set up by the Convention".[246]

2.2.10.9 The effect of the declaration of inadmissibility

The effect of a declaration of inadmissibility on account of non-exhaustion of the local remedies is generally of a *dilatory* character. The applicant may submit his case again to the Court after having obtained a decision from the national court concerned. In fact such a decision is considered as relevant new information by the Court, so that the application will not be rejected as being substantially the same as a matter already examined by the Court in the sense of Article 35(2)(b). The question of whether the local remedies rule must also be applied if meanwhile the national time-limits for appeal have expired, so that in fact local remedies are no longer available, will have to be decided on a case-by-case basis. Application of the rule in such a case has *peremptory* effect, since both the national and the international procedure are then barred. Such a consequence appears justified only when the individual in question is to be blamed for having allowed the time-limit to expire. A clear-cut answer to this, as well as several other questions concerning the application of the local remedies rule, cannot be given *in abstracto*. For guidance, use may be made of the general starting-point that that which can be demanded of the individual is not "what is impossible or ineffective, but only what is required by common sense, namely 'the diligence of a bonus pater familias'".[247]

2.2.10.10 Special circumstances absolving from the obligation of prior exhaustion

The Commission and the Court have accepted the possibility that according to the generally recognised rules of international law there may be special circumstances in which even effective and adequate remedies may be left unutilised.[248] The following special circumstances have been invoked by applicants: doubt on the part of the applicant as to the effectiveness of the relevant remedy;[249] lack of knowledge on his part as

246 Decision of 8 November 2001, *Giacometti*.

247 Judge Tanaka in his separate opinion in the *Barcelona Traction* Case, *ICJ Reports*, 1970, p. 148.

248 Appl. 2257/64, *Soltikow v. Federal Republic of Germany*, Yearbook XI (1968), p. 180 (224). See also Appl. 6861/75, *X v. the United Kingdom*, D&R 3 (1976), p. 147 (152).

249 Appl. 3651/68, *X v. the United Kingdom*, Yearbook XIII (1970), p. 476 (510-514); Appl. 19819/92, *Størksen v. Norway*, D&R 78-A (1994), p. 88 (93).

to (the existence of) a particular remedy;[250] non-admittance of an appeal because of a procedural mistake by the applicant;[251] poor health of the applicant;[252] advanced age of the applicant;[253] poor financial position of the applicant or the high costs of the procedure;[254] lack of free legal aid;[255] fear of repercussions;[256] errors or wrong advice by counsel or by the authorities;[257] the fact that two applicants had filed the same complaint, while only one applicant has exhausted the domestic remedies.[258] So far, special circumstances justifying the non-exhaustion have been recognised only exceptionally in the case law.

In the *Akdivar* Case the Court took account of the fact that the events complained of took place in an area of Turkey subject to martial law and characterised by severe civil strife. In such a situation the Court was of the opinion that it must bear in mind the insecurity and vulnerability of the applicants' position following the destruction of their homes and the fact that they must have become dependent on the authorities in respect of their basic needs. Against such a background the prospects of success of civil proceedings based on allegations against the security forces had to be considered negligible in the absence of any official inquiry into their allegations, even assuming that they would have been able to secure the services of lawyers willing to press their claims before the courts. In this context the Court found particularly striking the Commission's observation that the statements made by villagers following the events complained of gave the impression of having been prepared by the police. Nor could the Court exclude from its considerations the risk of reprisals against the applicants or their lawyers if they had sought to introduce legal proceedings alleging that the security forces were responsible for burning down their houses as part of a deliberate State policy of village clearance. Therefore, the Court considered that, in the absence of convincing explanations from the Government in rebuttal, the applicants had demonstrated the existence of special circumstances which dispensed them at the time of the events complained of from the obligation to exhaust the domestic remedies.[259] In the

250 Appl. 5006/71, *X v. the United Kingdom*, Coll. 39 (1972), p. 91 (95) Appl.15488/89, *Dello Preite v. Italy*, D&R 80 (1995), p. 14.

251 Appl. 23256/94, *Hava v. Czech Republic*, D&R 78-B (1994), p. 139 (144); 25046/94, *Grof v. Austria*, D&R 93 (1998), p. 29.

252 Appl. 3788/68, *X v. Sweden*, Yearbook XIII (1970), p. 548 (580-582).

253 Appl. 568/59, *X v. Federal Republic of Germany*, Coll. 2 (1960), p. 1 (3).

254 Appl. 181/56, *X v. Federal Republic of Germany*, Yearbook I (1955-1957), p. 139 (140-141).

255 Appl. 1295/61, *X v. Federal Republic of Germany* (not published).

256 Appl. 2257/64, *Soltikow v. Federal Republic of Germany*, Yearbook XI (1968), p. 180 (228).

257 Appl. 41250/98, *Steglich-Petersen v. Denmark*, D&R 94 (1998), p 163; See, however, the Court's judgment of 13 May 1980, *Artico*, para. 27. In Appl. 10000/82, *H v. the United Kingdom*, D&R 33 (1983), p. 247 (253), the Commission accepted that all domestic remedies were exhausted, since the applicant had received counsel's advice that a domestic remedy would have no prospect of success.

258 Appl. 9905/82, *A. Association and H v. Austria*, D&R 36 (1984), p. 187 (192) where the Commission also considered the second applicant's case to be admissible.

259 Judgment of 16 September 1996, paras 73-75; judgment of 24 April 1998, *Selçuk and Asker*, para. 65; judgment of 8 January 2004, *Ayder*, para. 91.

Selmouni Case the Commission had previously held that a situation where national authorities had remained passive in the face of serious allegations of misconduct or infliction of harm by State agents, was a relevant criterion in absolving the applicant from the obligation to exhaust domestic remedies.[260]

In the *Bahaddar* Case the Government maintained that the applicant had not exhausted the domestic remedies available to him. The Deputy Minister of Justice had rejected the application for revision of his refusal to recognise the applicant's refugee status or, in the alternative, to grant him a residence permit on humanitarian grounds. The applicant's lawyer had appealed against this decision to the Judicial Division of the Council of State, stating that the grounds for the appeal would be submitted as soon as possible. The lawyer was reminded by the Judicial Division three months later that no such grounds had yet been received and was invited to submit them within a month. She failed to do so, submitting her grounds of appeal only three months later; she had not asked for an extension of the time-limit, as she might have done. The Court held that even in cases of expulsion to a country where there is an alleged risk of ill-treatment contrary to Article 3, the formal requirements and time-limits laid down in domestic law should normally be complied with, such rules being designed to enable the national jurisdictions to discharge their caseload in an orderly manner. Whether there are special circumstances which absolve an applicant from the obligation to comply with such rules will depend on the facts of each case. It should be borne in mind in this regard that in the case of applications for recognition of refugee status it may be difficult, if not impossible, for the person concerned to supply evidence within a short time, especially if – as in the present case – such evidence must be obtained from the country from which he or she claims to have fled. Accordingly, time-limits should not be so short, or applied so inflexibly, as to deny an applicant for recognition of refugee status a realistic opportunity to prove his or her claim. In the case under examination, however, it would have been possible for the applicant to request an extension of the time-limit.[261]

In the Case of *R.M.D. v. Switzerland* the applicant complained about the fact that he had been detained for two months in seven different cantons, which had deprived him of any possibility of having the lawfulness of his detention reviewed by a court as required by Article 5(4) of the Convention. Regarding the question of whether the applicant had fulfilled the requirement of exhaustion of domestic remedies, the Court noted that it must take realistic account not only of the *existence of formal remedies* in the legal system of the Contracting Parties concerned, but also of the *context* in which they operate and the *personal circumstances* of the applicant. In this case the applicant was transferred to different counties of Switzerland in a short period of time. The applicant filed a complaint about his detention at the court in the first county,

[260] Appl. 25803/94, D&R 88 B (1997), p. 55 (62-63).
[261] Judgment of 19 February 1998, paras 45-46.

but when he was transferred, that court declared itself unable to decide on the matter. The applicant did not file another complaint at any of the other counties. According to the Court, the applicant could not be blamed for failing to avail himself of the remedies available in the other counties, since he was in a position of great legal uncertainty, because he could be transferred to another county soon. Furthermore, he had many practical difficulties in arranging effective representation, as many detained persons have. The problem in this case was not that remedies were unavailable in each of the cantons, but that they were ineffective in the applicant's particular situation. Because of the constant transfers he was unable to obtain a decision from a court regarding his detention as he was entitled to under Article 5(4).[262]

In the *Ayder* Case, where an unqualified undertaking was given by a senior public official that all property owners would be compensated for damage sustained and damage assessment reports were subsequently prepared with respect to each property, the Court found that, in the absence of a clear indication to the contrary, property owners could legitimately expect that compensation would be paid without the necessity of their commencing proceedings in the administrative courts. The Court did not consider that it had been shown that the need for each property owner to bring separate judicial proceedings was made sufficiently clear. In the light of the foregoing, the Court concluded that special circumstances existed which dispensed the applicants from the obligation to exhaust domestic remedies.[263]

2.2.10.11 Final observations

In certain cases the issue of the exhaustion of the local remedies may coincide with the question of whether or not the Convention has been violated. In *X v. the United Kingdom*, for example, the Commission decided that: "Having regard to the fact that the applicant has included in his application a complaint under Article 13 of the Convention concerning the absence of an effective remedy, (...) the Commission considers that it cannot reject all or part of the application as being inadmissible for failure to comply with the requirements as to the exhaustion of domestic remedies."[264]

Finally, it deserves mentioning that an applicant deprives himself of the ability to exhaust local remedies when he consents to the settlement of his claim with the national authorities. If that is the case, his application is declared inadmissible in Strasbourg on account of non-exhaustion.[265]

[262] Judgment of 26 September 1997, paras 43-45
[263] Judgment of 8 January 2004, paras 101-102.
[264] Appl. 7990/77, *X v. the United Kingdom*, D&R 24 (1981), p. 57 (60).
[265] See, *e.g.*, Appl. 7704/76, *X v. Federal Republic of Germany* (not published).

2.2.11 THE OBLIGATION TO SUBMIT THE APPLICATION WITHIN SIX MONTHS AFTER THE FINAL NATIONAL DECISION

2.2.11.1 General

The six-month time-limit set forth in Article 35(1) serves to prevent the compatibility of a national decision, action or omission with the Convention being questioned after a considerable lapse of time by the submission of an application to the Court. Its purpose is to maintain reasonable legal certainty and to ensure that cases raising issues under the Convention are examined within a reasonable time. It ought also to prevent the authorities and other persons concerned from being kept in a state of uncertainty for a long period of time. Lastly, the rule is designed to facilitate establishment of the facts of the case, which otherwise, with the passage of time, would become more and more difficult, thus making a fair examination of the issue raised under the Convention problematic.[266] On the other hand, the period of six months is considered to leave the person concerned with sufficient time to evaluate the desirability of submitting an application to the Court and to decide on the content thereof.[267]

The introduction of the application, and not its registration by the Registry to the Court, has to take place within a period of six months from the final decision.[268] In the *Cajella* Case the Court considered that the date of introduction of the application was, at the latest, 17 July 2001, which was less than six months after 23 January 2001, the date on which the Constitutional Court gave its judgment on the issue.[269]

The six-month rule is an admissibility condition which applies to applications by States as well as by individuals.

2.2.11.2 Final decision

There is a close relationship between the admissibility condition of the six-month period and the one concerning the exhaustion of local remedies.[270] Not only are they combined in the same Article, but they are also expressed in a single sentence whose grammatical construction implies such correlation. From the grammatical construction of Article 26 [the present Article 35(1)], in which the two conditions were set forth, the Commission inferred that "the term 'final decision', therefore, in Article 26 refers exclusively to the final decision concerned in the exhaustion of all local

266 Appl. 15213/89, *M v. Belgium*, D&R 71 (1991), p. 230 (234).

267 Appl. 22714/93, *Worm v. Austria*, D&R 83 (1995), p. 17; Appl. 32026/96, *Lacour v. France*, D&R 90 (1997), p. 141.

268 Appl. 24909/94, *Bonomo v. Italy*, D&R 92 (1998), p. 5; decision of 6 February 2003, *Belchev*.

269 Decision of 18 March 2004.

270 Decision of 29 January 2004, *Berdzenishvili*.

remedies according to the generally recognised rules of international law, so that the six-month period is operative only in this context."[271] From this the Commission concluded at a later instance that, if no local remedy is available, the challenged act or decision itself must be considered as the 'final decision'.[272]

In the case of *Christians against Racism and Fascism* the applicant association complained about a police order prohibiting all public processions other than those of a religious, educational, festive or ceremonial character, for a period running from 24 February to 23 April 1978. No remedy was available to challenge the ensuing measures or their application to the association's planned procession on 22 April 1978. With respect to the six-month period the Commission decided: "This period must normally be calculated from the final domestic decision, but where, as in the present case, no domestic decision is required for the application of a general measure to the particular case, the relevant date is the time when the applicant was actually affected by that measure. In the present case, this was the date of the procession planned by the applicant association, i.e. 22 April 1978."[273]

The Commission took a similar line in the case of an applicant who complained that he had not been entitled to have the lawfulness of his detention determined by a court contrary to Article 5(4). As the right guaranteed in Article 5(4) is applicable only to persons deprived of their liberty, the Commission decided that a person alleging a breach of that provision must, in the absence of a particular constitutional remedy or other similar remedies which could redress an alleged breach of Article 5(4), submit such a complaint to the Commission within six months from the date of his release.[274] And in the case of an application concerning the level of compensation after nationalisation of an industry, the Commission took the position that the six-month period did not run from the date of the nationalisation Act but from the date on which the amount of compensation for shareholders was fixed. In the Commission's opinion Article 26 [the present Article 35(1)] could not be interpreted so as to require an applicant to seize the Commission at any time before his position in connection with the matter complained of had been finally determined or settled at the domestic level.[275]

271 Appl. 214/56, *De Becker v. Belgium*, Yearbook II (1958-1959), p. 214 (242).

272 See, *e.g.*, Appl. 7379/76, *X v. the United Kingdom*, D&R 8 (1977), p. 211 (212-213); decision of 10 January 2002, *Hazar*; Decision of 6 May 2004, *Miconi*.

273 Appl. 8440/78, D&R 21 (1981), p. 138 (147).

274 Appl. 10230/82, *X v. Sweden*, D&R 32 (1983), p. 303 (304-305).

275 Appl. 9266/81, *Yarrow P.L.C. and Others v. the United Kingdom*, D&R 30 (1983), p. 155 (187). Similarly, in Appls 8588/79 and 8589/79, *Bramelid and Malmström v. Sweden*, D&R 29 (1982), p. 64 (84), the Commission decided that in proceedings concerning the right to purchase company shares leading to two subsequent decisions, one on the right to purchase and the other on the price, the six-month time-limit runs from the second decision to the extent that the individuals concerned complain in particular about the price.

The above-mentioned link between the two admissibility conditions laid down in Article 35(1) has as a further consequence, that the criteria used by the Court in answering the question of whether a given local remedy must or must not be sought are also relevant for determing the question of whether the time-limit has been observed;[276] the time-limit starts at the moment of the last national decision in the chain of local remedies that had to be exhausted. This means that remedies which the applicant did not have to pursue, for instance because they are not effective and adequate, are not taken into account as the starting-point of the time-limit. An applicant cannot, therefore, defer the time-limit, for instance by lodging a request for pardon, applying to an incompetent organ, or asking for reopening of his case. Decisions on such requests are not regarded as final national decisions in the sense of Article 35(1).[277]

A curious decision of the Commission in this connection is the one in the *Nielsen* Case. Although Nielsen's application had been lodged more than six months after the decision of the highest Danish court, the Commission did not declare it inadmissible on that account. Nielsen had in the meantime addressed a request to the Special Court of Revision and the Commission took the date of the decision of that court as the starting-point of the time-limit for appeal.[278]

The close relation between the two admissibility conditions of Article 35(1) may place the applicant in a difficult situation if he is not sure whether a particular remedy must or must not be pursued. If he first brings a certain action and waits for the outcome, he incurs the risk of subsequently not being received by the Court on account of exceeding the time-limit of six months, if the remedy in question did not have to be sought in the Court's opinion. If, on the other hand, he does not seek that remedy, he incurs the risk of not being received on the ground of non-exhaustion. In such a case an applicant is well-advised to lodge an application with the Court and at the same time to seek the remedy concerned. If later on the Court concludes that exhaustion of the remedy concerned was not required, at least the time-limit will have been complied with. And if the Court decides otherwise, the final national decision will as a rule still be in time, since the local remedies have to be exhausted only at the moment at which the Court decides on admissibility. If the national decision is not in time, the applicant may again lodge an application with the Court, the final national decision constituting a new fact. In matters like these the Commission used to take a flexible attitude. An Italian applicant contacted the Commission for the first time on 21 July

276 See, *e.g.*, Appl. 5759/72, *X v. Austria*, D&R 6 (1977), p. 15 (16); Appl. 7805/77, *Pastor X and Church of Scientology v. Sweden*, D&R 16 (1979), p. 68 (71); Appl. 15213/89, *M. v. Belgium*, D&R 71 (1991), p. 230 (235).

277 See, for example, with regard to a request to reopen the case Appl. 10431/83, *G. v. Federal Republic of Germany*, D&R 35 (1984), p. 241 (243) and Appl. 10308/83, *Altun v. Federal Republic of Germany*, D&R 36 (1984), p. 209 (231).

278 Appl. 343/57, Yearbook II (1958-1959), p. 412 (434-444).

1978, setting out in his letter the substance of his complaint. Subsequently he sought reopening of proceedings in Italy, possibly as a result of the information provided by the Commission's Secretariat. The applicant did not contact the Commission again until 17 February 1981, at the end of the reopening procedure. The Commission nevertheless considered his application to have been introduced on 21 July 1978, and, therefore, in time.[279]

In the *Miconi* Case the Court observed that in Italy there is no time-limit on the filing of an application for review of a law's constitutionality after the entry into force of the law. As this application for review can be made several times at any stage of proceedings, the Court noted that this could have unreasonable consequences as far as the six-months rule is concerned if the Constitutional Court's judgment was to be considered the final decision within the meaning of Article 35 of the Convention. Therefore, in the circumstances of the case, the Court found that the decision of the Constitutional Court given on 20 July 2000 was not the final decision within the meaning of Article 35(1) of the Convention. As a result, the six-month period ran from the entry into force of the law complained of. In this respect the Court considered that where the law complained of is a provisional act, such as the legislative decree in the present case, the 'final decision' within the meaning of the Convention is the definitive law which embodies that act. As Legislative Decree no. 166/1996 was never converted into a law, the Court found that Law no. 448/1998 was the final decision, as it maintained the effects of the said legislative decree. Consequently, the six-month period started to run from the date of entry into force of that law, i.e. on 1 January 1999.[280]

2.2.11.3 Starting-point of the time-limit

Although the six-month time-limit formally starts running from the moment at which the final national decision is taken, the Commission accepted the date on which that decision was notified to the applicant as the relevant moment, provided that the applicant was previously ignorant of the decision.[281] If a judgment is not delivered at a public hearing, the six-month period starts at the moment it was served on the applicant.[282] In the *Worm* Case the Court noted that, under domestic law and practice, the applicant was entitled to be served *ex officio* with a written copy of the Court of Appeal's judgment, and that the long delay for this service was exclusively the responsibility of the judicial authorities. The said judgment, which in its final version ran to over nine pages, contained detailed legal reasoning. In these circumstances the Court

279 Appls 9024/80 and 9317/81, *Colozza and Rubinat v. Italy*, D&R 28 (1982), p. 138 (158).

280 Decision of 6 May 2004.

281 Appl. 899/60, *X v. Federal Republic of Germany*, Yearbook V (1962), p. 136 (144-146). *Cf.* Appl. 9991/82, *Bozano v. Italy*, D&R 39 (1984), p. 147 (155).

282 Decision of 9 July 2002, *Venkadajalasarma*.

shared the Commission's view that the object and purpose of Article 26 [the pres... Article 35(1)] were best served by counting the six-month period as running from th... date of service of the written judgment. Moreover, this was the solution adopted b... Austrian law in respect of time-limits for lodging domestic appeals.[283] The positio... adopted by the Commission that the period started at the moment the applicant... lawyer became aware of the decision completing the exhaustion of domestic remedie... notwithstanding the fact that the applicant only became aware of the decision later... would seem to be disputable. After all it is the applicant's own decision whether o... not to file an application in Strasbourg.[284]

Depending on the nature of the case concerned, notification of the operative part... of the judgment might be insufficient. For the six-month period to start running, the... subsequent notification of the full text giving the reasons for the judgment may be... decisive.[285] In this respect, the Commission emphasised that the need to provide the... person concerned with sufficient time to evaluate the desirability of submitting an... application to the Commission and to decide on the content thereof, can only be... satisfied from the moment when the applicant has been able to acquaint himself not... only with the decision rendered by the national judicial authorities but also with the... factual and legal grounds for that decision.[286] However, if the applicant knew that the... decision was taken, but has made no further efforts to become acquainted with its... contents, the date of the decision is considered the starting-point of the time-limit.[287]

Unlike in the case of the local remedies rule, where the moment at which the Court... decides on admissibility is decisive, for the time-limit of the six-month period it is... the date of receipt of the application that counts. In the case of the local remedies rule,... the Commission evidently relied on the English version of Article 26 [the present... Article 35(1)], which includes the words 'may only deal with the matter', while for... its position concerning the time-limit for bringing the application it found support... in the French text, which reads: *'ne peut être saisie que'*. In the *Iversen* Case the... Norwegian Government submitted that the date of registration of the application with... the Secretariat was to be considered as the decisive date. The Commission, however,... decided that for the question of whether an applicant had or had not lodged the... complaint in due time, the relevant date was "at the latest the date of its acknowledged... arrival at the Secretariat-General."[288] In practice, the Commission took the date of the... applicant's first letter as the decisive moment, in which he stated that he wished to...

283 Judgment of 27 August 1997, para. 33.

284 Appl. 14056/88, *Aarts v. the Netherlands*, D&R 70 (1991), p. 208 (212); Decision of 7 September 1999, *Keskin*; Decision of 19 December 2002, *Pejic*.

285 Appl. 9299/81, *P v. Switzerland*, D&R 36 (1984), p. 20 (22).

286 Appl. 10889/84, *C. v. Italy*, D&R 56 (1988), p. 40 (57).

287 Appl. 458/59, *X v. Belgium*, Yearbook III (1960), p. 222 (234); Decision of 23 September 2004, *Çelik*.

288 Appl. 1468/62, *Iversen v. Norway*, Yearbook VI (1963), p. 278 (322).

lodge an application and gave some indication of the nature of the complaint.[289] The mere submission of certain documents was considered insufficient.[290]

Since the scope of an application in respect of the date of introduction is circumscribed by the terms of the applicant's first communication, the Court must also examine whether the further details of the application should be considered as legal submissions in respect of the applicant's main complaint to which the six-month rule would not be opposable,[291] or whether they should be considered as separate complaints introduced at a later stage.[292] The Commission concluded in a case where the applicant initially complained under Article 6(1) of lack of access to court, that his subsequent submissions alleging the lack of an oral hearing amounted to a fresh complaint. The Commission found that the complaint of a lack of an oral hearing contained a distinct, precise fact in respect of the right to a fair hearing. In these circumstances, for the purposes of the six-month rule, the complaints had to be considered separately.[293]

In the case of *19 Chilean nationals and the S. Association* the Commission was faced with the question of how to treat the declaration of 18 Chileans that they adhered to an application already lodged with the Commission by another Chilean. The Commission took the date of application for the 18 persons as their declaration and not the date of the filing of the original application.[294]

In a case where a period of almost seven years had elapsed between the initial letter to the Commission and the final completion of the application, the Commission first examined the question of the date of introduction of the application. The applicant wrote to the Commission for the first time on 12 December 1982 in a letter briefly setting out all her complaints. On 8 February 1983 the Secretariat sent her a letter drawing her attention to the need to exhaust domestic remedies. The letter also informed her that the application would be registered as soon as she returned the application form she had been given during a visit to the Secretariat. No more was heard from the applicant until 28 April 1989, on which date she sent the Commission a letter setting out in detail the complaints raised in December 1982 and including the relevant documents. On 30 June 1989 she sent the Commission a duly completed and signed application form. The Commission recalled that, according to its established practice, it considered the date of introduction of an application to be the date of the applicant's first letter indicating his intention to lodge an application and giving

289 Appl. 4429/70, *X v. Federal Republic of Germany*, Coll. 37 (1971), p. 109 (110). See also Appl. 8299/78, *X and Y v. Ireland*, D&R 22 (1981), p. 51 (72); Appl. 10293/83, *X v. the United Kingdom*, D&R 45 (1986), p. 41 (48).

290 Appl. 9314/81, *N v. Federal Republic of Germany*, D&R 31 (1983), p. 200 (201).

291 Appl. 12015/86, *Hilton v. the United Kingdom*, D&R 57 (1988), p. 108 (113).

292 Appl. 10857/84, *Bricmont v. Belgium*, D&R 48 (1986), p. 106 (153).

293 Appl. 18660/91, *Bengtsson v. Sweden*, D&R 79-A (1994), p. 11 (19-20).

294 Appls 9959/82 and 10357/83, *19 Chilean nationals and the S. Association v. Sweden*, D&R 37 (1984), p. 87 (89).

some indication of the nature of the complaints he wishes to raise. However, wh
a substantial interval followed before the applicant submitted further informati
the particular circumstances of the case had to be examined in order to decide wh
date should be regarded as the date of introduction of the application.[295] Although
express obligation laid down in Article 26 [the present Article 35(1)] of the Conventi
concerned only the introduction of an application, and the Commission had hithe
shown generosity in this respect by accepting that the date of introduction should
held to be the date on which the first letter setting out the complaint was submitte
without imposing any other restrictions, the Commission held that it would
contrary to the spirit and purpose of the six-month rule laid down in Article 35(
of the Convention to accept that by means of an initial letter an applicant could
in motion the procedure provided for in Article 34 of the Convention only to rema
inactive thereafter for an unlimited and unexplained period of time.[296] The Commis
sion pointed to the fact that it had always rejected applications submitted more tha
six months after the date of the final decision, if the running of time had not bee
interrupted by any special circumstance. It considered that it would be inconsisten
with the object and purpose of the six-month rule to deviate from this practice whe
the application had actually been introduced within six months of the final decisio
but has not been pursued thereafter.[297]

In the *Papageorgiou* Case the Court held that an application is lodged on the date o
the applicant's first letter, provided the applicant has sufficiently indicated the purpos
of the application. Registration – which is effected when the Secretary to the Com
mission [at present: the Registrar of the Court] receives the full case file relating to
the application – has only one practical consequence: it determines the order in which
applications will be dealt with. As to the applicant's alleged negligence, the Court
considered that parties to proceedings could not be required to enquire day after day
whether a judgment that has not been served on them has been delivered.[298]

In the *Monory* Case the Court recalled that it had previously stated that when the
reasons for a decision are necessary for the introduction of an application, the six-
month period ordinarily runs not from the date of notification of the operative part
of the decision but from the date on which the full reasons for the decision were given.
It noted that on 7 April 2000, when the letter enquiring about the outcome of the
proceedings before the Romanian courts was sent by the Hungarian Ministry to their
Romanian counterpart, the applicant was already acquainted with the outcome of his
appeal on points of law but not with the reasons given by the court. The date on which

295 Appl. 15213/89, *M v. Belgium*, D&R 71 (1991), p. 230 (234).
296 *Ibidem*.
297 See Appl 10626/83, *Kelly v. the United Kingdom*, D&R 42 (1985), p. 205 (206).
298 Judgment 22 October 1997, para 32.

he found out about the reasons for the decision was, at the earliest, 24 May 2001 when the Romanian Ministry communicated the text of the final decision to the applicant.[299] The Court noted that the Romanian Ministry represented the applicant in all the proceedings before the Romanian courts. All documents in the case, including previous court decisions, were sent by the Romanian Ministry to their Hungarian counterpart, which then forwarded them to the applicant. Furthermore, the letter addressed by the Romanian Ministry to their Hungarian counterpart on 5 March 2001 indicated that the Romanian Ministry alone played an active role in the proceedings before the Romanian courts. At no time did the courts communicate directly with the applicant. All documents, including subpoenas, were sent to the Romanian Ministry in their capacity of representative of the applicant. Furthermore, the Court acknowledged that the final decision was not subject to *ex officio* service on the parties. It recalled that according to its case law, if the applicant or his representative fails to make reasonable efforts to obtain a copy of the final decision, the delay in the lodging of the application with the Court is deemed to be due to their own negligence.[300] Accordingly, in the present case, the obligation to make all reasonable efforts to obtain a copy of the decision fell equally on the applicant and on his representative, the Romanian Ministry. As for the applicant, the Court noted that he had made reasonable efforts in order to obtain the decision. When he found out, unofficially, that the Oradea Appellate Court had adopted the decision, he used the customary channel of communication and asked for a copy of this decision. Hence, on 7 April 2000, the Hungarian Ministry asked their Romanian counterpart for a copy of the decision to be transmitted to them. As a consequence of his action, the applicant received the final decision of 2 February 2000 on 29 May 2000 by letter of 24 May 2000. Given the Romanian Ministry's role as representative of the applicant, its obligation to make all reasonable efforts in order to obtain the copy of the final decision was implied. Given that the Romanian Ministry was part of the Romanian Government, the Court noted that the Government enjoyed a dual capacity in the instant case: that of the representative of the applicant in the Hague Convention proceedings and that of the respondent Government of the High Contracting Party. In these circumstances it considered that the Romanian Ministry's failure to obtain a copy of the decision in their capacity as representative of the applicant could not be likened to the negligence of a private representative. The Romanian Ministry constituted part of the respondent Government and that Government could not invoke in their defence their own failures or negligence. The fact could not be overlooked that the applicant was a foreign national living outside the territory of Romania and could not be expected to know the language of the Romanian courts, i.e. Romanian. Accordingly, for any such contacts, the applicant would have needed the services of a representative. Under the Hague Convention, this

299 Decision of 17 February 2004.
300 See the decision of 9 April 2002, *Züleyha Yilmaz*.

role was played by the Romanian Ministry. The Court acknowledged that the Hag
Convention does not impose on the Government the obligation to serve final decisio
on the applicant. Notwithstanding this, it noted that the Hague Convention do
impose on the Government an obligation to represent the applicant and, in th
capacity, to make all reasonable efforts to secure to the applicant the enjoyment of h
parental rights. Therefore, the Court considered that the applicant made all reasonab
efforts to obtain a copy of the final decision of 2 February 2000. It thus considered tha
the starting date for the calculation of the six-month period was, at the earliest
24 May 2000. It followed that the application, lodged with the Court on 23 Novembe
2000, was within the six-month time limit.[301]

2.2.11.4 Continuing situation

A special starting date for the time-limit applies to cases involving a so-called
'continuing situation', where the violation is not (only) constituted by an act per-
formed or a decision taken at a given moment, but (also) by its consequences, which
continue and thus repeat the violation day by day. As long as that continuing situation
exists, the six-month period does not commence, since it serves to make acts and
decisions *from the past* unassailable after a given period.[302]

A well-known example is the *De Becker* Case. De Becker had been sentenced to
death in 1946 for treason during the Second World War. Later this sentence was
converted into imprisonment and in 1961 he was released under certain conditions.
Under Belgian criminal law such a sentence resulted in the limitation of certain rights
– including the right to freedom of expression – which limitation continued to apply
after the release. The Commission held that this was a continuing situation and consi-
dered the complaint admissible *ratione temporis*. It considered that the six-month rule
was not applicable here, because the issue was whether, by the application to De Becker
of the Belgian legislation in question, the Convention was still being violated.[303]

The Commission disagreed, however, with an applicant who alleged the existence
of a continuing violation of Article 13 insofar as no domestic remedy was available
to him in respect of a deprivation of possession. According to the Commission:
"Where domestic law gives no remedy against such a measure, it is inevitable that un-
less the law changes that situation will continue indefinitely. However the person affec-
ted suffers no additional prejudice beyond that which arose directly and immediately

301 Decision of 17 February 2004.

302 See in this respect Appl. 14807/89, *Agrotexim Hellas S.A. v. Greece*, D&R 72 (1992), p. 148 (158); Appl. 17864/91, *Çinar v. Turkey*, D&R 79-A (1994), p. 5 (7); judgment of 25 March 1999, *Iatridis*, para. 50; judgment of 1 March 2001, *Malama*, para. 35.

303 Appl. 214/56, *De Becker v. Belgium*, Yearbook II (1958-1959), p. 214 (230-234). See also Appl. 4859/71, *X v. Belgium*, Coll. 44 (1973), p. 1 (18).

from the initial measure. His position is not therefore to be compared to that of a person subject to a continuing restriction on his substantive Convention rights."[304]

In another case the Commission held that the failure of the State to pay certain sums which were due to the applicant, created an ongoing situation in which the six-month rule did not apply.[305] The same was held to be the case when the administration failed to comply with the judgment of the Council of State which annulled the administrative decision refusing the applicants' application for a licence to establish a foreign language school.[306]

In the above-mentioned *De Becker* Case the continuing situation ensued from a legal provision. In those cases where the continuing situation was due to a judicial decision or a decision of the executive, the Commission applied the time-limit in the usual way.[307] The Commission adopted the view with respect to the latter that they were pronounced at a clearly defined moment and that the resulting consequences could be of a temporary nature and might be terminated. However, it is difficult to understand why a continuing situation could not thus be called into existence as well. Legislative measures are of course also taken at a clearly defined moment and, in the case of De Becker, the legal provision concerned became effective with respect to him at a specific moment. Moreover, the legal consequences of legislative measures may also be of a temporary nature and may be terminated by the legislator. The distinction made by the Commission would, therefore, seem to require more convincing reasoning. In the case of *McDaid and Others* the Commission held that a 'continuing situation' referred to a state of affairs which operated by continuous activities by or on the part of the State to render the applicants victim. Where complaints relate to specific events which occurred on identifiable dates, the fact that the events continue to have serious repercussions on the applicants' lives does not constitute a continuing situation.[308]

In the *Malama* Case the Court noted that, following the judgment of 12 September 1997 in which the Athens Court of First Instance had declared that the applicant was entitled to the amount of compensation determined in 1993, the applicant repeatedly requested payment of the compensation, but to no avail. She subsequently applied to the Commission complaining that she had been unable to obtain fair compensation for the expropriation of her land. Those circumstances indicated the existence of a continuing situation in relation to her complaints concerning the fairness of the pro-

304 Appl. 8206/78, *X v. the United Kingdom*, D&R 25 (1982), p. 147 (151).

305 Appl. 11698/85, *X v. Belgium* (not published); Appl. 11966/86, *X v. Belgium* (not published).

306 Appl. 18357/91, *D. and A. H. v. Greece*, HRLJ, Vol. 16, No. 1-3, 1995, p. 50 (52). See also Appls 7572/76, 7586/76 and 7587/76, *Ensslin, Baader and Raspe v. Federal Republic of Germany*, D&R 14 (1979), p. 66 (113).

307 See, *e.g.*, Appl. 1038/61, *X v. Belgium*, Yearbook IV (1961), p. 324 (334) and Appls 8560/79 and 8613/79, *X and Y v. Portugal*, D&R 16 (1979), p. 209.

308 Appl. 25681/94, D&R 85(1996), p. 134: Decision of 30 March 2004, *Koval*.

ceedings and her right to peaceful enjoyment of her possessions; accordingly, the six-month rule could not be relied on against her. Although the compensation payable for the expropriation was indeed assessed by the Court of Appeal in 1993, it was quite clear that the applicant could not at that time have ascertained the precise value of the (old) paper drachmas per square metre, since that sum was not converted into new drachmas until 21 December 1998. Not until that date did she know how much she had been awarded. The six-month rule was, therefore, not applicable.[309]

2.2.11.5 Special circumstances absolving from the requirement of the six-month rule

With respect to the six-month rule, the Commission has also admitted that special circumstances might occur in which the applicant need not satisfy this requirement. The case law on this point is almost identical to that regarding special circumstances in connection with the local remedies rule.[310] In the *Toth* Case the Court adopted the liberal approach taken by the Commission and held that it was hardly realistic to expect a detainee without legal training to fully understand the complexity of the case concerned particulary with regard to the difference between the two types of procedure involved. The applicant was, therefore, excused for not strictly complying with the six-month rule.[311]

Special considerations could apply in exceptional cases where an applicant first avails himself of a domestic remedy and only at a later stage becomes aware, or should have become aware, of the circumstances which make that remedy ineffective. In such a situation, the six-month period might be calculated from the time when the applicant becomes aware, or should have become aware, of these circumstances.[312]

2.2.11.6 Anonymous applications

Article 35(2)(a) provides that the application must not be anonymous. This condition makes it possible to bar applications which have been lodged for purely political or propaganda reasons, although cases are also conceivable in which an applicant wishes to remain anonymous for fear of repercussions. However, after having lodged his complaint, the applicant is asked if he objects to his identity being disclosed. If he objects, his identity will not be disclosed during the procedure before the Court nor in the judgment or decision.[313] For obvious reasons the condition does not apply to inter-State applications.

309 Judgment of 1 March 2001, para. 35.
310 See *supra* 2.2.10.10.
311 Judgment of 12 December 1991, para. 82.
312 Judgment of 29 June 2004, *Dogan and Others*, para.113.
313 Rule 47(3) of the Rules of Court.

In practice this admissibility condition does not present many problems. The overwhelming majority of applications contain the name of the applicant and the other information which has to be supplied according to the Rules of Court. Moreover, the Commission has developed a flexible attitude as regards the identity of the applicant. Thus, although it declared inadmissible an application that was signed 'lover of tranquillity', it did so only because the documents filed did not contain a single clue as to the identity of the applicant.[314] The Commission's flexible attitude was also evident in a case in which a number of applications had been submitted by an association. The Commission considered both the association and its individual members as applicants. With respect to the individual members the Commission held that their identity had been insufficiently established and that accordingly their application, properly speaking, was inadmissible under Article 27(1)(a) [the present Article 35(2)(a)]. Nevertheless, the Commission pursued the examination of the case on the presumption that this procedural defect would subsequently be redressed. Eventually, however, the application was declared inadmissible on other grounds.[315] In a case where two organisations of doctors and nurses complained of unjustified and discriminatory interference with the right of their member doctors and nurses to respect for their private lives, the Commission noted that they did not claim to be victims of a violation of the Convention themselves. Once they had stated that they were representing various individuals, who had thus become applicants, it became essential for the associations to identify these individuals and to show that they had received specific instructions from each of them. Since this had not been done, the rest of the application had to be rejected as anonymous within the meaning of Article 35(2)(a).[316]

2.2.12 SUBSTANTIALLY THE SAME APPLICATIONS

2.2.12.1 Introduction

Article 35(2)(b) provides that the application must not be substantially the same as a matter which has already been examined by the Commission or has already been submitted to another procedure of international investigation or settlement unless it contains relevant new information. This ground of inadmissibility does not apply with respect to inter-State complaints.[317] However, this does not prelude the Court

314 Appl. 361/58, *X v. Ireland*, *Case-Law Topics, No. 3, Bringing an application before the European Commission of Human Rights*, Strasbourg, 1972, p. 10.
315 Appl. 3798/68, *Church of X v. the United Kingdom*, Yearbook XII (1969), p. 306 (318).
316 Appl. 10983/84, *Confédération des Syndicats Médicaux Français and Fédération Nationale des Infirmiers v. France*, D&R 47 (1986), p. 224 (229).
317 Report of 4 October 1983, *Cyprus v. Turkey*, D&R 72 (1992), p. 5 (23); Appl. 25781/94, *Cyprus v. Turkey*, D&R, 86 A (1996), p. 104 (133-134).

from considering at the merits stage whether and, if so, to what extent an inter-S application is substantially the same as a previous one. As the Commission obser in its Report on the Case of *Cyprus v. Turkey*,[318] Article 27(1)(b) [the present Art 35(2)(b)] reflects a basic legal principle of procedure which in inter-State cases a during the examination of the merits. The Commission held that it could not be task to investigate complaints already examined in a previous case, and a State co not, therefore, except in specific circumstances, claim an interest to have new findi made where the Commission has already adopted a Report under former Article of the Convention concerning the same matter.[319] The same holds good for Co judgments.

In practice, declarations of inadmissibility on the ground of the identical charac of two or more applications do not occur frequently.[320] In the *Times Newspapers Lt* Case[321] the applicants referred to their earlier application[322] and alleged the failure the United Kingdom Government to implement the judgment of the Court in th case.[323] With respect to this part of the application the Commission first pointed o that the supervision of judgments of the Court under Article 54 [the present Artic 46] is entrusted to the Committee of Ministers and subsequently decided that "cannot now examine these new developments in relation to the facts of the forme case (...), as it is barred from doing so by Article 27 paragraph 1(b) [the present Artic 35(2)(b)] of the Convention".[324] In the case of *Cyprus v. Turkey* (the fourth inter-sta case) the Commission recalled that in its Report of 10 July 1976 concerning applic tions Nos. 6780/74 and 6950/75, *Cyprus v. Turkey* (the first and second inter-Sta cases), it had considered that the evidence before it did not allow a definitive findin with regard to the fate of Greek Cypriots declared to be missing. Although in its Repor of 4 October 1983 concerning application No. 8007/77, *Cyprus v. Turkey* (the third inter-State case), the Commission had considered that it had found sufficien indications, in an indefinite number of cases, that Greek Cypriots who were sti missing at the time had been unlawfully deprived of their liberty, it could not be

318 Report of the Commission of 4 October 1983, D&R 72 (1992), p. 5(22).

319 Appl. 25781/94, *Cyprus v. Turkey*, D&R 86 A (1996), p. 104(132-133).

320 Some of the rare published cases in which this aspect came up for discussion are Appls 5145/71, 5246/71, 5333/72, 5586/72, 5587/72 and 5332/72, *Michael and Margarethe Ringeisen v. Austria*, Coll. 43 (1973), p. 152 (153); Appls 5070/71, 5171/71 and 5186/71, *X v. Federal Republic of Germany*, Yearbook XV (1972), p. 474 (482); and Appls 7572/76, 7586/72 and 7587/76, *Ensslin, Baader and Raspe v. Federal Republic of Germany*, Yearbook XXI (1978), p. 418 (452). In Appl. 3479/68, *X v. Austria and the Federal Republic of Germany*, Coll. 28 (1969), p. 132 (138), the Commission took into account a previously lodged complaint, "even if it cannot strictly be said to be substantially the same".

321 Appl. 10243/83, D&R 41 (1985), p. 123.

322 Appl. 6538/74, *Times Newspapers Ltd, Sunday Times and Harold Evens v. the United Kingdom*, D&R 2 (1975), p. 90.

323 Judgment of 26 April 1979, para. 21.

324 Appl. 10243/83, *Times Newspapers Ltd. and Others v. the United Kingdom*, D&R 41 (1985), p. 12 (129).

established with any certainty that this finding also concerned the cases in the present applications. Finally, the Commission recalled that an examination of the merits of application No. 25781/94, *Cyprus v. Turkey* (the fourth inter-State case) still remained to be carried out. In these circumstances the Commission reserved the question of whether the present applications did concern a "matter" which had "already been examined" by the Commission in the context of one of the inter-State cases. For the same reason the Commission postponed to the merits stage the Government's arguments about the *res judicata* effect of the Committee of Ministers' resolution in the third inter-State case.[325]

In the *Oberschlick* Case the applicant complained under Article 10 of the Convention that his right to freedom of expression had been violated because the Supreme Court had dismissed the plea of nullity for the preservation of the law as regards his conviction for defamation, which the European Court of Human Rights had found to be in violation of Article 10 of the Convention. The Commission found that the applicant was not complaining about his previous conviction, but about the Supreme Court's decision of 17 September 1992, which was taken after the European Court of Human Rights had given its *Oberschlick* judgment on 23 May 1991.[326] Consequently, the application was not considered identical.

2.2.12.2 An application which is substantially the same

Although in the case of *Cyprus v. Turkey*, mentioned above, the Commission decided that Article 35(2)(b) did not apply with respect to inter-state complaints, it did not exclude that it would have to consider at the merits stage whether and, if so, to what extent the present inter-State application was substantially the same as a previous one.[327] The Commission, therefore, reserved the question whether and, if so, to what extent the applicant Government could have a valid legal interest in the determination of the alleged continuing violations of the Convention insofar as they had already been dealt with in previous Reports of the Commission. The Commission noted in this context that at least some of the complaints raised did not seem to be covered by definitive findings in earlier Reports, while some others seemed to concern entirely new facts.

For an answer to the question of whether a concrete case concerns a matter which is substantially the same as a matter which has already been examined by the Court, it is decisive whether new facts have been put forward in the application. These facts must be of such a nature that they cause a change in the legal and/or factual data on which the Court based its earlier decision. The mere submission of one or more new

325 Appl. 25781/94, *Cyprus v. Turkey*, D&R 86 A (1996) p. 104 (133-134).

326 Appl. 19255/92 and 21655/93, D&R 81 A (1995), p. 5(10).

327 Appl. 25781/94, *Cyprus v. Turkey*, D&R 86 A (1996), p. 104 (134).

legal arguments is, therefore, insufficient, if the facts on which the application is [illegible] are the same.[328] The Commission did not consider as new facts those which [illegible] already known to the applicant at the time of the introduction of his application [illegible] could, therefore, have been presented by him on that occasion.[329]

A new fact is indeed involved when an applicant, whose earlier application has been declared inadmissible on account of non-exhaustion of local remedies, has afterwards obtained a decision in the last resort in the national legal system. The Commission's flexibility in this respect became evident in the following example. An applicant had submitted in a previous application that the final decision in his case had been taken by the Court of Appeal at Liège. On that basis his application was declared inadmissible because he was considered not to have exhausted the local remedies. In a new application he proved that he had made a mistake, since the decision in question had in reality been taken by the Court of Cassation, from whose decisions there is no appeal. The Commission considered this as relevant new information in the sense of Article 35(2)(b).[330] Obviously, a subsequent appeal in the last resort does not avail an applicant if his earlier application has been declared inadmissible on another ground as well.

A new fact is also involved when new obligations arise from the Convention for the Contracting State in question. An example is the case where a detained person complained about the refusal of the German authorities to permit him to leave Germany and live in Poland. His application was declared inadmissible on account of incompatibility with the provisions of the Convention, because the right to leave the country was not guaranteed in the Convention. In his new application he invoked Protocol No. 4, which had meanwhile become binding on Germany and whose Article 2(2) confers on everyone the right to leave a country, including that of which he is a national. As a result, the application was admissible under Article 35(2)(b). However, it was then rejected as being manifestly ill-founded, because paragraph 3 of Article 2 of Protocol No. 4 was held to permit an exception with respect to detained persons.[331]

Those cases in which the requirement of 'a fair and public hearing within a reasonable time' of Article 6 is at issue may present a somewhat special feature, as is shown by the following decision of the Commission. In his first complaint the applicant alleged a violation of the Convention, because a bankruptcy procedure had been pending against him for the past three years. This application was declared manifestly ill-founded. At the time when the Commission had to give its opinion on his second

328 See Appl. 202/56, *X v. Belgium*, Yearbook I (1955-1957), p. 190 (191) and Appl. 8206/78, *X v. the United Kingdom*, D&R 25 (1982), p. 147 (150).

329 Appl. 13365/86, *Ajinaja v. the United Kingdom*, D&R 55 (1988), p. 294 (296).

330 Appl. 3780/68, *X v. Belgium*, Coll. 37 (1971), p. 6 (8). See also Appl. 21962/93, *A.D. v. the Netherlands*, D&R 76-A (1994), p. 157 (161). See also, on the one hand, Appl. 4517/70, *Huber v. Austria*, Yearbook XIV (1971), p. 548, on the other hand, Appl. 6821/74, *Huber v. Austria*, D&R 6 (1977), p. 65.

331 Appl. 4256/69, *X v. Federal Republic of Germany*, Coll. 37 (1971), p. 67 (68-69).

'identical' complaint, the period had meanwhile increased to four years and eight months. This time the applicant was not dismissed by the Commission on the ground that "the time aspect constitutes in itself the relevant new information in the sense of Article 27(1)(b)."[332]

In *I.J.L v. the United Kingdom* the applicant complained about a report prepared by Inspectors appointed by the Department of Trade and Industry under sections 432(2) and 442 of the Companies Act 1985 to investigate allegations of an unlawful share support operation at the time of the take-over by Guinness PLC of the Distillers Company PLC. The applicant maintained that the Report referred quite extensively to him and was pejorative, containing criticisms of his honesty both in relation to the events which were the principal subject matter of the Report and his responses to the Inspectors. The content of the Report was seriously detrimental to his reputation, all the more so in view of the intense media interest generated by it. The Court noted that the applicant complained in a separate application (no. 29522/95), *inter alia*, that the Inspectors' investigation, his trial and conviction and the resultant publicity had blighted his reputation and led to the annulment of his knighthood. As a result he invoked Article 8 of the Convention. In its partial inadmissibility decision on this complaint the Commission found that, insofar as these matters could be considered an unjustified interference with the applicant's right under Article 8, that interference would in any event be justified under Article 8(2) of the Convention because it fulfilled the 'in accordance with the law' requirement. The Commission had found, as a result, that the applicant's complaint was inadmissible as being manifestly ill-founded. For the Court the publication of the Report could not be said to have caused the applicant any further prejudice to his private life including reputation over and above that attendant on his conviction following a lengthy jury trial. It further considered that in the circumstances the applicant's new application had the same factual basis as that of his previously rejected complaint under Article 8 notwithstanding that he had sought to support it with a new legal argument. Since the application was substantially the same as a matter that had previously been examined by the Convention institutions, it was inadmissible within the meaning of Article 35(2)(b) and (4) of the Convention.[333]

2.2.12.3 *The same applicant*

From the formulation of Article 35(2)(b) it could be inferred that the words 'substantially the same matter' also cover an application that is otherwise identical but

332 Appl. 8233/78, *X v. the United Kingdom*, D&R 17 (1980), p. 122 (130). Cf. also Appl. 9621/81, *Vallon v. Italy*, D&R 33 (1983), p. 217 (239), in which the continuing detention on remand constituted the relevant new information.

333 Decision of 6 July 1999.

is lodged by another applicant. The provision is, however, to be interpreted in the s
that it is only directed against identical applications by the same applicant. It w
not be in conformity with the purpose of the Convention to provide individual
protection, if an application from X, who considers himself to be the victim
violation of the Convention, would not be admitted on the ground of the fact that
identical violation in relation to Y is already being examined or has already b
examined. In fact, the Commission did not object to identical applications fr
different applicants, although it then joined such cases, if possible.[334]

Article 35(2)(b) may, however, bar applications from different applicants wh
concern the same violation against the same person, for instance if, in connection w
the same violation both the direct and the indirect victim lodge an application. In
earlier case law the Commission considered a new examination of the case justif
only if in each individual case a new fact was involved.[335] In a later case, however,
Commission was less strict. This case concerned the execution of an expulsion or
from the Federal Republic of Germany to Yugoslavia. At first instance the fiancee
the person to be expelled lodged a complaint with the Commission, which w
followed several years later by a complaint by the person himself. With respect to t
latter application the Commission decided that it could not be rejected under Arti
35(2)(b) as being substantially the same as the first application, because "this applica
has a specific personal interest in bringing an application before the Commission".
Here the criterion was not the identity of the case, but the identity of the interests o
the applicants involved. In the *Peltonen* Case the applicant complained about a refus
to issue a passport. The Government drew the Commission's attention to the fact tha
the applicant's brother had submitted a communication with similar contents to th
Human Rights Committee under the Optional Protocol to the Covenant on Civil and
Political Rights. The Commission held that it was true that the freedom guaranteed
by Article 2(2) of Protocol No. 4 resembled that protected by Article 12 of the Inter
national Covenant on Civil and Political Rights. The Commission recalled, however
that if the complainants before the Commission and, for instance, the United Nations
Human Rights Committee were not identical, the complaint to the Commission could
not be considered as being substantially the same as the communication to the Com
mittee.[337]

334 See, *e.g.*, the successive Appls 6878/75, *Le Compte v. Belgium*, D&R 6 (1977), p. 79 and 7238/75, *Va
Leuven and De Meyere v. Belgium*, D&R 8 (1977), p. 140. In its decision in the last-mentioned cas
the Commission held (p. 160): "In view of all the similarities between the two applications it
desirable that they should be examined together". The same conclusion can also be drawn from th
opinion of the Commission on the Appls 5577/72-5583/72, *Donnelly and Others v. the Unite
Kingdom*, Yearbook XVI (1973), p. 212 (266) that "apart from the fact that the applicants are differe
in each case (...) this complaint could still not be rejected under Article 27(1)(b) of the Convention".

335 Appl. 499/59, *X v. Federal Republic of Germany*, Yearbook II (1958-1959), p. 397 (399).

336 Appl. 9028/80, *X v. Federal Republic of Germany*, D&R 22 (1981), p. 236 (237).

337 Appl. 19583/92, D&R 80 A (1995), p. 38(43).

The question of identical complaints may also arise in connection with the lodging of a complaint by a State as well as by an individual. Thus, in the applications of a number of Northern Irishmen matters were denounced which had already formed the subject of the application of the Irish Government against the United Kingdom. The latter application had meanwhile been declared admissible, but the examination of the merits was still pending. The Commission did not decide on the question of whether the individual applications were now to be rejected on account of their having the same character as the application by a State, because "the relevant part of the inter-State case has (...) not yet been examined within the meaning of Article 27(1)(b) of the Convention."[338] This result in itself may be welcomed, but the reasoning on which it is based is less satisfactory. Indeed, the argument set forth by the Commission leaves wide open the possibility that in similar cases, where the examination has already been completed, the Commission may decide differently. On the ground of the emphasis which the Convention puts on individual legal protection this would be regrettable since it might discourage individual applicants. The application of a State and that of an individual are distinctly different, both in character and as to the interests involved. The latter specicically concerns the personal interests of the individual applicant, while the former is aimed much more at denouncing a general situation concerning 'European public order'. It is, therefore, questionable whether in the case of a succession of two applications of so different a character it is still possible to speak of 'a matter which is substantially the same'.

2.2.12.4 A matter which has already been submitted to another procedure of international investigation or settlement

So far very few decisions have been published in which an application was declared inadmissible on the ground that a matter had already been submitted to another international body for investigation or settlement. In view of the small number of international organs charged with the supervision of the implementation of human rights obligations this is not surprising. It is, however, somewhat surprising in connection with the UN Covenant on Civil and Political Rights and the Optional Protocol accompanying it.[339] This Protocol confers on individuals the right to submit an application ('communication') to the Human Rights Committee,[340] so that a case referred to in Article 35(2)(b) is quite conceivable.[341] The Commission held that it would be against the letter and spirit of the Convention if the same matter was simultaneously submitted to two international institutions. Article 35(2)(b) of the Convention aims at avoiding

338 Appls 5577-5583/72, *Donnelly and Others v. the United Kingdom*, Yearbook XVI (1973), p. 212 (266).

339 The UN Covenant on Civil and Political Rights and the Optional Protocol belonging thereto entered into force on 26 March 1976.

340 See Art. 1 of the Protocol.

341 See *supra* 1.13.6.

the plurality of international procedures concerning the same case.[342] In considering this issue the Commission needed, and the Court now needs to verify whether applications to the different institutions concern substantially the same person, facts and complaints.[343] An application introduced with the Commission alleging a violation of Article 6(1) in the proceedings concerning a pension claim, where simultaneously an application had been submitted to the Human Rights Committee alleging discrimination contrary to Article 26 of the Covenant, could in the opinion of the Commission not be considered as being substantially the same notwithstanding that they emanated from the same facts.[344]

In order not to run the risk of being declared inadmissible by the Court under Article 35(2)(b), the applicant has to withdraw his application lodged with the other body. It is not sufficient to request a suspension of the proceedings pending before that body, because this does not have the same effect as a complete withdrawal of the application, which is the only step that allows the Court to examine an application also brought before it.[345]

New events subsequent to the introduction of an application but directly related to the facts adverted to therein will be taken into account by the Court at the time of the examination of the application. Therefore, an application introduced before the Commission by two applicants, which had the same object as the application submitted to the Human Rights Committee by one of the applicants and joined by the second after the introduction of the application before the Commission, was considered to be substantially the same as the one submitted to the Human Rights Committee.[346]

In a case where the application had been submitted by the Council of Civil Service Unions and six individuals the Commission held that these applicants were not identical to complaints before the ILO organs concerned. The complaints before the ILO were brought by the Trade Union Congress, through its General Secretary, on its own behalf. The six individual applicants before the Commission would not have been able to bring such complaints since the Committee on Freedom of Association only examines complaints from organisations of workers and employees. Accordingly, the application could not be regarded as being substantially the same as the complaints before the ILO.[347] However, in a subsequent case the Commission decided the opposite. The applicants in this case were 23 former employees of a company. They had been dismissed because of the attitude they had taken as members of the works

342 Appl. 17512/90, *Calcerrada Fornielles and Cabeza Mato v. Spain*, D&R 73 (1992), p. 214 (223).

343 Appl. 11603/85, *Council of Civil Service Unions v. the United Kingdom*, D&R 50 (1987), p. 228 (251). App. 24872/94, *Pauger v. Austria*, D&R 80 A (1995), p. 170(174).

344 Appl. 16717/90, *Pauger v. Austria*, D&R 80 A (1995), p. 24(32).

345 *Ibidem*.

346 *Ibidem*.

347 Appl. 11603/85, *Council of Civil Service Unions and Others v. the United Kingdom*, D&R 50 (1987), p. 228 (237).

council. The Government submitted that the World Federation of Industry Workers (WFIW) had submitted a complaint to the Freedom of Association Committee of the ILO. Therefore, the complaint should be rejected as being substantially the same. The Commission noted that in the present case, although the main complainant was the WFIW, the four trade unions representing the workers at the company on the works council joined the proceedings, which specifically concerned the dismissal of the 23 applicants – the very persons who petitioned the Commission. Although formally the 23 individual applicants before the Commission were not the complainants who appeared before the ILO organs, the Commission adopted the view that the complaint was, in substance, submitted by the same applicants. On that basis the Commission concluded that the parties were substantially the same.[348] It seems that the Commission considered it conclusive that the original applicants were members of the trade union branches which participated in the proceedings before the ILO organs, although the Commission admitted that individual applicants could not complain before the Freedom of Association Committee of the ILO.[349]

In the *Lukanov* Case the applicant complained about conditions of detention. In the same case the Human Rights Committee of the Inter-Parliamentary Union examined in particular the conditions of the applicant's detention. On 12 September 1992, at the 88th Conference of the Inter-Parliamentary Council, the Committee issued a Report on the applicant's case. The matter was still under consideration by the Union. The Commission observed that the Inter-Parliamentary Union was an association of parliamentarians from all over the world, set up *inter alia* to unite parliamentarians in common action and to advance international peace and cooperation. The Union is a non-governmental organisation. The organs of the Union may adopt resolutions which are communicated by the parliamentarians concerned to the national parliaments and to international organisations. The Commission considered that the term 'another procedure' referred to judicial or quasi-judicial proceedings similar to those set up by the Convention. Moreover, the term 'international investigation or settlement' refers to institutions and procedures set up by States, thus excluding non-governmental bodies. The Commission considered that the Inter-Parliamentary Union constituted a non-governmental organisation, whereas Article 35(2)(b) referred to inter-governmental institutions and procedures. It followed that the procedures of the Inter-Parliamentary Union did not constitute 'another procedure of international investigation or settlement' within the meaning of Article 35(2)(b) of the Convention.[350]

348 Appl. 16358/90, *Cereceda Martin and Others v. Spain*, D&R 73 (1992), p. 120 (134).

349 Appl. 11603/85, *Council of Civil Service Unions and Others v. the United Kingdom*, D&R 50 (1987), p. 228 (237); Appl. 16358/90, *Cereceda Martin and Others v. Spain*, D&R 73 (1992), p. 120 (134).

350 Appl. 21915/93, D&R 80 A (1995), p. 108(123-124).

In the *Hill* Case the Court noted that it appeared from the file that the applica
and his brother had introduced an application with the UN Human Rights Commit
set up under the International Covenant on Civil and Political Rights complaini
that their right to a fair trial had been breached by the Spanish courts, namely t
Provincial High Court of Valencia. The Court observed that on 2 April 1997 t
Human Rights Committee had given its view on the case, finding Spain to be in brea
of several provisions of the Covenant. In an effort to execute this finding, the applica
had instituted two separate sets of proceedings before the Spanish authorities whic
had still not ended. The Court noted that the application did not concern the brea
of the applicant's right to a fair trial guaranteed by Article 6 of the Convention in th
framework of the criminal proceedings against him in the Provincial High Court
Valencia. The complaints submitted to the Court concerned the execution of th
decision of the UN Human Rights Committee finding a violation of several righ
guaranteed by the International Covenant. However, the Court did not need to decid
whether the application could be rejected as being substantially the same as tho
submitted to the Human Rights Committee, as it was in any case inadmissible *ratione materiae*.[351]

In the *Smirnova and Smirnova* Case the Court ascertained to what extent th
proceedings before it overlapped with those before the United Nations Human Right
Committee. The Court noted, first, that the communication pending before the
Human Rights Committee was lodged by and concerned only the first applicant and
its effects could not for this reason be extended to the second applicant. Next, the firs
applicant's complaints in that case were directed against her arrest on 26 August 199
and raised, in particular, the question whether this arrest was justified, the impossibilit
of challenging it in the courts, and the conditions of detention. The scope of the factua
basis for the first applicant's application to the Court, although going back to the arres
of 26 August 1995, was significantly wider. It extended to the whole of the proceedings
which terminated in 2002 and included the first applicant's arrest on three more
occasions since 26 August 1995. It followed that the first applicant's application was
not substantially the same as the petition pending before the Human Rights Commit
tee, and that being so, it fell outside the scope of Article 35(2)(b) of the Convention
and could not be rejected pursuant to that provision.[352] In the Case of *Kovacic, Mrkonjic and Golubovic* the Court acknowledged that the Convention institutions have
interpreted the concept of 'substantially the same application' very restrictively. They
have found themselves prevented from dealing with an application if the applicant
in the other international procedure was the same as the applicant who lodged the

[351] Decision of 4 December 2001.
[352] Decision of 3 October 2002.

application with the Commission or with the Court.[353] The Court continued that, even assuming that arbitration proceedings before the International Monetary Fund and mediation proceedings under the auspices of the Bank for International Settlement in the framework of succession negotiations were pending and that their subject matter were the same as that in the present cases, that the parties to the IMF and BIS procedures were not the same as those to the proceedings before the Court. It followed that it had not been shown that an application identical to, or substantially the same as, those before the Court in the present cases had already been submitted to another procedure of international investigation or settlement.[354]

The Court of Justice of the European Communities also has jurisdiction to deal with human rights issues within the Community context.[355] The applicable human rights issues may be identical to issues covered by the Convention. This will be even more so after the EU Charter of Fundamental Human Rights has become binding. This raises the question of whether the examination of those issues by the Court of Justice has to be considered 'another procedure of international investigation or settlement' in the sense of Article 35(2)(b) of the Convention. Leaving apart the fact that in the most of the procedures the issues raised before the two Courts will not be 'substantially the same',[356] since all the member States of the EU are also parties to the Convention and the European Court of Human Rights considers itself competent to also deal with complaints against member States of the EU that have a community context,[357] it may be expected that the Court will consider the procedure before the Court of Justice as a "'omestic remedy'. This will certainly be the case after the EU has acceded to the Convention.

[353] Appl. 11603/85, *Council of Civil Service Unions and others v. the United Kingdom*, D&R 50 (1987), p. 228 (236-237)
[354] Decision of 9 October 2003.
[355] Standing case law since Case 11/70, *Internationale Handelsgesellschaft*, ECR, 1970, p. 1134.
[356] Judgment of 18 February 1999, *Matthews*, paras 33-35.
[357] An example of this is Appl. 6452/74, *Sacchi v. Italy*, D&R 5 (1976), p. 43, the core of which was also discussed by the Court of Justice in Luxembourg, of which the court of Biella had requested a preliminary ruling in Case 155/73, *Sacchi*, ECR, 1974, p. 409. Mr Sacchi, operator of a cable television firm (Telebiella) without a licence, refused to pay the contribution for the TV receiving sets, which was punishable under Italian law. Upon this, he was convicted. A request for a licence for transmission via a cable system was refused. A presidential decree of 29 March 1973 equated cable TV equipment with radio and TV equipment, thus making it subject to the RAI/TV monopoly. Sacchi lodged a complaint with the Commission in Strasbourg about violation of Art. 10(1) of the Convention. Questions were submitted to the Court in Luxembourg, *inter alia*, about free movement of goods and services, competition and national monopolies of a commercial nature.

2.2.13 APPLICATIONS INCOMPATIBLE WITH THE PROVISIONS OF THE CONVENTION

2.2.13.1 Introduction

Incompatibility with the Convention was concluded in the case law of the Commission: (1) if the application fell outside the scope of the Convention *ratione personae*, *ratione materiae, ratione loci*, or *ratione temporis*; (2) if the individual applicant did not satisfy the condition of Article 34; and (3) if the applicant, contrary to Article 17, aimed at the destruction of one of the rights and freedoms guaranteed in the Convention.

In relation to the categories referred to (1) it has been observed above that the Commission did not differentiate clearly between its competence and the admissibility of the application.[358] Of these categories the territorial and the temporal scope of the Convention have already been discussed above.[359] In the Case of *Cyprus v. Turkey* the Commission held that an inter-state complaint could not be rejected as being incompatible with the provisions of the Convention.[360]

2.2.13.2 Jurisdiction ratione personae

Whether an application falls within the scope of the Convention *ratione personae* is determined by the answer to the question of who may submit an application to the Court (active legitimation) and against whom such an application may be lodged (passive legitimation). This question has been answered *passim* above. An application may be lodged by any of the Contracting States as well as by those natural and legal persons, non-governmental organisations and groups of individuals who are within the jurisdiction of the State against which the complaint is directed. With respect to applications by States it should also be noted that they must be lodged by a national authority competent to act on behalf of the State in international relations. In that respect, regard must be had not only to the text of the Constitution but also to how it is applied in practice.[361]

The Court cannot receive applications directed against a State which is not a party to the Convention[362] or, as the case may be, to the Protocols relied upon in the applica-

[358] See *supra* 2.2.9.

[359] See *supra* 1.5.2.

[360] App. 25781/94, D&R 86 A (1996), p. 104(135)

[361] Appls 6780/74 and 6950/75, *Cyprus v. Turkey*, Yearbook XVIII (1975), p. 82 (116).

[362] For some of the numerous examples, see Appl. 262/57, *X v. Czechoslovakia*, Yearbook I (1955-1957), p. 170; Appl. 8030/77, *Confédération Française Démocratique du Travail v. European Communities*, Yearbook XXI (1978), p. 530 (536-538); Appl. 21090/92, *Heinz v. Contracting States also Parties to the European Patent Convention*, D&R 76-A (1994), p. 125 (127).

tion.[363] Furthermore, an application will be declared inadmissible *ratione personae* if the alleged violation does not come under the responsibility of the respondent State. In general, a State is internationally responsible for the acts of its legislative, executive and judicial branches of government. The question may arise as to whether a particular organ or person can be considered as belonging to these government organs for the purpose of the Convention. The case has already been mentioned of a foreign or international organ which is active in the territory of a Contracting State, but does not fall under its responsibility.[364] Thus, an application brought in substance against the European Patent Office falls outside the scope of the Court's jurisdiction *ratione personae*.[365] In the *Calabro* Case the Court held that, in so far as the applicants' complaint concerned the Greek authorities' apparent reluctance to co-operate with their Hungarian counterparts, it was competent to assure the respect of the European Convention on Human Rights and not that of any other international agreement.[366]

Furthermore, the situation may arise where a State is responsible for the international relations of a given territory without it being possible for an application to be lodged against it on account of the acts of the authorities in those territories. Indeed, the Convention is only applicable to those territories if the State in question has made a declaration as referred to in Article 56(1).[367]

Applications may be directed only against States and consequently not against individuals or groups of individuals. Applications against individuals are, therefore, declared inadmissible *ratione personae*.[368] In practice, a number of complaints are directed against the most varied categories of individuals and organisations, such as judges and lawyers in their personal capacity, employers, private radio and TV stations and banks. For the rejection of such complaints the Commission generally invoked former Article 19, under which the Commission and the Court had to ensure the observance of the engagements which the Contracting States have undertaken, and former Article 25, which permitted it to receive applications if the applicant claimed to be the victim of a violation of the Convention by a Contracting State.[369] It appears from its case law, however, that the Commission did investigate whether a violation

[363] See, *e.g.*, the Appls 5351/72 and 6579/74, *X v. Belgium*, Coll. 46 (1974), p. 71 (80-81); Appl. 22564/93, *Grice v. the United Kingdom*, D&R 77-A (1994), p. 90 (97).

[364] For the special position of the British Judicial Committee of the Privy Council, see Appl. 3813/68, *X v. the United Kingdom*, Yearbook XIII (1970), p. 586 (598-600).

[365] Appl. 21090/92, *Heinz v. Contracting States also Parties to the European Patent Convention*, D&R 76 A (1992), p. 125 (127); Appl. 38817/97, *Lenzing AG v. the United Kingdom*, D&R 94 A (1998), p. 136 (146).

[366] Decision of 21 March 2002. See also the judgment of 6 April 2004, *Karalyos and Huber*, para. 40, where the question concerned the European Convention on Information on Foreign Law.

[367] On this, see *supra* 1.4.2.

[368] See Appl. 6956/75, *X v. the United Kingdom*, D&R 8 (1978), p. 103 (104); Appl. 19217/91, *Durini v. Italy*, D&R 76-A (1994), p. 76 (79), where the complaints concerning the contents of a will were directed against the testator and did not engage the responsibility of the State.

[369] See, *e.g.*, Appl. 2413/65, *X v. Federal Republic of Germany*, Coll. 23 (1967), p. 1 (7).

of the Convention by an individual may involve the responsibility of a State. Under international law a State is responsible for acts of individuals to the extent that the State has urged the individuals to commit the acts in question, has given its consent to them or in violation of its international obligations has neglected to prevent those acts, punish the perpetrators, or to impose an obligation to redress the injury caused.[370] These principles also apply within the framework of the European Convention because Article 1 creates that responsibility with respect to the treatment of 'everyone within their jurisdiction', and not only of foreigners. The Court has also held that a State cannot absolve itself from this responsibility by delegating its obligations to private bodies or individuals.[372]

The starting-point for State responsibility under the Convention is that it applies to all organs of the State, even those which under national law are independent of the Government, such as the judiciary.[373] However, it is not crystal clear in all cases whether a particular institution must be considered, with respect to the Convention, as an organ of the State concerned for which the latter is responsible. It is not possible to provide general answers to this question; a good deal depends, in each concrete case, on the precise position of the said institution under national law[374] and the involvement of public authorities. Thus, in the *Campbell and Cosans* Case the Court held the Government of the United Kingdom responsible for acts occurring at state schools since the State had assumed responsibility for formulating general school policy.[375] In a subsequent case, where an applicant and his mother complained about corporal punishment at a private school, the punishment of the applicant was administered by the headmaster of the private school for whose disciplinary regime the Government had declined responsibility under the Convention. The Commission held, however, that the United Kingdom was responsible under the Convention, Articles 1, 3 and 8 of which having imposed a positive obligation on High Contracting Parties to ensure a legal system which provides adequate protection for children's physical and emotional integrity: "The Commission considers that Contracting States do have an obligation under Article 1 of the Convention to secure that children within their jurisdiction are not subjected to torture, inhuman or degrading treatment or punishment, contrary to Article 3 of the Convention. This duty is recognised in English law which provides certain criminal and civil law safeguards against assault or unreasonable punishment. Moreover, children subjected to, or at risk of being subjected to ill-treat-

370 See I. Brownlie, *Principles of Public International Law*, Oxford, 1990, pp. 444-476.
371 See Appl. 852/60, *X v. Federal Republic of Germany*, Yearbook IV (1961), p. 346 (350-352).
372 Judgment of 23 November 1983, *Van der Mussele*, para 29.
373 See, *e.g.*, Appl. 7743/76, *J.Y. Cosans v. the United Kingdom*, D&R 12 (1978), p. 140 (149).
374 See, *e.g.*, Appl. 1706/62, *X v. Austria*, Yearbook IX (1966), p. 112 (162-164).
375 Judgment of 25 February 1982, para. 26.

ment by their parents, including excessive corporal punishment, may be removed from their parents' custody and placed in local authority care."[376]

The Commission also noted that the State obliges parents to educate their children or have them educated in schools, and that the State has the function of supervising educational standards and the suitability of teaching staff, even in independent schools. Furthermore, the effect of compulsory education is that parents are normally obliged to put their children in the charge of teachers. If parents choose a private school, the teachers assume the parental role in matters of discipline under the national law while the children are in their care by virtue of the *in loco parentis* doctrine. In these circumstances the Commission considered that the United Kingdom had a duty under the Convention to secure that all pupils, including pupils at private schools, were not exposed to treatment contrary to Article 3 of the Convention. The Commission considered that the United Kingdom's liability also extended to Article 8 of the Convention, under which provision it had to protect the right to respect for private life of pupils in private schools to the extent that corporal punishment in such schools might involve an unjustified interference with children's physical and emotional integrity.[377] The case ended in a friendly settlement, after it had been referred to the Court. In the *Costello-Roberts* Case, however, the Court has occasion to point out that the State has an obligation to secure to children their right to education under Article 2 of Protocol No. 1. Functions relating to the internal administration of a school, such as discipline, cannot be said to be ancillary to the educational process. In this respect the Court noted that a school's disciplinary system fell within the ambit of the right to education which has also been recognised in Article 28 of the UN Convention on the Rights of the Child. Secondly, it held that in the United Kingdom independent schools co-existed with a system of public education. The fundamental right of everyone to education is a right guaranteed equally to pupils in State schools and independent schools, with no distinction being made between the two. Finally, the Court referred to the *Van der Mussele* judgment where it held that a State could not absolve itself from responsibility by delegating its obligations to private bodies or individuals.[378]

With respect to so-called public industries and enterprises the case law of the Commission has been rather casuistic. In a number of cases it did not reach a decision on responsibility.[379] In one case the Commission described public transport companies as *entreprises para-étatiques*, for which the Government was not responsible.[380] Two

376 Appl. 14229/88, *Y v. the United Kingdom* (not published). See also the report of the Commission in this case of 8 October 1991, A.247-A, pp. 11-12.
377 *Ibidem.*
378 Judgment of 25 March 1993, para. 30.
379 Appl. 3059/67, *X v. the United Kingdom*, Coll. 28 (1969), p. 89 (93) and Appl. 4515/70, *X and the Association of Z v. the United Kingdom*, Yearbook XIV (1971), p. 538 (544).
380 Appl. 3789/68, *X v. Belgium*, Coll. 33 (1970), p. 1 (3-4).

later decisions, however, pointed in the other direction. In both cases the appli
had been discharged by British Rail, because they had refused to join a trade u
(the so-called 'closed-shop system'). The Commission reached the conclusion
as a public industry, British Rail came under the responsibility of the United King
and that accordingly the applications were admissible *ratione personae*.[381]

Does the responsibility of the Contracting States under the Convention extend
further in the sense that it also covers cases where there is no question of direct resp
sibility for the acts or omissions of governmental organs or of negligence with resp
to the acts of individuals? One decision of the Commission seemed to point in t
direction. At issue was whether the Irish Government was responsible for certain
of an institution which had been called into existence by law, but which otherwise
largely independent of the State. The Commission came to the conclusion that
acts concerned in this case (alleged violation of Article 11) did not fall under the dir
responsibility of the Irish Government. However, the Commission subsequ
accepted the submission that, despite this, the Irish Government would have viola
the Convention if it were to be established that national law did not protect the r
or freedom guaranteed by the Convention, the violation of which was alleged bef
the Commission, or at least did not provide a remedy for enforcing such protection.
However, rather than being a matter of State responsibility for acts of individuals, th
is a case of the possible violation by the State of a specific obligation resulting fro
the Convention, *viz.* from Article 13.

In the *Nielsen* Case the Government argued that the placement of a minor in
psychiatric hospital was the sole responsibility of the mother. The majority of the Com
mission found, however, that the final decision on the question of hospitalisation
the applicant was not taken by the holder of parental rights but by the Chief Physici
of the Child Psychiatric Ward of the State Hospital, thus engaging the responsibili
of the State under Article 5(1).[383] The Court disagreed with the Commission and hel
that the decision on the hospitalisation was in fact taken by the mother in her capacit
as holder of parental rights.[384]

In the *Ciobanu* Case the Court noted that the applicants' representatives failed to
submit to the Court all information of relevance to the case under the Convention
by introducing a complaint in the name of a deceased person, by signing the powe
of attorney on behalf of the deceased applicant and by omitting to inform the Court
of the applicant's death. The Court further noted that the applicant died on
31 December 1996, i.e. before the submission of his complaint to the Court. Therefore
the applicant had not expressed any intention to lodge such a complaint, nor claimed

381 Appl. 7601/76, *Young and James v. the United Kingdom*, Yearbook XX (1977), p. 520 (560-562) and Appl. 7806/77, *Webster v. the United Kingdom*, D&R 12 (1978), p. 168 (173-175).

382 Appl. 4125/69, *X v. Ireland*, Yearbook XIV (1971), p. 198 (218-224).

383 Report of 12 March 1987, A.144, p. 38.

384 Judgment of 28 November 1988, para. 73.

to be a victim, as required by Article 34 of the Convention, on the date of the application. Accordingly, it found that the case was not legally brought before it as regards the applicant who, as a consequence, lacked *locus standi*. Moreover, it recalled that the representatives did not lodge any complaint with the Court in their own name, nor did they manifest their intention to continue the case of the deceased in their own capacity. It followed from this that the representatives also lacked *locus standi* for the purpose of the proceedings before the Court. Accordingly, the application was incompatible *ratione personae*.[385]

In the *Mykhaylenky* Case the issue arose whether the State was liable for the debts of a State-owned company which was a separate legal entity and could be held responsible for the ultimate failure to pay the applicants the amounts awarded to them in the judgments against that company. The Court considered that the Government had not demonstrated that the company enjoyed sufficient institutional and operational independence from the State in order to absolve the State from responsibility under the Convention for its acts and omissions. The Court noted that it was not suggested by the Government or by the materials in the case-file that the State's debts to the company had ever been paid in full or in part, which implied the State's liability as regards the ensuing debts of the company. The debtor company had operated in the highly regulated sphere of nuclear energy and conducted its construction activities in the Chernobyl zone of compulsory evacuation, which was placed under strict Governmental control due to environmental and public health considerations. This control even extended to the applicants' terms of employment by the company, including their salaries. The State had prohibited the attachment of the company's property due to possible contamination. Moreover, the management of the company was transferred to the Ministry of Energy as of May 1998. In the Court's opinion these elements confirmed the public nature of the debtor enterprise, regardless of its formal classification under domestic law. Accordingly, the Court concluded that there were sufficient grounds to deem the State liable for the debts of the company to the applicants in the special circumstances of the case, despite the fact that the company was a separate legal entity. The Court found, therefore, that the applicants' complaint was compatible *ratione personae* with the provisions of the Convention.[386]

2.2.13.3 Jurisdiction ratione materiae

In order to answer the question of whether an application falls within the scope of the Convention *ratione materiae* it is necessary to differentiate between State applications and individual applications.[387]

385 Decision of 16 December 2003.

386 Judgment of 30 November 2004, paras 44-46; judgment of 21 December 2004, *Derkach and Palek*, para. 32.

387 Strictly speaking, inter-State applications cannot be rejected on this ground.

Article 33, which permits the Contracting States to lodge applications on "... alleged breach of the provisions of the Convention by another High Contracting Par... leaves open the possibility for States to submit applications which relate to provisio... of the Convention other than the articles of Section I. Articles that might be considere... as such, for instance, are Article 1 concerning the obligation for a Contracting St... to secure to everyone within its jurisdiction the rights and freedoms of Section I ... the Convention, and Article 34 in case of interference with the exercise of the indivi... dual right of complaint. The same applies to Article 46 in case of refusal to give effe... to a judgment of the Court, and Article 52 in case of refusal to furnish the request... information to the Secretary General of the Council of Europe concerning the imple... mentation of the provisions of the Convention. So far the Contracting States have no... availed themselves of this wider right of action, except as far as Article 1 is concerned.

The right of complaint of individuals has a somewhat more limited character. ... appears from Article 34 that individuals may lodge complaints only about 'the rights ... set forth in this Convention', which implies that their complaints may relate only t... the articles of Section I and the articles of the Protocols containing additional rights ... The question arises whether an exception must be made for Article 34; in other words, ... whether the right of complaint itself, the exercise of which the Contracting States have ... undertaken not to hinder, may be considered a 'right'. As a rule the Commission deals ... with such a complaint in a way different from that of a complaint concerning the ... violation of one of the rights or freedoms of Section I, in that it consulted directly with ... the Government concerned.

It might be argued that, apart from the right of individual complaint under Article ... 34, if an individual who has been successful before the Court feels that the judgment ... has not been complied with, he or she may properly claim to be a victim of a violation ... of Article 46, which contains the obligation to abide by the judgment of the Court. ... In the case of *Olsson I* the main issue was whether the decision of the Swedish author... rities to take the children of the applicants into care had given rise to a violation of ... Article 8 of the Convention. The Court found a violation of that provision and ... awarded the applicants just satisfaction under Article 41 of the Convention.[389] In the ... case of *Olsson II* the applicants complained that despite the Court's *Olsson I* judgment ... the Swedish authorities had continued to hinder their reunion with their children. ... The applicants had still not been allowed to meet the children under circumstances ... which would have enabled them to re-establish parent-child relationships. In their ... view Sweden had continued to act in breach of Article 8 and had thereby failed to ... comply with its obligations under Article 46(1) of the Convention. The Court referred ... to Resolution DH (88)18, adopted on 26 October 1988, concerning the execution of ... the *Olsson I* judgment, where the Committee of Ministers, "having satisfied itself that ...

388 For the meaning and scope of Article 1, see *supra* 1.4.1.

389 Judgment of 24 March 1988, para. 84.

... the Government of Sweden has paid to the applicants the sums provided for in the judgment", declared that the Committee had "exercised its functions under Article 46(2) of the Convention." The Court held that in the circumstances of the case no separate issue arose under Article 46, since the present complaint raised a new issue which had not been determined by the *Olsson I* judgment.[390] The Court thus left open the possibility that there might be circumstances under which a complaint under Article 46 of the Convention could be examined by it. The late Judge Martens questioned the position that the Committee of Ministers' competence under Article 46(2) of the Convention is an exclusive one. He gave two reasons for taking the view that complaints under Article 46(1) should not be decided by the Committee of Ministers but by the Court. In the first place, the interpretation of its judgments is, in the nature of things, better left to the Court than to a gathering of professional diplomats who are not necessarily trained lawyers possessing the qualifications laid down in the Convention. Secondly, the members of the Committee of Ministers are under the direct authority of their national administrations and cannot be considered as a 'tribunal' in the sense of the Convention.[391] Under Protocol No. 14 the Committee of Ministers will has the option to refer to the Court the question of whether a Contracting Party has failed to fulfil its obligations under Article 46 (the new paragraph 4 of Article 46).

The Court cannot deal with complaints about rights or freedoms not set forth in the Convention. Complaints concerning such rights and freedoms are declared inadmissible by the Court as being incompatible with the Convention. In practice, a great many complaints concern a variety of 'rights and freedoms'. From the colourful case law of the Commission the following examples of incompatibility *ratione materiae* may be cited: right to a university degree, right to asylum, right to start a business, right to diplomatic protection, right to a divorce, right to a driving licence, a general right to free legal aid, right to free medical aid, right to adequate housing, right to a nationality, right to a passport, right to a pension, right to a promotion and the right to be recognised as a scholar. In this context it should, however, be borne in mind that a right which is not set forth in the Convention, may find protection indirectly via one of the provisions of the Convention. Thus, it is conceivable that, although the right to admission to a country of which one is not a national, has not been included in the Convention, under certain circumstances a person cannot be denied admission to a country if his right to respect for his family life (Article 8) would be violated. Similarly, although the Convention does not recognise a right to a pension, violation of an

390 Judgment of 27 November 1992, para.75.

391 S.K. Martens, 'Individual Complaints under Article 53 of the European Convention on Human Rights', in: Rick Lawson and Matthijs de Blois (eds.), *The Dynamics of the Protection of Human Rights in Europe. Essays in Honour of Henry G. Schermers*, Vol. III, Dordrecht, 1994, pp. 253-286 (284-286).

existing right to a pension may be contrary to Article 1 of Protocol No. 1, in wh
the right to the enjoyment of one's possessions is protected.

Complaints to be equated with those concerning rights not protected in the C
vention are complaints concerning rights which are indeed incorporated in the C
vention, but with respect to which the respondent State has made a reservation
Complaints relating to such rights are also declared inadmissible on account of incom
patibility with the Convention.[393]

The applicant is not required to indicate accurately in his application the righ
set forth in the Convention which in his opinion have been violated. The Commiss
showed prepared to investigate *ex officio*, by reference to the submissions of t
applicant, whether there has been a violation of one or more of the provisions
Section I. This approach is in conformity with the above-mentioned objective charac
of the European Convention.[394] Nevertheless, it remains advisable for an applica
or counsel to raise all important points of fact and law during the examination
admissibility. The possible consequences if this is not done are apparent from th
Winterwerp Case. The Court held that there was an evident connection between th
issue of Article 6 raised before it and the initial complaints. This, in combination wi
the fact that the Dutch Government had not raised a preliminary objection on th
point, induced the Court to take the alleged violation of Article 6 into consideration,[395]
but its observations indicate that the Court would not be prepared to adopt such
lenient attitude in all circumstances.

2.2.13.4 The requirement of victim

The second of the above-mentioned categories of cases in which the application is not
compatible with the provisions of the Convention – those cases where the applicant
does not satisfy the condition of Article 34 – concerns the condition which has already
been discussed at length, *viz.* that an individual applicant must be able to furnish prima
facie evidence that he is personally the victim of the violation of the Convention alleged
by him, or at least has well-founded reasons for considering himself to be the victim.
If he merely puts forward a violation *in abstracto* or a violation which has done a wrong

392 See *infra* 38.2.

393 See, *e.g.*, Appl. 1452/62, *X v. Austria*, Yearbook VI (1963), p. 268 (276).

394 The approach was confirmed expressly by the Court in its judgment of 6 November 1980, *Guzzardi*, para. 106. In that case the Commission had – wrongly, according to the Italian Government – also considered the complaint in light of Art. 5, whereas the applicant had not expressly referred to it. On the basis of a detailed motivation the Court held as follows: "The Commission and the Court have to examine in the light of the Convention as a whole the situation impugned by an applicant. In the performance of this task, they are, notably, free to give to the facts of the case, as found to be established by the material before them (...), a characterisation in law different from that given to them by the applicant" (para. 58).

395 Judgment of 24 October 1979, para. 72.

only to other persons, his application is incompatible with the provisions of the Convention.[396]

2.2.13.5 Destruction or limitation of a right or freedom

The most obvious case of incompatibility with the provisions of the Convention is the third of the above-mentioned categories. This concerns applications which are directed at the destruction or limitation of one of the rights or freedoms guaranteed in the Convention, and as such conflict with Article 17, which will hereafter be discussed in greater detail.[397] Even if Article 17 had not been written, such applications of course would still be inadmissible, *viz.* on account of abuse of the right of complaint in the sense of Article 35(3), which will now be discussed.

2.2.14 APPLICATIONS WHICH CONSTITUTE AN ABUSE OF THE RIGHT OF COMPLAINT

Article 35(3) provides that the application must not constitute an abuse of the right of complaint. On this ground, too, in practice very few applications are declared inadmissible. This may probably be accounted for by the fact that it is very difficult to establish such an abuse, since the applicant's motives cannot easily be ascertained – certainly not in so early a stage of the examination.

The prudence of the Commission in this respect appeared from its interpretation of the term 'abuse'. Thus, the fact that the applicant is inspired by motives of publicity and political propaganda does not necessarily have to imply that the application constitutes an abuse of the right of complaint.[398] In such a case it is only justified to speak of an abuse if an applicant unduly stresses the political aspects of the case.[399] Similarly, with respect to a complaint by a teacher of Turkish ethnic origin about disciplinary proceedings brought against him for using the term 'Turkish' to describe the Muslim minority in Western Thrace, the Commission noted that an application is not an abuse merely by virtue of the fact that it is motivated by the desire for publicity or propaganda.[400]

396 See *supra* 1.13.3.2.

397 See *infra* chapter 36.

398 Appl. 332/57, *Lawless v. Ireland*, Yearbook II (1958-1959), p. 308 (338). See also Appl. 8317/78, *McFeeley v. the United Kingdom*, D&R 20 (1980), p. 44 (70-71).

399 Appl. 1468/62, *Iversen v. Norway*, Yearbook VI (1963), p. 278 (326).

400 Appl. 21782/93, *Raif v. Greece*, D&R 82 A (1995), p. 5(9)

The Commission also left open the question of whether an abuse is involved on the mere ground that no practical effects are envisaged regarding the application. It took a quite lenient attitude in this respect and held that an application that was to be devoid of any sound juridical basis and to have been lodged for propaganda purposes, may not be rejected as constituting an abuse of the right of petition unless it is clearly based on untrue statements of fact.[402]

An abuse may consist primarily in the object one wishes to attain with the application. Such an abuse of the right of complaint was found to exist in the case of *Ilse Koch*. This wife of the former commander of the Buchenwald concentration camp had been convicted for violation of the most elementary human rights. She submitted that she was innocent and requested that she be released, without invoking a specific provision of the Convention. In her application she voiced a number of accusations and complaints which were not supported in any way by the Convention. The Commission declared her application inadmissible, because her sole aim was evidently to escape the consequences of her conviction, so that her application constituted a 'clear and manifest abuse'.[403]

The condition that an application must not constitute an abuse is also an expedient tool for holding querulous applicants at bay. A German had in the course of time lodged a great many applications which had been rejected without exception, either because they were manifestly ill-founded or because of non-exhaustion of the local remedies. When – together with his wife – he once again lodged several applications which were moreover substantially the same as previous applications submitted by him, the Commission declared them inadmissible on account of abuse, and gave the applicant to understand: "It cannot be the task of the Commission, a body which was set up under the Convention 'to ensure the observance of the engagements undertaken by the High Contracting Parties in the present Convention', to deal with a succession of ill-founded and querulous complaints, creating unnecessary work which is incompatible with its real functions, and which hinders it in carrying them out."[404]

Not only the aim pursued in lodging an application, but also the applicant's conduct during the procedure may lead to a declaration of inadmissibility on account of abuse.

401 Appls 7289/75 and 7349/76, *X and Y v. Switzerland*, Yearbook XX (1977), p. 372 (406): "even assuming that the concept of abuse within the meaning of Art. 27(2) in fine may be understood as including the case of an application serving no practical purpose."

402 Appl. 21987/93, *Aksoy v. Turkey*, D&R 79-A (1994), p. 60 (71); Appl. 22497/93, *Aslan v. Turkey*, D&R 80 A (1995), p. 138(146); Decision of 5 October 2000, *Verbanov*.

403 Appl. 1270/61, *Ilse Koch v. Federal Republic of Germany*, Yearbook V (1962), p. 126 (134-136). See also Appl. 5207/71, *Raupp v. Federal Republic of Germany*, Coll. 42 (1973), p. 85 (90).

404 Appls 5070/71, 5171/71, 5186/71, *X v. Federal Republic of Germany*, Yearbook XV (1972), p. 476 (482). See also Appls 5145/71, 5246/71, 5333/72, 5586/72, 5587/72 and 5332/72, *Michael and Margarethe Ringeisen v. Austria*, Coll. 43 (1973), p. 152 (153); Appl. 13284/87, *M v. the United Kingdom*, D&R 54 (1987), p. 214 (218).

Thus, applications were rejected because the applicant had deliberately made false declarations in an attempt to mislead the Commission,[405] or because the applicant failed to furnish the necessary information even after repeated requests,[406] or because the applicant had broken bail and had fled,[407] or because he had used threatening or insulting language vis-à-vis the Commission or the respondent Government.[408]

The Court has repeatedly held that, although the use of offensive language in proceedings before the Court is undoubtedly inappropriate, except in extraordinary cases, an application may only be rejected as abusive if it is knowingly based on untrue facts.[409]

In the *Al-Nashif* Case the Court, while considering that an application deliberately grounded on a description of facts omitting events of central importance may in principle constitute an abuse of the right of petition, did not find it established that such a situation obtained in the present case, regard being had to the stage of the proceedings, to the fact that the information allegedly withheld only concerned new developments after the deportation complained of, and to the explanation by the applicants' lawyer.[410] In the *Klyakhin* Case the Court considered that, although some of the applicant's statements were inappropriate, they did not give rise to such extraordinary circumstances justifying a decision to declare the application inadmissible as an abuse of the right of petition.[411]

In the *Manoussos* Case the Court noted, on the one hand, that in some of the applicant's submissions he used insulting expressions about Czech people in general and about certain Czech authorities, and found nothing to warrant the use of such language. On the other hand, the Court took into consideration that such expressions were of rare occurrence in the applicant's voluminous submissions and that they had not recurred since the Section Registrar's letter in which the applicant was advised of the possible consequences of his continued use of insulting language. Considering all circumstances of the case, the Court did not find it appropriate to declare the application inadmissible as being abusive within the meaning of Article 35(3) of the Convention.[412]

405 Appls 2364/64, 2584/65, 2662/65 and 2748/66, *X v. Federal Republic of Germany*, Coll. 22 (1967), p. 103 (109) and Appl. 6029/73, *X v. Austria*, Coll. 44 (1973), p. 134.

406 Appl. 244/57, *X v. Federal Republic of Germany*, Yearbook I (1955-1957), p. 196 (197) and Appl. 1297/61, *X v. Federal Republic of Germany*, Coll. 10 (1963), p. 47 (48).

407 Appl. 9742/82, *X v. Ireland*, D&R 32 (1983), p. 251 (253).

408 Appl. 2625/65, *X v. Federal Republic of Germany*, Coll. 28 (1969), p. 26 (41-42) and Appl. 5267/71, *X v. Federal Republic of Germany*, Coll. 43 (1973), p. 154.; Appls 29221/95 and 29225/95, *Stankov and United Macedonian Organisation "Ilinden" v. Bulgaria*, D&R 94 A (1998), p. 68(76).

409 Judgment of 16 September 1996, *Akdivar*, paras 53-54; judgment of 5 October 2000, *Varbanov*, para. 36; Decision of 6 April 2000, *I.S. v. Bulgaria*; Decision of 10 April 2003, *S.H.K. v. Bulgaria*.

410 Judgment of 20 June 2002, para. 89.

411 Decision of 14 October 2003.

412 Decision of 9 July 2002.

In the *Duringer* Case the Court held that the applicant had sent numerous com-
munications by letter and electronic mail, making serious accusations touching t
integrity of certain judges of the Court and members of its Registry. In particular,
applicant, who had systematically tried to cast aspersions on judges of the Cou
members of its Registry and politicians of the respondent State, accused certain judg
of extremely serious crimes. Moreover, in seeking to ensure the widest possible circu
lation of his accusations and insults the applicant had evinced his determination
harm and tarnish the image of the institution and its members. The Court noted
addition that the application lodged, by a person who claimed to be called For
Grunge, contained the same expressions as those the applicant used. It noted, further
more, that in most passages the texts of these communications were similar, if no
identical, such as with regard to their presentation and the long lists of their addre
sees. Even supposing that the name 'Forest Grunge' was not an alias used by th
applicant, the Court considered that the applicant had repeatedly made, remark
without any foundation which were totally offensive and preposterous, and could no
fall within the scope of the provisions of Article 34 of the Convention. In the Court
opinion the intolerable conduct of the applicant and Mr Forest Grunge – always
supposing that the latter actually existed – was contrary to the purpose of the right
of individual petition, as provided for in Articles 34 and 35 of the Convention. There
was no doubt whatsoever that it constituted an abuse of the right of application within
the meaning of Article 35(3) of the Convention.[413]

The fact that an applicant had omitted to inform the Commission that after the
introduction of his application he had instituted proceedings before domestic courts
concerning the same facts, was not considered an abuse of the right of petition.[414] The
fact that an applicant publishes certain details of the examination of his case, may cause
the application to be declared inadmissible on account of abuse. However, the Com-
mission held that the appearance of an article disclosing confidential information
relating to the proceedings before the Commission did not constitute an abuse of the
right of petition, since the applicant's representative had merely answered questions
put to him by the press, who had secured their information from other sources. The
Commission considered that there was no conclusive evidence that the applicant's
representative was responsible for the disclosure of this information.[415] The Commis-
sion made a similar decision in a case where the applicants had told the press of their
intention to apply to the Convention organs. The confidentiality of the Commission
proceedings was respected, since the applicants did not make public any information
once their application had been introduced.[416]

413 Decision of 4 February 2003.
414 Appl. 13524/88, *F v. Spain*, D&R 69 (1991), p. 185 (194).
415 *Ibidem.*
416 Appl. 24645/94, *Buscarini, Balda and Manzaroli v. San Marino*, D&R 89 B (1997) p. 35(42).

As was pointed out above, the present admissibility condition does not apply to applications by States. Nevertheless, the case law of the Commission shows that the Commission did not exclude the possibility that an application by a State might likewise be rejected on account of abuse. This would not be done on the ground of the admissibility condition mentioned in Article 35(2), but on the ground of the general legal principle that the right to bring an action before an international organ must not be abused. Referring to its decision in the first *Greek* Case[417] the Commission stated in the case of *Cyprus v. Turkey* that "even assuming that it is empowered on general principle to make such a finding, [the Commission] considers that the applicant Government have, at this stage of the proceedings, provided sufficient particularised information of alleged breaches of the Convention for the purpose of Article 24."[418]

In its preliminary objection in the Case of *Cyprus v. Turkey* before the Court the Turkish Government pleaded that the applicant Government had no legal interest in bringing the application. They argued that Resolutions DH (79) 1 and DH (92) 12, adopted by the Committee of Ministers on the previous inter-State applications, constituted *res judicata* in respect of the complaints raised in the instant application which, they maintained, were essentially the same as those which were settled by the aforementioned decisions of the Committee of Ministers. The Court did not agree and added that this was the first occasion on which it had been seized of the complaints invoked by the applicant Government in the context of an inter-State application, it being observed that, as regards the previous applications, it was not open to the parties or to the Commission to refer them to the Court under former Article 45 of the Convention read in conjunction with former Article 48. The Court continued that, without prejudice to the question of whether and in what circumstances the Court had jurisdiction to examine a case which was the subject of a decision taken by the Committee of Ministers pursuant to former Article 32 of the Convention, it should be noted that, in respect of the previous inter-State applications, neither Resolution DH (79) 1 nor Resolution DH (92) 12 resulted in a 'decision' within the meaning of Article 32(1). This was clear from the terms of these texts. Indeed, it was to be further observed that the respondent Government accepted in their pleadings on their preliminary objections in the *Loizidou* Case that the Committee of Ministers did not endorse the Commission's findings in the previous inter-State cases. The Court accordingly concluded that the applicant Government had a legitimate interest in having the merits of the instant application examined by the Court.[419]

417 Appls 3321-3323/67 and 3344/67, *Denmark, Norway, Sweden and the Netherlands v. Greece*, Yearbook XI (1968), p. 690 (764).
418 Appls 6780/74 and 6950/75, *Cyprus v. Turkey*, Yearbook XVIII (1975), p. 82 (124); Appl. 25781/94, *Cyprus v. Turkey*, D&R 86 A (1995), p. 104 (134).
419 Judgment of 10 May 2001, paras. 65-68.

2.2.15 THE CONDITION OF NOT MANIFESTLY ILL-FOUNDEDNESS

2.2.15.1 General

Article 35(3) provides that the application must not be manifestly ill-founded. The admissibility condition, again, applies only to individual applications. Inter-State applications, which may be assumed to be filed only after extensive deliberation and to have been prepared by expert legal advisers of the Government, may in general be expected not to be manifestly ill-founded. Nevertheless, while reiterating that the wording of Article 35(2) and (3) makes reference only to Article 34, the Commission "does not exclude the application of a general rule providing for the possibility of declaring an application under Article 24 [the present Article 33] inadmissible, if it is clear from the outset that it is wholly unsubstantiated or otherwise lacking the requirements of a genuine allegation in the sense of Article 24 of the Convention."[420] Until now this has not occurred in practice. On the other hand a great many individual applications have been declared inadmissible on the ground of being manifestly ill-founded.

In practice, applications are declared manifestly ill-founded in particular if the facts about which a complaint is lodged evidently do not indicate a violation of the Convention, or if those facts cannot been proven or are manifestly incorrect. As to the latter, the applicant is required to give *prima facie* evidence of the facts put forward by him.[421] As regards the former ground, it is not always possible to distinguish clearly between manifest ill-foundedness and incompatibility with the Convention. There is incompatibility *ratione materiae* if an application concerns the violation of a right not protected by the Convention.[422] In that case the application falls entirely outside the scope of the Convention and no examination of the merits is possible. An application is manifestly ill-founded if it does indeed relate to a right protected by the Convention, but a *prima facie* examination discloses that the facts put forward cannot by any means justify the claim of violation, so that an examination of the merits is superfluous.

The case law in this matter has not always been consistent. An obvious example is the case law with respect to Article 14. According to this article the enjoyment of the rights and freedoms set forth in the Convention must be guaranteed without discrimination on any ground. Applications containing complaints about discrimination with respect to rights or freedoms which the Convention does not protect, have sometimes been declared manifestly ill-founded and sometimes incompatible with the Convention.[423]

It has been stated above that the power to declare an application inadmissible on the ground that it is manifestly ill-founded fits into the screening function which the drafters of the Convention intended the admissibility examination to perform. For a proper discharge of that function no more is needed than the power to reject those applications the ill-founded character of which is actually *manifest*. In several cases, however, the Commission has used this competence in a way which clearly went beyond this.

A clear example is the *Iversen* Case in which the applicant complained about the possibility that existed in Norway that dentists who had recently completed their studies could be obliged to work for some time in the public service. The complaint was declared "manifestly ill-founded" by the Commission, while it raised complicated questions concerning Article 4, which moreover divided the members of the Commission.[424] Therefore, a more detailed examination of the merits would decidedly have been justified. Similarly, an application on account of violation of the freedom of expression was declared manifestly ill-founded by the Commission on the basis of the finding that a prohibition that prevented a Buddhist prisoner from sending a manuscript to the publisher of a Buddhist journal constituted a reasonable application of the prison rule concerned and that this rule itself "is necessary in a democratic society for the prevention of disorder or crime within the meaning of Article 10(2)."[425] There again, to put it mildly, it was doubtful whether this was so obvious an interpretation of the said provision of the Convention that no difference of opinion was possible among reasonable persons. It is submitted that an application should be declared to be manifestly ill-founded only if its ill-founded character is actually evident at first sight or if the decision is based on standing case law.

Therefore, it is difficult to accept as a correct interpretation and application of this 'admissibility' requirement the position of the Commission, contained in its report in the *Powell and Rayner* Case, that the term 'manifestly ill-founded' under Article 27(2) [the present Article 34(3)] of the Convention extends further than the literal meaning of the word 'manifestly' would suggest at first reading. However, this would also appear to be the Court's position. In certain cases where the Court considers at an early stage in the proceedings that a *prima facie* issue arises, it seeks the observations of the parties on admissibility and merits. The Court may then proceed to a full

420 Appls 9940-9944/82, *France, Norway, Denmark, Sweden and the Netherlands v. Turkey*, D&R 35 (1984), p. 143 (161-162).

421 See, *e.g.*, Appl. 556/59, *X v. Austria*, Yearbook III (1960), p. 288. Similary, see the Court judgment of 9 October 1979, *Airey*, para. 18.

422 See *supra* 2.2.11.8.3.

423 For a declaration of manifest ill-foundedness, see, *e.g.*, Appl. 1452/62, *X v. Austria*, Yearbook VI (1963), p. 268 (278), and for a declaration of incompatibility, see, *e.g.*, Appl. 2333/64, *Inhabitants of Leeuw-St. Pierre v. Belgium*, Yearbook VIII (1965), p. 338 (360-362).

424 Appl. 1468/62, *Iversen v. Norway*, Yearbook VI (1963), p. 278 (326-332).

425 Appl. 5442/72, *X v. the United Kingdom*, D&R 1 (1975), p. 41 (42).

examination of the facts and legal issues of a case, but nevertheless may finally re
the applicant's substantive claims as manifestly ill-founded notwithstanding th
'arguable' character. In such cases the rejection of a claim under this head of in
missibility amounts to the following finding: after full information has been provid
by both parties, without the need of further formal investigation, it has now becom
manifest that the claim of a breach of the Convention is unfounded.[426]

2.2.15.2 Rejection of the application under Article 35(4)

Under the old system the Commission could, in the course of its examination of t
merits of an individual application which it had accepted as admissible, decide to rej
the application as inadmissible if, on the basis of these examinations, it reached th
conclusion that not all the conditions of admissibility had been complied with (Artic
29). Such a decision of the Commission required a two-third majority of its member
and had to state the reasons on which it was based. Former Article 29 thus enable
the Commission to stop the procedure even at this phase on the ground of inadmiss
bility, thus preventing the Court or the Committee of Ministers from having to dea
with the case.[427] Although the wording of Article 35(4) is not exactly the same as th
former Article 29 of the Convention, the Explanatory Report to Protocol No. 11
indicates no significant differences. According to the Explanatory Report, paragraph
4 of Article 35 does not signify that a State is able to raise an admissibility question
at any stage of the proceedings, if it could have been raised earlier. However, the Court
will be able to reject an application at any stage of the proceedings – even without an
oral hearing – if it finds the existence of one of the grounds of non-acceptance
provided in Article 35. Copies of all decisions declaring applications inadmissible
should be transmitted to the States concerned for information.[428] From the text of
Article 35(4) it cannot be inferred that this provision may be applied only if *new* facts
have become known to the Court. The principle of legal security and that of honouring
justified expectations might be said to plead for such a restriction of the rule.[429]

426 Report of 19 January 1989, A.172, p. 27. See also Appl. 15404/89, *Purcell v. Ireland*, D&R 70 (1991), p. 262, where it could hardly be said that the applicant did not have an 'arguable claim'. See also Judgment of 21 February 1990, *Powell and Rayner*, para. 29.

427 See Committee of Experts, *Explanatory Report on the Second to Fifth Protocols to the European Convention for the Protection of Human Rights and Fundamental Freedoms*, H(71)11, Strasbourg, 1971, p. 27.

428 Council of Europe, Explanatory Report to Protocol No. 11 to the European Convention of Human Rights and Fundamental Freedoms restructuring the control machinery established thereby, ETS No. 155.

429 A new fact was concerned, for example, when the Commission found during the examination of the merits that the applicant had used the procedure before the Commission to evade her obligations of payments vis-à-vis her creditor and thus had abused her right of complaint in the sense of Art. 27(2) of the Convention; Appl. 5207/71, *Raupp v. Federal Republic of Germany*, Coll. 42 (1973), p. 85 (89-90).

However, the case law shows that the Commission took the view that former Article 29 might also be applied on the basis of facts which were already known or might have been known to the Commission during the admissibility examination.[430]

From the *Schiesser* Case one might conclude that the Court was prepared to apply Article 29 even by analogy.[431] In that case the applicant had adduced a violation of Article 5(4), after his complaint concerning Article 5(3) had already been declared admissible by the Commission. In its report the Commission stated that, as regards Article 5(4), the requirement of previous exhaustion of local remedies had not been complied with. When the Swiss Government subsequently requested the Court to declare the application incompatible with the requirements of former Article 26, the latter took the position that it had no jurisdiction to deal with the issue, holding among other things: "The Court takes the view that, on the point now being considered, the Commission's report amounts, in substance, to an implicit decision of inadmissibility, although it does not expressly refer to Article 29(1) or even to Article 27(3)."[432] However, there could not possibly be a question of an implicit decision on the basis of Article 29, since the decision of the Commission had been taken with eleven votes in favour, one against and two abstentions. Since Article 29 (old) explicitly required unanimity, reference by the Court to Article 29(1) would seem to be out of place.

The Court reaffirmed its position in the *Artico* Case where it held with reference to its *Schiesser* judgment that "despite the apparent generality of the wording of Article 29, the respondent State is entitled by analogy to the benefit of the provisions governing the initial stage of the proceedings, in other words to obtain from the Commission, in a supplementary decision, *a ruling by majority vote* (Article 34) on the questions of jurisdiction or admissibility submitted to the Commission by the State immediately it has been led to do so by the change in the legal situation."[433]

In the Case of *K. and T. v. Finland* the Grand Chamber noted that neither the Convention nor the Rules of Court empowered it to review a decision by the panel to accept a request for a rehearing. What is more, the terms of Article 43(3) of the Convention (which provides: "If the panel accepts the request, the Grand Chamber shall decide the case by means of a judgment") make clear that once the panel has

430 See Appls 5577-5583/72, *Donnelly v. the United Kingdom*, Yearbook XIX (1976), p. 85 (252-254). See also the decision of the Commission on the Appls 5100/71, 5354/72 and 5370/72, *Engel, Dona and Schul v. the Netherlands*, B.20 (1974-76), pp. 134-140; and the decision of 29 May 1973 on Appl. 4371/71, *Kamma v. the Netherlands* (not published). Application of Art. 29 (old) in those cases did not lead to rejection of the applications, because the Commission held that all the conditions of admissibility had been satisfied. However, it may be inferred from the above-mentioned decisions that the Commission would have rejected them if the said conditions had not been satisfied, even if this could have been known during the admissibility examination.

431 Judgment of 4 December 1979.

432 *Ibidem*, para. 41.

433 Judgment of 13 May 1980, para. 27 (emphasis added).

accepted a request for a rehearing, the Grand Chamber has no option but to exam
the case. Consequently, once the panel has noted that the case raises, or might r
a serious question or issue within the meaning of Article 43(2), it is the entire 'ca
in so far as it has been declared admissible, that is automatically referred to the G
Chamber, which in principle decides the case by means of a new judgment. Howe
that does not mean that the Grand Chamber may not be called upon to exam
where appropriate, issues relating to the admissibility of the application in the s
manner as is possible in normal Chamber proceedings, for example by virtue
Article 35(4) *in fine* of the Convention (which empowers the Court to 'reject a
application which it considers inadmissible ... at any stage of the proceedings'),
where such issues have been joined to the merits, or where they are otherwise relev
at the merits stage.[434]

The Grand Chamber may likewise be required to apply other provisions of th
Convention that enable it to terminate the proceedings by a means other than a judg
ment on the merits, for example by approving a friendly settlement (Article 39 of th
Convention) or striking the application out of the list of cases (Article 37). Th
principle governing proceedings before the Grand Chamber, as before the othe
Chambers of the Court, is that it must assess the facts as they appear at the time of i
decision by applying the appropriate legal solution. Once a case is referred to it, th
Grand Chamber may accordingly employ the full range of judicial powers conferred
on the Court.[435]

In the *Pisano* Case the Government made a preliminary objection in which they
asked the Court to declare the application inadmissible. The Court held that Article
35(4) allows the Court, even at the merits stage, subject to Rule 55 of the Rules of
Court, to reconsider a decision to declare an application admissible where it concludes
that it should have been declared inadmissible for one of the reasons given in the first
three paragraphs of Article 35, including that of incompatibility with the provisions
of the Convention (Article 35(3) taken together with Article 34). According to the
Court's settled case law incompatibility *ratione personae* is present if the applicant
cannot or can no longer claim to be a victim of the alleged violation. The Court held,
however, that in the instant case both at the time when the applicant lodged his ap
plication and at the time when the Chamber declared it admissible, the applicant was
perfectly entitled to complain of the criminal proceedings in which he had been sen
tenced to life imprisonment without evidence being heard from a defence witness
whom he regarded as crucial. His conviction had become final, as he had exhausted
all the remedies available in domestic law for the submission of arguments concerning
the failure to call the witness. His complaints to the Court on that account under
Article 6(1) and (3)(d) of the Convention were not manifestly ill-founded, as the

[434] Judgment of 12 July 2001, paras 140-141.
[435] Judgment of 24 October 2002, *Pisano*, para. 28.

Chamber held in its decision on the admissibility of the application, and the panel of the Grand Chamber subsequently agreed, that those complaints raised serious questions affecting the interpretation or application of the Convention. It was true that the applicant failed to inform the Court in good time of his application for a retrial, but, contrary to the Government's assertion, such an application was not a remedy of which he was required to avail himself for the purposes of Article 35(1) of the Convention. It remained to be determined whether the application should be rejected as being incompatible *ratione personae* with the provisions of the Convention on the ground that, as a result of his acquittal with final effect after a retrial at which the witness concerned gave evidence, the applicant could no longer claim to be the 'victim' within the meaning of Article 34 of a violation of the Convention. In connection with this the Court noted that, although the situation of which the applicant complained had been remedied, the Italian courts dealing with the case had not found a violation of the relevant provisions of the Convention as regards the failure to examine the witness concerned during the initial trial. In the absence of such an acknowledgement by the national authorities the Court considered that it could not, in the light of events which occurred after the initial declaration of admissibility, subsequently declare the application inadmissible and reject it pursuant to Article 35(4) *in fine* of the Convention on the ground that the applicant could no longer claim to be the 'victim' of the alleged violation.[436]

In the *Assanidze* Case the Chamber to which the case was originally assigned, declared the whole of the applicant's complaint under Article 5(1) of the Convention admissible in its decision on 12 November 2002. At the hearing on 19 November 2003 the applicant complained for the first time about his prosecution in December 1999 and his ensuing detention in the second set of criminal proceedings. The Court held that, by virtue of Article 35(4) of the Convention, it might declare a complaint inadmissible "at any stage of the proceedings" and that the six-month rule is a mandatory one which the Court has jurisdiction to apply of its own motion. In light of the Government's observations and the special circumstances of the case, the Court considered that it was necessary to take this rule into account when examining the various periods for which the applicant was detained. With regard to the first period of detention it held that the complaint under Article 5(1) was made outside the six-month time-limit, since the applicant lodged his application with the Court on 2 July 2001. It followed that this part of the application had to be declared inadmissible as being out of time. As to the complaint concerning the applicant's prosecution on 11 December 1999 in the second set of criminal proceedings and his detention between that date and his acquittal, the Court noted that the first occasion this was raised before it was on 23 September and 19 November 2003. Consequently, it had not been dealt with in the admissibility decision of 12 November 2002, which defined the scope of

[436] *Ibidem*, paras 34-38; judgment of 13 January 2003, *Odievre*, para. 22.

the Court's examination. It followed that this complaint fell outside the scope of t
case referred to the Grand Chamber for examination.[437]

2.3 THE PROCEDURE AFTER AN APPLICATION HAS BEEN DECLARED ADMISSIBLE

2.3.1 GENERAL

The decision declaring an application admissible is communicated by the Registr
to the applicant, to the Contracting Party or Parties concerned and to any third par
where these have previously been informed of the application.[438] According to Artic
37 the Court may at any stage of the proceedings decide to strike an application ou
of the list of cases where the circumstances lead to the conclusion that one of the situa
tions mentioned there presents itself.

After the Court has declared an application admissible, it subjects the complai
contained therein to an examination of the merits (Article 38(1)(a)). The Court als
places itself at the disposal of the parties 'with a view to securing a friendly settlement
of the matter on the basis of respect for human rights as defined in the Convention
and the Protocols thereto' (Article 38(1)(b)). If no settlement can be reached in th
case of an individual application, the President of the Chamber will set deadlines fo
the submission of further written observations and the Chamber may decide, either
at the request of a party or of its own motion, to hold a hearing on the merits.[439] I
the case of an inter-State complaint the President of the Chamber will, after consulting
the Contracting Parties concerned, lay down the time-limits for the filing of written
observations on the merits and for the production of any further evidence. A hearing
on the merits shall be held if one or more of the Contracting Parties concerned so
requests, or if the Chamber so decides on its own motion.[440]

2.3.2 THIRD PARTY INTERVENTION

A Contracting Party, one of whose nationals is an applicant, has the right to submit
written comments and to take part in hearings.[441] When notice of an application is
given to the respondent Party, a copy of the application will at the same time be

437 Judgment of 8 April 2004, paras 160-162.
438 Rule 56(2) of the Rules of Court.
439 Rule 59 of the Rules of Court.
440 Rule 58 of the Rules of Court.
441 Article 36(1) of the Convention.

transmitted to any other Contracting Party one of whose nationals is an applicant in the case. If a Contracting Party wishes to exercise its right to submit written comments or to take part in a hearing, it must so advise the Registrar in writing not later than twelve weeks after the transmission or notification.[442] Another time limit may be fixed by the President of the Chamber for exceptional reasons.[443] In accordance with Article 36(2) of the Convention, the President of the Chamber or the Grand Chamber[444] may, in the interests of the proper administration of justice, invite any Contracting Party which is not a party to the proceedings, or any person concerned who is not the applicant, to submit written comments or take part in hearings. The President of a Chamber or the Grand Chamber is left a certain margin of discretion in this respect.

Third party intervention is only possible before a Chamber or the Grand Chamber and not before a Committee of three judges.[445] The drafters of Protocol 11 have provided States whose nationals have lodged applications against other States Parties to the Convention, with the opportunity to submit written comments and take part in hearings, only in relation to applications that have been declared admissible.[446] Nevertheless, the Court has admitted third party intervention in cases where it had not yet decided on admissibility. In the Case of *T.I. v. the United Kingdom* the Court took note of the comments of the German Government and of the United Nations High Commissioner for Refugees, while the German Government also took part in the oral hearing.[447] The interventions were made at the request of the Court and related to the admissibility of the case. In fact the case finally was declared manifestly ill-founded.

Individuals, non-governmental organisations or groups of individuals must have a perceptible interest in the outcome of the case, if they want to intervene.[448] In the Cases of *T. v. the United Kingdom* concerning the trial and sentencing of two minors who had murdered a child, the President granted leave to the non-governmental organisation Justice and to the parents of the child who had been murdered, to submit written comments in connection with the case. The President, furthermore, granted leave to the victim's parents to attend the hearing and to make oral submissions to the Court.[449] In the *Soering* Case, which concerned the extradition to the United States, and the ristk of the applicant being put on 'deathrow' for a long period of time,

442 See the judgment of 7 July 1989, *Soering*: Germany intervened because the applicant was a German national.
443 Rule 44(1)(2) of the Rules of Court.
444 From Rule 44(2)(a) it appears that this power of the President is exercised by the President of the (Grand) Chamber.
445 Article 36(1) of the Convention only mentions the Chamber and Grand Chamber.
446 Explanatory Report to Protocol No. 11, para 48.
447 Decision of 7 March 2000.
448 The Explanatory Report to Protocol No. 11 states in this respect in para 48: "establishing an interest in the result of any case".
449 Judgments of 16 December 1999, para. 4.

Amnesty International was granted leave to intervene as '*amicus curiae*'.[450] Other examples of non-governmental organisations which have been granted leave to intervene are Human Rights Watch, Interights, Article 19, Liberty, and Aire.[451] On the other hand, in the *Modinos* Case concerning the prohibition of homosexual activity in Cyprus, the intervention of the International Lesbian and Gay Association was refused. Given the Court's previous judgments in the case of Northern Ireland and the United Kingdom, the Court did not see any need for third party intervention.[452]

Requests for leave for this purpose must be duly reasoned and submitted in one of the official languages, within a reasonable time after the fixing of the written procedure. Any invitation or grant of leave referred to in paragraph 2 of Rule 41 of the Rules of the Court may be subject to any conditions, including time-limits, set by the President. Where such conditions are not complied with, the President may decide not to include the comments in the case file. Written comments have to be submitted in one of the official languages, save where leave to use another language has been granted. They are forwarded by the Registrar to the parties to the case, who are entitled, subject to any conditions, including time-limits, set by the President, to file written observations in reply or, where appropriate, to reply at the hearing.[453]

Protocol No.14, will amend Article 36, by adding a third paragraph which reads as follows:

> *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.*

This provision originates from an express request by the Council of Europe's Commissioner, supported by the Parliamentary Assembly.[454] At present it is already possible for the President of the Court to invite the Commissioner on Human Rights to intervene in pending cases. However, with a view to protecting the general interest more effectively, the Commissioner will be explicitly given the right to intervene as third party, even if not invited by the Court to do so.

450 Judgment of 7 July 1989, para 8.

451 Judgment of 23 September 1994, *Jersild*, para. 5 (Human Rights Watch); judgment of 27 September 1995, *McCann*, para. 5 (Amnesty International, Liberty, the Committee on the Administration of Justice, Inquest, British Irish Rights Watch); judgment of 16 September 1996, *Akdivar*, para. 3 (Amnesty International); judgment of 17 December 1996, *Saunders*, para 5 (Liberty); judgment of 15 November 1996, *Chahal*, para. 6 (Amnesty) International, Justice, Liberty, Aire Centre, Joint Council for the Welfare of Immigrants); judgment of 20 July 2001, *Pellegrini*, para. 10 (Aire).

452 Judgment of 22 April 1993, para. 4.

453 Rule 44(5) of the Rules of the Court.

454 Recommendation 1640(2004), adopted on 26 January 2004.

2.3.3 STRIKING THE APPLICATION OFF THE LIST OF CASES UNDER ARTICLE 37

Article 37 provides that the Court may at any stage of the proceedings – i.e. including during its examinations of the merits – decide to strike an application off its list of cases where the circumstances lead to the conclusion that the applicant does not intend to pursue his petition, or that the matter has been resolved, or that for any other reason established by the Court, it is no longer justified to continue the examination of the application.

In the case of an inter-State application the Chamber may only strike a case off the list if the applicant Contracting Party notifies the Registrar of its intention not to proceed with the case and the other Contracting Party or Parties concerned in the case agree to such discontinuance.[455] The Chamber will not make such a decision if it holds that any reason of a general character affecting the observance of the Convention and the Protocols thereto justifies further examination of the application.[456]

The decision to strike out an application which has been declared admissible, is given in the form of a judgment. The President of the Chamber forwards that judgment, once it has become final, to the Committee of Ministers in order to allow the latter to supervise, in accordance with Article 46(2) of the Convention, the execution of any undertakings which may have been attached to the discontinuance, friendly settlement or solution of the matter.[457] When an application has been struck out, the costs are at the discretion of the Court. If an award of costs is made in a decision striking out an application which has not been declared admissible, the President of the Chamber also forwards that decision to the Committee of Ministers.[458]

The Court may also decide to strike a case off its list of cases if the applicant shows a lack of interest by not responding to the request to provide further information. Thus in a number of cases concerning the length of civil proceedings, a lack of interest was manifested by the applicants in the proceedings pending before the Court, which the Court considered to be an implied withdrawal constituting a "fact of a kind to provide a solution of the matter". In the opinion of the Court there were no reasons of *ordre public* for continuing the proceedings. The Court, therefore, ordered these cases to be struck off the list, subject to the possibility of their being restored thereto in the event of a new situation justifying such a course.[459]

455 Rule 43(2) of the Rules of Court.

456 Appl. 24276/94, *Kurt v. Turkey*, D&R 81 (1995), p. 112. In this case, account was taken of the serious nature of the complaint (the disappearance of a detainee) and grave allegations of intimidation.

457 Rule 43(3) of the Rules of the Court.

458 Rule 43(4) of the Rules of the Court.

459 Judgments of 3 December 1991, *Gilberti, Nonnis, Trotto, Cattivera, Seri, Gori, Casadio, Testa, Covitti, Zonetti, Simonetti, Dal Sasso*; decision of 21 March 2002, *Zhukov*; decision of 23 April 2002, *Shepelev*.

According to Article 37(2) the Court may decide to restore an application to its list of cases if it considers that the circumstances justify such a course. In a case which had been struck off the list because the applicant's lawyer did not reply to letters from the Secretariat, the Commission decided to restore the case to its list of cases, since the applicant could prove that the letters had been received at the office of his lawyer after the latter's death, but had not been forwarded to him.[460] It is evident that the same possibility of re-acceptance does not exist with respect to cases which have been declared inadmissible.[461]

In the *Drozd* Case confidential information about the proceedings before the Commission was made public, for which the applicant was responsible. This responsibility was established by the fact that the applicant was on the editorial boards of the newspapers concerned. Given the serious and unjustified breach of the confidentiality of the Commission's proceedings it was considered no longer justified to continue the examination of the application.[462]

In the *Bunkate* Case the Dutch Government, which had referred the case to the Court after the Commission has adopted its report, notified the Court that they did not wish to proceed with the case, since the Court had already found a violation in the similar *Abdoella* Case.[463] The applicant did not comment on this proposal of the Dutch Government. The Commission, however, disagreed with the Government because in this way there would be no formal decision and the applicant would not be able to receive any just satisfaction to which, in the Commission's opinion, he was entitled. The Court agreed with the Commission that the applicant's entitlement to a formal and binding decision on the merits and to just satisfaction overrode any interest the Government may have had in discontinuance of the case.[464]

In the *Skoogström* Case a friendly settlement between the applicant and the Swedish Government was reached during the proceedings before the Court. The Swedish Commission for Revision of Certain Parts of the Code of Judicial Procedure had been asked to propose and elaborate the details for an amendment of the Code in order to put it beyond any doubt that it was in conformity with Article 5(3) of the Convention. In connection with this settlement the applicant was paid a sum of SEK 5,000 for his legal costs. In light of the settlement reached, the Swedish Government requested the Court to strike the case off its list. The Delegate of the Commission proposed that the Court should not strike the case off its list but should adjourn examination of the case "in order to ascertain what progress has been made in the work to amend the legislation, or alternatively to ascertain the timetable for the work which will lead to those amendments".[465] The Court, however, stated that it had no cause to believe that the settlement did not reflect the free will of the applicant. As far as the general interest was concerned, the Court did not feel able to defer judgment, nor did it see any reason of public policy sufficiently compelling to warrant continuation of its proceeding on the merits of the case. The Court, therefore, concluded that it would be appropriate to strike the case off the list.[466]

In the *Baggetta* Case the Italian Government contended that the applicant could no longer claim to be a victim of a violation of the Convention owing to two events that had occurred after the case was referred to the Court, namely the judgment of the Italian Court of Cassation holding that the applicant's prosecution was time-barred and the decision to recruit the applicant for a post on the railways, subject to a medical examination. The Court noted, however, that there had been neither a friendly settlement nor an arrangement. It considered that the two new facts brought to its notice were not of a kind to provide a solution to the matter and that a decision had accordingly to be taken on the merits.[467]

In the Case of *B.B v. France* the Government invited the Court to strike the case out of the list. They relied on two factors of which the Commission had been unaware, since the relevant information had been communicated to it on the day its report had been adopted: the Versailles Administrative Court had quashed the decision to enforce the order excluding the applicant from French territory and a compulsory residence order had been made against the applicant. Those measures meant that the applicant no longer risked being deported to the Democratic Republic of Congo and was no longer a 'victim'. The Court noted that there had been no friendly settlement or arrangement in the instant case. The compulsory residence order made was unilateral in character and issued by the French authorities after the Commission had adopted its report. It considered, however, that the order constituted an 'other fact of a kind to provide a solution of the matter'. In his initial application to the Convention institutions the applicant's main argument was that if he was deported to what was formerly Zaire, there would be a considerable risk of his being exposed to treatment which was contrary to Article 3 of the Convention, as he would not be able to receive the treatment his serious medical condition required in his country of origin. It appeared that as regards Article 3 the measure reflected, through its continuity and duration, the French authorities' intention to allow Mr B.B. to receive the treatment his present condition required and to guarantee him, for the time being, the right to remain in France. The Court saw this as tantamount to an undertaking by the French Government not to expel the applicant to his country of origin, the risk of a potential violation therefore having ceased, at least until such time as any new factors emerged justifying

460 Appl. 13549/88, *M v. Italy*, D&R 69 (1991), p. 195 (197).
461 Appl. 16542/90, *J v. France*, D&R 72 (1992), p. 226 (227).
462 Appl. 25403/94, D&R 84 (1995), p. 114; Appl. 26135/95, *Malige v. France*, D&R 84 (1995), p. 156.
463 Judgment of 25 November 1992.
464 Judgment of 26 May 1993, para 25.
465 Judgment of 2 October 1984, para. 24.
466 *Ibidem*, para 25.
467 Judgment of 25 June 1987, para. 18.

a fresh examination of the case. The Court saw no reason of public policy to proceed with the case. In that connection it pointed out that it had had occasion to rule on the risk that a person suffering from Aids would run if expelled to his country of origin in which he would be unable to receive the medical care that was absolutely necessary for his condition.[468] Accordingly, it was appropriate to strike the case out of the list.[469]

Although on a number of occasions the Court has accepted that the parents, spouses or children of a deceased applicant are entitled to take his place in the proceedings,[470] in the *Scherer* Case the Court held that the applicant's executor had not expressed any intention whatsoever of seeking, on the applicant's behalf, to have the proceedings reopened in Switzerland or to claim compensation for non-pecuniary damage in Strasbourg. Under these circumstances the applicant's death could be held to constitute a 'fact of a kind to provide a solution of the matter'.[471] Two other cases were struck off the list since the applicant's death, together with the silence of the heirs who showed no interest in the proceedings pending before the Court, constituted a 'fact of a kind to provide a solution of the matter', while there was no reason of *ordre public* for continuing the proceedings.[472]

In the Cases of *Aydin*[473] and *Akman*[474] the applicants did not agree with the terms of a proposed friendly settlement of the case. They stressed, *inter alia*, that the proposed declaration omitted any reference to the unlawful nature of the killing of the son and failed to highlight that he was unarmed at the material time. In the applicants' submission the terms of the declaration did not determine any of the fundamental human rights questions raised by the application. They urged the Court to proceed with its decision to take evidence in the case with a view to establishing the facts. The Court observed at the outset that the parties were unable to agree on the terms of a friendly settlement of the case. It recalled that, according to Article 38(2) of the Convention, friendly-settlement negotiations are confidential. Rule 62(2) of the Rules of Court stipulates in this connection that no written or oral communication and no offer or concession made in the framework of the attempt to secure a friendly settlement may be referred to or relied on in the contentious proceedings. The Court, therefore, proceeded on the basis of the declaration made outside the framework of the friendly-

468 See in this respect: judgment of 2 May 1997, *D v. the United Kingdom*, para. 53, where the Court held that in view of these exceptional circumstances and bearing in mind the critical stage now reached in the applicant's fatal illness, the implementation of the decision to remove him would amount to inhuman treatment by the respondent State in violation of Article 3.

469 Judgment of 7 September 1998. paras 37-40.

470 See, *e.g.*, the judgment of 24 May 1991, *Vocaturo*, para. 9; judgment of 31 March 1992, *X v. France*, para 1; and judgment of 22 February 1994, *Raimondo*, para. 2.

471 Judgment of 25 March 1994, para. 32.

472 Judgments of 3 December 1991, *Macaluso and Manunza*, para. 12.

473 Judgment of 10 July 2001, para. 32.

474 Judgment of 26 June 2001, para. 25

settlement negotiations by the respondent Government. Having examined carefully the terms of the respondent Government's declaration and having regard to the nature of the admissions contained in the declaration, as well as the scope and extent of the various undertakings referred to therein, together with the amount of compensation proposed, the Court considered that it was no longer justified to continue the examination of the application. Moreover, the Court was satisfied that respect for human rights as defined in the Convention and the Protocols thereto did not require it to continue the examination of the application. The Court noted in this regard that it had specified the nature and extent of the obligations which arose for the respondent Government in cases of alleged unlawful killings by members of the security forces under Articles 2 and 13 of the Convention. In two more recent judgments, the Cases of *Togcu* and *T.A. v. Turkey*, both concerning disappearances of the applicants' relatives, the Court based its decision to strike out these cases on a formal statement from the Turkish Government, notwithstanding the rejection of a friendly settlement by the applicants.[475]

In a dissenting opinion, Judge Loucaides opposed this 'striking out' process of the applications in a way which was very similar to the arguments of the applicants. He argued that there was no acceptance by the Government of responsibility for the violations complained of and that there was no undertaking to carry out any investigation of the disappearances. He further argued: "Instead, the Government undertake in the declaration generally 'to issue appropriate instructions and adopt all necessary measures with a view to ensuring that all deprivations of liberty are fully and accurately recorded by the authorities and that effective investigations into alleged disappearances are carried out in accordance with their obligations under the Convention'. However such an 'undertaking' does not add anything to the already existing obligation of the respondent Government under the Convention." He also disagreed with the Turkish Government's statement: "The Government consider that the supervision by the Committee of Ministers of the execution of Court judgments concerning Turkey in this and similar cases is an appropriate mechanism for ensuring that improvements will be made in this context." In his opinion that seemed to imply that the Government considered the Committee of Ministers as a more appropriate mechanism for ensuring improvements in cases like the one in respect of which the declaration was made than an examination of 'this and similar' cases by the Court. He feared that "the solution adopted may encourage a practice by States – especially those facing serious or numerous applications – of 'buying off' complaints for violations of human rights through the payment of *ex gratia* compensation, without admitting any responsibility and without any adverse publicity, such payments being simply accompanied by a general undertaking to adopt measures for preventing situations like those complained of, from arising in the future on the basis of unilateral declarations which are approved

475 Judgments of 9 April 2002, para. 32.

by the Court even though they are unacceptable to the complainants. This practice will inevitably undermine the effectiveness of the judicial system of condemning publicly violations of human rights through legally binding judgments and, as a consequence, it will reduce substantially the required pressure on those Governments that are violating human rights."[476] The Cases of *Akman* and *Aydin* could, in his opinion, be distinguished from the precious decisions in the *Togcu* Case and in *T.A. v. Turkey*, because the *Akman* Case concerned an alleged instantaneous violation, i.e. murder, and the *Aydin* Case concerned the disappearance of a person in respect of which an investigation was still being pursued at the time of the decision of the Court to strike the case out of the list, while the Cases of *Togcu* and *T.A. v. Turkey* concerned an alleged continuing violation, i.e. the disappearance of a person. As Judge Loucaides pointed out: "Departure from both decisions is justified for cogent reasons, namely to ensure more effective implementation of the obligations of the High Contracting Parties to the Convention through ceasing to strike cases out as a result of approving the method of compensation proposed by the respondent States on the basis of unilateral declarations unacceptable to the latter, like the one in the present case."[477]

The President of the Chamber, Judge Costa, stated in his concurring opinion that he came close to the views of Judge Loucaides and stressed that striking out should not be abused and should only be used in narrowly defined cases.[478] He continued by saying that "in the circumstances of the present cases, and without calling into question the good faith and sincerity of the respondent State, I am very concerned by the unilateral nature of its undertakings".[479]

The *Tahsin Acar* Case concerning the disappearance of the applicant's brother was referred to the Grand Chamber. The Turkish Government had sent the Court a text of a unilateral declaration expressing regret for the actions that had led to the application and offering to make an *ex gratia* payment of 70,000 pounds sterling to the applicant for any pecuniary and non-pecuniary damage and for costs. The Government requested the Court to strike the case out of the list under Article 37 of the Convention. The Grand Chamber considered that, under certain circumstances, it might be appropriate to strike out an application under Article 37(1)(c) of the Convention on the basis of a unilateral declaration by the respondent Government, even if the applicant wished the examination of the case to be continued. Depending on the particular circumstances of each case various considerations could come into play in the assessment of a unilateral declaration. It might be appropriate to examine whether the facts are in dispute between the parties, and, if so, to what extent. Other factors that might be taken into account are the nature of the complaints made, whether the Court has ruled on similar issues in previous cases, the nature and scope of any measures taken to enforce judgments delivered in such cases, and the impact of those measures on the case before the Court. The Court should also ascertain, among other things, whether in their declaration the Government made any admissions concerning the alleged violations of the Convention and, if so, should determine the scope of such admissions and the manner in which the Government intended to provide redress to the applicant. The Grand Chamber held that the unilateral declaration made in the present case did not adequately address the applicant's grievances. In the Chamber's view, where a person had disappeared or had been killed by unknown persons and there was *prima facie* evidence that supported allegations that the domestic investigation had fallen short of what was necessary under the Convention, a unilateral declaration should at the very least contain an admission to that effect, combined with an undertaking by the respondent Government to conduct, under the supervision of the Committee of Ministers, an investigation that fully complies with the requirements of the Convention as defined by the Court in previous cases of a similar nature. As the Government's unilateral declaration in the present case did not contain any such admission or undertaking, it did not offer a sufficient basis for the Court to hold that it was no longer justified to continue the examination of the application. The Grand Chamber accordingly rejected the Government's request to strike the application out under Article 37(1)(c) of the Convention and decided to pursue its examination of the merits of the case.[480]

2.3.4 THE EXAMINATION OF THE MERITS

2.3.4.1 General

Article 29 states that, except for cases declared inadmissible by a Committee, the Chamber has to examine the admissibility and the merits of the case. There may, however, be situations in which the Court will not take a separate admissibility decision. This could occur, for example, where a State does not object to a case being declared admissible.

According to Rule 58(1) of the Rules of Court, once the Chamber has decided to admit an inter-State application, the President of the Chamber will, after consulting the Contracting Parties concerned, lay down the time-limits for the filing of written

476 Dissenting opinion of Judge Loucaides.

477 *Ibidem.*

478 Such as where the applicant dies and the proceedings are not continued by his heirs: judgment of 14 May 2000, *Gladkowski*, or where proceedings are taken over by a legal entity which does not, in that particular case, have a legitimate interest allowing it to pursue the proceedings: judgment of 18 September 2001, *S.G. v. France*.

479 Judgments of 9 April 2002, concurring opinion of the President of the Chamber Judge Costa. On 9 September 2002 the Case of *T.A. v. Turkey* was referred to the Grand Chamber.

480 Judgment of 6 May 2003, paras. 74-82.

observations on the merits and for the production of any further evidence. The President may however, with the agreement of the Contracting Parties concerned, direct that a written procedure is to be dispensed with. According to Rule 59(1), in the case of an individual application the Chamber or its President may invite the parties to submit further evidence and written observations.

An application is initially examined by one or more judges as Judge Rapporteurs whom the Chamber appoints from among its members[481] and who submit such reports, drafts and other documents as may assist the Chamber in carrying out its functions. The merits of an application will be examined by a Chamber and, exceptionally, by the Grand Chamber. The parties will present their submissions by means of a written procedure. The oral procedure will consist of a hearing at which the applicant, or a State Party in an inter-State case, and the respondent State may present their arguments orally. The President of the Chamber fixes the written and oral procedure.[482]

Article 40 of the Convention indicates that oral proceedings are, in principle, to be conducted in public. It also specifies that documents submitted in the written proceedings (memorials and formal written information) are also, in principle, accessible to the public. Thus, documents deposited with the Registrar and not published will be accessible to the public unless otherwise decided by the President either on his own initiative or at the request of a party or of any other person concerned.

2.3.4.2 The written procedure

According to Rule 38(1) of the Rules of Court, no written observations or other documents may be filed after the time-limit set by the President of the Chamber or the Judge Rapporteur. For the purposes of observing this time-limit the material date is the certified date of dispatch of the document or, if there is none, the actual date of receipt at the Registry.[483]

According to Rules 17-19 of Practice Direction 3, a time-limit set under Rule 38 may be extended on request from a party. A party must make such a request as soon as it has become aware of the circumstances justifying such an extension and, in any event, before the expiry of the time-limit. It should state the reason for the delay. If an extension is granted, it applies to all parties for which the relevant time-limit is running, including those which have not asked for it. According to Rules 3 and 7 of Practice Direction 3, all pleadings as well as documents should be sent in triplicate by

[481] Rule 48(2) with respect to inter-State applications and Rule 49(1) with respect to individual applications.

[482] Rule 59(4) of the Rules of Court. See in this respect Practice Direction 3 to the Rules of Court.

[483] Rule 38(2) of the Rules of Court.

post with one copy sent, if possible, by fax. In case of the use of fax, the name of the person signing a pleading must also be printed on it so that he or she can be identified.

Concerning form and contents, Practice Direction 3 in Rule 8 prescribes that a pleading should include: (a) the application number and the name of the case; (b) a title indicating the nature and content (*e.g.* observations on admissibility [and the merits]; reply to the Government's/the applicant's observations on admissibility [and the merits]; observations on the merits; additional observations on admissibility [and the merits]; memorial etc.). In addition, Rule 9 prescribes that a pleading should normally: (a) be on A4 paper having a margin of not less than 3.5 cm wide; (b) be wholly legible and, preferably, typed; (c) have all numbers expressed as figures; (d) have pages numbered consecutively; (e) be divided into numbered paragraphs; (f) be divided into chapters and/or headings corresponding to the form and style of the Court's decisions and judgments; (g) place any answer to a question by the Court or to the other party's arguments under a separate heading; and (h) give a reference for every document or piece of evidence. According to Rule 10, if a pleading exceeds 30 pages, a short summary should also be filed with it. Finally, according to Rule 11, where a party produces documents or other exhibits together with a pleading, every piece of evidence should be listed in a separate annex. Concerning the contents, Rule 13 prescribes that the pleadings should include: (i) a short statement confirming a party's position on the facts of the case as established in the decision on admissibility; (ii) legal arguments relating to the merits of the case; and (iii) a reply to any specific questions on a factual or legal point put by the Court. An applicant submitting claims for just satisfaction should do so in the written observations on the merits. Itemised particulars of all claims made, together with the relevant supporting documents or vouchers, should be submitted. If the applicant fails to do so, the Chamber may reject the claim in whole or in part.[484]

2.3.4.3 The oral hearing

The examination of the merits usually takes a good deal of time; apart from exceptional cases, approximately two years. In some cases this is inevitable, *viz.* if it is difficult to ascertain the facts, or if the attempts to reach a friendly settlement take a long time. On the whole, however, the desirability of shortening the procedure is evident, especially if it is borne in mind that the time which elapses between the moment at which an application is submitted and the date of the decision on admissibility is also rather long in many cases. In this respect it has to be noted that the Rules of Court have been amended and that the rule which provided that in general an oral hearing would be held, has been deleted. Instead, Rule 59(3) of the Rules of Court provides

[484] Rule 60 of the Rules of Court. The Practice Direction with respect to claims under Article 41 has not yet been issued.

that the Chamber may decide, either at the request of a party or of its own motion, to hold a hearing on the merits if it considers that the discharge of its functions under the Convention so requires. It is now current practice for oral hearings to be held only in a limited number of cases.

The applicant must be represented at any hearing decided on by the Chamber unless the President of the Chamber exceptionally grants leave to the applicant to present his or her own case, subject, if necessary, to being assisted by an advocate or other approved representative.[485] According to Rule 64 of the Rules of Court, the President of the Chamber organises and directs hearings and prescribes the order in which those appearing before the Chamber will be called upon to speak. Where a party or any other person due to appear fails or declines to do so, the Chamber may, provided that it is satisfied that such a course is consistent with the proper administration of justice, nonetheless proceed with the hearing.[486] In the *Diennet* Case the hearing took place even though at a preparatory meeting the Court was informed that the applicant's lawyer was stranded in Paris as a result of an airline strike. It decided to hold the hearing at the fixed time and to fax a provisional record of it to applicant's lawyer so that she could submit any observations in writing before the deliberations.[487]

All communications with and pleadings by individual applicants or their representatives, witnesses or experts in respect of a hearing, or after a case has been declared admissible, shall be in one of the Court's official languages, unless the President of the Chamber authorises the continued use of the official language of a Contracting Party.[488]

2.3.4.4 Investigative measures and inquiry on the spot

The Chamber may, at the request of a party or of its own motion, adopt any investigative measures which it considers capable of clarifying the facts of the case. The Chamber may, *inter alia*, invite the parties to produce documentary evidence and decide to hear as a witness or expert or in any other capacity any person whose evidence or statements seem likely to assist it in carrying out its tasks.[489] The Chamber may also ask any person or institution of its choice to express an opinion or make a written report on any matter considered by it to be relevant to the case. According to Rule A1(3) of the Annex to the Rules of Court, after a case has been declared admissible or, exceptionally, before the decision on admissibility, the Chamber may appoint one or more of its members or of the other judges of the Court, as its delegate or delegates, to conduct an inquiry, carry out an on-site investigation or take evidence in

485 Rule 36(3) of the Rules of Court.
486 Rule 65 of the Rules of Court.
487 Judgment of 26 September 1995, para 5.
488 Rule 34 of the Rules of Court.
489 Rule A1(1) and (2) of the Annex to the Rules of Court.

some other manner. The Chamber may also appoint any person or institution of its choice to assist the delegation in such manner as it sees fit. Under the Convention, the Contracting States are obliged to furnish the facilities required (Article 38(1)(a)). In accordance with Rule A1(5) of the Annex to the Rules of Court, proceedings forming part of any investigation by a Chamber or its delegation will be held in camera, save in so far as the President of the Chamber or the head of the delegation decides otherwise.

The parties must assist the Chamber, or its delegation, in implementing any measure for taking evidence. The Contracting Party on whose territory on-site proceedings before a delegation take place must extend to the delegation the facilities and co-operation necessary for the proper conduct of the proceedings. These include, to the full extent necessary, freedom of movement within the territory and all adequate security arrangements for the delegation, for the applicant and for all witnesses, experts and others who may be heard by the delegation. It is the responsibility of the Contracting Party concerned to take steps to ensure that no adverse consequences are suffered by any person or organisation on account of any evidence given, or of any assistance provided, to the delegation.[490] The Court does not have any means for compelling a witness, expert or other person to appear before it. Rule A3 of the Annex to the Rules of Court provides that, where a party or any other person due to appear fails or declines to do so, the delegation [and the Chamber, as the case may be] may, provided that it is satisfied that such a course is consistent with the proper administration of justice, nonetheless continue with the proceedings. Even without an express provision in the Rules of Procedure it would seem possible for the Court to communicate such failure to the Contracting State concerned. This State will then have to take any appropriate measures necessary to ensure that the persons in question will co-operate. In fact the Contracting States are obliged to give the Court the necessary assistance in the performance of its duties. This would seem to also ensue by analogy from Article 38(1)(a) of the Convention, which provides that, if the Court decides to carry out an inquiry on the spot, 'the States concerned shall furnish all necessary facilities.'

The head of the delegation may request the attendance of witnesses, experts and other persons during on-site proceedings before a delegation. The Contracting Party on whose territory such proceedings are held must, if so requested, take all reasonable steps to facilitate that attendance. In accordance with Rule 37(2), the Contracting Party in whose territory the witness resides is responsible for servicing any summons sent to it by the Chamber for service. In the event of such service not being possible, the Contracting Party must give reasons in writing. The Contracting Party shall further

490 Rule A2 of the Annex to the Rules of Court.

take all reasonable steps to ensure the attendance of persons summoned who are under its authority or control.[491]

The President of the Chamber may, as he or she considers appropriate, invite or grant leave to, any third party to participate in an investigative measure. The President lays down the conditions of any such participation and may limit that participation if those conditions are not complied with.[492]

The former Commission availed itself of the power to conduct an inquiry on the spot for the first time in connection with the first complaint by Greece against the United Kingdom.[493] On that occasion an inquiry was made in Cyprus into the existence of certain practices of torture and into whether the threat to public order was such that the measures taken by the British authorities were justified. In September 1975 the Commission again went to Cyprus, this time, *inter alia*, to visit two refugee camps in connection with complaints by Cyprus against Turkey.[494] In the *Northern Ireland* Case the Court expressed its disapproval of the fact that, as the Commission had hinted in its report, the British Government had not always afforded the desirable assistance. In its judgment the Court emphasised the importance of the obligation of Contracting States set forth in Article 28(a) (the present Article 28(1)(a)).[495] In connection with the five applications which were lodged against Turkey the Commission decided to send a delegation to that country in order to continue its efforts to reach a friendly settlement. The delegation had discussions with, *inter alia*, the Minister of Justice, members of the Grand National Assembly and members of the Military Court of Cassation. The delegation also met with journalists, academics and trade unionists, and visited Military Detention Centres, where it was able to talk in private with prisoners.[496]

Within the framework of a number of individual complaints against Turkey, the Commission and the Court organised fact-finding missions to Turkey.[497] This concerned allegations of gross violations, such as disappearances, killing and torture in south east Turkey. In most of these cases the domestic authorities had neither made an effective inquiry into the alleged violations nor started any serious investigation against the perpetrators of the cruelties.[498] Recently a delegation of three Judges of the Court took evidence from witnesses in Ankara in the *Abdürrezzak Ipek* Case. The applicant complained about the disappearance of his two sons, who were allegedly

491 Rule A 5(4) of the Annex to the Rules of Court.
492 Rule A 1(6) of the Annex to the Rules of Court.
493 Appl. 176/56, *Greece v. the United Kingdom*, Yearbook II (1958-1959), p. 182.
494 Appls 6780/74 and 6950/74, *Cyprus v. Turkey*, Yearbook XVIII (1975), p. 82.
495 Judgment of 18 January 1978, *Ireland v. the United Kingdom*, para. 93.
496 Report of 7 December 1985, *France, Norway, Denmark, Sweden and the Netherlands v. Turkey*, D&R 44 (1985), p. 31 (36-37).
497 Judgment of 18 December 1996, *Aksoy*, para 23; judgment 25 May 1998, *Kurt*, para 13; judgment of 8 July 1999, *Cakici*, para 13.
498 Report of the Commission of 10 September 1999, *Akdeniz*, para 384.

last seen by three people taken into detention with them. He also alleged that his family home and property had been destroyed by security forces in the course of an operation conducted in his village. The Turkish Government submitted that the investigation carried out by the authorities proved that no operation was conducted in the area by security forces. They further maintained that the applicant's sons were never detained.[499]

On 11 September 2002 the Grand Chamber decided that a delegation of judges should carry out an on-the-spot investigation in Moldova in the *Ilaşcu* Case. The Court also decided to ask the parties to provide further clarification in writing about the case. The applicants had been convicted in 1993 for various crimes by a court of the 'Moldovan Republic of Transdniestria' (MRT), a region of Moldova which declared its independence in 1991 but is not recognised by the international community. The first applicant had been sentenced to capital punishment and the other three applicants to prison sentences between 12 and 15 years. The judgment was subsequently declared unconstitutional by the Supreme Court of Moldova. Three of the applicants were detained in Transdniestria, while the first applicant was released on 5 May 2001 and moved to Romania. The applicants complained about the proceedings which led to their conviction in 1993 and claimed that their detention since then had been unlawful. They also complained of the conditions of their detention and, in substance, of a violation of their right not to be hindered in the effective exercise of the right of individual application. The applicants considered that the Moldovan authorities were responsible under the Convention for the alleged violations of their Convention rights since they had not taken adequate measures to stop them. They further contended that the Russian Federation shared that responsibility as the territory of Transdniestria was and continues to be *de facto* under Russia's control owing to the stationing of its troops and military equipment and its alleged support of the separatist regime.[500]

Article 38(1)(a) of the Convention provides for measures to enforce the duty of co-operation on the part of a Contracting State. In cases in which, in the Court's opinion, an inquiry on the spot is absolutely necessary while the Contracting Party refuses to co-operate, it would appear most appropriate for the Court to appeal to the Committee of Ministers. Through a resolution the latter organ may bring pressure to bear on the recalcitrant State to comply with its obligations and to co-operate by making an investigation on its territory possible. In addition, although in practice this is not very likely to occur, another Contracting State might lodge an application against the recalcitrant State for alleged violation of Article 38. As was stated above, Article 33 permits the Contracting States to complain about 'any alleged breach of the provisions of the Convention by another High Contracting Party', so that they need not confine

499 Press release issued by the Registrar, 20 November 2002.
500 Press release issued by the Registrar, 11 October 2002.

themselves to the rights and freedoms of Section I of the Convention and of the Protocols, but may also refer to an article such as Article 38. In the *Timurtas* Case the Court held that "It is inherent in proceedings relating to cases of this nature, where an individual applicant accuses State agents of violating his rights under the Convention, that in certain instances solely the respondent State has access to information capable of corroborating or refuting these allegations. A failure on a Government's part to submit such information as is in their hands without a satisfactory explanation may not only reflect negatively on the level of compliance by a respondent State with its obligations under Article 38 para. 1 (a) of the Convention, but may also give rise to the drawing of inferences as to the well-foundedness of the allegations. In this respect, the Court reiterates that the conduct of the parties may be taken into account when evidence is being obtained."[501]

Where a witness, expert or other person is summoned at the request or on behalf of a Contracting Party, the costs of their appearance will be borne by that Party unless the Chamber decides otherwise. The costs of the appearance of any such person who is in detention in the Contracting Party on whose territory on-site proceedings before a delegation take place, will be borne by that Party unless the Chamber decides otherwise. In all other cases the Chamber decides whether such costs are to be borne by the Council of Europe or awarded against the applicant or third party at whose request or on whose behalf the person appears. In all cases such costs are taxed by the President of the Chamber.[502]

Rule A 6 lays down the oath or solemn declaration by witnesses and experts heard by a delegation.

Any delegate may put questions to the Agents, advocates or advisers of the parties, to the applicant, witnesses and experts, and to any other persons appearing before the delegation. Witnesses, experts and other persons appearing before the delegation may, subject to the control of the head of the delegation, be examined by the Agents and advocates or advisers of the parties. In the event of an objection to a question put, the head of the delegation decides. Save in exceptional circumstances and with the consent of the head of the delegation, witnesses, experts and other persons to be heard by a delegation will not be admitted to the hearing room before they give evidence. The head of the delegation may make special arrangements for witnesses, experts or other persons to be heard in the absence of the parties where that is required for the proper administration of justice. The head of the delegation decides in the event of any dispute

501 Judgment of 13 June 2000, para 66. See also judgment of 24 April 2003, *Aktas*, paras. 272-277; judgment of 9 May 2003, *Tepe*, paras. 128-135 and judgment of 15 January 2004, *Tekdag*, paras. 57-61.

502 Rule A5(6) of the Annex to the Rules of Court.

arising from an objection to a witness or expert. The delegation may hear for information purposes a person who is not qualified to be heard as a witness or expert.[503]

A verbatim record is prepared by the Registrar of any proceedings concerning an investigative measure. If all or part of the verbatim record is in a non-official language, the Registrar arranges for its translation into one of the official languages. The representatives of the parties receive a copy of the verbatim record in order that they may, subject to the control of the Registrar or the head of the delegation, make corrections, but in no case may such corrections affect the sense and bearing of what was said. The Registrar sets, in accordance with the instructions of the head of the delegation, the time-limits granted for this purpose. The verbatim record, once so corrected, is signed by the head of the delegation and the Registrar and then constitutes certified matters of record.[504]

2.3.4.5 Hearing of witnesses or experts by the Chamber

Since the amendment of the Rules of Court the provisions concerning the hearing of witnesses and experts are to be found in the Annex to the Rules of Court concerning investigative measures. The provisions concerning investigative measures by a delegation apply, *mutatis mutandis*, to any such proceedings conducted by the Chamber itself.[505] According to Rule A 1(1) of the Annex to the Rules of Court, the Chamber may, at the request of a party or of its own motion, adopt any investigative measure which it considers capable of clarifying the facts of the case.

Witnesses, experts and other persons to be heard by a Chamber are summoned by the Registrar. The summons has to indicate (a) the case in connection with which it has been issued; (b) the object of the inquiry, expert opinion or other investigative measure ordered by the Chamber or the President of the Chamber; and (c) any provisions for the payment of sums due to the person summoned.[506]

The Chamber may, *inter alia*, invite the parties to produce documentary evidence and decide to hear as a witness or expert or in any other capacity any person whose evidence or statements seem likely to assist it in carrying out its tasks.[507] For example in the case of *Brozicek* the Court decided to hear five witnesses on a specific point and to order an opinion by a handwriting expert.[508] The Chamber may also ask any person or institution of its choice to express an opinion or make a written report on any matter considered by it to be relevant to the case.[509]

503 Rule A7 of the Annex to the Rules of Court.

504 Rule A8 of the Annex to the Rules of Court.

505 Rule A3(3) of the Annex to the Rules of Court.

506 Rule A5(2) in conjunction with Rule A1(4) of the Annex to the Rules of Court.

507 Rule A1 of the Annex to the Rules of Court.

508 Judgment of 19 December 1989, para. 5.

509 Rule A1(2) of the Annex to the Rules of Court.

2.3.5 FRIENDLY SETTLEMENT

2.3.5.1 General

From the terms of Article 38 it is clear that the drafters of the Convention intended the attempts to reach a friendly settlement to take place simultaneously with the examination of the merits. This makes sense. In fact, on the one hand, a complete examination of the merits is superfluous if a friendly settlement is reached. On the other hand, the Chamber cannot mediate in an effective way with a view to reaching such a settlement until it has gained some insight into the question of whether or not the application is well-founded. Moreover, the provisional views within the Chamber on the latter question may put pressure on (one of) the parties to co-operate with reaching a settlement.

The friendly settlement is a form of *conciliation*, one of the traditional methods of peaceful settlement of international disputes. The term 'conciliation', which refers particularly to inter-State disputes, has been replaced in the European Convention by 'friendly settlement' because disputes between States and individuals may be – and for the most greater part are – concerned.[510] A non-legal element has been introduced into the friendly settlement procedure. Indeed, this method is not necessarily based on exclusively legal considerations; other factors may also play a part in it. Experience demonstrates the great utility of the conciliation element in Convention proceedings. Thus, for instance, 20 percent of the cases declared admissible in 2001 have resulted in a friendly settlement, often providing for pecuniary compensation for the victim and sometimes referring to a change in the law of the State concerned.[511]

Friendly settlement negotiations could be 'guided', or even encouraged, by a judge (with the help of the registry of the Court). Also, during friendly settlement negotiations, parties may call upon the services of the Court's registry to help them in these negotiations. A member of a Chamber might at any stage assist the parties in settling their case.

As far as Protocol No. 14 is concerned, the provisions of Article 39 (new) are taken partly from the present Article 38(1)(b) and 2 and also from the present Article 39. However, since under the present Article 38(1)(b) it is only after an application has been declared admissible that the Court places itself at the disposal of the parties with a view to securing a friendly settlement, this procedure will be more flexible. The Court will be free to place itself at the parties' disposal at any stage of the proceedings.

510 See *Collected Edition of the 'Travaux Préparatoires' of the European Convention on Human Rights*, Vol. III, The Hague, 1977, pp. 271-272.

511 See: Council of Europe, Report of the Evaluation Group to the Committee of Minister on the European Court of Human Rights, EG(2001)1 27 September 2001, p. 21.

Friendly settlements will thus be encouraged and may prove particularly useful in repetitive cases as well as in other cases where questions of principle or changes in domestic law are not involved. It goes without saying that these friendly settlements, will also have to be based on respect for human rights, pursuant to Article 39(1)(new).[512]

The new Article 39 will provide for supervision of the execution of friendly settlements by the Committee of Ministers. This new provision was inserted to reflect a practice which the Court has already developed. Within the framework of the text of Article 46(2) the Court uses to endorse friendly settlements through *judgments* and not – as provided for in the present Article 39 of the Convention – through *decisions*, since the execution of the latter is not subject to supervision by the Committee of Ministers. It was recognised that adopting a judgment instead of a decision, might have negative connotations for respondent Parties and make it harder to secure a friendly settlement. The new procedure will make this easier and thus reduce the Court's workload.[513]

2.3.5.2 The way in which the Court secures a friendly settlement

The Court has wide discretion as to how it may try to secure a friendly settlement. The Convention does not impose any limitations on the Court in this matter, with the exception of the requirement to be discussed below that the settlement reached must be based on respect for human rights as defined in the Convention.[514]

This flexible and informal character of the procedure enables the Court to create an atmosphere which makes it easier for the parties to reach a compromise. In this context, the fact that the procedure is confidential plays an important part. Furthermore, the fact that it may be attractive for the respondent State to avoid continuation of the procedure, which would lead to a thorough examination of the facts and might result in public condemnation, helps to create a situation in which States may be willing to accept a compromise. The individual applicant may also benefit from the compromise by having certainty about the outcome of the dispute and reparation, if any, of the damages incurred, at the earliest possible moment. He or she may, therefore, generally also wish to avoid lengthy proceedings before the Court, involving the risk of an unfavourable judgment. The Chamber may provide the parties with an indication of its provisional opinion on the merits. The separate decision on admissibility is important for the parties when considering whether they should start friendly settlement negotiations.[515]

512 Explanatory Report to Protocol No. 14, CETS 194, para 93.

513 *Ibidem*, para 94.

514 Article 38(1)(b) of the Convention.

515 Explanatory Report to Protocol No. 11, para 78.

On the other hand, the friendly settlement procedure entails the drawbacks of a non-public procedure. Owing to the fact that it is a compromise, the friendly settlement, without further qualifications, would involve the risk that ultimately an agreement may be reached which does not meet the standards with respect to human rights set by the Convention. However, the concluding words of Article 38(1)(b) require the settlement to be reached 'on the basis of respect for Human Rights as defined in this Convention.' It is the duty of the Court to see to this. Besides the parties concerned, the Court must agree to the content of the settlement. It is possible that the victim of a violation is ready to accept a given sum of money with which the Government concerned might wish to buy off the violation, while the cause of the violation, for instance in the form of a legal provision or an administrative practice conflicting with the Convention, would continue to exist. In such a case the Court will have to demand that the Contracting State concerned, in addition to giving compensation to the victim, takes measures to alter the law or administrative practice in question. In its attempts to secure a friendly settlement, the Court also has a duty with respect to the public interest, which constitutes a further indication of the 'objective' character of the procedure provided for in the Convention.

Besides the public interest in the maintenance of the legal order created by the Convention, the issue of the *Rechtsfrieden* (peace through justice) also plays a part here. Indeed, if the Court did not see to it that the existing violation be ended, there would be considerable risk that repeated applications might be submitted about the same situation conflicting with the Convention in a given Contracting State.

The former Commission has never refused a proposed settlement for the reason that it had not been reached 'on the basis of respect for Human Rights as defined in this Convention'.[516] And as far as information is available, up to present the same holds good with respect to the Court.

About the actual course of the attempts to reach a friendly settlement and the role of the Court, only a few general remarks can be made, precisely because the procedure is confidential and data about it are, therefore, scanty.

Article 38 states that the Court places itself at the disposal of the parties. Immediately after a complaint has been declared admissible, the Registrar, acting on instructions from the Chamber or its President, invites the parties to state whether they wish to make proposals for a possible settlement. A friendly settlement will even be possible after the case has been referred to the Grand Chamber.[517]

[516] See H. Krüger and C.A. Nørgaard, 'Reflections concerning friendly settlement under the European Convention on Human Rights', in: F. Matscher and H. Petzold (eds.), *Protecting Human Rights: The European Dimension*, Cologne, 1988, pp. 329-334 (332).

[517] See in this respect judgment of 24 October 2002, *Pisano*, para 28.

Sometimes the Court will first examine the possibilities for a friendly settlement in discussions with one or both of the parties separately. In other cases it will immediately bring the parties into contact with each other because it considers it possible for a settlement to be reached. The Court may provide the parties with an indication of its provisional opinion on the merits. This separate decision on admissibility is important for the parties when considering whether they should start friendly settlement negotiations. The Court only makes use of these methods in cases where a friendly settlement is justified and not in those cases where a decision on the merits of the case is important for the further development of the case law.[518]

The degree to which the Court has to be proactive depends on whether it is dealing with an inter-State application or an individual application. In the first case the parties are more or less on equal terms, so that the Court may confine itself to a more passive role. Whilst it may also be true in the case of an individual application that the parties are formally on equal terms, the respondent State is generally better equipped to conduct negotiations within the framework of a friendly settlement than an individual applicant. Therefore, the latter, in taking a decision on whether or not to agree to a given settlement, may be guided by the Court. The Court, owing to its expertise and experience, will often be better able to evaluate the content of the settlement and may, by playing a guiding role, neutralise factual inequality between the parties to the negotiations to some extent. However, the role of the Court should not dominate to such an extent that it is actually the Court which determines the terms of the settlement and imposes it more or less upon the individual applicant. Up to the present, however, there have been no indications of such a situation.

The Court is responsible for the establishment of the facts and may conduct an investigation on the understanding that the parties furnish the Court with all the relevant information. Parties to friendly settlement proceedings are not at liberty to disclose the nature and content of any communication made with a view to and in connection with a friendly settlement. Material relating to the friendly settlement negotiations must remain confidential.[519] In the *Familiapress Zeitung* Case the applicant had used confidential information of a provisional measure in a procedure before the domestic court. The Commission considered that to be "a serious breach of confidentiality" and decided to strike the case of the list.[520]

If a friendly settlement in the sense of Article 38 is reached, the Court strikes the case out of its list by means of a decision which is confined to a brief statement of the facts and of the solutions reached.[521] As stated above, the Court now endorses friendly

[518] See in this respect: N. Bratza en M. O'Boyle, "The Legacy of the Commission to the New Court under the Protocol No. 11", in *The Birth of European Human Rights Law. Liber Amicorum Carl Aage Norgaard*, M. de Salvia en M.E. Villiger (eds.), Baden-baden, Nomos, 1998, p. 387.

[519] Rule 62(2) of the Rules of Court.

[520] Report of 3 March 1995, D&R 80 (1996), pp. 76-77.

[521] Article 39 of the Convention.

settlements through *judgments* and not – as provided for in Article 39 – through *decisions*, of which execution is not subject to supervision by the Committee of Ministers. If the Court is informed that an agreement has been reached between the applicant and the respondent State, it verifies the equitable nature of the agreement and, where it finds the agreement to be equitable, strikes the case out of its list in accordance with Rule 43(3).[522]

2.3.5.3 Friendly settlements reached

The number of cases in which a friendly settlement has been reached has increased dramatically since the entry into force of Protocol No. 11. From 1999 up to the end of 2003, according to the available information, 695 friendly settlements have been reached.[523]

The first friendly settlement concerned a special case. In the *Boeckmans* Case the applicant complained about remarks made by a judge during his trial, which were alleged to be incompatible with the right to a fair trial under Article 6 of the Convention. The Belgian Government, while upholding the validity of the judgment in question, agreed to pay Boeckmans compensation of 65,000 Belgian francs, because the remarks were such "as to disturb the serenity of the atmosphere during the proceedings in a manner contrary to the Convention and may have caused the applicant a moral injury."[524]

In a great number of cases the substance of the settlement has consisted merely of the Government concerned paying compensation and/or redressing the consequences of the violation for the victim as much as possible.[525] A number of settlements have in fact been based on judgments of the Court in cases which raised identical issues. In a case against the United Kingdom, for instance, six applicants complained about their dismissal from employment after refusal to join a trade union. After the Court's judgment in the *Young, James and Webster* Case the Government settled the case by offering the applicants compensation in respect of loss of earnings, pension rights and other employment benefits.[526] Similarly, in the *Geniets* Case the admissible part of the application was similar to the *Van Droogenbroeck* Case where the Court found a breach of Article 5(4) because of the absence of an effective and accessible judicial remedy which satisfied the requirements of that provision. As a result, the

522 Rule 75(4) of the Rules of Court.

523 See *European Court of Human Rights: Survey of Activities and Statistics*, Council of Europe, Strasbourg, 2001, 2002 and 2003.

524 Report of 17 February 1965, Yearbook VIII (1965), p. 410 (422).

525 See, *e.g.*, judgment of 20 March 2001, *Köksal*, para 14; judgment of 21 May 2001, *Değerli*, para. 14; judgment of 12 February 2002, *Gawracz*, para. 9; judgment of 18 June 2002, *Samy*, para. 14; judgment of 6 May 2003, *Sêdek*, para 14; judgment of 21 October 2004, *Binbay*, para. 19.

526 Report of 10 December 1984, *Eaton and Others v. the United Kingdom*, D&R 39 (1984), p. 11 (15).

Belgian Government showed itself prepared to pay compensation to Geniets.[527] With respect to three complaints regarding corporal punishment of children at school, the way to a settlement was paved by the Court's judgment in the *Campbell and Cosans* Case as a result of which Government of the United Kingdom changed the relevant legislation and in addition made *ex gratia* payments to the applicants concerned.[528]

In the *Tsavachidis* Case a Jehova Witness complained that the Greek intelligence services kept him under surveillance on account of his religious beliefs. The Court pointed out that in a number of earlier cases it had had to consider systems of secret surveillance in States other than Greece and to ascertain, under Article 8 of the Convention, that there were adequate and effective safeguards against abuses of such systems. Furthermore, in the cases of *Kokkinakis* and *Manoussakis* – in which the facts had, however, been different from those of the *Tsavachidis* Case – the Court had had to rule under Article 9 of the Convention on the application of the relevant Greek legislation to the Jehovah's Witnesses. In so doing it had clarified the nature and extent of the Contracting States' obligations in that regard, including payment of compensation. It followed that the case was ripe for a settlement and should be struck out of the list.[529]

In a case where the applicant complained under Articles 8, 13 and 14 of the Convention about the investigation and inquiries into his sexual orientation and about his discharge from the RAF by reason of his homosexuality, the Court noted that it considered the issues raised in its judgment in, *inter alia*, *Smith and Grady*, in which violations of Articles 8 and 13 of the Convention were found. The Court further observed that following that judgment, the policy of the Ministry of Defence was abandoned and homosexuals had been allowed to serve in the United Kingdom is armed forces as from 12 January 2000. Furthermore, the respondent State paid a certain amount in compensation.[530]

In several cases the Court was notified of a friendly settlement reached between the Government and the applicant in respect of the latter's claim under Article 41. When delivering the principal judgment, the Court took formal note of the settlement and concluded that it was appropriate to strike the case out of its list.[531]

Many applications received in Strasbourg allege that the length of domestic criminal, civil or administrative court proceedings has exceeded the 'reasonable time' stipulated

527 Report of 15 March 1985, *Geniets v. Belgium*, D&R 41 (1985), p. 5 (12).

528 Report of 23 January 1987, *Townend v. the United Kingdom*, D&R 50 (1987), p. 36; report of 16 July 1987, *Durairaj and Baker v. the United Kingdom*, D&R 52 (1987), p. 13; report of 16 July 1987, *Family A v. the United Kingdom*, D&R 52 (1987), p. 150.

529 Judgment of 21 January 1999.

530 Judgment of 29 July 2003, *Brown*, para 13.

531 See *e.g.* judgment of 29 September 1987, *Erkner and Hofauer*; judgment of 29 March 1990, *Kostovski*; judgment of 2 September 1996, *Vogt*; judgment of 31 March 1998, *Tsomtsos*.

in Article 6(1) of the Convention (more than 3,129 of a total of 5,307 applications declared admissible between 1955 and 1999). A particularly high number of such applications concerned Italy. Of the applications registered in the period from 1 November 1998 to 31 January 2001, 2,211 were directed against Italy. Of these, 1,5[illegible] related to the length of proceedings. Again, of the 1,085 applications declared admissible in 2000, 486 concerned Italy, of which 428 cases related to this issue. In addition, as of July 2001, there were about 10,000 further provisional applications in total against Italy which fell into this category, of which 3,177 files were ready for registration but could not be processed for lack of human resources at the Registry. In the period from 1 January 1999 to 31 December 2003, 177 of these cases against Italy ended in a friendly settlement in which the Italian Government was prepared to pay a certain amount for just satisfaction.[532]

In a very high number of applications against Turkey the applicants complained in relation to the payment of compensation following the expropriation of their property. They alleged that the compensation they received did not reflect the real increase in inflation during the period between the date the amount was fixed and the date of payment. The great majority of these cases ended by reaching a friendly settlement in which the Turkish Government agreed to pay a certain amount of compensation.

There are also examples of more substantive settlements. In this respect mention could be made of the settlement in the case of *France, Norway, Denmark, Sweden and the Netherlands v. Turkey*, which was accepted by the Commission in 1985. The substantive parts of the settlement included the assurance by the Turkish Government that they would strictly observe their obligations under Article 3 of the Convention, a vague promise concerning the granting of amnesty and – as regards the derogations under Article 15 of the Convention – a reference to an even more vague declaration by the Turkish Prime Minister of 4 April 1985, stating that "I hope that we will be able to lift martial law from the remaining provinces within 18 months."[533] In particular the acceptance by the applicant States of the latter part of the settlement was striking in view of the fact that, when lodging their complaint, the applicant States upheld that a public emergency threatening the life of the nation did not exist in Turkey in 1982. Although the application, as declared admissible, also included alleged violations of the Articles 5, 6, 9, 10, 11 and 17 of the Convention, those provisions were not explicitly mentioned in the settlement.

Due to their rather lenient attitude, the applicant Governments had manoeuvred the Commission into a very difficult position. It may even be argued that the Commission was left with no choice but to accept the settlement. Indeed, in the alternative

[532] See *Survey of Activities of the European Court of Human Rights*, http://www.echr.coe.int/Eng/InfoNotesAndSurveys.htm.

[533] Report of 7 December 1985, D&R 44 (1985), p. 31 (39).

the case would have been decided by the Committee of Ministers – Turkey had not recognised the jurisdiction of the Court at that time – in which case the applicant States and Turkey would obviously have played a prominent if not decisive role. Be this as it may, it does not turn the settlement into one which was reached 'on the basis of respect for Human Rights as defined in this Convention.' It is, therefore, questionable whether the Commission sufficiently upheld this requirement of former Article 28(1)(*b*). It is submitted that the Commission should at least have insisted on a stricter type of supervision over the observance by Turkey regarding its commitments under the settlement. With respect to Article 15, as well as to the granting of amnesty, there was in fact no supervision at all: the Turkish Government only undertook to keep the Commission informed of further developments. As far as Article 3 was concerned, supervision was confined to a commitment by Turkey to submit three reports under former Article 57 during 1986, to enter into a dialogue with the Commission on each of those reports, and to prepare a short final report on the implementation of the settlement no later than 1 February 1987. All this, moreover, was to be conducted in a confidential manner.[534] As was to be expected, these supervisory arrangements turned out to be inadequate. Although martial law was lifted in Turkey in the course of 1987, allegations of serious violations of human rights continued.[535]

After Turkey had accepted the right of individual petition and the compulsory jurisdiction of the Court in 1989, many applications were brought against Turkey alleging violations of Article 2 and 3 of the Convention. Several cases ended in a friendly settlement. In some of those the Court accepted the friendly settlement. The Court stated that, in view of its responsibilities under Article 19 of the Convention, it would nevertheless be open to the Court to proceed with its consideration of the case if a reason of public policy (*ordre public*) appeared to necessitate such a course, but that it discerned no such reason.[536] In other cases the Turkish Government accepted that the use of excessive or disproportionate force resulting in death constitutes a violation of Article 2 of the Convention and undertook to issue appropriate instructions and adopt all necessary measures to ensure that the right to life – including the obligation to carry out effective investigations – would be respected in the future. In fact, new legal and administrative measures were adopted which resulted in a reduction in the occurrence of deaths in circumstances similar to those of the application referred to here, as well as more effective investigations.[537] In the case of *Denmark v. Turkey* the Court observed that the friendly settlement, *inter alia*,

[534] *Ibidem*.

[535] See Amnesty International, *Turkey, Brutal and Systematic Abuse of Human Rights*, London, 1989.

[536] Judgment of 3 October 1997, *Sur*, para 31; judgment of 25 September 2001, *Ercan*, para. 29; judgment of 31 October 2001, *Saki*, para. 14; judgment of 9 April 2002, *Toğcu*, para. 37; judgment of 19 June 2003, *Ulku Dogan and Others*, para. 21.

[537] Judgment of 26 June 2001, *Akman*, para 31; judgment of 26 November 2002, *Yakar*, para. 32; judgment of 15 July 2004, *Örnek and Eren*, para 24; judgment of 27 July 2004, *Çelik*, para. 16.

made provision for the payment of a sum of money to the applicant Government as
included a statement of regret by the respondent Government concerning the
occurrence of occasional and individual cases of torture and ill-treatment in Turkey
which emphasised, with reference to Turkey's continued participation in the Council
of Europe's police-training project, the importance of the training of Turkish police
officers, and provided for the establishment of a new bilateral project in this area.
Furthermore, it had been decided to establish a continuous Danish-Turkish political
dialogue that would also focus on human rights issues and within which individual
cases might be raised. The Court also took note of the changes to the legal and
administrative framework which had been introduced in Turkey in response to
instances of torture and ill-treatment as well as the respondent Government's
undertaking to make further improvements in the field of human rights – especially
concerning the occurrence of incidents of torture and ill-treatment – and to continue
their co-operation with international human rights bodies, in particular the Committee
for the Prevention of Torture. Against that background the Court was satisfied that
the settlement was based on respect for human rights as defined in the Convention
or its Protocols.[538]

In cases of deportation or extradition, a friendly settlement may sometimes lead
to an immediate solution. The threatened deportation of a South African who had
gone into exile, allegedly for political reasons, raised questions in connection with the
prohibition of degrading and inhuman treatment set forth in Article 3 of the Con-
vention. This case was eventually resolved because the Belgian authorities provided
the applicant with the documents required for emigration to Senegal as desired by him
and paid his travelling expenses.[539] In another case a Jordanian citizen had been
expelled to Jordan after the Commission had decided, in accordance with Rule 36 of
the Commission's Rules of Procedure, to indicate to the Swedish Government that
it was desirable in the interest of the parties and the proper conduct of the proceedings
before the Commission not to deport the applicant to Jordan until the Commission
had had an opportunity to examine the application at its forthcoming session. In the
settlement reached the applicant was granted permission to return to Sweden and to
reside in Sweden permanently.[540] Complaints concerning inhuman treatment and a
breach of the right to respect for family life were raised in a similar case against Sweden
by a 12-year-old Lebanese boy whose deportation was at issue. The application also
was originally filed on behalf of his two elder brothers who had already been deported
from Sweden. Under the terms of the friendly settlement that was eventually arrived
at, the Swedish Government agreed to grant permission to the applicant's brothers
to reside and work in Sweden, their travel expenses being paid by the Government,

538 Judgment of 5 April 2000, paras 24-25.
539 Report of 17 July 1980, *Giama v. Belgium*, D&R 21 (1982), p. 73.
540 Report of 7 December 1989, *Mansi v. Sweden*, D&R 64 (1990), p. 253(258).

to make an *ex gratia* payment as well as a payment for legal expenses, and to revise the relevant regulations concerning expulsion.[541] In the case of *Yang Chun Jin Alias Yang Xiaolin v. Hungary* the applicant alleged that, if extradited to China, he risked having an unfair trial, being detained under harsh conditions, being subjected to torture, or being sentenced to death. Noting that the Hungarian Minister of Justice had decided to refuse the applicant's extradition to China and that he had left Hungary for Sierra Leone, the Court found that the applicant was no longer threatened with extradition to China from Hungary and that the matter was resolved.[542]

Friendly settlements can also be found in which there is, apart from financial compensation, the willingness on the part of the respondent State to amend the legislation which gave rise to the complaint. In a case concerning the refusal to grant legal aid for appeal against a sentence the Government of the United Kingdom issued a practice note to all appeal court chairmen and clerks opening the possibility of review in cases where legal aid had been refused and the court concerned considered that, *prima facie*, an appellant might have substantial grounds for lodging the appeal.[543] In the *Gussenbauer* Case against Austria the settlement resulted in radical changes to the Austrian system of counsel assigned to prisoners.[544] In the *Zimmermann* Case the Austrian Government was willing to propose to the Federal President to quash, by an act of grace, the conditional prison sentence of seven months imposed on Zimmermann by the Vienna Regional Court. In this case financial compensation was also offered.[545] In the *Selim* Case the applicant wished to contract a civil marriage with a Romanian citizen. The Municipality of Nicosia informed the applicant that Section 34 of the Marriage Act did not allow a Turkish Cypriot professing the Muslim faith to contract a civil marriage. The applicant was thus forced to marry in Romania without any of his family or friends being able to attend. The case ended in a friendly settlement. The Court took note of the agreement reached between the Government and the applicant. It noted, in addition, that new legislation had been enacted, which provided for the application of the Marriage Act Cap. 279 to members of the Turkish Community, thus conferring on them the right to marry. It further noted that a new law (The Civil Marriage Act 2002), which would apply to all Cypriots without distinction of origin, was also to be tabled in Parliament for enactment.[546]

541 Report of 8 December 1984, *Bulus v. Sweden*, D&R 39 (1984), p. 75 (78-79). See also the report of 7 October 1986, *Min, Min and Min Paik v. the United Kingdom*, D&R 48 (1986), p. 58, and the report of 4 July 1991, *Fadelle v. the United Kingdom*, D&R 70 (1991), p. 159 (162).
542 Judgment of 8 March 2001; see also judgment of 21 December 2001, *K.K.C. v. the Netherlands*.
543 Report of 13 February 1992, *Higgins v. the United Kingdom*, D&R 73 (1992), p. 95 (97-98).
544 Report of 8 October 1974, *Gussenbauer v. Austria*, Yearbook XV (1972), p. 558.
545 Report of 6 July 1982, *Zimmermann v. Austria*, D&R 30 (1983), p. 15 (20).
546 Judgment of 16 July 2002, para. 16

In some cases considerations of public interest also play a part, especially in relation to the prospect that the challenged law will be amended. In the *Alam* Case in which a complaint was lodged, *inter alia*, about Article 6(1), the Commission included in its considerations the fact that the British Government had introduced Bills in which aliens were granted the right to appeal against decisions of immigration officers. Again, in a case against Austria concerning Article 6(1) the principal element of the settlement reached was the fact that the Government had proposed an amendment of the law as a result of which detained persons henceforth could also be present at hearings where an appeal lodged to their detriment was dealt with.[548] In two other cases the friendly settlement included the readiness on the part of the Governement of the United Kingdom to amend prison administrative practices in order to inform a prisoner's relatives in due time of his imminent transfer to another prison,[549] and to better safeguard the prisoners' right to respect for their correspondence.[550]

In a complaint against the United Kingdom the applicant, in addition to alleging violation of his right to respect for his family life and home as a result of noise and vibration nuisance, complained that this also affected his property located a quarter of a mile from Heathrow Airport. The matter was settled by an *ex gratia* payment by the Government.[551]

In a number of cases, matters of family law were at issue. In two of these cases, both against Sweden, the applicants complained about the taking into public care of their respective children. Due to the fact that in both cases the children had in the meantime been returned to their mothers, they could be settled on the basis of compensation paid by the Government.[552]

2.3.5.4 Other forms of similar arrangements

Apart from the friendly settlement referred to in Article 37(1)(b) the parties sometimes reach a settlement of the dispute themselves. In those cases the applicant withdraws his complaint after having come to some kind of arrangement with the Government concerned.[553]

A well-known example is the *Televizier* Case. In that case the applicant, who was the owner of a radio and T.V magazine, complained about violation of the freedom of expression (Article 10) and about discriminatory treatment (Article 14) in connection with a judgment of the Dutch Supreme Court, which was based on the Copyright Act. The case concerned information provided and comments given on radio and television programmes, for which use had been made of summaries of programmes of the Central Broadcasting Bureau in the Netherlands. Some years after the application had been submitted the parties informed the Commission that they had arrived at an arrangement and that the applicant wished to withdraw the application. Televizier had meanwhile concluded an agreement with one of the broadcasting organisations about the publication of the latter's radio and TV guide.[554] In the Case of *Denmark, Norway and Sweden v. Greece* the Commission took note of the Parties' concordant requests that the proceedings should be closed. It found that the texts of the relevant provisions of Greek law were sufficient to show that remedies were open in Greece to persons claiming to have been victim of political prosecution under the former regime and that these remedies also provided compensation. It decided to close the proceedings in this case and to strike it off its list.[555]

In cases like these the Commission was (and the Court is) willing to accept the withdrawal of the application and to strike the case off the list only if considerations of public interest do not oppose to its doing so. Thus, in the *Gericke* Case the Commission at first refused to agree to the withdrawal of the application on the ground that "the present application raises problems of individual freedom involved in the application of Article 5, paragraph 3, of the Convention, which may extend beyond the interests of the particular applicants."[556] After the adoption of its report in the *Wemhoff* Case[557] in May 1966, the Commission discontinued the procedure in the case of *Gericke*, who had been condemned as an accomplice of Wemhoff, because it held that reasons of public interest no longer made it necessary to examine the case any further.[558] A number of other cases were terminated because the issue(s) at stake had in the meantime been decided by the Court in comparable cases.[559] In some cases the main element of the informal settlement consisted of an amendment of the legislation which was the cause of the alleged violation.[560]

There is also a possibility that the Court may decide to strike a case off the list of cases if a solution is reached by way of a unilateral measure. In accordance with Article

547 Report of 17 December 1968, *Mohammed Alam v. the United Kingdom*, Yearbook X (1967), p. 478.
548 Report of 13 October 1981, *Peschke v. Austria*, D&R 25 (1982), p. 182.
549 Report of 15 May 1986, *Seale v. the United Kingdom*, D&R 50 (1987), p. 70.
550 Report of 15 May 1986, *McComb v. the United Kingdom*, D&R 50 (1987), p. 81.
551 Report of 8 July 1987, *Baggs v. the United Kingdom*, D&R 52 (1987), p. 29.
552 Report of 10 October 1986, *Aminoff v. Sweden*, D&R 48 (1986), p. 82; and report of 10 October 1986, *Widén v. Sweden*, *Ibidem*, p. 93.
553 Rule 43(1) of the Rules of Court.
554 Report of 3 October 1968, *N.V. Televizier v. the Netherlands*, Yearbook XI (1968), p. 783.
555 Report of 4 October 1976, D&R 6 (1977), p. 5 (8).
556 Report of 22 July 1966, *Gericke v. Federal Republic of Germany*, Yearbook VIII (1965), p. 314 (320).
557 Report of 1 April 1966, B.5 (1969).
558 See Council of Europe, *Stock-Taking on the European Convention on Human Rights* (1954-1984), Strasbourg, 1984, p. 145.
559 Report of 9 May 1987, *Bozano v. Switzerland*, D&R 52 (1987), p. 5 (11); the case was terminated after the Court's *Sanchez-Reisse* judgment, while the Case of *Scotts' of Greenock Ltd and Lithgow Ltd v. the United Kingdom*, report of 5 March 1987, D&R 51 (1987), p. 34 (37), was withdrawn on the basis of the *Lithgow* judgment.
560 Appl. 10664/83, *Bowen v. Norway*, D&R 45 (1986), p. 158 (161); see also the report of 7 May 1986, *Prasser v. Austria*, D&R 46 (1986), p. 81.

37(1)(c) the Court may at any stage of the proceedings decide to strike an applicat... off its list of cases where the circumstances lead to the conclusion that it is no lon... justified to continue the examination of the application. The Court may, howev... decide to restore the case to the list again if new circumstance justify this. Thus, in one... case the applicant complained that, if he was deported to what was formerly Zair... would amount to treatment contrary to Article 3 of the Convention, as it would redu... his life expectancy because he would not receive the medical treatment his condition... demanded. The Government invited the Court to strike the case off the list. The... relied on two factors of which the Commission had been unaware, since the relevan... information had been communicated to it on the day its report had been adopted... the Versailles Administrative Court had quashed the decision to enforce the order... excluding the applicant from French territory, while a compulsory residence order... had been made. Those measures meant that the applicant no longer risked being... deported to the Democratic Republic of Congo and was no longer a 'victim'. The... Court noted that there had been no friendly settlement or arrangement in the instant... case. The compulsory residence order made was unilateral in character and issued by... the French authorities after the Commission had adopted its report. It considered, ... however, that the order constituted an 'other fact of a kind to provide a solution of... the matter'. Accordingly, it was appropriate to strike the case out of the list. The Court... however, reserved the power to restore it to the list if new circumstances were to arise... justifying such a measure.[561]

As described above,[562] in the cases of *Aydin*,[563] *Akman*[564] and *Tahsin Acar*[565] the applicants did not agree to a friendly settlement of the case. The Court held that having examined the terms of the respondent Government's declaration carefully and having regard to the nature of the admissions contained in the declaration as well as the scope and extent of the various undertakings referred to therein, together with the amount of compensation proposed, it considered that it was no longer justified to continue the examination of the applications. In the case of *Tahsin Acar* the Grand Chamber held that, under certain circumstances, it might be appropriate to strike out an application under Article 37(1)(c) of the Convention on the basis of a unilateral declaration by the respondent Government even if the applicant wished the examination of the case to be continued. It will, however, depend on the particular circumstances whether the unilateral declaration offers a sufficient basis for finding that

561 Judgment of 7 September 1998, *B.B. v. France*, para 37.
562 See *supra* 2.3.3.
563 Judgment of 10 July 2001, para. 15.
564 Judgment of 26 June 2001, para 30.
565 Judgment of 29 April 2002, para. 65.

respect for human rights as defined in the Convention does not require the Court to continue its examination of the case.[566]

As a non-exhaustive list the Court indicated that relevant factors for deciding whether a unilateral declaration is sufficient to decide to strike a case off the list of cases include the nature of the complaints made, the question of whether the issues raised are comparable to issues already determined by the Court in previous cases, the nature and scope of any measures taken by the respondent Government in the context of the execution of judgments delivered by the Court in any such previous cases, and the impact of these measures on the case at issue. It may also be material whether the facts are in dispute between the parties, and if so to what extent, and what *prima facie* evidentiary value is to be attributed to the parties' submissions on the facts. In that connection it will be of significance whether the Court itself has already taken evidence in the case for the purposes of establishing disputed facts. Other relevant factors may include the question of whether in their unilateral declaration the respondent Government has made any admission(s) in relation to the alleged violations of the Convention, and if so, the scope of such admissions and the manner in which they intend to provide redress to the applicant. As to the last-mentioned point, in cases in which it is possible to eliminate the effects of an alleged violation (as, for example, in some property cases) and the respondent Government declares its readiness to do so, the intended redress is more likely to be regarded as appropriate for the purposes of striking out the application, although the Court, as always, retains its power to restore the application to its list as provided in Article 37(2) of the Convention and Rule 43(5) of the Rules of Court.[567]

A full admission of liability in respect of an applicant's allegations under the Convention cannot be regarded as a condition *sine qua non* for the Court to be prepared to strike an application out on the basis of a unilateral declaration by a respondent Government. However, in cases concerning persons who have disappeared or have been killed by unknown perpetrators and where there is *prima facie* evidence in the case-file supporting allegations that the domestic investigation fell short of what is necessary under the Convention, a unilateral declaration should at the very least contain an admission to that effect, combined with an undertaking by the respondent Government to conduct, under the supervision of the Committee of Ministers in the context of the latter's duties under Article 46(2) of the Convention, an investigation that is in full compliance with the requirements of the Convention.[568]

In the *Kalanturi* Case the applicant complained that his expulsion to Iran would expose him to a risk of inhuman and degrading treatment contrary to Article 3 of the Convention. The Government took the position that, since the Federal Office for

566 Judgment of 6 May 2003, para. 75.
567 *Ibidem*, para 76.
568 *Ibidem*, para 84.

Refugees had set aside its decision of 31 August 1998 and ruled that there were [illegible] to the applicant's expulsion under section 53(4) of the Aliens Act, the applicant [illegible] now fully protected against an expulsion to Iran in breach of Article 3 of the [illegible] vention. The new decision could only be set aside by the Federal Office for Refug[illegible] itself and, in such event, an appeal would be available to the administrative cou[illegible] Furthermore, the federal government as such could not give assurances concern[illegible] the grant of a residence permit, as the issue of such permits was the responsibility [illegible] the relevant *Länder* authorities. The Court held that the decision of the Federal Of[illegible] for Refugees was binding on the Aliens Office and might only be set aside by [illegible] Federal Office for Refugees itself; an appeal would lie to the administrative cou[illegible] against any new decision. In light of the Federal Office for Refugees' decision, [illegible] continued examination of the application was no longer justified.[569]

2.3.5.5 Non-compliance with the terms of a friendly settlement

There is no express provision in the Convention concerning non-compliance. It would seem to be possible for one of the Contracting States to submit a complaint concerning non-compliance with a friendly settlement to the Committee of Ministers. In fact, as members of the Council of Europe the Contracting States may take the initiative for the much more far-reaching procedure of expulsion of a Member State from the organisation under Article 8 of the Statute of the Council of Europe, when the latter has seriously violated its engagements concerning human rights and fundamental freedoms. Therefore, they must certainly also be considered as being authorised to put non-compliance with a friendly settlement before the Committee of Ministers in order to try, through that organ, to induce the State in question to comply with its obligations under the settlement. In view thereof it would be advisable for the Committee of Ministers, when stating that no further steps in the respective case are necessary in view of the settlement reached, to reserve to itself the right to take appropriate measures at a later date should one of the parties not comply with its obligations. Since the entry into force of Protocol No.11 a practice has been developed by which the Court endorses friendly settlements through *judgments* and not – as provided for in Article 39 of the Convention – through *decisions*, whose execution are not subject to supervision by the Committee of Ministers.

Under Protocol No. 14 the new Article 39 will expressly provide for supervision of the execution of friendly settlements by the Committee of Ministers. According to the *Explanatory Report to Protocol No. 14* this amendment is in no way intended to reduce the Committee's present supervisory powers, particularly concerning the striking out decisions covered by Article 37. It would be advisable for the Committee of Ministers to distinguish more clearly, in its practice, between its supervision function

[569] Judgment of 11 October 2001, paras 52-57.

by virtue of the new Article 39, paragraph 4 (friendly settlements), on the one hand, and that under Article 46, paragraph 2 (execution of judgments), on the other.[570]

A non-official settlement may also be reached when the Court's examination of the merits is quite complete, or almost so. It must, therefore, be determined for each individual case what is the best solution if such a settlement is not complied with by the Contracting State in question: supervision by the Committee of Ministers, or restoration of the application to the list. When a thorough examination of the merits has not yet taken place, it would seem to be most appropriate for the Court to place the case on the list of cases again when 'the circumstances of the case as a whole justify such restoration.' The consequence of this is that the original application as a whole is resuscitated, so that no additional difficulties may arise in connection with the admissibility conditions. Here again, however, the Court will first have to ascertain whether the settlement has really not been complied with, and it will, therefore, have to give the State concerned an opportunity to prove the contrary.

2.4 PROCEEDINGS BEFORE THE GRAND CHAMBER

2.4.1. GENERAL

The Grand Chamber has competence both with regard to inter-State applications referred to it under Article 30 or Article 43 of the Convention as well as to individual applications when they are referred to it under Article 30 or Article 43. The Grand Chamber is also competent to consider requests for advisory opinions, a function which the plenary Court carried out under the former system.[571] In cases with specified serious implications a Chamber will be able to relinquish jurisdiction *proprio motu* in favour of the Grand Chamber at any time, as long as it has not yet rendered judgment, unless one of the parties to the case objects.[572] Such relinquishment should also speed up proceedings. Once a judgment has been rendered by a Chamber, any of the parties may request that the case be referred to the Grand Chamber for a re-hearing.[573]

[570] *Explanatory Report to Protocol No. 14*, para 94.
[571] Rule 88 of the Rules of Court.
[572] Rule 72 of the Rules of Court.
[573] Rule 73 of the Rules of Court.

2.4.2 RELINQUISHMENT OF JURISDICTION IN FAVOUR OF THE GRAND CHAMBER

In accordance with Article 30 of the Convention, where a case pending before a Chamber raises a serious question affecting the interpretation of the Convention or the Protocols thereto or where the resolution of a question before it might have a result inconsistent with a judgment previously delivered by the Court, the Chamber may at any time before it has rendered its judgment, relinquish jurisdiction in favour of the Grand Chamber, unless one of the parties to the case has objected in accordance with paragraph 2 of this Rule. Reasons need not be given for the decision to relinquish.[574] Conferring a veto right on the parties keeps open the possibility for their case to receive a handling in two instances. However, the objection against relinquishment of jurisdiction has to be duly reasoned; otherwise it will be considered invalid.[575]

2.4.3 REFERRAL TO THE GRAND CHAMBER

In accordance with Article 43(1) of the Convention within a period of three months from the date of the judgment of the Chamber, any party to the case may, in exceptional cases, request that the case be referred to the Grand Chamber. A re-hearing of the case, as envisaged in Article 43, will take place only exceptionally, when a case raises a serious question affecting the interpretation or application of the Convention or a serious issue of general importance.[576] The purpose is to ensure the quality and consistency of the Court's case law by allowing for a re-examination of the most important cases. The intention is that these conditions will be applied in a strict sense.[577]

The party must specify in its request the serious question affecting the interpretation or application of the Convention or the Protocols thereto, or the serious issue of general importance, which in its view warrants consideration by the Grand Chamber.[578]

According to the *Explanatory Report to Protocol No. 11* serious questions affecting the interpretation of the Convention are involved when a question of importance not yet decided by the Court is at stake, or when the decision is of importance for future cases and for the development of the Court's case law. Moreover, a serious question may be particularly evident when the judgment concerned is not consistent with the previous judgment of the Court. A serious question concerning the application of the

574 Rule 72(1) of the Rules of Court.
575 Rule 72(2) of the Rules of Court.
576 Article 43(2) of the Convention and Rule 73(2) of the Rules of Court.
577 *Explanatory Report to Protocol No. 11*, para. 99. See in this respect Article 43(1) of the Convention and Rule 73(1) of the Rules of Court, where the term 'exceptionally' has been used.
578 Rule 73(1) of the Rules of Court.

Convention may be at stake when a judgment necessitates a substantial change of national law or administrative practice but does not itself raise a serious question of interpretation of the Convention. A serious issue of general importance could involve a substantial political issue or an important issue of policy.[579]

A request for a re-hearing may concern the admissibility as well as the merits of a case. A request may also be made if a party to the case has a disagreement with respect to a judgment concerning the award of just satisfaction under Article 41 of the Convention.[580]

In order to ensure that the parties are in a position to observe the time limit of three months from the date of delivery of the judgment, they will be informed about the date on which the judgment is delivered. A panel of five judges of the Grand Chamber decides on the acceptance of the request. If the request is accepted, the Grand Chamber has to make the final determination as to whether the Convention has been violated after written and, if the Court so decides, oral proceedings. If the conditions for a request of referral are not met, the panel rejects the request and the Chamber's judgment becomes final. It will accept the request only if it considers that the case does raise a serious question as defined in Article 43(2). Reasons need not be given for a refusal of the request.[581] In practice it seems to be rather difficult to have a case be referred to the Grand Chamber. In the period from 1 January 2000 to 31 December 2003 only 26 requests were accepted.[582]

In the *Pisano* Case the Italian Government asked the Grand Chamber to review the decision of the panel of five judges to accept the request for referral. They argued that the request did not satisfy the conditions laid down in Article 43 of the Convention. In the Government's submission the case did not raise any serious questions affecting the interpretation or application of the Convention, or indeed any serious issues of general importance. They emphasised that the applicant had not produced any evidence to suggest that it did but had merely referred to the dissenting opinion appended to the Chamber judgment. The latter opinion, however, was not sufficient to justify a rehearing of the case as it did not in any way call into question the manner in which Article 6 of the Convention had been construed. Lastly, the Government argued that the Grand Chamber, seeing that it had the final say about its own jurisdiction and whether it had been validly seized, was not bound by the opinion of the five judges. The Grand Chamber noted that neither the Convention nor the Rules of Court empowered it to review a decision by the panel to accept a request for a rehearing. What is more, the terms of Article 43(3) of the Convention provide as follows: 'If the panel accepts the request, the Grand Chamber shall decide the case by means

579 *Explanatory Report to Protocol No. 11*, paras 100-102.
580 Judgment of 28 May 2002, *Kingsley*, para. 7
581 Rule 73(2) of the Rules of Court.
582 See Grand Chamber, Annual Activity Reports 2000-2003.

of a judgment' and thus make it clear that, once the panel has accepted a request [illegible] a rehearing, the Grand Chamber has no option but to examine the case.[583]

2.4.4 THE PROCEDURE BEFORE THE GRAND CHAMBER

According to Rule 71(1) of the Rules of Court, any provisions governing proceedings before the Chambers shall apply, *mutatis mutandis*, to proceedings before the Grand Chamber.

Where a case has been submitted to the Grand Chamber either under Article [illegible] or under Article 43 of the Convention, the President of the Grand Chamber designates as Judge Rapporteur(s) one or, in the case of an inter-State application, one or more of its members.[584] The Judge Rapporteur of the Grand Chamber is always a judge other than the judge elected in respect of the respondent Party. The proceedings of the Grand Chamber are normally written proceedings but, if the Court so decides, oral proceedings may be held. The powers conferred on a Chamber in relation to the holding of a hearing may, in proceedings before the Grand Chamber, also be exercised by the President of the Grand Chamber.[585] From the text of Article 31(a) of the Convention it may be deduced that, if the decision to relinquish jurisdiction in favour of the Grand Chamber is taken before a decision as to admissibility has been taken, the Grand Chamber will also decide on admissibility. After all, in accordance with Article 35(4) of the Convention, the Court rejects any application which it considers inadmissible. It may do so at any stage of the proceedings. At this stage third party intervention is also possible.[586]

As holds good for the Chambers of the Court, the Grand Chamber must assess the facts as they appear at the time of its decision by applying the appropriate legal solution. Once a case is referred to it, the Grand Chamber deals with the case afresh and may employ the full range of judicial powers conferred on the Court.[587] In this respect the Court held: "The Court would first note that all three paragraphs of Article 43 use the term 'the case' ('*l'affaire*') for describing the matter which is being brought before the Grand Chamber. In particular, paragraph 3 of Article 43 provides that the Grand Chamber is to 'decide *the case*' – that is the whole case and not simply the 'serious question' or 'serious issue' mentioned in paragraph 2 – 'by means of a judgment'. The wording of Article 43 makes it clear that, whilst the existence of a serious question affecting the interpretation or application of the Convention or the Protocols thereto, or a serious issue of general importance' (paragraph 2) is a

583 Judgment of 24 October 2002, para. 26.
584 Rule 50 of the Rules of Court.
585 Rule 71(2) of the Rules of Court.
586 Rule 44 (3) of the Rules of Court.
587 Judgment of 24 October 2002, *Pisano*, para. 28.

prerequisite for acceptance of a party's request, the consequence of acceptance is that the whole 'case' is referred to the Grand Chamber to be decided afresh by means of a new judgment (paragraph 3). The same term 'the case' ('*l'affaire*') is also used in Article 44 para. 2 which defines the conditions under which the judgments of a Chamber become final. If a request by a party for referral under Article 43 has been accepted, Article 44 can only be understood as meaning that the entire judgment of the Chamber will be set aside in order to be replaced by the new judgment of the Grand Chamber envisaged by Article 43 para. 3. This being so, the 'case' referred to the Grand Chamber necessarily embraces all aspects of the application previously examined by the Chamber in its judgment, and not only the serious 'question' or 'issue' at the basis of the referral. In sum, there is no basis for a merely partial referral of the case to the Grand Chamber."[588]

The Grand Chamber may also re-examine, where appropriate, issues relating to the admissibility of the application in the same manner as this is possible in normal Chamber proceedings, for example by virtue of Article 35(4) *in fine* of the Convention.[589]

The Grand Chamber may likewise be required to apply other provisions of the Convention that enable it to terminate the proceedings by a means other than a judgment on the merits, for example by approving a friendly settlement (Article 39 of the Convention) or striking the application off the list of cases (Article 37).

2.5 JUDGMENT OF THE COURT

Where the Chamber finds that there has been a violation of the Convention or the Protocols thereto, it gives in the same judgment a ruling on the application of Article 41 of the Convention if that question, after being raised in accordance with Rule 60 of the Rules of Court, is ready for decision. If the question is not ready for decision, the Chamber reserves it in whole or in part and fixes the further procedure.[590]

According to Article 42 in conjunction with Article 44(2) of the Convention, judgments of Chambers become final (a) when the parties declare that they will not request that the case be referred to the Grand Chamber; or (b) three months after the date of the judgment, if reference of the case to the Grand Chamber has not been requested; or (c) when the panel of the Grand Chamber rejects the request to refer the case to the Grand Chamber. According to Article 44(1) of the Convention, the judgment of the Grand Chamber is final. Judgments have to be reasoned (Article 45,

588 Judgment of 12 July 2001, *K. and T. v. Finland*, para. 140; judgment of 11July 2002, *Göc*, para. 36; judgment of 24 October 2002, *Pisano*, para. 28; judgment of 6 May 2003, *Perna*, para.23; judgment of 6 May 2003, *Tahsin Acar*, para.63; judgment of 28 April 2004, *Azinas*, para. 32.
589 Judgment of 28 April 2004, *Azinas*, para. 32.
590 Rule 75(1) of the Rules of Court.

paragraph 1). This article does not concern decisions taken by the panel of five judges of the Grand Chamber in accordance with Article 43, nor Committee decisions on admissibility under Article 28.

The judgment will be transmitted to the parties but will not be published until it has become final (Article 44, paragraph 3). Unless the Court decides that a judgment will be given in both official languages, all judgments will be given either in English or in French.[591] According to Rule 77 of the Rules of Court the judgment may be read out at a public hearing by the President of the Chamber or by another judge delegated by him or her. The Agents and representatives of the parties are informed in due time of the date of the hearing. Final judgments of the Court are published under the responsibility of the Registrar in an appropriate form. In addition, the Registrar is responsible for the publication of official reports of selected judgments and decisions and of any document which the President of the Court considers it useful to publish.[592]

According to Article 46, the High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties. The final judgment is transmitted to the Committee of Ministers, which will supervise its execution.

With respect to the binding force and execution of judgments, Protocol No. 14 will amend Article 46 of the Convention. Three new paragraphs will be added to Article 46. The new Article 46, in its paragraph 3, will empower the Committee of Ministers to ask the Court to interpret a final judgment for the purpose of facilitating the supervision of its execution. The Committee of Ministers' experience of supervising the execution of judgments shows that difficulties are sometimes encountered due to disagreement as to the interpretation of judgments. The Court's reply settles any argument concerning a judgment's exact meaning. The qualified majority vote required on the part of the Committee of Ministers by the last sentence of paragraph 3 shows that the Committee of Ministers should use this possibility sparingly in order to avoid over-burdening the Court. The aim of the new paragraph 3 is to enable the Court to give an interpretation of a judgment, not to pronounce on the measures taken by a High Contracting Party to comply with that judgment. No time-limit has been set for making requests for interpretation, since a question of interpretation may arise at any time during the Committee of Ministers' examination of the execution of a judgment.

The Court is free to decide on the manner and form in which it wishes to reply to the request. Normally, it would be for the formation of the Court which delivered the original judgment to rule on the question of interpretation. More detailed rules governing this new procedure may be included in the Rules of Court.[593]

591 Rule 76 of the Rules of Court.

592 Rule 78 of the Rules of Court.

593 *Explanatory Report to Protocol No. 14*, paras 96-97.

Paragraphs 4 and 5 of Article 46 will empower the Committee of Ministers to bring infringement proceedings before the Court. The Court will sit as a Grand Chamber,[594] having first served the State concerned with notice to comply. The Committee of Ministers' decision to do so requires a qualified majority of two thirds of the representatives entitled to sit on the Committee. This infringement procedure does not aim to reopen the question of violation, already decided in the Court's first judgment. Nor does it provide for payment of a financial penalty by a High Contracting Party found in violation of Article 46, paragraph 1. It is felt that the political pressure exerted by proceedings for non-compliance in the Grand Chamber and by the latter's judgment should suffice to secure execution of the Court's initial judgment by the state concerned.[595]

In fulfilling its supervisory task the Committee of Ministers has invited the Court to identify, as far as possible, in its judgments in which a violation of the Convention is found, what it considers to be an underlying systemic problem and the source of this problem, particularly when it is likely to give rise to numerous applications, so as to assist States in finding the appropriate solution and the Committee of Ministers in supervising the execution of judgments.[596]

In this respect the Court held in the *Broniowski* Case that above all the measures adopted must be such as to remedy the systemic defect underlying the Court's finding of a violation so as not to overburden the Convention system with large numbers of applications deriving from the same cause. Such measures should, therefore, include a scheme which offers redress to those affected for the Convention violation identified in the instant judgment in relation to the present applicant. In this context the Court's concern is to facilitate the most speedy and effective resolution of a dysfunction established in national human rights protection. Once such a defect has been identified, it falls to the national authorities, under the supervision of the Committee of Ministers, to take, retroactively if appropriate, the necessary remedial measures in accordance with the subsidiary character of the Convention, so that the Court does not have to repeat its finding in a lengthy series of comparable cases. The Court held that, with a view to assisting the respondent State in fulfilling its obligations under Article 46, the Court has sought to indicate the type of measure that might be taken by the Polish State in order to put an end to the systemic situation identified in the present case. The Court was not in a position to assess whether the December 2003 Act can be treated as an adequate measure in this connection since no practice of its implementation has been established as yet. In any event, this Act does not cover persons who – like Mr Broniowski – had already received partial compensation, irre-

594 New Article 31(b).

595 *Explanatory Report to Protocol No. 14*, para 98.

596 Resolution Res. (2004) 3 van 12 May 2004 on judgments revealing an underlying systemic problem.

spective of the amount of such compensation. Thus, it was clear that for this g... of Bug River claimants the Act could not be regarded as a measure capable of pu... an end to the systemic situation identified in the present judgment as adversely af... ting them. Nevertheless, as regards general measures to be taken, the Court consid... that the respondent State must, primarily, either remove any hindrance to the imp... mentation of the right of the numerous persons affected by the situation found ... respect of the applicant, to have been in breach of the Convention, or provide eq... valent redress in lieu. As to the former option, the respondent State should, therefo... through appropriate legal and administrative measures secure the effective a... expeditious realisation of the entitlement in question in respect of the remaining B... River claimants, in accordance with the principles for the protection of property right... laid down in Article 1 of Protocol No. 1, having particular regard to the principles ... relating to compensation.[597] Since the applicant belonged to a fairly large group o... victims of similar violations, on 4 July 2004 the Court used the 'leading case' procedu... for the first time, whereby examination of the many similar cases is being suspende... until the required measures have been taken. This procedure is one of the means ... chosen to reduce the Court's workload.[598]

In the *Sejdovic* Case the Court held that the infringement of the applicant's right ... to a fair trial had originated in a problem resulting from Italian legislation on the ... question of trial *in absentia* and had been caused by the wording of the provisions of ... the CCP relating to the conditions for lodging an application for the lifting of a ... procedural bar. There was a shortcoming in the Italian legal system which meant that ... every person convicted *in absentia* who had not been effectively informed of the ... proceedings against him could be deprived of a retrial. The Court considered that the ... shortcomings of domestic law and practice revealed in the present case could lead to ... a large number of well-founded applications in the future. Italy had a duty to remove ... every legal obstacle that might prevent either the reopening of the time allowed for ... an appeal or a retrial in the case of every person convicted by default who, not having ... been effectively informed of the proceedings against him, had not unequivocally ... waived the right to appear at his own trial. Such persons would thus be guaranteed ... the right to obtain a new ruling on the charges brought against them from a court ... which had heard them in accordance with the requirements of Article 6 of the Con... vention. Consequently, Italy should take appropriate measures to make provision for ... and regulate further proceedings capable of effectively securing the right to the ... reopening of proceedings, in accordance with the principles of the protection of the ... rights enshrined in Article 6 of the Convention.[599]

[597] Judgment of 22 June 2004, paras 193-194.
[598] Human Rights Information Bulletin, H Inf (2005) 1, p. 23.
[599] Judgment of 10 November 2004, paras 46-47.

According to the *Explanatory Report to Protocol No. 14* the Committee of Ministers should bring infringement proceedings only in exceptional circumstances. Nevertheless, it appeared necessary to give the Committee of Ministers, as the competent organ for supervising execution of the Court's judgments, a wider range of means of pressure to secure execution of judgments. Currently, the ultimate measure available to the Committee of Ministers is recourse to Article 8 of the Council of Europe's Statute (suspension of voting rights in the Committee of Ministers or even expulsion from the Organisation). This is an extreme measure, which would prove counterproductive in most cases; indeed, the High Contracting Party which finds itself in the situation foreseen in paragraph 4 of Article 46 continues to need the discipline of the Council of Europe. The new Article 46, therefore, adds further possibilities of bringing pressure to bear to the existing ones. The procedure's mere existence, and the threat of using it, should act as an effective new incentive to execute the Court's judgments. It is foreseen that the outcome of infringement proceedings will be expressed in a judgment of the Court.

2.6 THE AWARD OF COMPENSATION UNDER ARTICLE 41

2.6.1 GENERAL

When the Court finds that a violation of the Convention by a Contracting State has taken place, under Article 41 it may afford just satisfaction to the injured party provided that the consequences of the violation cannot be fully repaired according to the internal law of the State concerned. The initiative for having the claim for just satisfaction determined lies with the original applicant as the injured person.[600] According to Rule 75(1) of the Rules of the Court, where the Chamber finds that there has been a violation of the Convention or the Protocols thereto, it gives in the same judgment a ruling on the application of Article 41 of the Convention if that question, after being raised in accordance with Rule 60 of the Rules of Court, is ready for decision; if the question is not ready for decision, the Chamber reserves it in whole or in part and fixes the further procedure. In that case, and also in cases where the claim by the applicant is finalized after the judgment on the merits, the Chamber which rules on the application of Article 41 will, as far as possible, be composed of those judges who sat to consider the merits of the case. Where it is not possible to constitute the original Chamber, the President of the Court completes or composes the Chamber by drawing lots (Rule 75(2) of the Rules of Court). This would seem appropriate from

[600] See Rule 60 of the Rules of Court.

the viewpoint of procedural economy. The judges who examined the merits are [illegible] informed of the different aspects of the case and for that reason most competent [illegible] determine the amount of compensation to be awarded, if any. Any claim which [illegible] applicant Contracting Party or the applicant may wish to make for just satisfaction [illegible] under Article 41 of the Convention must, unless the President of the Chamber direc[illegible] otherwise, be set out in the written observations on the merits or, if no such writte[illegible] observations are filed, in a special document filed no later than two months after th[illegible] decision declaring the application admissible. Thus, in the *Nasri* Case, despite several [illegible] reminders, counsel for the applicant did not file any claims for just satisfaction. The Court, for its part, saw no ground for examining this question of its own motion.[602]

In the *Haase* Case the applicants were separated from their children in December 2001 and never saw them again. In this respect they claimed non-pecuniary damage on behalf of the children. However, in accordance with Rule 38(1) of the Rules of Court no written observations filed outside the time-limit set by the President of the Chamber will be included in the case file unless the President of the Chamber decides otherwise. The applicants' request to present the application on behalf of their children as well was submitted on 19 December 2002, which was after the close of the written procedure on the admissibility of the application. The Court, therefore, considered that it could not take the damage claimed on behalf of the children into account.[603]

The Court specifies in its judgment the period, which is usually three months, within which the specified sum must be paid to the individual.[603] And in accordance with Rule 75(3) of the Rules of Court, the Chamber may, when affording just satisfaction under Article 41 of the Convention, direct that if settlement is not made within a specified time, interest is to be payable on any sums awarded. It is subsequently up to the Committee of Ministers under Article 54 to determine if the specified sum has been paid within the time-limit set by the Court.

The Court will award financial compensation under Article 41 only where it is satisfied that the loss or damage complained of was actually caused by the violation it has found, since the State cannot be required to pay damages in respect of losses for which it is not responsible.[604]

601 Judgment of 13 July 1995, para. 49; judgment of 13 February 2001, *Schöps*, para. 57

602 Judgment of 8 April 2004, para. 121.

603 See, *e.g.*, the judgment of 28 August 1991, *Moreira De Azevedo*; judgment of 21 September 1993, *Kremzow*; judgment of 27 October 1993, *Dombo Beheer B.V*; judgment of 11 January 2001, *Platakou*; judgment of 23 July 2002, *Västberga Taxi Aktiebolag and Vulic*.

604 Judgment of 28 May 2002, *Kingsley*, para. 40.

2.6.2 NO INDEPENDENT PROCEDURE

From the Court's case law it becomes clear that an application for compensation on the basis of Article 41 is not considered as an independent procedure, but is dealt with as an element of a larger whole, of which the examination of the merits forms the first part. In the '*Vagrancy*' Cases the Court stated that the application for compensation is closely linked to the proceedings concerning the merits before the Court and cannot, therefore, be regarded as a new complaint, to which former Articles 25, 26 and 27 [the present Articles 34 and 35] of the Convention apply. For that reason the original applicant did not need to exhaust the local remedies once more with respect to his application for compensation.[605] In the *Barberà, Messegué and Jarbardo* Case the Court noted that under Spanish law a remedy existed making it possible to obtain compensation in the event of the malfunctioning of the system of justice. However, referring to the aforementioned '*Vagrancy*' Cases it did not consider itself bound to stay the proceedings relating to the applicants' claims. In this respect, the Court held: "If, after having exhausted domestic remedies without success before complaining in Strasbourg of a violation of their rights, then doing so a second time, successfully, to secure the setting aside of the convictions, and finally going through a new trial, the applicants were required to exhaust domestic remedies a third time in order to be able to obtain just satisfaction from the Court, the total duration of the proceedings would be hardly consistent with the effective protection of human rights and would lead to a situation incompatible with the aim and object of the Convention."[606] Furthermore, in the *Ogur* Case the Court took into account the fact that the events complained of took place more than eight years before.[607]

In the *Neumeister* Case the Austrian Government argued that the Commission had committed an error by transmitting Neumeister's application for compensation directly to the Court, whereas it ought to have considered and examined it as a new complaint under Article 25 [the present Article 34]. This complaint was assumed to concern the alleged violation of Article 5(5) of the Convention, in which it is provided that 'Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation'. The principal argument of the Court against this line of reasoning was as follows: "the proceedings in the present case no longer fall within Section III of the Convention but are the final phase of proceedings brought before the Court under Section IV on the con-

605 Judgment of 10 March 1972, para. 20. See also the judgment of 6 November 1980, *Guzzardi*, para. 113; judgment of 18 December 1986, *Bozano*, para. 9; judgment of 13 June 1994, *Barberà, Messegué and Jabardo*, para. 17; judgment of 4 May 2000, *Rotaru*, para. 83; judgment of 26 July 2001, *Ilijkov*, para. 123; judgment of 13 June 2002, *Anguelova*, para. 172.

606 Judgment of 13 June 1994, para. 17; judgment of 20 May 1999, *Ogur*, para. 98.

607 Judgment of 20 May 1999, para. 98.

clusion of those to which the original petition of Neumeister gave rise in 1963 be... the Commission."[608]

In the *Anguelova* Case the Bulgarian Government argued that, since Article ... para. 1 (4) of the Bulgarian Code of Criminal Procedure provided for the possibi... of reopening criminal proceedings in cases where the European Court of Hu... Rights had found a violation of the Convention, the applicant should, if the Co... found a violation in the present case, submit a civil claim for damages once the ... minal proceedings were reopened. The Court noted that the provision of the Co... of Criminal Procedure referred to by the Government concerned the reopening ... criminal proceedings which were ended by a judicial decision, whereas the investi... tion in the applicant's case was terminated by a decision of the prosecuting authori... It was, therefore, unclear whether the Code of Criminal Procedure required ... reopening of the investigation after the Court's findings in the present case. Furth... more, the Court held that Article 41 of the Convention does not require applica... to exhaust domestic remedies a second time in order to obtain just satisfaction if th... have already done so in vain in respect of their substantive complaints. In this co... nection the Court considered that the hypothetical possibility that the investigati... might be resumed many years after the death of the applicant's son in police custo... and after the first ineffective investigation, and that the applicant might then have ... opportunity to bring a civil claim, which would only be successful if the fresh inves... gation produced results, could not reasonably be interpreted as *restitutio in integr...* under domestic law.[609]

2.6.3 QUESTIONS REGARDING ARTICLE 41 WHICH ARE NOT READY FOR DECISION

Article 41 appears to imply that the decision on an award of compensation must b... given together with the judgment on the merits. Rule 75 of the Rules of Court, how... ever, leaves the moment of the decision on an award of compensation entirely open. If the Chamber of the Court which deals with the case finds that there is a violation of the Convention, the Chamber gives a decision on the application of Article 41 in the same judgment if the question, after being raised under Rule 75, is ready for decision. As an example, reference could be made to the judgment in the *Golder* Case in which the Court, after having found that there had been a violation of Article 6(1) and Article 8, decided that in the circumstances of the case it was not necessary to afford to the applicant any just satisfaction other than that resulting from the findi...

608 Judgment of 7 May 1974, para. 30.
609 Judgment of 13 June 2002, para. 172.

of a violation of his rights.[610] The majority of the decisions concerning Article 41 are made simultaneously with the judgment on the merits.

If the question of compensation has been raised, but is not yet ready for decision, the Chamber reserves it in whole or in part and fixes the ensuing procedure. If the question of compensation has not been raised, the Chamber lays down a time-limit within which this may be done by the original applicant.[611] Thus the possibilities for raising the question of compensation have been left as wide as possible. At the same time the interests of the respondent States are served in this way because, as the Court formulated it: "they may be reluctant to argue the consequences of a violation the existence of which they dispute and they may wish, in the event of a finding of a violation, to maintain the possibility of settling the issue of reparation directly with the injured party without the Court being further concerned."[612]

In a number of cases applicants complained that as a consequence of the length of domestic proceedings they were deprived of the enjoyment of their property, thereby relying on Article 1 of Protocol No. 1. Since the Court already found a violation of Article 6(1), it did not find it necessary to examine the complaint based on Article 1 of Protocol No. 1. Nevertheless, in the *Brigandi* Case, where the applicant had sought compensation for loss of enjoyment of property, the Court found that the measures already taken by the national courts – which included compensation for loss of enjoyment – had not made full reparation for the consequences of the breach found. The Court, therefore, awarded the applicant a specified sum on an equitable basis.[613]

In the *Zanghì* Case the applicant had only claimed compensation in respect of damage resulting from the alleged violation on Article 1 of Protocol No. 1. In its judgment of the same day as that of the *Brigandi* Case, concerning the same respondent State, in connection with the same type of violation, the Court observed that it was still possible that the national courts before which the applicant's action remained pending, might make reparation for the final consequences of the failure to try the case within a reasonable time. Therefore, as a matters stood, it dismissed the applicant's claim for compensation of damage.[614] After having obtained a final domestic decision, Mr Zanghì again requested compensation for the financial consequences of the failure to try the case within a reasonable time. The Court decided to re-enter the case on its list. This means that the dismissal of the claim for just satisfaction 'as the matter stood' in the Court's earlier judgment was only provisional. It also means, by implication, that the applicant was not estopped, because he relied

610 Judgment of 21 February 1975, para. 46; judgment of 26 February 2002, *Morris*, para. 98; judgment of 27 February 2003, *Niederböster*, para. 49.
611 See, for example, the judgment of 28 June 1978, *König*, para. 140.
612 Judgment of 22 June 1972, *Ringeisen*, para. 18.
613 Judgment of 19 February 1991, para. 33.
614 Judgment of 19 February 1991, para. 9.

the first time, in support of his claim, on Article 1 of Protocol No. 1 and not on Art... 6 of the Convention. The Court found, however, that, as it held it unnecessary to ... on the complaint based on Article 1 of Protocol No. 1, the financial consequen... an infringement of the applicant's right to the peaceful enjoyment of his posses... could not be taken into consideration. As to the consequences of the breach of Art... 6(1) of the Convention, which was found by the Court on 19 February 1991, it ... at the time, even though no claim for just satisfaction had been made under that ... that it was still possible that the national courts might make reparation for them. ... final domestic decision, in the opinion of the Court, was not of such a nature ... call for a reconsideration of the decision delivered on 19 February 1991.[615] Thus ... the second time, and this time finally, the applicant's claim for compensation ... dismissed. In its final judgment the Court did not make clear in which way and to ... extent the final domestic decision compensated the applicant in respect of the alleg... violation of Article 6, nor did it indicate how its final judgment in the *Zanghi* Case ... to be reconciled with that in the *Birgandi* Case.

In the *Windisch* Case the Government referred to the possibility of the applicant ... case being reopened if the Attorney General decided – as had in fact since happe... – to lodge a plea of nullity for the preservation of the law. The applicant's coun... mentioned, as an example, the *Unterpertinger* Case (judgment of 24 November 19... where the criminal proceedings involved had been reopened as a result of the Court ... judgment. The Court considered that the compensation sought in respect of the leng... of the national proceedings was not recoverable because the violation found in t... principal judgment did not concern this point.[616]

In the *Vogt* Case the Court was of the opinion that the question of reparation w... not ready for decision. It was accordingly necessary to reserve it and to fix the further ... procedure, account being taken of the possibility of an agreement between the re... pondent State and the applicant.[617] In the *Papamichalopoulos* Case the Court invited ... the Government and the applicants to submit, within two months, the names and pos... tions of experts chosen by agreement for the purpose of valuing the disputed land an... to inform it, within eight months from the expiry of that period, of any friendly settle... ment that they might reach before the valuation.[618]

615 Judgment of 10 February 1993, para. 8.
616 Judgment of 28 June 1993, para. 15.
617 Judgment of 26 September 1995, para. 74. See also the judgment of 30 May 2000, *Carbonara and Ventura*, para. 79.
618 Judgment of 31 October 1995, para. 3.

2.6.4 SUPERVISION BY THE COURT OF AN AGREEMENT ON COMPENSATION

Even if an agreement is reached between the injured party and the State found to be liable of a violation, the Court is still involved in the matter. In fact, according to Rule 75(4) of its Rules of Court, the Court will have to verify the equitable nature of such agreement and, when it finds the agreement to be equitable, will strike the case off the list by means of a judgment. Such supervision of the equitable nature of the agreement on compensation was exercised by the Court in, *e.g.*, the *Luedicke, Belkacem and Koç* Case,[619] the *Airey* Case,[620] the *Malone* Case,[621] the *Kostovski* Case[622] and the *Katikaridis* Case.[623]

In the *Winterwerp* Case the judgment under Article 41 consisted of the unanimous decision by the Court to strike the case off the list. The reason for this was that the Government of the Netherlands and Winterwerp had come to an agreement, which was judged on its equitable nature by the Court. This arrangement, in part, even went beyond that originally suggested by Winterwerp's counsel. The principal elements of the arrangement were as follows: "(1) The State shall promote that Mr. Winterwerp be placed as soon as possible in a hostel. The State Psychiatric Establishment at Eindhoven is and will remain prepared to give Mr. Winterwerp medical treatment whenever this might be necessary; (2) The State shall transfer a lump sum of 10,000 (ten thousand guilders) to Mr. Winterwerp's new guardian to be used for the resocialisation of Mr. Winterwerp."[624]

Sometimes the agreement concerns only a part of the claim of the applicant and the Court has to decide about the rest of the claim. Thus in the *Barthold* Case the settlement only concerned the claims for fees and expenses and for loss of earnings.[625] The Court took note of this agreement and considered it appropriate to strike the case off the list as far as those claims were concerned.

619 Judgment of 10 March 1980, para. 13.
620 Judgment of 6 February 1981, para. 10.
621 Judgment of 26 April 1985, para. 9. See also the judgments of 29 September 1987, *Erkner and Hofauer*, para. 8; and the judgment of 27 June 1988, *Bouamar*, para. 8.
622 Judgment of 29 March 1990, para. 7.
623 Judgment of 31 March 1998, para. 11.
624 Judgment of 27 November 1981.
625 Judgment of 31 January 1986, para. 9. See also the judgments of 9 June 1988, *O., H., W. and R. v. the United Kingdom*.

2.6.5 THE QUESTION OF RESTITUTIO IN INTEGRUM

As to the merits of the procedure for compensation under Article 41, it is especia... the passage which states that, 'if the internal law of the said Party allows only part... reparation to be made for the consequences of this decision or measure' which h... caused problems.

In the '*Vagrancy*' Cases the Belgian Government submitted that the applicat... for compensation was ill-founded, because under Belgian law compensation coul... be obtained from the State for damage caused by an unlawful situation for which th... State was responsible under national or international law. Those who claimed compen... sation before the Court, therefore, ought to have applied first to the national court... The Court held that the treaties from which the text of Article 41 has been derived... undoubtedly related in particular to cases where the nature of the injury would make... it possible to wipe out entirely the consequences of a violation but where the interna... law of the State involved precludes this being done. However, according to the Court... this did not alter the fact that Article 41 is also applicable to cases in which such a... *restitutio in integrum* is not possible precisely on account of the nature of the injury... concerned.[627] The Court added the following: "indeed, common sense suggests that... this must be so *a fortiori*".[628] The Court distinguished here between those cases in... which, considering the nature of the injury, *restitutio in integrum* is possible and those... in which it is not, and considered it has jurisdiction in both cases; in the first case,... however, only when such *restitutio in integrum* is precluded under national law. Thus,... in the '*Vagrancy*' Cases which according to the Court belonged to the second category,... the Court declared that it had jurisdiction to award compensation. It held, however,... that the applicants' claims for damages were not well-founded. Although in this case... the decision not to grant compensation was taken unanimously, there were considerable differences of opinion within the Court on the argument described above.

In their joint separate opinion the judges Holmback, Ross and Wold asserted that... the argument followed by the Court was "unsound" and "completely alien to the text... of Article 50" [the present Article 41] for those cases in which *restitutio in integrum*... was impossible.[629] In the first place they submitted with regard to the Court's... argument: "It presupposes that there is an absolute obligation on the State to restore... to the applicants the liberty of which they have been deprived. But this cannot be so... because of the maxim *impossibilium nulla est obligatio*."[630] Furthermore, they opined... that in the two cases distinguished by the Court the jurisdiction of the Court should...

626 Judgment of 10 March 1972, para. 15.
627 *Ibidem*, para. 20. See in this respect also the judgment of 31 October 1995, *Papamichalopoulos*... para. 34; judgment of 23 January 2001, *Brumărescu*, para. 20.
628 *Ibidem*.
629 See the opinion annexed to the judgment.
630 *Ibidem*.

depend on the fact that "the internal law does not allow full reparation".[631] On the ground of Articles 5(5), 13, 53 and 54 [the present Article 46] they were of the opinion that the general rule underlying the Convention is that "a party claiming to be injured must seek redress before national courts and not before the European Court of Human Rights". The only exception to this is the jurisdiction conferred on the Court by Article 41 to award compensation in case the internal law in question does not make full reparation possible.[632] In their view the Court's conception led "to the Court in fact assuming jurisdiction in respect to claims for reparation in all cases where *restitutio* is impossible, regardless of the state of internal law."[633]

In its judgment in the '*Vagrancy*' Cases as well as in the subsequent *Ringeisen* Case the Court did take into account the fact that the Belgian and the Austrian Government, respectively, had refused the applicant compensation.[634] But in the '*Vagrancy*' Cases it immediately added: "The mere fact that the applicants could have brought and could still bring their claims for damages before a Belgian Court does not therefore require the Court to dismiss their claims as being ill-founded any more than it raises an obstacle to their admissibility."[635]

In the *Ringeisen* Case the Court was even more explicit. The necessity to apply Article 41 exists "once a respondent government refuses the applicant reparation to which he considers he is entitled."[636]

A considerable difference between the view of the three above-mentioned judges and that of the Court remains. According to the three judges, the Court may award compensation only in one exceptional case, *viz.* when under internal law there is no possibility of obtaining full compensation. In the Court's view it is sufficient for the application of Article 41 that a Government has refused the compensation claimed by the applicant. The view of the three judges resembles most closely the principle of general international law that a State must previously have been enabled as much as possible to redress the consequences of any violation of its international obligations itself within the context of its own national legal system.[637] On the other hand, the Court has argued that, if for the consideration of an application under Article 41 it should be required that the local remedies have first been exhausted, the total length of the procedure provided for in the Convention could hardly be considered compatible with the idea of effective protection of human rights.[638] Moreover, it might be

631 *Ibidem*.
632 *Ibidem*.
633 *Ibidem*.
634 Judgment of 10 March 1972, para. 16. and judgment of 22 June 1972, para. 14 respectively.
635 Judgment of 10 March 1972, para. 20.
636 Judgment of 22 June 1972, para. 20.
637 Compare the corresponding principle of general international law underlying the local remedies rule, *supra* 2.2.10.1.
638 Judgment of 10 March 1972, *De Wilde, Ooms and Versyp* ('*Vagrancy*' Cases), para. 20.

argued in support of the Court's view that the consideration of applications under Article 41 and the examination of the merits should be regarded as one and indivisible,[639] so that the decision that the local remedies have been exhausted, in combination with the finding that a friendly settlement has not been reached and that the State has not been found willing to pay damages, must be considered a sufficient basis for the application of Article 41. The consequence of the latter approach is that, with respect to the decision on an application for compensation under Article 41 of the Convention, the internal law of the State concerned becomes irrelevant.

In the final analysis, the middle course suggested by judge Verdross in his separate opinion would appear the most attractive. From the text of Article 41 he infers that the Court, when dealing with an application for compensation, should first of all ascertain whether the injured individual is able to obtain adequate compensation under internal law. If that is the case, the respondent State should be enabled to award compensation according to its own procedures, but with the Court remaining competent to assure itself that just satisfaction has indeed duly been given and to fix a time within which this should take place.[640] In this construction the State concerned is given the opportunity to settle the matter within the context of its own legal system, while the Court can judge afterwards whether the compensation is equitable and at the same time keep the total duration of the procedure within reasonable limits.

The viewpoint of the Court set forth above appears to have become constant case law, however, since it has been confirmed explicitly or implicitly in a series of judgments.[641] Thus, in the *De Cubber* Case the Court noted that Article 50 [the present Article 41] was applicable, because the conditions were fulfilled: "the proceedings in Belgium after 26 October 1984 (...) have not redressed the violation found in the judgment of that date; they have not brought about a result as close to *restitutio in integrum* as was possible in the nature of things."[642]

In the *Barberà, Messegué and Jarbardo* Case the Spanish Government submitted that the Court's principal judgment[643] had been executed in Spain in the fullest possible manner. The Constitutional Court's judgment quashing the convictions and ordering that the proceedings in the *Audiencia Nacional* be reopened, represented an innovation for the Spanish legal system under which previously the finding of a violation by the European Court of Human Rights could not constitute a ground for reopening

639 See *supra* 2.6.2.

640 Separate opinion of Judge Verdross in the '*Vagrancy*' Cases, judgment of 10 March 1972.

641 Judgment of 10 March 1980, *König*, para. 15; judgment of 13 May 1980, *Artico*, paras. 44-45; judgment of 6 November 1980, *The Sunday Times*, para. 16; and the judgment of 6 November 1980, *Guzzardi*, para. 113.

642 Judgment of 14 September 1987, para. 21.

643 Judgment of 6 December 1988, para. 2, where the Court found a violation of Art. 6(1) based above all on "the fact that very important pieces of evidence were not adequately adduced and discussed at the trial in the applicants' presence and under the watchful eye of the public".

proceedings. In the subsequent proceedings all the guarantees laid down in Article 6 had been scrupulously complied with and they, therefore, afforded the most complete *restitutio in integrum* that could be obtained from the point of view of Article 41. However, the Court observed that it could not speculate as to what the outcome of the proceedings would have been had the violation of the Convention not occurred. Nevetheless, the applicants were kept in prison as a direct consequence of the trial found by the Court to be in violation of the Convention. There was thus, in the opinion of the Court, a clear causal connection between the damage claimed by the applicants and the violation of the Convention. In the nature of things, the subsequent release and acquittal of the applicants could not in themselves afford *restitutio in integrum* or complete reparation for damage derived from their detention.[644] Accordingly, the Court considered that the question to be decided was the level of just satisfaction in respect of those damages, to be determined by the Court at its discretion having regard to what was equitable.[645]

In the *Papamichalopoulos* Case the Court found a violation on the basis of an irregular *de facto* expropriation (occupation of land by the Greek Navy since 1967) which had lasted for more than twenty-five years by the date of the principal judgment of 24 June 1993. In its judgment on just satisfaction the Court held: "the unlawfulness of such a dispossession inevitably affects the criteria to be used for determining the reparation owed by the respondent State, since the pecuniary consequences of a lawful expropriation cannot be assimilated to those of an unlawful dispossession."[646] Consequently, the Court ordered the Greek State to pay the applicants "for damage and loss of enjoyment since the authorities took the possession of the land in 1967, the current value of the land, increased by the appreciation brought about by the existence" of certain buildings which had been erected on the land since the occupation, as well as the construction costs of those buildings.[647]

In the *Iatridis* Case the applicant owned a cinema but did not own the land on which the cinema that he ran was situated. The ownership of the cinema site had been a matter of dispute between the lessors of the cinema and the State since 1953 and this dispute had still not been resolved by the date of adoption of the judgment. In its principle judgment in the case the Court held: "on 23 October 1989 the Athens Court of First Instance heard the case under summary procedure and quashed the eviction order on the grounds that the conditions for issuing it had not been satisfied. No appeal lay against that decision. From that moment on, the applicant's eviction thus ceased to have any legal basis and Ilioupolis Town Council became an unlawful occupier and should have returned the cinema to the applicant, as was indeed recom-

644 Judgment of 13 June 1994, para. 16.

645 *Ibidem*, paras 18-20. In the same sense judgment of 25 July 2000, *Smith and Grady*, paras 18-19.

646 Judgment of 31 October 1995, para. 36.

647 *Ibidem*, para. 39. See also the judgment of 10 June 2003, *Serghides*, para. 23.

mended by all the bodies from whom the Minister of Finance sought an opinion, namely the Ministry of Finance, the State Legal Council and the State Lands Authority."[648] Consequently, the Court considered that the manifest unlawfulness under Greek law of the interference complained of would justify awarding the applicant full compensation. Nothing short of returning the use of the cinema to the applicant would put him, as far as possible, in a situation equivalent to the one in which he would have found himself had there not been a breach of Article 1 of Protocol No. 1. The Court pointed out that the applicant did not own the land on which the cinema that he ran was situated. He rented that land from a third party under a lease valid until 30 November 2002. The issue of the ownership of the land was at the material time the subject of proceedings in the national courts. In all these circumstances the Court considered that the applicant should be awarded only compensation that would cover loss of the earnings that he could have derived from running the cinema until the end of the current lease (30 November 2002).[649]

In the principal judgment in the Case of the *Former King of Greece* the Court held that the interference in question satisfied the requirement of lawfulness and was not arbitrary. The act of the Greek Government which the Court held to be contrary to the Convention was an expropriation that would have been legitimate but for the failure to pay any compensation. The lawfulness of such a dispossession inevitably affects the criteria to be used for determining the reparation owed by the respondent State, since the pecuniary consequences of a lawful taking cannot be assimilated to those of an unlawful dispossession. In this context the Court noted that international case law of courts and arbitration tribunals, gave the Court valuable guidance; although that case law concerned more particularly the expropriation of industrial and commercial undertakings, the principles identified in that field are valid for situations such as the one in the instant case. In the *Amoco International Finance Corporation* Case the Iran-United States Claims Tribunal stated, referring to the judgment of the Permanent Court of International Justice in the *Case Concerning the Factory at Chorzów*, that: "a clear distinction must be made between lawful and unlawful expropriations, since the rules applicable to the compensation to be paid by the expropriating State differ according to the legal characterisation of the taking." (Amoco International Finance Corporation v. Iran, Interlocutory Award of 14 July 1987, Iran-U.S. Claims Tribunal Reports (1987-II), para. 192)."[650] In view of the above, the Court was of the opinion that in the present case the nature of the breach found in the principal judgment did not allow the Court to proceed on the basis of the principle of *restitutio in integrum*. That said, the Government were of course free to decide on their own initiative to return all or part of the properties to the applicants. In conclusion, the

[648] Judgment of 25 March 1999, para. 61.
[649] Judgment of 19 October 2000, para. 37.
[650] Judgment of 28 November 2002, paras. 74-75.

Court held that, unless the Government would decide on their own initiative to return the properties to the applicants, it deemed it appropriate to fix a lump sum based, as far as possible, on an amount "reasonably related" to the value of the property taken, i.e. an amount which the Court would have found acceptable under Article 1 of Protocol No. 1, had the Greek State compensated the applicants. In determining this amount the Court took into account the claims of each applicant, the question of the movable property, the valuations submitted by the parties and the possible options for calculating the pecuniary damage, as well as the lapse of time between the dispossession and the present judgment. The Court considered that in the unique circumstances of the present case resort to equitable considerations was particularly called for.[651]

2.6.6 MEASURES OF REDRESS

In several cases the Court noted that it is well established that the principle underlying the provision of just satisfaction for a breach of the Convention is that the applicant should as far as possible be put in the position he would have enjoyed had the proceedings complied with the Convention's requirements.[652]

The Court has indicated that, in the context of the execution of judgments in accordance with Article 46 of the Convention, a judgment in which it finds that a breach has occurred, imposes on the respondent State a legal obligation under that provision to put an end to the breach and make reparation for its consequences in such a way as to restore as far as possible the situation existing before the breach. If, on the other hand, national law does not allow – or allows only partially – reparation to be made for the consequences of the breach, Article 41 empowers the Court to afford the injured party such satisfaction as appears to it to be appropriate. It follows, *inter alia*, that a judgment in which the Court finds a violation of the Convention or its Protocols imposes on the respondent State a legal obligation not just to pay those concerned the sums awarded by way of just satisfaction, but also to choose, subject to supervision by the Committee of Ministers, the general and/or, if appropriate, individual measures to be adopted in its domestic legal order to put an end to the violation found by the Court and to redress so far as possible the effects.[653] Furthermore, it follows from the Convention and from Article 1 in particular that in ratifying the Convention the Contracting States undertake to ensure that their domestic legislation is compatible with it. Consequently, it is for the respondent State to remove any obstacles in its

[651] *Ibidem*, para. 79.
[652] See e.g. judgment of 26 October 1984, *Piersack*, para 12; judgment of 28 May 2002, *Kingsley*, para. 40.
[653] Judgment of 13 July 2000, *Scozzari and Giunta*, para. 249; judgment of 24 October 2002, *Pisano*, para. 43; judgment of 8 April 2004, *Haase*, para. 115.

domestic legal system that might prevent the applicant's situation from being adequately redressed.[654]

2.6.7 THE INJURED PARTY

The term 'injured party' is fairly clear in the Court's view. 'Injured party' is a synonym for 'victim' in Article 34, and as such may be considered "the person directly affected by the failure to observe the Convention".[655] This also includes legal persons.[656] From this it follows, for instance, that counsel for the applicant cannot bring his fee directly under the claim for reparation pursuant to Article 41, although it may after all form part of the reparation awarded to the applicant. In the *Belkacem* Case the applicant had received free legal aid with respect to the Strasbourg proceedings and had not stated that he owed his counsel any additional amount. When the latter nevertheless claimed a supplementary fee, the Court decided that a lawyer "cannot rely on Article 50 to seek just satisfaction on his own account".[657]

In the *Pakelli* Case counsel had not claimed an immediate payment of his fee because of the financial situation of his client. Reparation of costs for legal assistance was nevertheless awarded, because counsel had not waived his right to reparation of his costs (as the Government suggested). The Court noted that "in a human rights case a lawyer will be acting in the general interest if he agrees to represent or assist a litigant even if the latter is not in a position to pay him immediately"[658] and included the payment in the the reparation awarded.

In *X v. France* the applicant had died during the proceedings before the Court. His parents, however, had expressed their wish to continue the proceedings. The Court decided that the parents were entitled to take his place. The applicant had claimed 150,000 francs for non-pecuniary damage. The case concerned the length of compensation proceedings brought by a haemophiliac inflicted with the AIDS virus following a blood transfusion. The applicant had claimed that the length of proceedings had prevented him from obtaining the compensation which he had hoped for, and thus

654 Judgment of 17 February 2004, *Meastri*, para. 47.

655 Judgment of 6 November 1980, *The Sunday Times*, para. 13. See also the judgment of 14 September 1987, *Gillow*, para. 23: "Since this case relates to events and their consequences which were experienced by Mr and Mrs Gillow together, the Court considers it equitable that all sums awarded in this judgment should be paid to the survivor of them, Mrs Gillow."

656 Judgment of 7 July 1989, *Unión Alimentaria Sanders S.A.*, para. 45; judgment of 6 April 2000, *S.A. v. Portugal*, paras 15-20; judgment of 19 March 2002, *Société industrielle d'Entretien et de Service (SIES)*, paras. 18-24.

657 Judgment of 10 March 1980, para. 15. See also the judgment of 13 May 1980, *Artico*, para. 42; judgment of 19 December 1990, *Delta*, para. 47; judgment 28 May 2002, *Beyeler*, para. 27; judgment of 28 November 2002, *The former King of Greece and Others*, para. 105.

658 Judgment of 25 April 1983, para. 47.

from being able to live independently and in better psychological conditions for the remaining period of his life. Without further observation the Court found that the applicant had sustained non-pecuniary damage and held that France was to pay the applicant's parents the entire sum sought.[659] In case the Court has awarded just satisfaction to the next of kin and the respondent State requests a revision of that judgment because the next of kin cannot be traced, the Court may revise its judgment in such a way that the earlier compensation does not have to be paid.[660]

The Court has frequently been requested to award damages to the relatives of a person who was unlawfully killed by agents of the State or had disappeared and for whose disappearance the respondent State was held responsible.[661] In the *Kurt* Case the applicant maintained that both she and her son had been victims of specific violations of the Convention as well as of a practice of such violations. She requested the Court to award a total amount of 70,000 pounds sterling (GBP) which she justified as follows: GBP 30,000 for her son in respect of his disappearance and the absence of safeguards and effective investigative mechanisms in that regard; GBP 10,000 for herself to compensate for the suffering to which she had been subjected on account of her son's disappearance and the denial of an effective remedy with respect to his disappearance; and GBP 30,000 to compensate both of them on account of the fact that they were victims of a practice of 'disappearances' in south-east Turkey. The Court recalled that it had found the respondent State in breach of Article 5 in respect of the applicant's son. It considered that an award of compensation should be made in his favour having regard to the gravity of the breach in question. It awarded the sum of GBP 15,000, which amount was to be paid to the applicant and held by her for her son and his heirs. Moreover, given that the authorities had not assisted the applicant in her search for the truth about the whereabouts of her son, which had led it to find a breach of Articles 3 and 13 in her respect, the Court considered that an award of compensation was also justified in her favour. It accordingly awarded the applicant the sum of GBP 10,000.[662]

If the Court decides that there has been a violation of the Convention, this does not mean that the next of kin will be automatically awarded compensation. First of all there should be a causal link between the violation found and the damage alleged. Secondly, the alleged damage should be substantiated. In the *Ogur* Case the Court noted that, as regards pecuniary damage, the file contained no information on the applicant's son's income from his work as a night-watchman, the amount of financial

659 Judgment of 31 March 1992, para. 54.

660 Judgment of 3 May 2001, *E.P. v. Italy*, paras 7-9.

661 Judgment of 27 September 1995, *McCann, Farrell and Savage*, para. 142; judgment of 9 October 1997, *Andronicou and Constantinou*, para 153; judgment of 19 February 1998, *Kaya*, para. 1; judgment of 25 May 1998, *Kurt*, para. 73; judgment of 8 July 1999, *Cakici*, para. 8.

662 Judgmant of 25 May 1998, para. 321; see also judgment of 28 July 1998, *Ergi*, para. 330.

assistance he gave the applicant, the composition of her family or any other rele
circumstances. That being so, the Court could not allow the compensation cl
submitted under this head in accordance with Rule 60(2) of the Rules of Court.[663] In
most of such cases only non-pecuniary damage is taken into consideration.[664] In
Case of *McCann, Farrell and Savage* the Court held that, having regard to the fact th
the three terrorist suspects who were killed had been intending to plant a bomb
Gibraltar, the Court did not consider it appropriate to make an award under this hea
It, therefore, dismissed the applicants' claim for damages.[665]

In the *Haase* Case the applicants claimed non-pecuniary damage on behalf of the
children. The Court pointed out that in principle a person who is not entitled under
domestic law to represent another may nevertheless, in certain circumstances, a
before the Court in the name of the other person.[666] The Court referred in this respect
to the *Aksoy* Case where the pecuniary claims made by the applicant prior to his death
for loss of earnings and medical expenses arising out of detention and torture were
taken into account by the Court in making an award to the applicant's father who had
continued the application.[667]

In the *Caciki* Case the Court found that it might be taken as established that the
applicant died following his apprehension by the security forces and that the State's
responsibility was engaged under Article 2 of the Convention. In these circumstances
there was a direct causal link between the violation of Article 2 and the loss by his
widow and children of the financial support which he provided for them. The Court
noted that the Government had not queried the amount claimed by the applicant.
Having regard to the detailed submissions by the applicant concerning the actuarial
basis of calculation of the appropriate capital sum to reflect the loss of income due
to applicant's death, the Court awarded compensation to be held by the applicant on
behalf of his brother's surviving spouse and children.[668]

In the *Cilic* Case the claims for pecuniary damage related to alleged losses accruing
subsequent to the death of the applicant's brother. They did not represent losses
actually incurred either by the applicant's brother before his death or by the applicant
after his brother's death. The Court refused compensation. It noted that the applicant's
brother was unmarried and had no children. It was not claimed that the applicant was
in any way dependent on him. More in general, however, the Court held that an award
in respect of pecuniary damage was not excluded regarding an applicant who has

663 Judgment of 20 May 1999, para, 98; judgment of 8 July 1999, *Cakici*, para.127.
664 Judgment of 19 February 1998, *Kaya*, para. 122; judgment of 20 May 1999, *Ogur*, para. 98.
665 Judgment of 27 September 1995, para. 218.
666 See judgment of 8 April 2004, paras. 113-120.
667 Judgment of 18 December 1996, para. 113.
668 Judgment of 8 July 1999, para. 127. See also judgment of 31 May 2001, *Akdeniz*, para. 127.

established that a close member of the family has suffered a violation of the Convention.[669]

In the event of a conflict over a minor's interests between a natural parent and the person appointed by the authorities to act as the child's guardian there is a danger that some of those interests will never be brought to the Court's attention and that the minor will be deprived of effective protection of his rights under the Convention. Consequently, even though the parents have been deprived of parental rights – indeed that is one of the causes of the dispute which they have referred to the Court – their standing suffices to afford them the necessary power to apply to the Court on the children's behalf, as well in order to protect their interests.[670]

2.6.8 JUST SATISFACTION

2.6.8.1 General

As to the term 'just satisfaction', the formulation of Article 41 makes it plain in the first place that the Court has a certain discretion in determining it: "as is borne out by the adjective 'just' and the phrase 'if necessary', the Court enjoys a certain discretion in the exercise of the power conferred by Article 41".[671] Taking this as a point of departure the Court strictly upholds that the only element qualifying for satisfaction is the injury due to the previously found violation of the Convention. Injury which is connected therewith, but which in fact is due to other causes, does not qualify for satisfaction.[672] The Court, therefore, requires a causal link between the injury and the violation.[673] In the *Quaranta* Case the applicant had claimed compensation in respect of the main complaint concerning the right to liberty under Article 5, whereas the Court had only found a violation in relation to one of the subsidiary complaints. The Court rejected the compensation claim for lack of causal link.[674] In cases where the Court finds a violation of the reasonable time requirement of Article 6, it usually does not find that a causal link exists between the violation and the alleged damage.[675]

In the *Albert and Le Compte* Case the first claim concerned a request to the Court to direct the State to annul the disciplinary sanctions imposed on the applicants. The

669 Judgment of 28 March 2000, para 102.
670 Judgment of 8 April 2004, *Haase*, para. 120.
671 Judgment of 6 November 1980, *Guzzardi*, para. 114.
672 Judgment of 10 March 1980, *König*, para. 18; judgment of 6 February 1981, *Airey*, para. 12.
673 Judgment of 23 October 1985, *Benthem*, para. 46; judgment of 2 June 1986, *Bönisch*, para. 11; judgment of 22 June 2000, *Cöeme*, para. 155; judgment of 27 February 2001, *Lucà*, para. 48; judgment of 17 February 2004, *Maestri*, para.46.
674 Judgment of 24 May 1991, para. 43.
675 Judgment of 1 March 2002, *Kutic*, para 39; judgment of 6 June 2002, *Marques Francisco*, para. 27; judgment of 13 June 2002, *Mereu and S. Maria Navarrese S.R.L.*, para. 19.

Court decided that, even when leaving aside the fact that the Court is not empow
to do this, "the disciplinary sanctions, which were the outcome of proceedings fo
by the Court not to have complied with one of the rules of Article 6 § 1 of the Conv
tion, cannot on that account alone be regarded as the consequences of that brea
As for the criminal sentence, there is no connection whatsoever between them
the violation (...) As for the applicant's second series of claims (...), the Court consider
it proper to distinguish here, as in the Case of *Le Compte, Van Leuven and De Mey*
(...), between damage caused by a violation of the Convention and the costs incurr
by the applicant."[676]

In the *Canea Catholic Church* Case the Court opined that in holding that th
applicant church had no capacity to take legal proceedings, the Court of Cassation
did not only penalise the failure to comply with a simple formality necessary for the
protection of public order, as the Government maintained. It also imposed a re
restriction on the applicant church preventing it on this particular occasion and fo
the future from having any dispute relating to its property rights determined by th
courts. Such a limitation impaired the very substance of the applicant church's righ
to a court' and, therefore, constituted a breach of Article 6(1) of the Convention.
Making its assessment on an equitable basis, the Court awarded the applicant church
the whole of the sum sought for the pecuniary damage it sustained on account of its
inability to take legal proceedings.[677] In the *Ajdenize* Case the Court held that a precise
calculation of the sums necessary to make complete reparation in respect of the
pecuniary losses suffered by an applicant may be prevented by the inherently uncertain
character of the damage flowing from the violation. An award may still be made
notwithstanding the large number of imponderables involved in the assessment of
future losses, though the greater the lapse of time involved the more uncertain the link
between the breach and the damage becomes. The question to be decided in such cases
is the level of just satisfaction in respect of either past and future pecuniary loss, which
it is necessary to award to an applicant, the matter to be determined by the Court at
its discretion having regard to what is equitable.[678]

2.6.8.2 Factors determining whether just satisfaction will be awarded

The reparation under Article 41 is intended to place the applicant as far as possible
in the position he would have been, had the violation of the Convention not taken

676 Judgment of 24 October 1983, para. 9. See on the said distinction also, *e.g.*, judgment of 6 November 1980, *The Sunday Times*, para. 16; judgment of 18 October 1982, *Le Compte, Van Leuven and De Meyere*, para. 13; judgment of 25 April 1983, *Van Droogen-broeck*, para. 13.

677 Judgment of 16 December 1997, para.55.

678 Judgment of 31 May 2001, paras. 128 and 130.

place.[679] Whether and to what extent satisfaction will be awarded by the Court depends on the circumstances of the case.

In the *Neumeister* Case there had been a violation of Article 5(3) and the Court awarded the applicant compensation amounting to 30,000 Austrian Schillings. An important factor in the determination of the amount was the degree to which the detention under remand had exceeded reasonable limits. In this case, however, there were a number of circumstances which induced the Court to decide that compensation for material injury was not necessary. In particular, the duration of the detention under remand counted towards the ultimately imposed imprisonment. For the remainder, the applicant had been granted a pardon. These factors also amply counterbalanced, in the Court's opinion, the moral injury which Neumeister had sustained. Even though this did not, according to the Court, constitute a genuine *restitutio in integrum*, it approached this very closely. The sum of money was, therefore, awarded to him as compensation for the damage he had incurred in the form of costs in the matter of legal assistance in his attempts to prevent the violation of the Convention, subsequently to request the Commission and the Court to establish this violation, and finally to obtain compensation.[680]

In the *Engel* Case only a symbolic amount of compensation of Dfl. 100 was awarded to Engel. Compensation was refused to De Wit, Dona and Schul, because the violation of the Convention in regard to them only consisted in the fact that the Supreme Military Court had dealt with their cases *in camera*. In its judgment on the merits the Court had already found that they did not seem to have suffered as a result. They had not since then advanced any new arguments for their claims for damages. In awarding Dfl. 100 to Engel the Court took into account the very short duration of the detention and the fact that the injury caused by the violation of Article 5(1) had been largely compensated by the circumstance that Engel had not actually had to undergo his punishment.[681]

On the other hand, in the *Guincho* Case the Court found a violation of the reasonable-time requirement of Article 6(1), which stemmed from two periods of almost total inactivity on the part of the State. The resultant lapse of time, totaling more than two years, did not only "reduce the effectiveness of the action brought, but it also placed the applicant in a state of uncertainty which still persists and in such a position that even a final decision in his favour will not be able to provide compensation for the lost interest". Accordingly, the Court awarded the applicant compensation of 150,000 Escudos.[682]

679 Judgment of 23 October 1984, *Piersack*, para. 12.

680 Judgment of 7 May 1974, paras. 30-31.

681 Judgment of 23 November 1976, para. 10.

682 Judgment of 10 July 1984, paras. 29-30. See also, *inter alia*, the judgment of 22 March 1983, *Campbell and Cosans*, paras. 12-14 and the judgment of 14 September 1987, *Gillow*, para. 11.

Other factors may also play a part in the awarding of reparation of costs and ses. In the *Airey* Case, for instance, it seems to have been an important factor British Government had already declared itself prepared before the proceedings to award a given amount.[683] On the other hand, no compensation is awarded fees are borne by an insurance company, since in that case "there is no capable of being the subject of a claim for restitution".[684] The same argument if the applicant has received free legal aid.[685] In the *Wassink* Case the applica sought a specified amount for the expenses and fees of the lawyer who repres him before the Commission and the Court. The Dutch Government argued that applicant, who had received legal aid in Strasbourg, had not shown that he had his lawyer additional fees whose reimbursement he was entitled to request. In Court's view, the mere fact that the applicant was granted legal aid did not mean he was not under an obligation to pay the fee note drawn up by his counsel attached to the claim submitted under Article 41. In the absence of proof to contrary, the Court must accept that the applicant was required to pay his lawyer amount set out in the fee note, from which the sums received from the Council Europe are to be deducted.[686] And in the *Pakelli* Case, although the applicant did have to pay the bill of his lawyer immediately, because of his financial situation could ask for the amount he needed to pay that bill.[687]

The fact that an applicant has accepted an out-of-court settlement does not exclude the award of compensation. In the *Silva Pontes* Case where the applicant had conclu an agreement with the private party defendant, the Court held that the agreeme concerned the consequences of a road accident and not those, for which the State co be held responsible, flowing from the failure to comply with the reasonable time req rement. The Court, therefore, awarded the applicant a specified sum for pecuni and non-pecuniary damage.[688]

The Court also takes into consideration whether the finding of a violation has effect beyond the confines of a particular case. The respondent State is then under a obligation to take the necessary measures in its domestic legal system to ensure performance of its obligations under Article 46 of the Convention. Thus in the Norr Case the Court took into account that Ireland had to take the necessary steps to ensu its obligations under Article 46. In this respect the Court referred to the change in law which had been effected with regard to Northern Ireland in compliance with

683 Judgment of 6 February 1981, para. 10.
684 Judgment of 23 October 1984, *Öztürk*, para. 9.
685 Judgment of 18 December 1986, *Johnston*, para. 86; judgment of 25 June 1987, *Baggetta*, para. judgment of 27 July 1987, *Feldbrugge*, para. 18.
686 Judgment of 27 September 1990, para. 42. Similarly, see the judgment of 25 October 19 *Koendjbiharie*, para. 35.
687 Judgment of 25 April 1983, para. 47.
688 Judgment of 23 March 1994, para. 46.

Court's finding of a violation in the *Dudgeon* Case. This lead the Court to the decision that its finding of a violation constituted adequate just satisfaction for the purposes of Article 41.[689] However, the Court held in the *Dudgeon* Case that changes in the contested legislation or practice after the finding of a violation cannot constitute *per se* just satisfaction in respect of facts which occurred previously, although they may be taken into account for the award of non-pecuniary damage.[690] Moreover, it may take several years before the respondent State has made the necessary changes. In fact in Ireland it took almost four years before the Criminal Law (Sexual Offences) Act 1993 modified Irish Law to decriminalise consensual homosexual acts between adult males. In *S. L. v. Austria* the Court noted that the judgments concerned had been given ten to twento years previously. The Court considered it now appropriate to award just satisfaction for non-pecuniary damage in a case like the present one, even though the Criminal Code concerned had recently been repealed and the applicant had, in part therefore, achieved the objective of his application. In fact the Court attached weight to the fact that the applicant had been prevented from entering into relations corresponding to his disposition until he reached the age of eighteen.[691]

A trend appears to have developed in the case law of the Court to the effect that injury pursuant to Article 41 can be made good, as far as it was "incurred by the applicants in order to try to prevent the violation found by the Court or to obtain redress therefore" and only if, in particular, three criteria are fulfilled: costs and expenses susceptible of satisfaction must have been (1) 'actually incurred', (2) 'necessarily incurred' and (3) 'reasonable as to quantum'.[692] These criteria apply to costs described as material damage as well as to costs referable to proceedings.[693]

2.6.8.3 The costs of the proceedings

Legal costs are only recoverable insofar as they relate to the violation found.[694] In the *Eckle* Case the Court went into the matter of restitution of costs of proceedings extensively. The Court held that an applicant is entitled to an award of costs and expenses

689 Judgment of 26 October 1988, para. 50.
690 Judgment of 24 February 1983, para. 14.
691 Judgment of 9 January 2003, para. 52. See also 10 February 2004, *B.B. v. the United Kingdom*, para. 34.
692 Judgment of 18 October 1982, *Le Compte, Van Leuven and De Meyere*, para. 14; judgment of 24 February 1983, *Dudgeon*, para. 14; judgment of 27 August 1991, *Philis*, para. 76; judgment of 12 May 1992, *Megyeri*, para. 34; judgment of 28 March 2000, *Baranowski*, para. 82; judgment of 29 June 2000, *Sabeur Ben Ali*, para. 49; judgment of 26 July 2001, *Ilijkov*, para. 124.
693 See, e.g., judgment of 6 November 1980, *The Sunday Times*, paras 23-42; judgment of 24 February 1983, *Dudgeon*, paras 19-22; 43; judgment of 25 April 2000, *Punzelt*, para. 106; judgment of 22 June 2000, *Coëme*, para. 155.
694 Judgment of 25 September 1992, *Pham Hoang*, para. 45; judgment of 19 April 1994, *Van der Hurk*, para. 66; judgment of 28 May 2002, *Beyeler*, para. 27; judgment of 28 November 2002, *The former King of Greece and Others*, para. 105; judgment of 10 June 2003, *Serghides*, para. 38.

under Article 41 when these costs are incurred in order to seek, through the dom... legal order, prevention or redress of a violation, to have the same established b... Commission and later by the Court, or to obtain reparation therefore, and when t... "were actually incurred, were necessarily incurred and were also reasonable as ... quantum". Considering, however, the proceedings in which the costs were incurr... in this case, the claim for restitution of costs and expenses incurred in the proceedi... before the Koblenz Court of Appeal was rejected because: "it should not be overlook... that the complaint in question was not aimed at securing a more expeditious conduc... of the proceeding: the complaint was directed against the unreasonable length of t... detention on remand and had as its sole object Mr. Eckle's release from custody ... could have been of relevance in relation to Article 5, para. 3 – if (...) the Commissio... had not declared the application inadmissible on that score – but not in relation t... Article 6, para. 1."[695] In relation to the claims for restitution of costs incurred in t... 'review' procedure before the Regional Court of Trier, the Court considered that "... view of his not having raised the issue of 'reasonable time' himself the applicant cann... recover in full Mr von Stackelberg's fees and disbursements".[696] Concerning the ... recovery of costs in relation to the procedure in Strasbourg, the Government express... the view "that a deduction should be made in view of the applications having bee... unsuccessful in relation to three complaints declared inadmissible by the Commi... sion". The Court did not agree with this, because "in contrast to what occurred in the ... case of *Le Compte, Van Leuven and De Meyere*, to which the Government referred (... the complaints in question failed at the admissibility stage. Furthermore, the ... Commission did not reject them as being manifestly ill-founded, and hence after a ... preliminary inquiry into the merits, but for being out of time and for non-exhaustion ... of domestic remedies. (...) As is apparent from the decision on admissibility, the ... examination of these two questions of admissibility (...) was not of such complexity ... that its outcome could warrant the deduction called for by the Government."[697]

On the other hand,in the *Campbell and Fell* Case[698] the restitution of costs and ... expenses was made conditional on the degree to which the complaints were successful.

The costs made with respect to the Strasbourg proceedings must have been made with ... a view to establishing the violation of the Convention by the Court. Just satisfaction ... may be afforded for costs incurred at all stages of the proceedings. The reimbursement ... may cover the costs and fees of the lawyer as well as travel and subsistence expenses. ... The Court will also take other costs, such as services of experts, photocopying and ... postal costs, and translation fees, into consideration, as long as these costs are neces...

695 Judgment of 21 June 1983, para. 30.
696 *Ibidem*, para. 28.
697 *Ibidem*, para. 51.
698 Judgment of 28 June 1984, para. 146. See also the judgment of 18 December 1986, *Johnston*, para. 86.

sarily incurred. However, the applicant must seek the reimbursement of these costs himself, because according to the Court, this is not a matter which it has to examine of its own motion.[699] In the *Brogan* Case the applicants did not submit any claim for reimbursement of costs and expenses and the Court held that the question of the application of Article 41 was not ready for decision in relation to the claim for compensation for prejudice suffered.[700] When the Court had to deal with the question of compensation under Article 41, the applicants sought not only compensation for prejudice sustained but also for reimbursement of costs and expenses incurred before the Convention organs. However, the Court stated that it had held that in its principal judgment there was no call to examine the application of Article 50 [the present Article 41] in relation to reimbursement of any costs or expenses incurred. The Court referred to Article 52 [the present Article 42] according to which the earlier decision was final. Therefore, the Court could not entertain the applicants' subsequent claim in this respect.[701]

In the Case of *L. and v. v Austria* the applicants asserted that following the Court's judgment further costs had to be incurred in order to remove the consequences flowing from the violation of the Convention. They argued in particular that – in case of a finding of a violation by the Court – they would be entitled, pursuant to Article 363a of the Code of Criminal Procedure, to have the criminal proceedings reopened in order to have their convictions set aside and to have them removed from their criminal records. The applicants, therefore, requested the Court to rule that the respondent State was obliged to pay any future costs necessary for removing the consequences of the violation at issue and to reserve the fixing of the exact amount to a separate decision. The Court considered that such a claim was speculative. The Court noted in particular that both applicants were sentenced to a prison term suspended on probation in 1997 and that the three-year probationary period had already expired. What remained was the entry of their convictions in their criminal records. In this situation it was open to doubt whether there would be any need for the applicants to have the criminal proceedings against them reopened, as the respondent State might well choose other means to have their convictions expunged. The respondent State might, for instance, decide to grant the applicants a pardon and have their convictions removed from their criminal records. Having regard to these circumstances the Court dismissed the applicants' claim for future costs.[702]

In the *Akdivar* Case the applicants complained that notwithstanding the order in the principal judgment for costs to be paid in pounds sterling, the respondent Government

699 Judgment of 24 April 1990, *Huvig*, para. 38; judgment of 19 February 1991, *Colacioppo*, para. 16.
700 Judgment of 29 November 1988, para. 71.
701 Judgment of 30 May 1989, *Brogan and Others*, para. 7.
702 Judgment of 9 January 2003, para. 68.

had paid only part of the costs owed, in equal divisions, into bank accounts op
by the authorities on behalf of each of the applicants. The sums had been pai
Turkish liras some four months after the delivery of the principal judgment a
13 January 1997. As a result, the applicants stated that there was a shortfall of
5,681.89 as of 13 January 1997, a sum which had accumulated 8% interest since
The Court pointed out that by Article 53 [the present Article 46] of the Conven
the High Contracting Parties undertake to abide by the decision of the Court in
case to which they are parties. Furthermore, it considered that the issue of a shortf
in the payment of costs ordered in the principal judgment is a matter which concer
the proper execution of a judgment of the Court by the respondent State. According
it is a question which falls to be decided by the Committee of Ministers of the Coun
of Europe.[703]

2.6.8.4 Other damages that might be compensated

hat other kind of damage may be compensated in addition to direct costs of proce
dings? In the *König* Case, according to the Court, the extent to which the 'reasonable
time' had been exceeded had left the applicant in prolonged uncertainty regarding h
career, which in the Court's opinion ought to be compensated in the form of DM
30,000 of damages.[704] In the *Goddi* Case the applicant maintained that, if he had ha
an opportunity to have his defence adequately presented, he would certainly hav
received a lighter sentence. The Court did not accept so categorical an allegation.
However, it held that the outcome might possibly have been different if the applicant
had had the benefit of a practical and effective defence and that, therefore, such a los
of real opportunities warranted the award of just satisfaction.[705] A similar reasoning
was followed by the Court in the *Colozza* Case, where it had found a violation of Article
6(1) of the Convention, since the applicant was never heard in his presence by a
'tribunal' which was competent to determine all the aspects of the matter. The Court
noted that an award of just satisfaction could only be based on the fact that the appli
cant had not had the benefit of the guarantees of Article 6 and awarded just satisfaction
to the applicant's widow for loss of real opportunities.[706] Reparation for loss of earning
is also possible,[707] as well as the repayment of fines and costs unjustly awarded against

703 Judgment of 1 April 1998, para. 59
704 Judgment of 10 March 1980, para. 19.
705 Judgment of 9 April 1984, para. 35.
706 Judgment of 12 February 1985, para. 38. See also the judgment of 2 June 1986, *Bönisch*, para. 1
judgment of 8 July 1986, *Lingens*, para. 50; judgment of 28 October 1987, *Inze*, para. 47.
707 Judgment of 24 November 1986, *Unterpertinger*, para. 35; judgment of 21 June 1988, *Berrehi*
para. 34, where, however, no reparation of loss of earnings was awarded because of the lack of a caus
link.

the applicant,[708] and reimbursement of the travel and subsistence expenses met by the applicant in attending the hearings before the Commission and the Court.[709] Reparation of immaterial damage can be awarded for suffered uncertainty,[710] feeling of unequal treatment,[711] unjust imprisonment[712] and feeling of frustration.[713]

Several factors can play a part in the determination of the amount of such kinds of compensation. In the *Ringeisen* Case the Court had found that there had been a violation of Article 5(3). The Court awarded the applicant compensation of DM 20,000, and in fixing the amount of this sum, took into account the following factors. Firstly, the fact that the detention under remand had exceeded reasonable limits by 22 months. Although the period of imprisonment to which he had ultimately been condemned was reduced by the duration of the detention under remand, he had always maintained that he was innocent and on that account had undoubtedly felt so long a detention under remand as unjust. Secondly, the fact that his detention had been hard on him, since it had been impossible for him to undertake anything to avoid bankruptcy.[714]

In the *Artico* Case the Court took three elements into consideration, *viz.* the imprisonment actually served, the additional imprisonment which the applicant had possibly incurred in consequence of the lack of effective legal aid and the isolated position in which he had been placed as a result of this. The Court held that "none of the above elements of damage lends itself to a process of calculation. Taking them together on an equitable basis, as is required by Article 50, the Court considers that Mr. Artico should be afforded satisfaction assessed at three million (3,000,000) Lire."[715]

In the *Sporrong and Lönnroth* Case the Court had found a violation of Article 1 of Protocol No. 1 of the Convention. In order to decide whether or not the applicants had been prejudiced, the Court had to determine during which periods the continuation of the measures complained of had been in violation of Protocol No. 1, and in addition which constituent elements of damage warranted examination. The Court found it reasonable that a municipality should, after obtaining an expropriation permit, require some time to undertake and complete the planning needed to prepare

708 Judgment of 27 February 1980, *De Weer*, para. 60; judgment of 8 July 1986, *Lingens*, para. 53; judgment of 28 August 1992, *Schwabe*, para. 40.
709 Judgment of 10 December 1982, *Corigliano*, para. 53.
710 Judgment of 10 July 1984, *Guincho*, para. 44.
711 Judgment of 2 June 1986, *Bönisch*, para. 11; judgment of 23 April 1987, *Lechner and Hess*, para. 65; judgment of 8 July 1987, *Baraona*, para. 61.
712 Judgment of 24 November 1986, *Unterpertinger*, para. 35.
713 Judgment of 26 May 1994, *Keegan*, para. 68; judgment of 31 October 1995, *Papamichalopoulos*, para. 36.
714 Judgment of 22 June 1972, paras. 25-26. The Court did not exclude that a third factor – the deteriorated health due to the detention – could also have played a role, but Ringeisen had not advanced any evidence for that fact while from medical reports the contrary could be inferred.
715 Judgment of 13 May 1980, para. 48. See further the judgment of 21 June 1983, *Eckle*, para. 14; and particularly the judgment of 18 December 1984, *Sporrong and Lönnroth*, paras. 19-21.

the final decision on the expropriation contemplated. Whilst a comparison be... the beginning and the end of the periods of damage did not show that the appli... were prejudiced in financial terms, the Court nevertheless did not conclude that ... was no loss within that period. There were, in fact, other factors which also warra... attention. Firstly, there were limitations on the utilization of the properties. In addition, during the periods of damage the value of the properties in question ... Furthermore, there were difficulties in obtaining loans, secured by way of mortg... Above all, the applicants were left in prolonged uncertainty as they did not know ... the fate of their properties would be. To these factors had to be added the non-pe... niary damage occasioned by the violation of Article 6(1) of the Convention ... applicants' case could not be heard by a tribunal competent to determine all the aspe... of the matter. The applicants thus suffered damage for which reparation was not pro... vided by the withdrawal of the expropriation permits.[716] As regards claims for los... earnings, the Court's case law establishes that there must be a clear causal connect... between the damage claimed by the applicant and the violation of the Convention a... that this may, in the appropriate case, include compensation in respect of loss ... earnings.[717]

In the *Bozano* Case the applicant claimed just satisfaction for the violation of Artic... 5(1) of the Convention. The Court concluded that the applicant's detention in Fran... involved a serious breach of the Convention, which inevitably caused him substanti... non-pecuniary damage. With regard to his subsequent detention in Switzerland an... Italy the Court found that it had no jurisdiction to review the compatibility of th... detention with the Convention, since the Commission had either declared the ap... plicant's complaints against those two States inadmissible or struck them off its lis... Nonetheless, there was a need to have regard to the applicant's detention as it too... place prior to the enforcement of the deportation order. In the Court's view the rel... damage was that sustained as a consequence of the process of enforcing the deportati... order and of the unlawful and arbitrary deprivation of liberty.[718]

If the damage or the costs do not lend themselves to a process of calculation, or the ... calculation presented to the Court is unreasonable, the Court fixes them on an equi... table basis.[719] In the *Young, James and Webster* Case there was no dispute that all three ... applicants had incurred pecuniary and non-pecuniary losses and also liability for legal ... costs and expenses referable to the Strasbourg proceedings, but certain claims exceeded ... with regards to their quantum, the sums offered by the British Government during ...

716 Judgment of 18 December 1984, para. 26.

717 Judgment of 13 June 1994, *Barberà, Messegué and Jabardo*, paras. 16-20; judgment of 8 July 199... *Cakici*, para. 127; judgment of 10 April 2001, *Tanli*, para. 181.

718 Judgment of 2 December 1987, para. 9.

719 Judgment of 13 May 1980, *Artico*, para. 48; judgment of 18 October 1982, *Young, James and Webst...* para. 11; judgment of 2 June 1986, *Bönisch*, para. 11.

unsuccessful friendly settlement negotiations. The Court observed that "high costs of litigation may themselves constitute a serious impediment to the effective protection of human rights. It would be wrong for the Court to give encouragement to such a situation in its decisions awarding costs under Article 50. It is important that applicants should not encounter undue financial difficulties in bringing complaints under the Convention and the Court considers that it may expect that lawyers in Contracting States will cooperate to this end in the fixing of their fees."[720] During the settlement negotiations the British Government offered to have the costs in question independently assessed or 'taxed' by a Taxing Master. In the opinion of the Court this would have been a reasonable method of assessment. However, the applicants did not take up this offer. In these circumstances the Court accepted the figure of 65,000 offered by the Government in respect of all legal costs and expenses.[721]

A claim for compensation will be rejected when there is nothing to suggest with reasonable certainty that without the violation the result would have been different.[722] Other possible reasons for rejection of reparation claims are: the Court's finding that, by holding that the violation has occurred, its judgment has already furnished sufficient satisfaction for the purposes of Article 50;[723] the conclusion that the applicants did not suffer any damage;[724] the fact that the domestic court has imposed a sentence identical to that given before the judgment of the Court, but now after a trial attended by all the guarantees laid down by the Convention;[725] the circumstance that the applicant has adduced insufficient evidence or information in support of his claim;[726] or the Court's holding that the "claims stem from matters in respect of which it has found no violation".[727]

In the Case of *Abdulaziz, Cabales and Balkandali*, the applicants sought 'substantial', but unquantified, compensation for non-pecuniary damage in the form of distress, humiliation and anxiety. They argued that the interference complained of concerned a vital element in society, namely family life; that sexual discrimination was universally condemned; and that the existence of a practice in breach of the Convention was an aggravating factor. The Court held that by reason of its very nature, non-pecuniary damage of the kind alleged could not always be the object of concrete proof.

720 Judgment of 18 October 1982, para. 11.

721 Judgment of 18 October 1982, para. 12.

722 Judgment of 10 March 1972, *De Wilde, Ooms and Versyp* ('*Vagrancy*' Cases), para. 20; judgment of 23 February 1984, *Luberti*, para. 40.

723 Judgment of 18 October 1982, *Le Compte, Van Leuven and De Meyere*, para. 12; judgment of 18 December 1987, *F. v. Switzerland*, para. 45; judgment of 22 April 1993, *Modinos*, para. 30.

724 Judgment of 23 November 1976, *Engel*, para. 10.

725 Judgment of 26 October 1984, *Piersack*, para. 15; judgment of 28 June 1993, *Windisch*, para. 11.

726 Judgment of 21 November 1983, *Foti*, para. 18; judgment of 29 May 1986, *Deumeland*, para. 98; judgment of 14 September 1987, *Gillow*, para. 14; judgment of 20 June 1988, *Schönenberger and Durmaz*, para. 38.

727 Judgment of 18 December 1986, *Johnston*, para. 85.

However, it is reasonable to assume that persons who, like the applicants, find themselves faced with problems relating to the continuation or inception of their married life may suffer distress and anxiety. The Court, however, considered that in the circumstances of these cases its findings of violation of themselves constituted sufficient satisfaction. The applicants' claim for monetary compensation could not therefore be accepted.[728]

In the Case of *A.D.T. v. the United Kingdom* concerning a conviction for homosexual acts with a number of consenting adults, the Court awarded 10,000 pounds sterling in respect of non-pecuniary damage.[729] In the *Smith and Davies* Case the applicants submitted that both the investigation of their sexual orientation and their consequent discharge from the armed forces on the sole ground of their homosexuality were profoundly degrading and humiliating events. Moreover, and as a result, they could not now pursue a career in a profession which they enjoyed and in which they excelled.[730] In its principal judgment the Court recalled that it had found that both the investigations and consequent discharges constituted 'especially grave' interference with the applicants' private lives for three reasons. In the first place, the Court considered that the investigation process was of an 'exceptionally intrusive character', noting that certain lines of questioning were 'particularly intrusive and offensive'. Secondly, the Court considered that the discharge of the applicants had a 'profound effect on their careers and prospects' and, thirdly, it found the absolute and general character of the policy striking, leading as it did to the discharge of the applicants on the ground of an innate personal characteristic irrespective of their conduct or service records. The principal judgment had also noted that the High Court, in its judgment delivered on 7 June 1995 in the domestic judicial review proceedings, had described the applicants' service records as 'exemplary' and had found that they had been 'devastated' by their discharge. Although not found to give rise to a violation of Article 3, these events were described in that context as having been 'undoubtedly distressing and humiliating for each of the applicants'. The Court considered it clear that the investigations and discharges described in the principal judgment were profoundly destabilising events in the applicants' lives which had and, it cannot be excluded, continue to have a significant emotional and psychological impact on each of them. The Court, therefore, awarded, on an equitable basis, GBP 19,000 to each applicant in compensation for non-pecuniary damage.[731] With respect to the pecuniary damages, the Court referred to the *Vogt* Case and recalled that one of the reasons why it considered Mrs Vogt's dismissal from her post as a schoolteacher to be a 'very severe measure', was

728 Judgment of 28 May 1985, para. 96.
729 Judgment of 31 July 2000, paras 43-45.
730 Judgment of 25 July 2000, para. 10.
731 *Ibidem*, paras 12-13.

the finding that schoolteachers in her situation would 'almost certainly be deprived of the opportunity to exercise the sole profession for which they have a calling, for which they have been trained and in which they have acquired skills and experience'.[732] In the *Smith and Davies* Case the Court was of the opinion that the significant differences between military service and civilian life and qualifications, together with the emotional and psychological impact of the investigations and of the consequent discharges, rendered it difficult for the applicants to find civilian careers which were, and would continue to be, equivalent to their service careers. Both applicants had access to certain armed forces' resettlement services. However, the first applicant submitted that she was too psychologically affected by the events surrounding her discharge to take immediate and full advantage of those services. The second applicant did participate in a resettlement programme and received a resettlement grant of GBP 5,583.[733] Moreover, the Court considered significant the loss to the applicants of the non-contributory service pension scheme. The lump sum and service pension which the first applicant would receive on retirement were substantially less than the amounts she would have received had she not been discharged, even if she had not achieved her predicted promotions before retirement. The same held true, but to a lesser extent, for the second applicant. In such circumstances, and making its assessment on an equitable basis, the Court awarded compensation (inclusive of interest claimed) to the applicants for past loss of earnings, for future loss of earnings and for the loss of the benefit of the non-contributory service pension scheme.[734]

In the *Davies* Case the Government contended that the applicant was not entitled to any compensation because he had not shown that he had suffered any stress or distress as a result of the violation. The Court observed that some forms of non-pecuniary damage, including emotional distress, by their very nature cannot always be the object of concrete proof. This did not prevent the Court from making an award if it considered that it was reasonable to assume that an applicant had suffered injury requiring financial compensation. It was reasonable to assume that the applicant suffered distress, anxiety and frustration exacerbated by the unreasonable length of the proceedings. The Court awarded the applicant 4,500 euros.[735]

In the *Stran Greek Refineries and Stratis Andreadis* Case the Court held that the adequacy of compensation might be diminished if it is paid without reference to various circumstances likely to reduce its value, such as the lapse of a considerable

732 Judgment of 26 September 1995, para. 60
733 Judgment of 25 July 2000, para. 20.
734 *Ibidem*, paras. 20-25.
735 Judgment of 16 July 2002, para. 38. Similarly, see judgment of 10 October 2002, *D.P. and J.C. v. the United Kingdom*, para. 142, and judgment of 28 January 2003, *Peck*, para.119.

period of time.[736] In the *Guillemin* Case the Court took note of the excessive and
tinuing duration of the proceedings the applicant had brought to secure compen
for an expropriation which the Court of Cassation had held to be unlawful. The C
observed that since the principal judgment was given, the proceedings in the nat
courts, which were still pending, had deprived the applicant of the compensatio
which she was entitled and would doubtless continue to deprive her of it, at leas
the Court of Cassation gave judgment. The Court considered it appropriate, with
prejudice to the amount that would finally be paid to the applicant at the end of
proceedings in the Court of Cassation, to award her compensation for the loss of a
liability of the sum already awarded in the judgment of the Evry *Tribunal de Gra*
Instance on 26 May 1997 that has been caused by the town council's refusal to com
with that judgment.[737]

In the *Selim Sadak* Case the applicants alleged that they had sustained pecuni
damage corresponding to what they would have earned as members of parliament h
they not been forced to vacate their seats and the loss of earnings they endured a
result of the restrictions to their civic rights. The Court considered that, irrespecti
of the dissolution of the DEP, because of the forfeiture of their parliamentary sea
the applicants undoubtedly sustained pecuniary damage, which, however, could n
be assessed with precision. To that must be added non-pecuniary damage, which t
finding of a violation in this judgment was not sufficient to make good.[738]

In the *Teixeira de Castro* Case the applicant claimed, firstly, compensation for lo
of earnings during the three years of the six-year sentence he spent in prison on the
ground that without the two police officers' intervention he would not have bee
convicted. He also requested compensation for loss of earnings because, when he came
out of prison, he had been dismissed and was unable to find another job as he was
labelled a drug trafficker. Owing to the fact that he had been in prison and conse
quently had no earnings, his wife and son had gone hungry and had known periods
of intense anxiety. Since his conviction their life had been a series of humiliations he
had lost friends and become estranged from members of his family. The Court held
that the documents in the case file suggested that the term of imprisonment com
plained of would not have been imposed if the two police officers had not intervened.
The loss by the applicant both of his earnings while he was deprived of his liberty and
of opportunities when he came out of prison were actual and entitled him to an award
of just satisfaction.[739] However, in cases of deprivation of liberty, compensation for
pecuniary damages will not be given if a causal link between the violation found and
the claimed damages does not exist.[740]

[736] Judgment of 19 December 1994, para. 82.
[737] Judgment of 2 September 1998, paras 24-25.
[738] Judgment of 11 June 2002, para. 56.
[739] Judgment of 9 June 1998, para. 49.
[740] Judgment of 4 June 2002, *Yagmurdereli*, para. 69

2.6.8.5 No Jurisdiction to direct a State to take certain measures

Repeatedly the Court has declared that it lacked jurisdiction to direct the States to take certain measures, such as to abolish the violation found by the Court and to repair the costs, etc. The Court notes regularly that it is left to the State concerned to choose the means within its domestic legal system to give effect to its obligations under Article 53.[741]

In the *Corigliano* Case the Court declared the claim inadmissible to order the State to make certain articles of the Penal Code inapplicable to 'political and social trials'. This "falls outside the scope of the case brought before the Court".[742] Also, the request to publish a summary of the Court's judgment in local newspapers or the removal of any reference to the applicant's conviction in the central criminal record fall outside the scope of the jurisdiction of the Court.[743]

In the *Bozano* Case the applicant had requested the Court to recommend that the French Government to approach the Italian authorities through diplomatic channels with a view to securing either a 'presidential pardon' – leading to his 'rapid release' – or a reopening of the criminal proceedings taken against him in Italy from 1971 to 1976. The Government argued that the Court did not have the power to take such a course of action. Furthermore, they maintained that it would in any case be unconnected with the subject-matter of the dispute, since it would amount to recommending France to intervene in the enforcement of final decisions of the Italian courts. The Court did not go into these arguments. It merely pointed out that Mr Bozano's complaints against Italy were not in issue before it, as the Commission had declared them inadmissible.[744] One cannot escape the impression that the Court did not want to enter into the issue of whether or not it had the power to make a recommendation as requested by the applicant. It might be argued that in cases where *restitutio in integrum* is impossible, as in the present case, the Court has no other option but to award just satisfaction. However, what Mr Bozano in addition requested from the Court was only a *recommendation* and such a recommendation should, in general, not be deemed inappropriate, comparable as it would seem to be with the recommendation of provisional measures, for which there is also no express basis in the Convention.

In the *Akdivar* Case the applicants claimed, *inter alia*, compensation under this provision for the losses incurred as a result of the destruction of their houses by the security forces which forced them to abandon their village. They further submitted that the Court should confirm, as a necessary implication of an award of just satis-

[741] Judgment of 20 September 1993, *Saïdi*, para. 47; judgment of 13 July 1995, *Tolstoy Miloslavsky*, paras 69-72; judgment of 30 October 1995, *Papamichalopoulos*, para. 34; judgment of 1 April 1998, *Akdiva*, para. 62.
[742] Judgment of 10 December 1982, para. 51.
[743] Judgment of 27 February 1992, *Manifattura FL*, para. 26; judgment of 23 April 1992, *Castells*, para. 54.
[744] Judgment of 18 December 1986, para. 65.

faction, that the Government should (1) bear the costs of necessary repairs in the village to enable the applicants to continue their way of life there; and (2) remove the obstacle preventing the applicants from returning to their village. The Court held that if *restitutio in integrum* is in practice impossible, the respondent States are free to choose the means whereby they will comply with a judgment in which the Court has found a breach, and the Court will not make consequential orders or declaratory statements in this regard. It falls to the Committee of Ministers acting under Article 54 of the Convention to supervise compliance in this respect.[745]

In the *Papamichalopoulos* Case the Court held that "the loss of all ability to dispose of the land in issue, taken together with the failure of the attempts made [up to the present] to remedy the situation complained of, [had] entailed sufficiently serious consequences for the applicants de facto to have been expropriated in a manner incompatible with their right to the peaceful enjoyment of their possessions". The act of the Greek Government which the Court held to be contrary to the Convention, was not an expropriation that would have been legitimate but the failure to pay fair compensation. It was a taking by the State of land belonging to private individuals, which had lasted twenty-eight years, the authorities having ignored the decisions of national courts and their own promises to the applicants to redress the injustice committed in 1967 by the dictatorial regime.[746] Consequently, the Court considered that the return of the land in issue – as defined in 1983 by the Athens second Expropriation Board – would put the applicants as far as possible in a situation equivalent to the one in which they would have been if there had not been a breach of Article 1 of Protocol No. 1. The award of the existing buildings would then fully compensate them for the consequences of the alleged loss of enjoyment. The Court held that if the respondent State did not make such restitution within six months from the delivery of this judgment it was to pay the applicants for damage and loss of enjoyment since the authorities took possession of the land in 1967, the current value of the land increased by the appreciation brought about by the existence of the buildings and the construction cost of the latter.[747]

In the *Scozzari and Giunta* Case the Court held that a judgment in which the Court finds a breach of the Convention imposes on the respondent state a legal obligation not just to pay those concerned the sums awarded by way of just satisfaction, but also to choose, subject to supervision by the Committee of Ministers, the general and/or if appropriate, individual measures to be adopted in their domestic legal order to put an end to the violation found by the Court and to redress so far as possible the effects.[748]

745 Judgment of 1 April 1998, para. 62; judgment of 24 April 1998, *Selçuk and Asker*, para. 154; judgment of 24 July 1998, *Mentes and Others*, para. 423.

746 Judgment of 24 June 1993, para. 45.

747 Judgment of 31 October 1995, paras 38-40.

748 Judgment of 13 July 2000, para. 249.

In the *Velikova* Case the applicant claimed 100,000 French francs in compensation for the pain and suffering resulting from the violations of the Convention. She asked for an order of the Court that this amount be paid directly to her in full, free of taxes or of any claim or attachment by the government or by third persons. The applicant also requested the Court to order that there should be no negative consequences for her, such as reduction in social benefits due to her as a result of the receipt of the above amount. The Court considered that the compensation fixed pursuant to Article 41 and due by virtue of a judgment of the Court should be exempted from attachment. It held that it would be incongruous to award the applicant an amount in compensation for, *inter alia*, deprivation of life constituting a violation of Article 2, if the State itself were then allowed to attach this amount. The purpose of compensation for non-pecuniary damage would inevitably be frustrated and the Article 41 system perverted, if such a situation were to be deemed satisfactory. However, the Court held that it had no jurisdiction to make an order exempting compensation from attachment. It, therefore, left this point to the discretion of the Bulgarian authorities.[749]

Where the choice of measures is theoretical in the sense that it is constrained by the nature of the violation, the Court can itself directly require certain steps to be taken. To date it has made use of this possibility only on two occasions. In the *Assanidze* Case the Court ordered the release of the applicant who was being arbitrarily detained in breach of Article 5 of the Convention. It held that as regards the measures which the Georgian State had to take, subject to supervision by the Committee of Ministers, in order to put an end to the violation that had been found, its judgments are essentially declaratory in nature and that, in general, it is primarily for the State concerned to choose the means to be used in its domestic legal order in order to discharge its legal obligation under Article 46 of the Convention, provided that such means are compatible with the conclusions set out in the Court's judgment. This discretion as to the manner of execution of a judgment reflects the freedom of choice attaching to the primary obligation of the Contracting States under the Convention to secure the rights and freedoms guaranteed. However, by its very nature the violation found in the instant case did not leave any real choice as to the measures required to remedy it. In these conditions, having regard to the particular circumstances of the case and the urgent need to put an end to the violation of Article 5(1) and Article 6(1) of the Convention, the Court considered that the respondent State had to secure the applicant's release at the earliest possible date.[750] In the *Ilaşcu* Case the Court considered that any continuation of the unlawful and arbitrary detention of the three applicants would necessarily entail a serious prolongation of the violation of Article 5 found by the Court and a breach of the respondent States' obligation under Article

749 Judgment of 18 May 2000, para. 99.

750 Judgment of 8 April 2004, paras 202-203.

46(1) of the Convention to abide by the Court's judgment. Regard being had to the grounds on which the respondent States had been found by the Court to be in violation of the Convention, they had to take every measure to put an end to the arbitrary detention of the applicants still detained and to secure their immediate release.

In this respect it should be noted that the Committee of Ministers in a fairly recent Resolution considered that the execution of judgments would be facilitated if the existence of a systemic problem is already identified in the judgment of the Court. Therefore, it invited the Court: "I. as far as possible, to identify, in its judgments finding a violation of the Convention, what it considers to be an underlying systemic problem and the source of this problem, in particular when it is likely to give rise to numerous applications, so as to assist states in finding the appropriate solution and the Committee of Ministers in supervising the execution of judgments; II. to specially notify any judgment containing indications of the existence of a systemic problem and of the source of this problem not only to the state concerned and to the Committee of Ministers, but also to the Parliamentary Assembly, to the Secretary General of the Council of Europe and to the Council of Europe Commissioner for Human Rights and to highlight such judgments in an appropriate manner in the database of the Court."[752]

In the Explanatory Report to Protocol No. 14 it is indicated that it would be useful if the Court and, as regards the supervision of the execution of judgments the Committee of Ministers, adopt a special procedure so as to give priority treatment to judgments that identify a structural problem capable of generating a significant number of repetitive applications with a view to securing speedy execution of the judgment.[753]

In virtue of Protocol No. 14, paragraphs 4 and 5 of Article 46 of the Convention accordingly will empower the Committee of Ministers to bring infringement proceedings before the Court (which will sit as a Grand Chamber), having first served the State concerned with notice to comply. The Committee of Ministers' decision to do so requires a qualified majority of two thirds of the representatives entitled to sit on the Committee. This infringement procedure does not aim to reopen the question of violation already decided in the Court's first judgment. Nor does it provide for payment of a financial penalty by a High Contracting Party found in violation of Article 46, paragraph 1. It is felt that the political pressure exerted by proceedings for non-compliance in the Grand Chamber and by the latter's judgment should suffice to secure execution of the Court's initial judgment by the state concerned.[754]

751 Judgment of 8 July 2004, para. 490.
752 Resolution (2004)3 of 12 May 2004.
753 *Explanatory Report to Protocol No.14*, para. 16.
754 *Ibidem*, para. 98.

2.7 REQUEST FOR INTERPRETATION OF A JUDGMENT OF THE COURT

Rule 79 of the Rules of Court deals with the possibility of requesting the Court to interpret a judgment. A party may request such an interpretation within one year following the delivery of the judgment. The request must state precisely the point or points in the operative provisions of the judgment of which interpretation is required. The original Chamber may decide of its own motion to refuse the request on the ground that there is no reason to warrant considering it. Where it is not possible to constitute the original Chamber the President of the Court will complete or compose the Chamber by drawing lots. If the Chamber does not refuse the request, the Registrar will communicate it to the other party or parties and will invite them to submit any written comments within a time-limit laid down by the President of the Chamber. The President of the Chamber will also fix the date of the hearing should the Chamber decide to hold one. The Chamber will decide by means of a judgment. A request for interpretation will be dealt with, according to Rule 102 of the Rules of Court, in proceedings largely resembling the normal proceedings before the Court.

Until 2005 the Court only decided on a request for interpretation on three occasions. On 21 December 1972, on the basis of a letter from the original individual applicant, the Commission submitted to the Court a request for interpretation of the Court's second judgment in the *Ringeisen* Case of 22 June 1972. In this judgment Ringeisen had been awarded compensation of DM 20,000. The question whether this amount would have to be paid directly to Ringeisen or whether it might be claimed by the trustee in the bankruptcy of Ringeisen had been left by the Court to the discretion of the Austrian Government. In this connection, however, the Court had referred to the Austrian legislation concerning compensation on account of detention under remand, which implied that no attachment or seizure may be made against such compensation. The money was, however, sent by the Austrian authorities on consignment to a judicial tribunal. The latter decided that upon request of the persons entitled to it or after a final judicial decision the money was to be paid. The Commission asked the Court what was meant by the order to pay compensation, in particular with respect to the currency and the place of the payment, and whether the term 'compensation' was to be understood as an amount that was exempt from any judicial claims under Austrian law or, on the contrary, was subject to such claims. The Court replied that the compensation was to be paid in German marks and was to be made payable in the Federal Republic of Germany. Furthermore the Court ruled that the money was to be paid to Ringeisen and was personally exempt from any claim or title to it. This ruling, therefore, implied disapproval of the position taken by the Austrian authorities. Austria had called into question the competence of the Court in the matter, stating that "the competence of the (...) Court (...) for interpretation of its judgments

(...) is based solely on the Rules of the Court. Therefore, in the light of Article [illegible] the (...) Convention, the well-founded question may even be raised whether this [illegible] institution is compatible at all with the Convention." The Court pointed out [illegible] the sole purpose of Article 52 [the present Article 42] is to exclude appeal [illegible] another authority from decisions of the Court.[755] It submitted that there is no question of appeal when the Court deals with a request for interpretation. In such a case the Court exercises inherent jurisdiction, because such a request concerns only elucidation of the purport and scope of a preceding judgment. Furthermore, the Court pointed out that Rule 56 (the present Rule 57) had been submitted to the Contracting States at the time of its adoption and that no objections had been raised against it by those States.[756]

In its judgment of 10 February 1995 in the *Allenet de Ribemont* Case the Court awarded the applicant under Article 50 an overall sum of FRF 2,000,000 for pecuniary and non-pecuniary damage, together with FRF 100,000 for costs and expenses. In response to the applicant's request for a ruling that France should guarantee him against any application for enforcement of a judgment delivered by the Paris *Tribunal de Grande Instance* on 14 March 1979, the Court said that "under Article 41 it does not have jurisdiction to issue such an order to a Contracting State".[757] In July-August 1995 the applicant was informed that an attachment of the sums awarded to him by the Court had been effected at the request of the parties in whose favour the judgment of the Paris *Tribunal de Grande Instance* had been given. Following a request from Mr Allenet de Ribemont the Commission submitted to the Court a request for interpretation of the judgment of 10 February 1995. The request was worded as follows: "*Firstly*, is it to be understood that Article 50 of the Convention, which provides for an award of just satisfaction to the injured party if the domestic law of the High Contracting Party allows only partial reparation to be made for the consequences of the decision or measure held to be in conflict with the obligations arising from the Convention, means that any sum awarded under this head must be paid to the injured party personally and be exempt from attachment? *Secondly*: In respect of sums subject to legal claims under French law, should a distinction be made between the part of the sum awarded under the head of pecuniary damage and the part awarded under the head of non-pecuniary damage? and *Thirdly*: If so, what were the sums which the Court intended to grant the applicant in respect of pecuniary damage and non-pecuniary damage respectively?"

The Court observed, firstly, that when considering a request for interpretation it is exercising inherent jurisdiction: it goes no further than to clarify the meaning and

[755] See *supra* 2.5.
[756] Judgment of 23 June 1973, paras 12-15.
[757] Judgment of 10 February 1995, para. 23.

scope which it intended to give to a previous decision which issued from its own deliberations, specifying if need be what it thereby decided with binding force. The Court understood the first question put by the Commission as an invitation to interpret Article 50 in a general, abstract way. That, however, went outside not only the bounds laid down by Rule 57 of Rules of Court, but also those of the Court's contentious jurisdiction under the Convention. In any event, the Court had not in the instant case ruled that any sum awarded to Mr Allenet de Ribemont was to be free from attachment. The applicant had asked the Court to hold that the State should guarantee him against any application for enforcement of the judgment delivered by the Paris *Tribunal de Grande Instance* on 14 March 1979. In response the Court had said that "under Article 50 it does not have jurisdiction to issue such an order to a Contracting State". Accordingly, the question had been left to the national authorities acting under the relevant domestic law. In short, the Court had no jurisdiction to answer the first question put by the Commission. As to the Commission's second and third questions the Court said that in its judgment of 10 February 1995 it had awarded the applicant FRF 2,000,000 'for damage' without distinguishing between pecuniary and non-pecuniary damage. In relation to the sum awarded the Court had considered that it did not have to identify the proportions corresponding to pecuniary and non-pecuniary damage respectively. It was not bound to do so when affording 'just satisfaction' under Article 50 of the Convention. In point of fact it was often difficult, if not impossible, to make any such distinction. The Court held that the judgment it had delivered on 10 February 1995 was clear on the points in the operative provisions on which interpretation had been requested. To hold otherwise would not be to clarify 'the meaning and scope' of that judgment but rather to modify it in respect of an issue which the Court had decided with binding force. Accordingly, it was unnecessary to answer the Commission's second and third questions.[758]

In the *Hentrich* Case the Court had ruled in its judgment of 3 July 1995 on just satisfaction that the French Government should pay a specified amount of money. In her request for interpretation the applicant complained of the delay in paying the just satisfaction – payment being made on 1 December 1995 – and she claimed default interest on the sums awarded. This was not considered a matter for interpretation.[759]

Protocol No. 14 will amend Article 46(3) to empower the Committee of Ministers to ask the Court to interpret a final judgment for the purpose of facilitating the supervision of its execution. The Committee of Ministers' experience of supervising the execution of judgments shows that difficulties are sometimes encountered due to disagreement as to the interpretation of judgments. The Court's reply is designed to settle any argument concerning a judgment's exact meaning. The qualified majority vote

[758] Judgment of 7 August 1996, para. 23.
[759] Judgment of 3 July 1997, paras 14-16.

required by the last sentence of paragraph 3 shows that the Committee of Ministers should use this possibility sparingly, in order to avoid over-burdening the Court.

No time-limit has been set for making requests for interpretation since a question of interpretation may arise at any time during the Committee of Ministers' examination of the execution of a judgment. The Court is free to decide on the manner and form in which it wishes to reply to the request. Normally it would be for the formation of the Court which delivered the original judgment to rule on the question of interpretation. More detailed rules governing this new procedure may be included in the Rules of Court.[760]

2.8 REQUEST FOR REVISION OF A JUDGMENT

The competence of the Court to deal with requests for revision of its judgments is likewise not regulated by the Convention. Like the competence to give an interpretation of a judgment at the request of a party, the competence to revise a judgment may also be considered as inherent in the jurisdiction of the Court. The procedure to be followed in connection with a request for revision is also to be found in the Rules of Court, *viz.* in Rule 80.

A party may, in the event of the discovery of a fact which might by its nature have a decisive influence and which, when a judgment was delivered, was unknown to the Court and could not reasonably have been known to that party, request the Court within a period of six months after that party acquired knowledge of the fact, to revise that judgment. The original Chamber may decide of its own motion to refuse the request on the ground that there is no reason to warrant considering it. Where it is not possible to constitute the original Chamber, the President of the Court will complete or compose the Chamber by drawing lots. If the Chamber does not refuse the request, the Registrar will communicate it to the other party or parties and invite them to submit any written comments within a time-limit laid down by the President of the Chamber. The President of the Chamber will also fix the date of the hearing should the Chamber decide to hold one. The Chamber decides by means of a judgment. A request for revision will be dealt with, according to Rule 102 of the Rules of Court, in proceedings largely resembling the normal proceedings before the Court.

760 *Explanatory Report to Protocol No. 14*, paras 96-97.

Up to the present (February 2005) eight requests for revision had been honoured by the Court,[761] while four requests had been dismissed.[762] This rather low figure is not surprising. In general, cases in which an originally unknown fact of decisive importance is discovered after the final judgment are very rare. It is even less likely that such a situation will occur after lengthy local proceedings and the elaborate proceedings before the Court.

In the *Pardo* Case the applicant complained, *inter alia*, of a breach of his right to a fair trial. He claimed that as a party in commercial litigation in the Aix-en-Provence Court of Appeal he had not had the opportunity to present oral arguments on the merits despite the fact that the President had announced that there would be a further hearing at a later date. In its judgment the Court held that there had been no violation of Article 6(1).[763] At Mr Pardo's request the Commission submitted to the Court a request for the revision of that judgment. The Commission noted that the Court, prior to its hearing on 22 March 1993, had asked the participants in the proceedings to produce some documents. For the reasons given at the hearing these requests were not complied with. Since then the applicant had been able to obtain certain of these documents and in particular the letter from Mr de Chessé to Mr Davin (both lawyers) of 25 March 1985 and the list of documents contained in the appeal file. The Commission took the view that, as the Court had asked for these documents to be produced, they might by their nature have had a decisive influence on its judgment. The Court took the view that the two documents submitted in support of the Commission's request (the letter from Mr de Chessé to Mr Davin of 25 March 1985 and the list of documents in the appeal file), documents to which Mr Pardo did not have access until after the delivery of the judgment of 20 September 1993, could be regarded as facts for the purposes of Rule 58(1) [the present Rule 80(1)]. The Court noted that, under the terms of the second sentence of Rule 58(4) [the present Rule 80(4)], the Chamber constituted to consider the request for revision could only determine the admissibility of that request. It had, accordingly, to confine itself to examining whether, *prima facie,* the facts submitted were such as 'might by [their] nature have a decisive influence'. The task of considering whether they actually had a 'decisive influence' lay in principle with the Chamber which gave the original judgment. A decision on the admissibility of the request, therefore, in no way prejudged the merits of the request. However, in carrying out its examination the Court had to bear in mind that, by virtue of Article 52 [the present Article 42] of the Convention, its judgments were final. Inasmuch as it called

761 Judgment of 3 May 2001, *E.P. v. Italy;* judgment of 23 October 2001, *Tripodi;* judgment of 7 November 2002, *Viola;* judgment of 26 November 2002, *Frattini;* judgment of 8 April 2003, *Perhirin and 29 Others;* judgment of 29 April 2003, *Grasso;* judgment of 8 July 2004, *Karagiannis;* judgment of 21 September 2004, *Stoiescu.*

762 Judgment of 10 July 1996, *Pardo;* judgment of 30 July 1998, *Gustafsson;* judgment of 28 January 2000, *McGingley and Egan;* judgment of 2 October 2003, *Corsi.*

763 Judgment of 20 September 1993, para. 29.

into question the final character of judgments, the possibility of revision, which was not provided for in the Convention but had been introduced by the Rules of Court. It was an exceptional procedure. That was why the admissibility of any request for revision of a judgment of the Court under this procedure was subject to strict scrutiny. In order to establish whether the facts on which a request for revision were based 'might by [their] nature have a decisive influence', they had to be considered in relation to the decision of the Court the revision of which was sought. The Court observed in this connection that a request to those appearing before the Court for documents to be produced was not in itself sufficient to warrant the conclusion that the documents in question 'might by [their] nature have a decisive influence'. On the other hand, the Court could not exclude the possibility that the documents in question 'might by [their] nature have a decisive influence'. It fell to the Chamber which gave the original judgment to determine whether those documents actually cast doubt on the conclusions it reached in 1993. The Court accordingly declared the request for revision admissible and referred it to the Chamber which gave the original judgment.[764] In its judgment of 29 April 1997 the Court decided that the documents in question did not provide any information on the proceedings concerned whose course had been in dispute before the Court. The documents would not have had a decisive influence on the original judgment and did not constitute any grounds for revision. Therefore, the request was dismissed.[765]

In the *Gustafsson* Case the applicant complained that the lack of State protection against industrial action conducted by the Hotel and Restaurant Workers' Union (HRF) against his restaurant, gave rise to a violation of his right to freedom of association as guaranteed by Article 11 of the Convention. The Court concluded that Article 11 of the Convention was applicable in the applicant's case but that there had been no violation of this Article.[766] In requesting the Court to revise its judgment of 25 April 1996 the applicant adduced evidence in relation to two allegations advanced by the Government for the first time in their memorial to the Court during the main proceedings. This concerned firstly their assertion that in 1986 one of his employees, who was also a member of HRF, had contacted the HRF to complain about the terms of employment. Secondly, it concerned the Government's allegation that the applicant could not substantiate his own assertion that the employment terms which he offered were, as regards salaries, equal to or better than those required under a collective agreement with the HRF. The Court held that, although the judgment referred to the additional information in question, this only disposed of a point of procedure in reply to the applicant's contention that the Government were estopped from changing the

764 Judgment of 10 July 1996, paras 24-25.

765 Judgment of 29 April 1997, paras 20-22; see also in this respect the judgment of 28 January 2000, *McGinley and Egan*, paras 35-36.

766 Judgment of 25 April 1996, paras 51-55.

stance they had adopted before the Commission and from adducing the evidence before the Court. The Court's answer that it was not prevented from taking the information into account if it considered it relevant could not of its own be taken to mean that the Court actually did have regard to the information. The reasons stated in the ensuing part of the original judgment were sufficient to support, and were decisive for, the Court's conclusion that there had been no violation of Article 11 of the Convention. It contained no mention of the additional evidence and arguments submitted by the Government. Nor was there anything to indicate that the evidence had been relied on here. Nor did other parts of the Court's reasoning and conclusions mention the first set of facts in dispute, namely the Government's allegation that the trade union action had its background in a complaint in 1986 by an HRF member employed by the applicant. Only the second set of disputed facts concerning the terms and conditions of employment was alluded to. However, the reasons contained in the relevant part of the judgment were merely accessory to those mentioned above. Furthermore, the Court did not state anything suggesting an acceptance on its part of the arguments and evidence advanced by the Government in rebuttal. It did not regard the additional facts submitted by them as established facts. Rather than determining the disagreement between the applicant and the Government as to the terms and conditions of employment, the Court had regard to the general interest sought to be achieved through the union action, in particular the special role and importance of collective agreements in the regulation of labour relations in Sweden. It followed that the evidence adduced by the applicant would not have had a decisive influence on the Court's judgment of 25 April 1996 as far as the applicant's complaint under Article 11 of the Convention was concerned. Nor would it have had any such bearing on its conclusions with respect to his complaints under Article 1 of Protocol No. 1 or Article 6 or 13 of the Convention. Accordingly, the evidence did not offer any ground for revision.[767]

Most of the requests for revision concerned the issue of just satisfaction under Article 41 of the Convention. In a number of cases the applicant had died before the Court had taken a decision in his case, finding a violation of the Convention and awarding the applicant compensation under Article 41. Subsequently, the respondent State requested for revision of the principal judgment concerning Article 41 of the Convention. The Court found that it had not been informed to whom it could legitimately award the just satisfaction due, and decided to revise its principal judgment so that no amount be awarded for non-pecuniary damage.[768] In the Case of *E.P. v. Italy* the Court decided to revise its principal judgment and not to award costs and expenses,

767 Judgment of 30 July 1998, paras 27-32.

768 Judgment of 3 May 2001, *E.P. v. Italy*, para. 6; judgment of 23 October 2001, *Tripodi*, para. 5. See also the judgment of 26 November 2002, *Frattini*, para. 3, and the judgment of 8 April 2003, *Perhirin and 29 Others*, para. 5, where the Court revised the judgment concerning Article 41 with respect to the moral damage awarded to the deceased applicants and their heirs.

because the applicant's lawyer had not provided the information requested.[769] In the *Grasso* Case the Court revised its principal judgment concerning Article 41 in the sense that the payment for moral damage should be paid to the legitimate heirs of the deceased applicant.[770] In the *Viola* Case the applicant's lawyer informed the Court that he had received news of the applicant's death. He, therefore, requested the Court to take the necessary steps in order to pay the just satisfaction to the applicant's widow. The Court agreed and revised its principal judgment in that sense.[771] In the *Corigliano* Case the applicant requested revision of the judgment previously delivered by the Court concerning his application, in which the Court found a violation of Article 6(1) on account of the length of the proceedings but made no financial award in respect of damage. Noting that no sum had been awarded to the applicant because no claim had reached the Registry within the time allowed, and that no new information warranting revision of the earlier judgment had been received, the Court decided to dismiss the application for revision.[772]

In the *Stoiescu* Case the Court had held that there had been a violation of Article 6(1) on account of the lack of a fair hearing and the denial of access to court as well as a violation of Article 1 of Protocol No. 1. The Court had ordered the Romanian State to return the property in question to the applicant or, failing that, to pay him EUR 270,000 for pecuniary damage. It also awarded him EUR 6,000 for non-pecuniary damage.[773] The Romanian Government requested revision of the Court's judgment on account of the discovery of a new fact, namely that the applicant had lost his status as heir when his certificate of inheritance was declared null and void following an application by a third-party who inherited under the terms of a will. The Court noted that following proceedings in the Romanian courts between 1995 and 1999 the applicant's certificate of inheritance, which formed the basis of his claim for the return of the property, had been declared null and void. That decision could have decisively affected the admissibility decision and the judgment that had been handed down by the Court in the case in 2000 and 2003. The Court considered that, due to the lack of a computerised database of pending cases in Romania at the material time, the Romanian Government could not reasonably have been aware of events. However, the applicant had been involved in the proceedings concerning the validity of his certificate of inheritance for over seven years and could have informed the Court of the position before it gave its judgment, but had knowingly declined to do so. Since 20 May 1999, when the Bucharest Court of Appeal declared his certificate of inheritance null and void, the applicant had lost his status as his aunt's heir and his right to the return of the property. In those circumstances he could no longer claim to be a victim, within

769 Judgment of 3 May 2001, para. 7.
770 Judgment of 29 April 2003, para. 7.
771 Judgment of 7 November 2002, paras 5-10.
772 Judgment of 2 October 2003, para. 10.
773 Judgment of 4 March 2003.

the meaning of the Convention, of a violation of his rights. Accordingly, the Court unanimously declared the Government's application for revision admissible. Consequently, it declared Mr Stoicescu's application inadmissible and revised the judgment of 4 March 2003 in full.[774]

2.9 ADVISORY JURISDICTION OF THE COURT

Since the entry into force of Protocol No. 2 on 21 September 1970, the Court has jurisdiction to give advisory opinions on legal questions concerning the interpretation of the Convention and the Protocols thereto (Article 1(1) of Protocol No. 2).

The advisory jurisdiction of a court may be of great importance for a uniform interpretation and the further development of the law. With regard to international law this is quite evident from the practice of the International Court of Justice and the Court of Justice of the European Communities. Via its advisory opinions the International Court of Justice has made an important contribution to the interpretation and the progressive development of the law of the United Nations in particular. The advisory jurisdiction of the International Court of Justice is formulated very broadly, without any conditions being made as to the scope of such advisory opinions. According to Article 96 of the Charter of the United Nations in conjunction with Article 65 of the Court's Statute, the Court may give advisory opinions 'on any legal question', so that the most varied issues of international law may be submitted to the Court. The jurisdiction of the Court of Justice of the European Communities is very limited as to its scope, but still comprises the field of the conclusion of treaties, which is of great importance for the Communities.

The practical importance of the advisory jurisdiction of the European Court of Human Rights, on the other hand, has been reduced to a minimum from the outset because of the restrictions which are put on it in the said Protocol. In fact, Article 1(2) provides that advisory opinions of the European Court:

> *shall not deal with any question relating to the content or scope of the rights or freedoms defined in Section I of the Convention and in the Protocols thereto, or with any other question which the Commission, the Court, or the Committee of Ministers might have to consider in consequence of any such proceedings as could be instituted in accordance with the Convention.*

A request for an advisory opinion must indicate in precise terms the question on which the opinion of the Court is sought, and in addition the date on which the Committee of Ministers decided to request an advisory opinion, as well as the names and addresses of the person or persons appointed by the Committee to give the Court any explana-

774 Judgment of 21 September 2004, para. 33.

tions which it may require (Rule 83 of the Rules of Court). A copy of the re
transmitted to the members of the Court (Rule 84 of the Rules of Court). The
dent lays down the time-limits for the filing of written comments or other doc
(Rule 85 of the Rules of Court). The President also decides whether after the
of the written procedure an oral hearing is to be held (Rule 86 of the Rules of

Advisory opinions are given by majority vote of the plenary Court. They m
the number of judges constituting the majority, while any judge may attach
opinion of the Court either a separate opinion, concurring with or dissenting
the advisory opinion, or a bare statement of dissent (Rule 88 of the Rules of

The advisory opinion is read out by the President or his delegate at a
hearing, and certified copies are sent to the Committee of Ministers, the Contra
States and the Secretary General of the Council of Europe (Rules 89 and 90 of the
of Court).

If the Court considers that the request for an advisory opinion is not with
consultative competence, it so declares in a reasoned decision (Rule 87 of the
of Court).

It is obvious that a high degree of inventiveness is required for the formula
of a question of any importance which could stand the test of Article 1(2) of Prot
No. 2 and could, therefore, be submitted to the Court.

So far, at any rate, in June 2004 the Court delivered its first decision on its compet
to give an advisory opinion. The request concerned the Commonwealth of Indepe
ent States (CIS) which was established in 1991 by a number of former Soviet Repub
and at present comprises 12 States. It provides for the establishment of a Human Rig
Commission of the Commonwealth of Independent States (the CIS Commission)
monitor the fulfilment of the human rights obligations entered into by States. The C
Convention entered into force on 11 August 1998. In May 2001 the Parliamentary
Assembly of the Council of Europe adopted a Recommendation that the Committe
of Ministers request the Court to give an advisory opinion on the question of whet
the CIS Commission should be regarded as 'another procedure of internationa
investigation or settlement' within the meaning of Article 35(2)(b) of the Convention
The Parliamentary Assembly referred to 'the weakness of the CIS Commission as a
institution for the protection of human rights' and expressed the view that it should
not be regarded as a procedure falling within the scope of Article 35(2)(b).[775] The
Committee of Ministers followed the recommendation and requested the Court to
give an advisory opinion on "the co-existence of the Convention on Human Rights
and Fundamental Freedoms of the Commonwealth of Independent States and the
European Convention on Human Rights". The Court considered that the request for
an advisory opinion related essentially to the specific question whether the CIS Com

[775] Recommendation 1519(2001).

mission could be regarded as 'another procedure of international investigation or settlement' within the meaning of Article 35(2)(b) of the Convention and was satisfied that the request related to a legal question concerning the interpretation of the Convention, as required by Article 47(1). It was, however, necessary to examine whether the Court's competence was excluded by Article 47(2), on the ground that the request raised a 'question which the Court or the Committee of Ministers might have to consider in consequence of any such proceedings as could be instituted in accordance with the Convention'. The Court considered that 'proceedings' in this context referred to proceedings relating to applications lodged with it by States or individuals under Articles 33 and 34 of the Convention respectively and that the term 'question' extended to issues concerning the admissibility of applications under Article 35 of the Convention. It observed that the question whether an individual application should be declared inadmissible on the ground that the matter had already been submitted to 'another procedure of international investigation or settlement' had been addressed in a number of concrete cases in the past, in particular by the former European Commission of Human Rights.

In that connection the Court endorsed the Commission's approach, which showed that the examination of this question was not limited to a formal verification of whether the matter had been submitted to another procedure but extended, where appropriate, to an assessment of the nature of the supervisory body concerned, its procedure and the effect of its decisions. The question whether a particular procedure fell within the scope of Article 35(2)(b) was, therefore, one which the Court might have to consider in connection with proceedings instituted under the Convention, so that its competence to give an advisory opinion was in principle excluded. As far as the CIS Convention procedure was concerned the Court noted that several States Parties to the European Convention on Human Rights were members of the CIS and that three had signed and one had ratified the CIS Convention. Moreover, the rights set out in the CIS Convention were broadly similar to those in the European Convention on Human Rights. It could not, therefore, be excluded that the Court might have to consider, in the context of a future individual application, whether the CIS procedure was 'another procedure of international investigation or settlement'. The Court concluded that the request for an advisory opinion did not come within its advisory competence.[776]

It is submitted that it is regrettable that the advisory jurisdiction of the Court does not have a wider scope. Widening of the scope of the Court's advisory jurisdiction would, however, require amendment of Protocol No. 2. It would seem desirable that the subject-matter to which requests for an advisory opinion may relate be extended to any legal question concerning the Convention and the Protocols, though on condition

[776] Decision of 2 June 2004.

that the giving of an advisory opinion by the Court must not amount to a dec... of the Court under Section IV of the Convention and that the request must not d... relate to a dispute which is pending before the Court, while wide discretion ou... be given to the Court to comply with the request or not, on the basis of the cha... and/or the importance of the question submitted to it and in view of its case l...

Secondly, more entities should be entitled to submit a request for an advi... opinion. In the present situation only the Committee of Ministers may addre... request for an advisory opinion to the Court (Article 1(1) of Protocol No. 2). In ad... ition, the Parliamentary Assembly of the Council of Europe, and perhaps each of t... individual Contracting States, might be considered for entitlement to make a requ...

However, such changes depend on the consent of the Contracting States and t... recent negotiations concerning Protocol No. 14 provide little evidence of willingn... on their part to widen the scope of the advisory jurisdiction of the Court.

CHAPTER 3
THE SUPERVISORY TASK OF THE COMMITTEE OF MINISTERS

REVISED BY LEO ZWAAK

INDEX

3.1 INTRODUCTION

Unlike the Court, the Committee of Ministers was not set up in connection with the adoption of the European Convention. It is the policy-making and executive organ of the Council of Europe.[1]

One of the tasks of the Committee of Ministers concerning human rights results directly from the Statute of the Council of Europe, *viz.* from Article 8. By virtue of this article the Committee supervises the observance of the obligation contained in Article 3 of the Statute, according to which every member of the Council of Europe 'must

[1] On the Committee, see also *supra* 1.10.

accept the principles of the rule of law and of the enjoyment by all persons within ... jurisdiction of human rights and fundamental freedoms'. The more specific ... the Committee of Ministers with regard to human rights, however, have been ... down in the Convention.

3.2 THE DECISION-MAKING COMPETENCE UNTIL 1998

Apart from its function of supervising the judgments of the Court under the former Article 54 (the present Article 46(2)), before the entry into force of Protocol No. ... the most important function of the Committee of Ministers was that which ensued from the former Article 32. In those instances where, after a complaint had been declared admissible by the Commission and a report on the merits had been sent to the Committee of Ministers, the case was not referred to the Court within a period of three months, the Committee of Ministers decided whether there had been a violation of the Convention. With respect to those cases the Committee of Ministers had a task comparable to that of the Court, although the procedure followed by the two organs differed quite substantially. The decisions of both organs were binding. The Contracting States had also undertaken to regard as binding the decisions taken by the Committee of Ministers under former Article 32(4). However, the State which was declared in default by the Committee of Ministers, had to take 'satisfactory' measures within a prescribed period (former Article 32(3)), while a decision of the Court had to be complied with directly (former Article 53).

Under former Article 32(2), when the Committee of Ministers had found that there had been a violation of the Convention, the Contracting State concerned was obliged to take the measures required by that decision within a period to be prescribed by the Committee of Ministers. The Committee of Ministers exercised this recommendatory power for the first time in the *Greek* Case.[2] During the examination in the *Houart* Case concerning a violation of Article 6 on the ground of the non-public character of disciplinary proceedings, the Committee of Ministers was informed by the Belgian Government that it accepted the opinion of the Commission and that, following two judgments of the Court,[3] it had changed its legislation to the effect that certain disciplinary proceedings would henceforth be held in public. The Committee of Ministers took note of this information and recommended that the Government

2 Yearbook XII (1969), pp. 513-514.

3 Judgment of 23 June 1981, *Le Compte, Van Leuven and De Meyere*, and judgment of 10 February 1983, *Albert and Le Compte*.

should pay the applicant a certain amount for the costs of the proceedings and for the defence.[4]

Since 1987 it had become standing practice for the Committee of Ministers to also recommend that a certain amount of money be paid to the original applicant for expenses incurred in the proceedings before the Commission or as just satisfaction for other damages suffered.[5]

In the first case of *Greece v. the United Kingdom* the Committee of Ministers decided that no further steps were needed after Greece and the United Kingdom had reached a settlement.[6] The Committee of Ministers was also inclined to stop the proceedings if no settlement between the parties had been reached but certain measures had improved the situation complained of. In the *Bramelid and Malmström* Case the applicants complained that they had been compelled to surrender their shares for a price below their real value and alleged, *inter alia*, that the arbitrators to whom their dispute was referred did not constitute a 'tribunal' within the meaning of Article 6(1) of the Convention. In its report the Commission had expressed the opinion that there had been a violation of Article 6(1) of the Convention.[7] During the examination of the case, the Government of Sweden informed the Committee of Ministers that the Swedish Parliament had adopted an amendment to the legislation according to which a party not satisfied with an arbitral decision could start a procedure before an ordinary court. The Committee of Ministers decided that, having regard to the information supplied by the Government of Sweden, no further action was called for.[8]

A situation which had not been provided for in former Article 32 of the Convention was the one which arose when the required two-thirds majority in the Committee of Ministers could not be found, either for the view that there had been an violation, or for the view that no violation had occurred. In such a case no decision as required by the former Article 32 was taken, while there was no question of some kind of settlement between the parties, nor was there any guarantee that the situation held by the Commission to conflict with the Convention, would be corrected or made good with respect to the victim by the respondent State. An example of the above situation was the *Huber* Case. In its report the Commission had expressed the opinion that Austria had violated Article 6(1) of the Convention with respect to the applicant.[9] The most important passage from the resolution of the Committee of Ministers in this case reads as follows: "Voting in accordance with the provisions of Article 32(1) of the

4 Res. DH(87)10 of 25 September 1987.

5 Res. DH(89)1 of 18 January 1989, *Sallustio*; Res. DH(89)6 of 2 March 1989, *Veit*.

6 Res. DH(59)12 of 20 April 1959, Council of Europe, *Collection of Resolutions adopted by the Committee of Ministers in application of Article 32 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1959-1981*, Strasbourg, 1981.

7 Report of 12 December 1983, D&R 38 (1984), p. 18 (38-41).

8 Res. DH(84)4 of 25 October 1984, *ibidem*, p. 43.

9 Report of 8 February 1973, D&R 2 (1975), p. 11 (29).

Convention, but without attaining the majority of two thirds of the members
to sit... [D]ecides therefore that no further action is called for in this case,
power of the Committee of Ministers under former Article 32 was designe
guarantee that the supervisory procedure should ultimately result in a binding de
on whether or not there had been a violation. However, a consequence of the
thirds requirement was that such a guarantee did not exist in practice, as was ev
from the *Huber* Case and also from the *East Africans* Case,[11] the *Dores and Si*
Case,[12] the *Dobbertin* Case[13] and the *Warwick* Case.[14]

When the Committee of Ministers found a violation of the Convention, it
obliged, under former Article 32(2), to prescribe a period within which the Sta
question was to take the measures required in the light of the Committee's deci
However, no cases have been reported in which such a period has been prescribed
measures other than remunerations. This might be accounted for partly by the
that only in a few cases has the Committee of Ministers found a violation of the Co
vention which in its opinion called for further action other than the payment of su
faction and costs.

The first case in which the Committee of Ministers would have had the opportu
to prescribe a compliance period for measures other than remuneration was the Gr
Case, in which the Commission had concluded that a great many articles of
Convention had been violated.[15] However, before the Committee of Ministers h
found in its resolution that there had been a violation of the Convention, Greece
already withdrawn from the Council of Europe and denounced the Convention
Under these circumstances the Committee of Ministers observed that it was "cal
upon to deal with the case in conditions which are not precisely those envisaged
the Convention" and concluded "that in the present case there is no basis for furth
action under paragraph 2 of (former) Article 32 of the Convention".[17]

The only other occasion known to us, in which the Committee of Ministe
considered imposing a compliance period for measures other than remuneration, w
offered by the first two cases of *Cyprus v. Turkey*. On 21 October 1977 the Committe
of Ministers decided in those cases that "events which occurred in Cyprus constitu
violations of the Convention". In addition, the Committee of Ministers requeste
Turkey to take measures "in order to put an end to such violations as might contin
to occur and so that such events are not repeated", and urged the parties "to resu

10 Res. DH(75)2 of 15 April 1975, Yearbook XVIII (1975), p. 325 (326).
11 Res. DH(77)2 of 21 October 1977, Yearbook XX (1977), p. 642 (644).
12 Res. DH(85)7 of 11 April 1985.
13 Res. DH(88)12 of 28 September 1988.
14 Res. DH(89)5 of 2 March 1989.
15 Yearbook XII (1969), p. 512.
16 *Ibidem*.
17 *Ibidem*, p. 513.

intercommunal talks".[18] By a resolution of 20 January 1979 the Committee of Ministers dealt with the matter again. It regretted to find that its request that the negotiations between the Turkish and the Greek-Cypriotic community be resumed, had not been complied with by the parties and subsequently decided "strongly to urge the parties to resume intercommunal talks under the auspices of the Secretary General of the United Nations in order to agree upon solutions on all aspects of the dispute", after which it stated that it considered this decision "as completing its consideration of the case Cyprus versus Turkey".[19] Cyprus and Turkey, contrary to former Article 32(4), had not given effect to the original decision of the Committee of Ministers. When the second resolution was adopted, there were no indications that they would as yet take the measures prescribed in the original decision. In fact, therefore, the Committee of Ministers backed out of the case and shirked its responsibilities under the Convention by shifting the matter to the Secretary General of the United Nations.

3.3 THE SUPERVISORY TASK SINCE 1998

3.3.1 GENERAL

Since the entry into force of Protocol No. 11 the Committee of Ministers performs only a supervisory task under the European Convention in connection with judgments of the Court. As pointed out above, Article 46(1) of the Convention provides that the Contracting Parties "undertake to abide by the final judgment of the Court in any case to which they are parties". This undertaking entails precise obligations for respondent States which are found to be in violation of the Convention. On the one hand they must take measures in favour of applicants to put an end to these violations and, as far as possible, erase their consequences (*restitutio in integrum*), while, on the other hand, they must take the measures needed to prevent new, similar violations. A primary obligation is the payment of just satisfaction (normally a sum of money), which the Court may award the applicant under Article 41 of the Convention and which covers, as the case may be, pecuniary and/or non-pecuniary damage and/or costs and expenses. The payment of such compensation is a strict obligation which is clearly defined in each judgment.[20]

According to Article 46(2) of the Convention, once the Court's final judgment has been transmitted to the Committee of Ministers, the latter invites the respondent State to inform it of the steps taken to pay the amounts awarded by the Court in respect of just satisfaction and, where appropriate, of the individual and general measures taken

18 Res. DH(79)1 of 20 January 1979, Yearbook XXII (1979), p. 440.
19 *Ibidem*.
20 See *supra* 2.6.1.

to abide by the judgment.[21] Once it has received this information, the Committee examines it closely. According to Rule 1(c) of the Rules of the Committee of Ministers for the application of Article 46(2) of the Convention, in case the chairmanship of the Committee of Ministers is held by the representative of a State which is a party to a case referred to the Committee of Ministers under Article 46(2), that representative shall relinquish the chairmanship during any discussion of that case.

The Directorate General of Human Rights helps the Committee of Ministers carry out this responsibility under the Convention. In close co-operation with the authorities of the State concerned it considers what measures need to be taken in order to comply with the Court's judgment. At the Committee of Ministers' request it supplies opinions and advice based on the experience and practice of the Convention bodies.

In accordance with Rule 3(b) the Committee of Ministers shall examine whether the just satisfaction awarded by the Court has been paid, including, as the case may be, default interest. To the extent required the Committee shall also take into account the discretion of the State concerned to choose the means necessary to comply with the judgment. In all cases it will strive to ascertain whether 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, and/or, whether general measures have been adopted, preventing new violations similar to that or those found or putting an end to continuing violations. It is the Committee of Ministers' well-established practice to keep cases on its agenda until the States concerned have taken satisfactory measures and to continue to request explanations or action.[22] When there is a delay in the execution of a judgment, the Committee of Ministers may adopt an interim resolution assessing the progress towards execution. As a rule this type of interim resolution contains information about any interim measures taken and indicates a timetable for the reforms designed to resolve the problem or problems raised by the judgment once and for all. If there are obstacles to execution, the Committee will adopt a more strongly worded interim resolution urging the authorities of the respondent State to take the necessary steps in order to ensure that the judgment is complied with.

According to Rule 4(b), if the State concerned informs the Committee of Ministers that it is not yet in a position to inform the Committee that the general measures

[21] See the Rules of the Committee of Ministers for the application of Article 46(2) of the Convention, http://www.coe.int/T/E/Human_rights/execution/. Unless indicated otherwise, in this chapter the Rules refer to this set of Rules.

[22] Rule 4(a) provides that, until the State concerned has provided information on the payment of the just satisfaction awarded by the Court or concerning possible individual measures, the case will be placed on the agenda of each human rights meeting of the Committee of Ministers, unless the Committee decides otherwise.

necessary to ensure compliance with the judgment have been taken, the case will be placed again on the agenda of a meeting of the Committee of Ministers taking place no more than six months later, unless the Committee decides otherwise; the same rule applies when this period expires and for each subsequent period. The Committee may bring its full weight to bear in order to induce the State concerned to comply with the Court's judgment. In practice the Committee of Ministers rarely resorts to political and diplomatic pressure but tends, instead, to function as a forum for constructive dialogue enabling States to work out satisfactory solutions with regard to the execution of judgments. On a number of occasions, however, interim resolutions have been drafted and adopted in order to pressurise States that had refused to afford applicants just satisfaction or to take specific measures in compliance with judgments. Under the Statute of the Council Europe tougher political sanctions could be considered such as suspension or termination of membership of the Council of Europe under Article 8 of the Statute, but obviously these are *ultima remedia* that will be considered in very exceptional circumstances only.

The Committee of Ministers is entitled to consider any communication from the injured party with regard to the payment of the just satisfaction or the taking of individual measures.[23]

With respect to access to information, Rule 5 provides as follows: "Without prejudice to the confidential nature of Committee of Ministers' deliberations, in accordance with Article 21 of the Statute of the Council of Europe, information provided by the State to the Committee of Ministers in accordance with Article 46 of the Convention and the documents relating thereto shall be accessible to the public, unless the Committee decides otherwise in order to protect legitimate public or private interests. In deciding such matters, the Committee of Ministers shall take into account reasoned requests by the State or States concerned, as well as the interest of an injured party or a third party not to disclose their identity."

In accordance with Rule 7 the Committee of Ministers may in the course of its supervision of the execution of a judgment adopt interim resolutions in order to provide information on the state of progress of the execution or, where appropriate, to express concern and/or to make relevant suggestions with respect to the execution. There may be situations in which the adverse consequences of the violation suffered by an injured party are not always adequately remedied by the payment of just satisfaction. Depending on the circumstances the execution of the judgment may also require the respondent State to take individual measures in favour of the applicant, such as the reopening of unfair proceedings if domestic law allows for such reopening, the destruction of information gathered in breach of the right to privacy or the revocation of a deportation order issued despite of the risk of inhumane treatment in the

[23] Rule 6(a).

country of destination. It may also require general measures – such as an adaptation of legislation, rules and regulations, or of a judicial practice – to prevent new violations.

After having established that the State concerned has taken all the necessary measures to abide by the judgment, the Committee adopts a resolution concluding that its functions under Article 46(2) of the Convention have been exercised.

Finally, Article 17 of the Statute of the Council of Europe provides for still another tool for the Committee in fulfilling its supervisory powers. According to that article, the Committee of Ministers may set up advisory or technical committees or commissions if it deems this desirable. The Committee of Ministers might proceed to appoint for the purpose of taking evidence and other tasks within the context of its functions under the Convention.

3.3.2 SCOPE OF THE OBLIGATION TO COMPLY WITH A JUDGMENT

A judgment of the Court does not expressly order the respondent State to take specific measures to rectify the applicant's situation and prevent further violations. Under the Convention States are free to choose the means whereby they implement individual or general measures.

This is not to say, however, that the payment of just satisfaction is the only obligation that may derive from a judgment of the Court. To execute a judgment finding one or more violations of the Convention the respondent State may, depending on the circumstances, also be required to take certain measures. This may be, first, individual measures for the applicant's benefit, so as to end an unlawful situation that still continues, and to redress its consequence (*restitutio in integrum*), and secondly, general measures to prevent further violations of a similar nature.

This has been stressed by the Court in the *Papamichalopoulos* Case. There the Court pointed out that from the obligation under Article 46 of the Convention follows, *inter alia*, that a judgment, in which the Court finds a breach, imposes on the respondent State a legal obligation not only to pay those concerned the sums awarded by way of just satisfaction, but also to choose, subject to supervision by the Committee

[24] For instance, the striking out of an unjustified criminal conviction from the criminal records, the granting of a residence permit or the reopening of impugned domestic proceedings: Recommendation No. R (2000) 2 of the Committee of Ministers to the member States on the re-examination or reopening of certain cases at domestic level following judgments of the European Court of Human Rights, of 19 January 2000.

[25] For instance, legislative or regulatory amendments, changes of case law or administrative practice or publication of the Court's judgment in the language of the respondent State and its dissemination to the authorities concerned.

of Ministers, the general and/or, if appropriate, individual measures to be taken in their domestic legal order to put an end to the violation found by the Court and to redress so far as possible its effects.[26]

3.3.3 JUST SATISFACTION

If the Court has decided that the respondent State has to pay just satisfaction under Article 41 of the Convention within three months of the delivery of its judgment, the Committee of Ministers will examine the case at its meeting following the delivery of that judgment.[27] In a number of cases against Italy concerning violations of the requirement of a reasonable length of proceedings, the Committee had recommended that the Government pay, within a time-limit of three months, just satisfaction to the applicants. The Italian Government disagreed with the proposals of the Committee of Ministers and refused to pay the applicants. The Committee subsequently noted at its next meeting that, although the time-limit had been extended, the Government still had not paid the sums it had agreed to pay following the Committee's recommendation. It decided to strongly urge the Government to proceed without delay to pay the specified amount to the applicants. It further decided, if need be, to resume consideration of these cases at each of its forthcoming meetings.[28] In its subsequent session the Committee of Ministers again adopted resolutions in the Italian cases and then firmly stated that, in accordance with (former) Article 32(2) of the Convention, the Government of Italy was to pay the applicants before a fixed date a certain amount in respect of just satisfaction. The Committee of Ministers invited the Government to inform it of the measures taken in consequence of its decision, having regard to the Government's obligations under (former) Article 32(4) of the Convention to abide by it.[29] Finally, on 17 September 1992 the Committee of Ministers ended the consideration of these cases by declaring, after having taken note of the measures taken by the Italian Government, that it had exercised its functions under (former) Article 32 of the Convention.[30]

[26] Judgment of 31 October 1995, para. 34; see also the judgment of 13 July 2000, *Scozzari and Giunta v. Italy*, para. 249.

[27] The three month time-limit has become standing practice since the judgment of 28 August 1991, *Moreira de Azevedo*, para. 1 of the operative part of the judgment.

[28] Res. DH(91)12 of 6 June 1991, *Azzi*; Res. DH(91)13 of 6 June 1991, *Lo Giacco*; Res. DH(91)21 of 27 September 1991, *Savoldi*; Res. DH(91)22 of 27 September 1991, *Van Eesbeeck*; Res. DH(91)23 of 27 September 1991, *Sallustio*; Res. DH 91(24) of 27 September 1991, *Minniti*.

[29] Res. DH(92)3 of 20 February 1992, *Lo Giacco*; Res. DH92(4) of 20 February 1992, *Savoldi*; Res. DH(92)5 of 20 February 1992, *Van Eesbeeck*; Res. DH(92)6 of 20 February 1992, *Sallustio*; Res. DH(92)7 of 20 February 1992, *Minniti*.

[30] Res. DH(92)45 of 17 September 1992, *Azzi*; Res. DH(92)46 of 17 September 1992, *Lo Giacco*, Res. DH(92)47 of 17 September 1992, *Savoldi*; Res. DH(92)48 of 17 September 1992, *Van Eesbeeck*; Res. DH(92)49 of 17 September 1992, *Sallustio*; Res. DH(92)50 of 17 September 1992, *Minniti*.

In case the respondent State is unable to show proof of payment, the case
on the agenda of the Committee of Ministers and will be dealt with at every sub
meeting of the Committee until it is satisfied that the payment has been made

It has become practice that, from the expiry of the initial three-month per
for the payment until the final settlement, interest should be payable on the a
at a rate equal to the marginal lending rate of the European Central Bank dur
default period.[31]

On the whole the respondent States are willing to pay the compensation award
the Court to the applicant. However, apart from the above-mentioned reasonable
cases concerning Italy, in a few instances, such as in the *Stran Greek Refineries*
Stratis Andreas Case and the *Loizidiou* Case, the Committee of Ministers had to
with the unwillingness of the respondent State to pay compensation.

After delivery of the judgment of the Court in the *Stran Greek Refineries and St*
Andreas Case[32] the Greek Government informed the Committee of Ministers
considering the size of the just satisfaction awarded to the applicants and the econ
problems in Greece, it was not able to make immediate full payment. The Comm
of Ministers strongly urged the Greek Government to pay the amount correspon
to the value of just satisfaction as of March 1995 and decided, if need be, to re
consideration of the case at each of its forthcoming meetings.[33] Subsequently
September 1996, the Chairman of the Committee of Ministers wrote to the Min
of Foreign Affairs of Greece underlining the fact that the credibility and effectiv
of the mechanism for the collective enforcement of human rights established un
the Convention is based on the respect of the obligations freely entered into by
Contracting Parties and in particular on respect for the decisions of the supervi
bodies. According to its Final Resolution of 20 March 1997 the Committee of Min
was informed that the Greek Government had transferred 30,863,828.50 US do
to the applicants, which sum the applicants were entitled to enjoy without
interference whatsoever. The Committee, having satisfied itself that the amount
increased in order to provide compensation for the loss of value caused by the de
in payment, corresponded to the just satisfaction awarded by the Court, declared
it had exercised its supervisory function under the Convention.[34]

In its Interim Resolution concerning the judgment in the *Loizidou* Case,
Committee of Ministers noted that the Government of Turkey had indicated that
sums awarded by the Court could only be paid to the applicant in the context

31 Judgment of 18 June 2002, *Önyerildiz*, para. 168; judgment of 30 November 2004, *Gur*
para. 34; judgment of 30 November 2004, *Klyakhin*, para. 134; judgment of 2 December
Yaroslavtsev, para. 42.

32 Judgment of 9 December 1994.

33 Interim Resolution of 15 May 1996, DH (96) 251.

34 Final Resolution of 20 March 1997, DH (97) 184.

global settlement of all property cases in Cyprus. It concluded that the conditions of payment envisaged by the Government of Turkey could not be considered to be in conformity with the obligations flowing from the Court's judgment. It strongly urged Turkey to review its position and to pay the just satisfaction awarded in this case in accordance with the conditions set out by the Court so as to ensure that Turkey, as a High Contracting Party, met its obligations under the Convention.[35]

In its second Interim Resolution the Committee once more stressed that Turkey had had ample time to fulfil in good faith its obligations in the case concerned. It emphasised that the failure on the part of a High Contracting Party to comply with a judgment of the Court was unprecedented. It declared that the refusal of Turkey to execute the judgment of the Court demonstrated a manifest disregard for its international obligations, both as a High Contracting Party to the Convention and as a Member State of the Council of Europe. In view of the gravity of the matter it strongly insisted that Turkey comply fully and without any further delay with the Court's judgment of 28 July 1998.[36] At its subsequent meeting on 26 June 2001 the Committee declared that it very deeply deplored the fact that Turkey still had not complied with its obligations under the judgment of the Court.[37]

At its meeting on 12 November 2003 the Committee nrged the Turkish Government to reconsider its position and to pay without any conditions whatsoever the just satisfaction awarded to the applicant by the Court, within one week at the latest. It declared the Committee's resolve to take all adequate measures against Turkey, if the Turkish Government failed once more to pay the just satisfaction to the applicant.[38] On 12 December 2003 the Chairman of the Committee of Ministers announced that the Turkish Government had executed the judgment of 28 July 1998 in the *Loizidou* Case by paying to the applicant the sum which had been awarded to her by the Court in respect of just satisfaction.[39]

3.3.4 INDIVIDUAL MEASURES

The need to take individual measures at the domestic level, in addition to the payment of pecuniary compensation if determined by the Court, is considered by the Committee of Ministers where the established breach continues to have negative consequences for the applicant, which cannot be redressed through pecuniary compensation.

35 Interim Resolution of 6 October 1999, DH (99) 680.

36 Interim Resolution of 24 July 2000, DH (2000) 105.

37 Interim Resolution of 26 June 2002, DH (2001) 80.

38 Interim Resolution of 12 November 2003, DH (2003) 174.

39 Press Release Council of Europe: http://press.coe.int/cp/2003/620a(2003).htm.

The reopening of proceedings at the domestic level may constitute an impo
means of redressing the effects of a violation of the Convention, where there
serious shortcomings in the procedure before the national courts. In fact, the re
ning of domestic proceedings was also within the powers of the Commit
Ministers to suggest during the period before the entry into force of Protocol N
in cases which had not been referred to the Court and where the Committee
Ministers acted under the former Article 32 as the final arbiter.

In the joint cases of *Pataki* and *Durnshirn* the applicants had alleged violation
the right to a fair trial, because they were not represented in a particular phase of
criminal proceedings against them, whereas the Public Prosecutor was present.
Commission considered that the Austrian Penal Code conflicted with the Conven
on this point. In the last phase of the proceedings before the Commission Aust
amended its legislation to eliminate this conflict. At the same time a temporary arra
gement was made which enabled the applicants to have their case re-examined by
Austrian judicial authorities. At the suggestion of the Commission, the Committee
of Ministers then expressed its satisfaction with the amendment of the law and decid
that no further steps were necessary.[41]

In the *Unterpertinger* Case the applicant claimed that he had been convicted
the basis of testimony, namely statements made to the police by his former wife a
stepdaughter, in respect of which his defence rights had been appreciably restric
The Court found a violation of Article 6.[42] The Austrian Government informed
Committee of Ministers that the Austrian Supreme Court, on the ground of unlaw
refusal to admit supplementary evidence, had quashed the judgment of the Court
Appeal by which the latter had dismissed the applicant's appeal against his convict
by the Innsbruck Regional Court. As a result, the case was referred back to
Innsbruck Court of Appeal for re-examination and decision. That court quashed
applicant's conviction and acquitted him on the ground of lack of evidence. T
Committee of Ministers decided, on the basis of the information supplied by
Austrian Government, that it had exercised its supervisory function.[43]

In the *Barbarà Messegué and Jarbardo* Case the Court found a violation on
ground that the applicants had not received a fair trial.[44] The Spanish Governme
informed the Committee of Ministers that the Constitutional Court had ordered
reopening of the proceedings before the *Audiencia Nacional* in the applicants' ca
That court acquitted the applicants as there was not sufficient evidence against the
The problems of a general nature raised by the Court in its judgment had been resolv

40 Yearbook VI (1963), p. 714 (738).
41 *Ibidem*, p. 730. See also Res. DH(64)1 of 5 June 1964 concerning the *Glaser* Case.
42 Judgment of 6 December 1988, para. 33.
43 Resolution of 18 January 1989, DH (89) 002.
44 Judgment of 6 December 1988 on the merits, para. 89; judgment of 13 June 1994 on the ques
of just satisfaction, para. 16.

by legislative changes and by the development of the case law of the Constitutional Court and the Supreme Court. The Committee of Ministers agreed and decided that Spain had fulfilled its obligations.[45]

In the *Open Door and Dublin Well Women* Case the Court found a violation of Article 10 in that the High Court's injunction had prohibited the dissemination of information to pregnant women about abortion services in the United Kingdom.[46] The High Court lifted the injunction with regard tot the Dublin Well Women Centre. Having taken note of the information supplied by the Irish Government, the Committee of Ministers decided that it had exercised its supervisory function.[47]

In the *Daktaras* Case the Court held that there were insufficient guarantees to exclude all reasonable doubt as to the impartiality of the Supreme Court which had examined the applicant's cassation petition.[48] The Government informed the Committee of Ministers that the domestic proceedings had been reopened on 29 January 2002 by a decision of the Criminal Chamber of the Supreme Court. This reopening was made possible by the application of the new section of the Code of Criminal Procedure called "Reopening of criminal cases following a judgment of the European Court of Human Rights", which entered into force on 15 October 2001. Following the reopening of the national proceedings, on 2 April 2002 a plenary session of the Criminal Chamber of the Supreme Court annulled the previous cassation judgment. According to the new judgment, the cassation petition submitted by the President of the Criminal Chamber of the Supreme Court was not taken into account. The cassation petition submitted by Mr Daktaras, as well as that of his legal representative, were rejected.[49]

Sometimes reopening of the domestic proceedings is the only form of *restitutio in integrum* regarding a violation of Article 6 by previous proceedings. In view of the problem raised in certain cases of the lack of appropriate national legislation, the Committee of Ministers has adopted a recommendation to Member States on the re-examination or reopening of certain cases at the domestic level following judgments of the Court.[50] In the recommendation the Committee of Ministers invites the Contracting Parties to ensure that adequate possibilities exist at the national level to achieve, as far as possible, *restitutio in integrum*. It further encourages them "to examine their national legal systems with a view to ensuring that there exist adequate

45 Resolution of 16 November 1994, DH (94) 84.
46 Judgment of 29 October 1992, para. 80.
47 Resolution of 25 June 1996, DH (96) 368.
48 Judgment of 10 October 2000, para. 38.
49 Resolution of 6 July 2004, DH(2004)43.
50 Recommendation of 19 January 2000, on the re-examination or reopening of certain cases at domestic level following judgments of the European Court of Human Rights, R (2000) 2.

possibilities of re-examination of the case, including reopening of proceed
instances where the Court has found a violation of the Convention, especially
(i) the injured party continues to suffer very serious negative consequences b
of the outcome of the domestic decision at issue, which are not adequately r
died by the just satisfaction and cannot be rectified except by re-exami
or reopening, and
(ii) the judgment of the Court leads to the conclusion that
(a) the impugned domestic decision is on the merits contrary to the
vention, or
(b) the violation found is based on procedural errors or shortcomings o
gravity that a serious doubt is cast on the outcome of the do
proceedings complained of."

In the explanatory memorandum to this recommendation it is indicated th
regards the terms, the recommendation uses "re-examination" as the generic
The term "reopening of proceedings" denotes the reopening of court proceedi
a specific means of re-examination. Violations of the Convention may be remed
by different measures ranging from administrative re-examination of a case
granting a residence permit previously refused) to the full reopening of judicial pro
dings (*e.g.* in cases of criminal convictions). The recommendation applies prima
to judicial proceedings where existing law may pose the greatest obstacles to reopen
The recommendation is, however, also applicable to administrative or other measu
or proceedings, although legal obstacles will usually be less serious in these area

Sub-paragraph (i) of the recommendation is intended to cover the situation
which the injured party continues to suffer very serious negative consequences
capable of being remedied by just satisfaction, because of the outcome of dome
proceedings. It applies in particular to persons who have been sentenced to leng
prison sentences and who are still in prison when the Court examines the case
also applies, however, in other areas, such as when a person is unjustifiably den
certain civil or political rights (in particular in case of loss of, or non-recognitio
legal capacity or personality, bankruptcy declarations, or prohibitions of polit
activity), if a person is expelled in violation of his or her right to family life, or if a
has been unjustifiably forbidden contact with his or her parents. It is understood
a direct causal link must exist between the violation found and the continuing suffe
of the injured party.

Sub-paragraph (ii) is intended to indicate, in cases where the above-mentio
conditions are met, the kind of violations in which re-examination of the case
reopening of the proceedings will be of particular importance. Examples of situati
mentioned under item (a) are criminal convictions violating Article 10, because
statements characterized as criminal by the national authorities constitute a legiti
exercise of the injured party's freedom of expression, or violating Article 9 beca

the behaviour characterised as criminal is a legitimate exercise of freedom of religion. Examples of situations mentioned under item (b) are those where the injured party did not have the time and facilities to prepare his or her defence in criminal proceedings, where the conviction was based on statements extracted under torture or on material which the injured party had no possibility of verifying, or where in civil proceedings the parties were not treated with due respect for the principle of equality of arms.

As appears from the text of the recommendation, any such shortcomings must be of such gravity that serious doubt is cast on the outcome of the domestic proceedings. The recommendation does not deal with the problem of who ought to be empowered to ask for reopening or re-examination. Considering that the basic aim of the recommendation is to ensure adequate redress for the victims of certain grave violations of the Convention found by the Court, the logic of the system implies that the individuals concerned should have the right to submit the necessary requests to the competent court or other domestic organ. Considering the different traditions of the Contracting Parties, no provision to this effect has, however, been included in the recommendation. The recommendation also does not address the special problem of 'mass cases', i.e. cases in which a certain structural deficiency leads to a great number of violations of the Convention. It was considered preferable to leave it to the State concerned to decide it in such cases reopening or re-examination is a realistic solution, or whether other measures are more appropriate.

Another example of an individual measure that may be called for following a judgment is cancellation of a person's criminal record in respect of a conviction that led to a violation of the Convention. Such a measure may be taken, for instance, where the applicant has already served a sentence and the reference to his conviction in his judicial record is the only remaining consequence of the violation. In the *Marijnissen* Case the Commission had found a violation of the reasonable time requirement under Article 6.[51] The case was not referred to the Court, so the Committee of Ministers had to act under (former) Article 32 as the final supervisory body. It agreed with the Commission. The Government of the Netherlands informed the Committee of Ministers that it accepted its decision; the sentence served against the applicant would not be executed and no mention of this sentence would appear in the applicant's judicial record. The Committee of Ministers decided that no further action was called for in this case.[52]

In the *Van Mechelen* Case the Court had found a violation of Article 6(3)(d) on the ground that the applicants' conviction was based to a decisive extent on statements given by unidentified witnesses who were members of the police and whose reliability

51 Report of 12 March 1984, D&R 40 (1985), p. 83.
52 Resolution of 25 February 1985, DH (85) 004

could not be tested by the defence.[53] During the examination of the case
Committee of Ministers the Government of the Netherlands gave the
information about the measures taken with a view to remedying the
situation and preventing new violations. The applicants were provisionally
on 25 April 1997 on the orders of the Minister of Justice and were subsequ
letter of 22 July 1997, informed that they would not be required to serve the
of their sentences. Furthermore, the reasons why the sentences were not
their entirety were mentioned in their criminal records.[54]

In the *Ben Yaacoub* Case a friendly settlement was reached as the
Government had decided to lift, as of 30 August 1992, the effects of an expulsion
made against the applicant.[55] The Belgian Government notified the
Ministers of the date on which the effects of the expulsion order against the
were lifted. Prior to that date, it undertook to examine any request for safe
enabling the applicant to enter Belgium, provided that it was based on valid
and was supported by appropriate evidence. The Committee of Ministers
resume consideration of this case at its first meeting after 30 August 1992,
if appropriate.[56]

In the Case of *D. v. the United Kingdom* the Court had held that the
proposed removal from the United Kingdom to St. Kitts would place him
reduced life expectancy, of inhuman and degrading treatment and of invasion
physical integrity.[57] The Government of the United Kingdom gave the
information about the measures taken to avoid the impending violation as
the judgment. The applicant was granted an indefinite leave which would
to remain in the country, where he would continue to receive adequate
treatment and palliative care.[58]

In the Case of *A.P and T.P. v. Switzerland* the Court had found a violation of
6(2) since, irrespective of any personal guilt, the applicants had been
heirs, of an offence allegedly committed by a deceased person.[59] The Swiss
informed the Committee of Ministers that by a judgment of the Federal Court
of the applicants had been revised. Following this revision the cantonal tax
were obliged to reimburse the fine imposed on the applicants, with interest
on the sum. The Committee of Ministers decided to resume consideration of
as far as general measures were concerned when the legislative reforms had
carried out, or at the latest at its first meeting in 2001.[60]

53 Judgment of 23 April 1997, para. 66.
54 Resolution 19 February 1999, DH (99) 124.
55 Judgment of 27 November 1987, para. 14.
56 Resolution of 29 September 1988, DH (88) 13.
57 Judgment of 2 May 1997, para. 54.
58 Resolution of 18 February 1998, DH (98) 10.
59 Judgment of 29 August 1997, para. 48.
60 Interim Resolution of 18 January 1999, DH (99) 110.

In the *Vasilescu* Case, which related to, firstly, the unlawful seizure and the continued retention of valuables with respect to which the domestic courts had accepted the applicant's property rights and, secondly, the lack of access to an independent tribunal that could order their return, the Court had found a violation of Article 6(1) and Article 1 of Protocol No. 1.[61] The Romanian Government informed the Committee of Ministers that the Constitutional Court of Romania had rendered a decision declaring that, in order to comply with the Constitution, Article 278 of the Code of Criminal Procedure – concerning the right to appeal decisions of the public prosecutor – would be interpreted to the effect that a person who had an interest could challenge before a court any measure decided by the prosecutor. This decision became final and binding under Romanian law with its publication in the Official Journal of Romania and accordingly enforceable *erga omnes*. The Government considered that similar cases – where the valuables in question had been confiscated without any order from a competent judicial authority – were not likely to recur. The Committee of Ministers decided to resume consideration of the case until legislative reforms had been carried out, or at the latest at one of its meetings at the beginning of 2001.[62]

In the Case of the *Socialist Party v. Turkey*, relating to the dissolution of this party on account of certain statements made in 1991 by one of the applicants, the Party's chairman, Mr Perinçek, the Court had found a violation of Article 11.[63] The Committee of Ministers noted that it had been informed that in a judgment of 8 July 1998 – i.e. after the judgment of the Court – the Court of Cassation of Turkey had confirmed a criminal conviction imposed on Mr. Perinçek by the First State Security Court of Ankara on 15 October 1996, according to which the sanction of dissolution of the party also carried with it personal criminal responsibility. It noted, furthermore, that by virtue of this conviction, Mr Perinçek had been sentenced to a 14-month prison sentence, which he started to serve on 29 September 1998. He had furthermore been banned from further political activities. The Committee of Ministers insisted on Turkey's obligation under Article 53 (the present Article 46) of the Convention to erase, without delay, through action by the competent Turkish authorities, all the consequences resulting from the applicant's criminal conviction on 8 July 1998 and decided, if need be, to resume consideration of the case at each forthcoming meeting.[64] During its next session the Committee of Ministers noted with regret that action had *still not* been taken by the Turkish authorities to give full effect to the judgment of the Court and to the Committee's interim resolution. It urged Turkey, without further delay, to take all necessary action to remedy the situation of the former Chairman of the Socialist Party, Mr Perinçek.[65]

61 Judgment of 22 May 1998, paras. 41 and 54.
62 Interim Resolution of 8 October 1999, DH (99) 676.
63 Judgment of 25 May 1998, para. 54.
64 Interim Resolution of 4 March 1999, DH (99) 245.
65 Interim Resolution of 28 July 1999, DH (99) 529.

In the area of the execution of the Court's judgments positive developments
taken note of in the *Sadak, Zana, Dicle* and *Dogan* Cases against Turkey. Afte
decision by the Ankara Court of Cassation suspending the prison sentences of th
Turkish former members of Parliament, this court decided, on 14 July 2004, to
the Ankara State Security Court's verdict in the retrial of four former Kurdish
and to order a fresh hearing in an ordinary court. The Committee of Ministers
that the Court of Cassation had found that shortcomings identified by the Euro
Court of Human Rights in the 1994 trial had not been properly addressed in the
proceedings. It considered this to be a convincing example of the positive impa
recent constitutional amendments, which were aimed at ensuring the direct applica
of the European Convention of Human Rights to the Turkish legal system.[66]

With respect to the fourth inter-State case of *Cyprus against Turkey* the Comm
of Ministers had noted that after a period of some years during which progress was
rare, at recent meetings concrete information had been presented making it pos
to register progress towards the execution of this complex and controversial judgme
In particular, the Committee of Ministers had been informed that a school had ope
for Greek Cypriot pupils in the north of the island and that the Committee on Mis
Persons had taken steps to bring its terms of reference further into line with
requirements of the Court judgment. That said, there were obviously still serious is
to be resolved.[67]

3.3.5 GENERAL MEASURES

In certain cases it is clear from the circumstances that the violation resulted fr
particular domestic legislation or from the absence of legislation. In such cases
order to comply with the Court's judgments, the State concerned must either amen
existing laws or introduce appropriate new ones. In many cases, however, th
structural problem that led to a violation, lies not in an obvious conflict betwe
domestic law and the Convention but rather in case law of the national courts. In
situation a change of case law of the national courts may preclude possible fut
violations. When courts adjust their legal stance and their interpretation of natio
law to meet the demands of the Convention, as reflected in the Court's judgment
they implement these judgments by virtue of their domestic law. In this way furth
similar violations may be effectively prevented. However, it is precondition that t
judgment concerned is published and circulated among the national authorit
including the courts, and accompanied, where appropriate, by an explanatory circu

66 Documents of the Committee of Ministers, CM/AS (2004)9 of 4 October 2004.
67 *Ibidem.*

Following the judgment of the Court in the *Jersild* Case, the Danish Supreme Court acquitted, in a judgment of 28 October 1994, a journalist who had been charged with invasion of privacy by entering an area without permission which was not accessible to the public. In the City Court of Copenhagen and in the Eastern Division of the High Court the journalist had been found guilty as charged. However, the Supreme Court acquitted the journalist as it found that this result was most in keeping with the jurisprudence of the European Court of Human Rights concerning Article 10. In this connection the Supreme Court made a special reference to the *Jersild* judgment as the latest authority. Moreover, following the *Jersild* judgment of the Court, the Special Court of Revision decided on 24 January 1995 to allow the case against, *inter alia*, Mr Jersild to be reopened.[68]

In the *Vogt* Case the Court had held that the exclusion from public service in the Land of Lower-Saxony, on account of the applicants' political activities as a member of the German Communist Party, constituted a violation of her right to freedom of expression and of her freedom of association and also discrimination in the enjoyment of these rights.[69] The German Government informed the Committee of Ministers that the German Federal Ministry of the Interior had transmitted the judgment of the Court with a letter to the Länder indicating that the authorities would have to examine all future cases of this kind in detail, in the light of the Court's judgment, in order to prevent the repetition of violations similar to those found in the present case. The ministry was, however, of the opinion that it would not be possible to reopen old dismissal procedures on the basis of judgments of the Court. The Government noted further that the Convention is directly applicable in German law and considered that the German courts will not fail, in case they were to be seized with new cases of the same kind, to interpret the law in accordance with the judgments of the European Court.[70]

In the *Gaygusuz* Case a Turkish national complained about violation of Articles 6(1), 8 and 14 of the Convention and of Article 1 of Protocol No. 1 by the Austrian authorities' refusal to grant emergency assistance to the applicant, an unemployed man who had exhausted entitlement to unemployment benefit, on the ground that he did not have Austrian nationality. The Court found a violation of Article 14 in conjunction of Article 1 of Protocol No. 1.[71] The Austrian Government informed the Committee of Ministers that the Austrian Constitutional Court, which was seized with several complaints regarding the constitutionality of the discrimination against foreigners provided for in Articles 33 and 34 of the Unemployment Insurance Act, had changed its earlier jurisprudence according to which benefits such as emergency assistance did

68 Resolution of 11 September 1995, DH(95)212.
69 Judgment of 26 September 1995, paras. 61 and 68.
70 Resolution of 28 January 1997, DH(97)12.
71 Judgment of 16 September 1996, para. 52.

not fall under Article 1 of Protocol No 1, and had aligned it with that of the
the *Gaygasuz* Case. In consequence, the Austrian Constitutional Court had
with immediate effect the two provisions in question insofar as they reserved
to emergency assistance to Austrian nationals. It had found it appropriate
circumstances to deviate from its usual practice of postponing the full effect
judgment to a future date. Immediately after this judgment the Austrian Par
had adopted a new law providing that the amendments to the Unemploy
Insurance Act entered into force on 1 April 1998 and not on 1 January 2000.

In the *Kalashnikov* Case concerning the poor conditions in which the ap
was held in detention before trial between 1995 and 2000, due in particular to
prison overcrowding and to an insanitary environment, and concerning the exc
length of both this detention and the criminal proceedings, the Court had fo
violation of Articles 3, 5(1) and 6(1).[73] The Russian Government, in its inform
to the Committee of Ministers, referred in particular to two major reforms which
already resulted in significant improvement of the conditions of pre-trial det
and their progressive alignment with the Convention's requirements. The Com
of Ministers decided to examine at one of its meetings, no later than 2004, wh
any further progress had been achieved in the adoption of the general mea
necessary to effectively prevent these kind of violations of the Convention.[74]

With respect to the length of proceedings in Italy the Court has been faced
continuous problems. In the *Bottazzi* Case the Court drew attention to the fact
since 25 June 1987, the date of the *Capuano* Case, it had delivered 65 judgme
which it had found violations of Article 6(1) in proceedings exceeding a 'reas
time' in the civil courts of the various regions of Italy. Similarly, under former Art
31 and 32 of the Convention, more than 1,400 reports of the Commission resu
in resolutions by the Committee of Ministers finding Italy in breach of Article
the same reason. The frequency with which violations were found showed that t
was an accumulation of identical breaches which were sufficiently numerou
amount not merely to isolated incidents. Such breaches reflected a continuing situa
that had not yet been remedied and in respect of which litigants had no dom
remedy. This accumulation of breaches accordingly constituted a practice that
incompatible with the Convention.[75]

In its Interim Resolution the Committee of Ministers recalled that excessive de
in the administration of justice constitute an important danger, in particular to res
for the rule of law. The Committee further noted that the question of Italy's adop

[72] Resolution of 12 November 1998, DH(98)372.
[73] Judgment of 15 July 2002, paras. 103, 121 and 135.
[74] Interim Resolution of 4 June 2003, DH (2003) 123.
[75] Judgment of 28 July 1999, para. 22; see also judgment of 28 July 1999, *Di Mauro*, para. 23.

of general measures to prevent new violations of the Convention of this kind had been before the Committee of Ministers since the judgments of the Court in the 1990s and, therefore, highlighted the existence of serious structural problems in the functioning of the Italian judicial system.[76] At its session in October 2000 the Committee of Ministers noted with satisfaction that recently the highest Italian authorities had manifested – both at the national level and before the organs of the Council of Europe – their solemn commitment to eventually finding an effective solution to the situation.

The Committee also expressed appreciation regarding the progress made in the implementation of major reform to the Italian judicial system, undertaken in order to find long-term remedies, to ensure special expediency in the treatment of the oldest and most deserving cases and to alleviate the burden of the Court. It noted that the reforms, undertaken by the Italian authorities, had included three different lines of action: 1. deep structural modernisation of the judicial system for better long-term efficiency (notably through the introduction of Article 6 of the Convention into the Italian Constitution, the streamlining of the jurisdictions of the civil and administrative courts, the increased reliance on the single judge, the creation of the office of justices of the peace and also the subsequent extension of their competence to minor criminal offences, new simplified dispute settlement mechanisms, and the modernisation of a number of procedural rules); 2. special actions dealing with the oldest cases pending before the national civil courts or aiming at improvements which, while being of a structural nature, could already produce positive effects in the near future (in particular the creation of provisional court chambers composed of honorary judges, entrusted with the solution of civil cases pending since May 1995, an important increase in the number of judges and administrative personnel and two important resolutions by the Supreme Council of the Magistrature laying down a number of monitoring mechanisms and guidelines for judges in order to prevent further unreasonably long proceedings and also in order to speed up those which have already been incriminated by the European Court of Human Rights); and 3. reduction of the flow of applications to the Court and the speeding up of compensation procedures by means of the creation of a domestic remedy in cases of excessive length of procedures.

The Committee acknowledged that the measures in the first group, aiming at a structural reform of the entire Italian judicial system, could not be expected to produce major effects before a reasonable time had elapsed, although it was already possible to see the first signs of a positive trend in the statistics recently provided to the Committee of Ministers by the Italian authorities. The Committee concluded that Italy, while making undeniable efforts to solve the problem and having adopted measures of various kinds which allowed concrete hope for an improvement within a reasonable

[76] See in this respect Resolution of 11 July 1997, DH(97)336; Interim Resolutions of 15 July 1999, DH (99) 436 and DH (99) 437.

time, had not, so far, thoroughly complied with its obligations to abide by the
judgments and the Committee of Ministers' decisions finding violations of
of the Convention on account of the excessive length of judicial proceedings
upon the Italian authorities, in view of the gravity and persistence of the
to maintain the high priority now given to the reform of the Italian judicial
and to continue to make rapid and visible progress in the implementation
reforms; to continue their examination of further measures that could help
prevent new violations of the Convention on account of the excessive length of
proceedings; and to inform the Committee of Ministers with the greatest
of all steps undertaken to this effect. It decided to continue the attentive exam
of this problem until the reforms of the Italian judicial system had become
effective and a reversal of the trend at the domestic level had be fully confirm
Meanwhile, the Committee of Ministers resumed its consideration of the
made, at least at yearly intervals, on the basis of a comprehensive report to be
each year by the Italian authorities.[77] In concluding its examination of the third
report presented by the Italian authorities, on 29 September 2004, the Commit
Ministers noted with concern that an important number of reforms announced
2000 were still pending for adoption and/or for effective implementation, a
minded the Italian authorities of the importance of respecting their undert
to maintain the high priority initially given to the reforms of the judicial system
to continue to make rapid and visible progress in the implementation of these
As regards the effectiveness of the measures adopted so far, the Committee of Min
deplored the fact that no stable improvement could yet be seen: subject to a few
tions, the situation generally worsened between 2002 and 2003[78] with an increa
both the average length of proceedings and the backlog of pending cases. The C
mittee of Ministers accordingly confirmed its willingness to pursue the monito
until a reversal of the trend at the national level had been fully confirmed by re
and consistent data. In light of this situation the Committee of Ministers took
of the information provided by Italy concerning a follow-up plan aimed at ensu
the respect of the expected execution objectives. It invited Italy to rapidly submit
complementary information requested, as well as to complete the above-mentio
follow-up plan by implementing an action plan. It also decided to examine the
report by April 2005 at the latest.[79]

In the Cases of *Akdivar, Aksoy, Çetin, Aydin, Mentes, Kaya, Yilmaz, Selçuk and Asl*
Kurt, Tekin, Güleç, Ergi, and *Yasa,* the Court had found various violations of
Convention by Turkey, which all resulted from the actions of its security forces in

77 Interim Resolution DH(2000)135 of 25 October 2000.
78 See CM/Inf(2004)23 rev.
79 Documents of the Committee of Ministers, CM/AS (2004)9 of 4 October 2004.

south-east of the country, a region subject to a state of emergency for the purposes of the fight against terrorism. The Turkish Government informed the Committee of Ministers that it had engaged in an important process, including notably the drafting of measures in respect of regulations and training, in order to implement fully and in all circumstances the constitutional and legal prohibition of the use of torture and ill-treatment. The Committee of Ministers noted that the actions of the security forces challenged in these cases took place in a particular context, i.e. the rise of terrorism during the years 1991-1993. However, it also noted that the principal problems, which gave rise to the violations found, had subsequently remained unaddressed, and that, in particular, investigations relating to these violations, when they took place, had not produced concrete and satisfactory results.

The Committee of Ministers noted, in respect of the efficiency of criminal proceedings directed against agents of the security forces, that still, more than two years after the first judgments of the Court denouncing the serious violations of the human rights at issue in the case at hand, the information provided to the Committee of Ministers did not indicate any significant improvement of the situation with regard to offences falling within the jurisdiction of the state Security Courts and/or committed in the regions subject to a state of emergency. The Committee of Ministers called upon the Turkish authorities to rapidly complete the announced reform of the existing system of criminal proceedings against members of the security forces, in particular by abolishing the special powers of the local administrative councils in engaging criminal proceedings, and to reform the prosecutor's office in order to ensure that prosecutors in the future had the independence and necessary means to ensure the identification and punishment of agents of the security forces who abuse their powers so as to violate human rights. The Committee of Ministers decided to continue, in accordance with its responsibilities under the Convention, the examination of the above cases until measures had been adopted which would effectively prevent new violations of the Convention.[80]

In its follow-up Resolution the Committee of Ministers noted with satisfaction that Turkey had pursued and enhanced its reform process with a view to ensuring that its security forces and other law enforcement authorities respect the Convention in all circumstances and thus prevent new violations. In particular, the Committee expressed appreciation for the Government's efforts to effectively implement the existing laws and regulations concerning police custody through administrative instructions and circulars issued to all personnel of the Police and *Gendarmerie*, which, *inter alia*, provided for stricter supervision of their activities. It also took note of the recent constitutional and legislative amendments, particularly those which limited to 4 days the maximum periods of detention before persons accused of collective offences are presented to a judge, and those which introduced the right of access to

80 Interim Resolution of 9 June 1999, DH (99) 434.

a lawyer after a maximum period of 48 hours in police custody in cases of
offences committed in the state of emergency regions and falling within the
of the State Security Courts. The Committee of Ministers expressed, however,
about the continuing existence of new complaints of alleged torture and ill-
as evidenced notably through the new applications lodged with the Court
with concern that, three years after the adoption of Interim Resolution DH
Turkey's undertaking to engage in a global reform of basic, in-service and
training of the Police and *Gendarmerie* remained to be fulfilled and
concrete and visible progress in the implementation of the Council of Europe
Training Project was very urgent. The Committee of Ministers urged
accelerate without delay the reform of its system of criminal prosecution for
by members of the security forces, in particular by abolishing all restrictions
prosecutors' competence to conduct criminal investigations against State officials
reforming the prosecutor's office and by establishing sufficiently deterring
prison sentences for persons found guilty of grave abuses such as torture and ill-
ment. It called upon the Turkish Government to continue to improve the
of persons deprived of their liberty in the light of the recommendations of the
mittee for the Prevention of Torture (CPT) and decided to pursue the
the execution of the judgments concerned until all necessary measures had been
ted and their effectiveness in preventing new similar violations had been

In 27 judgments against Turkey the Court had found that the criminal
of the applicants, on account of statements contained in articles, books,
messages addressed to, or prepared for, a public audience, had violated their
of expression guaranteed by Article 10 of the Convention. In its Interim
on violations of the freedom of expression in Turkey, the Committee of
encouraged the Turkish authorities to bring to a successful conclusion the
sive reforms planned to bring Turkish law into conformity with the
Article 10 of the Convention.[82] At its subsequent meeting, having
significant progress achieved in a series of reforms undertaken with a view to
Turkish law and practice with the requirements of the Convention in the
freedom of expression, the Committee of Ministers welcomed the changes
the Turkish Constitution, in particular to its Preamble, to the effect that only
constitutional activities instead of thoughts or opinions could be restricted,
as to Articles 13 and 26, which introduced the principle of proportionality and
cated grounds for restrictions of the exercise of freedom of expression, similar to
contained in paragraph 2 of Article 10 of the Convention. It noted also the
important legislative measures adopted as a result of these reforms, in

81 Interim Resolution of 10 July 2002, DH (2002) 98.

82 Interim Resolution of 23 July 2001, DH(2001) 106.

repeal of Article 8 of the Anti-terrorism Law and the modification of Articles 159 and 312 of the Turkish Criminal Code. The Committee of Ministers welcomed in this context also the 'train the trainers' programme currently being carried out in the framework of the Council of Europe/European Commission Joint Initiative with Turkey to enhance the ability of the Turkish authorities to implement the National Programme for the adoption of the Community acquis (NPAA) in the accession partnership priority area of democratization and human rights, noting that this programme aims, among other things, at devising a long-term strategy for integrating Convention training into the initial and in-service training of judges and prosecutors. The Committee of Ministers expressed appreciation in this context of the recent establishment of the Judicial Academy, as well as many Convention awareness-raising and training activities for judges and prosecutors initiated by the Turkish authorities. Furthermore, it welcomed the amendment of Article 90 of the Constitution, which had recently been adopted by the Turkish Parliament to facilitate the direct application of the Convention and Strasbourg case law in the interpretation of Turkish law. It encouraged the Turkish authorities to consolidate their efforts to bring Turkish law fully into conformity with the requirements of Article 10 of the Convention. The Committee of Ministers decided to resume consideration of the general measures in these cases within nine months, and outstanding individual measures concerning the respective applicants at its 897th meeting (September 2004), it being understood that the Committee's examination of those cases involving applicants convicted on the basis of former Article 8 of the Anti-terrorism Law would be closed upon confirmation that the necessary individual measures had been taken.[83]

In the *Scozzari and Giunta* Case the Court found two violations of Article 8 of the Convention by Italy on account, on the one hand, of the delays in organising contact visits and the limited number of such visits between the first applicant and her children, after they had been taken into public care and, on the other hand, of the placement of the children in a community among whose managers were persons convicted for ill-treatment and sexual abuse of handicapped persons placed in the community.[84] The Committee of Ministers noted that, following Ms Scozzari's taking up residence in Belgium, the Belgian Government had approached the Italian authorities in order to examine the possibilities of organising, by judicial means, the placement of the children in Belgium, near the mother's place of residence, under the guardianship of the competent youth court. It found that such a proposal could provide the basis for a solution respecting the Court's judgment. Considering the urgency of the

83 Interim Resolution of 2 June 2004, DH(2004) 38.

84 Judgment of 13 July 2000, paras. 183 and 216.

situation the Committee of Ministers encouraged the Belgian and Italian auth
to implement the proposal without delay so as to put an end to the violations

At its next session the Committee of Ministers expressed regret that, more
one year after the Court's judgment, the latter had still not been fully executed
several problems that lay at the basis of the Court's finding of a violation in
of the placement in the *Forteto* community had not been remedied. It invite
Italian authorities to rapidly take concrete and effective measures in order to
the children from being irreversibly separated from their mother and to ensure
their placement respects the superior interests of the children and the mother's
as defined by the Court in its judgment.[86] The Committee of Ministers noted
certain general measures remained to be taken and that further information
clarifications were outstanding with regard to a number of other measures, includ
where appropriate, information on the impact of these measures in practice. It reca
that the obligation to take all such measures is all the more pressing in cases
procedural safeguards surrounding investigations into cases raising issues under Ar
2 of the Convention are concerned. The Committee of Ministers decided to pur
the supervision of the execution of the judgments concerned until all necessary ge
measures had been adopted and their effectiveness in preventing new, similar
lations had been established and the Committee of Ministers had satisfied itself
all necessary individual measures had been taken to erase the consequences of the
lations found with respect to the applicants. It resumed consideration of these
as far as individual measures were concerned, at each of its DH meetings, and
regard to outstanding general measures it decided to review their adoption within
months from the date of its interim resolution at the latest.[87]

Following the idea submitted in the context of the Committee of Ministers' supervi
of the implementation of the *Ryabykh* judgment, a high-level seminar was held
the participation of the highest Russian judiciary, *prokuratura*, executive author
and the Bar to discuss the prospects for further reforms of the supervisory rev
procedure, one of the topics at the heart of Russian judicial reform. The violation
the Convention found in the *Ryabykh* Case was due to the quashing, by the Presid
of the Belgorod Regional Court in March 1999, of a final judicial decision in
applicant's favour, following an application for supervisory review lodged by
President of the same court under Articles 319 and 320 of the Code of Civil Procedu
as they were then in force. The latter gave the President discretionary powers to ch
lenge at any moment final court decisions. The Court found that this supervis
review by the Presidium infringed the principle of legal certainty and thus the

85 Interim Resolution of 29 May 2001, DH (2001) 65.
86 Interim Resolution of 3 October 2001, DH (2001) 151.
87 Interim Resolution of 23 February 2005, DH(2005) 20.

plicant's right to a court.[88] Subsequently, the Russian Federation adopted some general measures with a view to remedying the systemic problem at the basis of the violation. According to the new Code of Civil Procedure, the time period for lodging an application for supervisory review was limited to one year (Article 376) and the list of state officials empowered to lodge such an application was significantly narrowed (Article 377).

While these measures were welcomed by the Committee of Ministers, doubts were expressed as to whether the measures taken were sufficient to prevent new, similar violations of the principle of legal certainty. The Russian authorities were thus invited to continue the reform of the supervisory review procedure, bringing it in line with the Convention's requirements, as highlighted, *inter alia*, by the *Riabykh* judgment. Given the complexity of the issue and the ongoing reflection on the matter in Russian legal circles, it was suggested, at the Committee of Ministers' meeting (8-9 December 2004), that a high-level seminar be held with a view to taking stock of the current *nadzor* practice and to discussing prospects for further reform of this procedure in conformity with the Convention's requirements.[89]

As a result, the Directorate General of Human Rights organized a seminar in Strasbourg, from 21–22 February 2005, in close co-operation with the Russian authorities. The participants at the Conference welcomed the reforms of the supervisory review procedure adopted by the Russian Federation through the new Codes of Criminal, Commercial (Arbitration) and Civil Procedure (in force respectively since 1 July 2002, 1 January 2003 and 1 February 2003). Notably it was suggested by many participants that the supervisory review in its amended form more closely respected the legal certainty principle enshrined in the Convention, especially in criminal and commercial matters. More reservations were, however, expressed, from the Convention viewpoint, as to the existing supervisory review procedure in civil matters. The conclusions of the seminar will be reported to competent Russian authorities with a view to contributing to their reflection on possible further reforms of the *nadzor* procedure. The Committee of Ministers will also be informed regarding the seminar in the context of its supervision of the execution of the Court's judgment in the *Riabykh* case. Given the time needed for the enactment of the new legislative measures, the Committee of Ministers decided to postpone its examination of the case until the legislative reforms have been carried out, or at the latest, until its first meeting in 2006.[90]

88 Judgment of 24 July 2003, paras. 57–58.
89 Interim Resolution of 8 February 2006, DH(2006)1.
90 http://www.coe.int/T/E/Human_rights/execution/.

3.4 MONITORING FUNCTIONS PERFORMED BY THE COMMITTEE OF MINISTERS

3.4.1 GENERAL

During the Council of Europe Summit in Vienna in October 1993 one of the [matters] discussed was the implications of the geographical enlargement of the Council of Europe as a result of the political changes which had taken place in Central and Eastern Europe as from 1989. On that occasion the Heads of State and Government of the Member States of the Council of Europe stated that "the Council is the pre-eminent European political institution capable of welcoming, on an equal footing and in permanent structures, the democracies of Europe freed from communist oppression. For that reason the accession of those countries to the Council of Europe is a decisive factor in the process of European construction based on our Organisation's values. Such accession presupposes that the applicant country has brought its institutions and legal system into line with the basic principles of democracy, the rule of law and respect of human rights."[91]

In that context the Committee of Ministers has repeatedly expressed the view that the opening up of Central and Eastern European countries cannot take place at the cost of lowering the norms and standards of human rights protection established by the Council of Europe. In connection with the requests for accession of new Member States, the question arose of how to determine whether the State concerned fulfilled the requirements for membership. Apart from the procedure of Article 52 of the Convention,[92] the Council of Europe lacks a mechanism under which the Member States can be kept under constant surveillance regaring their compliance with the commitments accepted within the framework of the Council of Europe.

Against this background and inspired by the Vienna Summit, where the Heads of State and Government resolved to ensure full compliance with the commitments accepted by all Member States within the Council of Europe, the Committee of Ministers adopted a declaration on compliance with these commitments.[93] The declaration envisages a political mechanism under which the Members States of the Council of Europe, its Secretary General or its Parliamentary Assembly may refer questions of implementation of commitments concerning the situations of democracy, human rights and the rule of law to the Committee of Ministers. On 20 April 1995, the Committee of Ministers adopted the procedure for implementing the above-mentioned declaration. When considering issues referred to it, the Committee of Ministers will take account of all relevant information available from different sources such as the Parliamentary Assembly and the Organisation for Security and Co-operation in Europe (OSCE). The mechanism will not affect the existing procedures arising from statutory or conventional control mechanisms. At least three meetings of the Ministers' Deputies at A level, fixed in advance, will be devoted to this question every year. At the first meeting and subsequently every second year, unless decided otherwise, the Secretary General will present a factual overview of compliance with the commitments. The discussions will be confidential and held in camera "with a view to ensuring compliance with commitments, in the framework of a constructive dialogue". The Committee of Ministers will then consider, in a constructive manner, matters brought to its attention, encouraging member States, through dialogue and co-operation, to take all appropriate steps to conform with the principles of the Statute in the cases under discussion. Finally, in cases requiring specific action, the Committee of Ministers may decide to request the Secretary General to make contacts, collect information or furnish advice; to issue an opinion or recommendation; to forward a communication to the Parliamentary Assembly or; to take any other decision within its statutory powers.

3.4.2 MONITORING IN PRACTICE

By virtue of paragraph 1 of the 1994 Declaration on Compliance with Commitments, "questions of implementation of commitments concerning the situation of democracy, human rights and the rule of law in any member State" may be brought before the Committee of Ministers by member States, by the Secretary General, or on the basis of a recommendation from the Parliamentary Assembly. To date, the Committee of Ministers has been seized twice on the basis of this paragraph. On both occasions this concerned the specific situation in the Chechen Republic of the Russian Federation. This was done for the first time by the Secretary General in June 2000 and a second time by the Parliamentary Assembly in April 2003 in its Recommendation 1600 (2003).

Likewise, by virtue of paragraphs 5 and 6 of the 1995 Procedure for implementing the 1994 Declaration, any Delegation within the Committee of Ministers or the Secretary General may ask to put the situation in any member State on the agenda of a special (*in camera*) monitoring meeting, on the basis of its own concerns or with reference to a discussion in the Parliamentary Assembly. The request should be accompanied by specific questions. These paragraphs were used once by the Secretary General in early 2002 concerning the situation in Moldova.[94]

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91 Council of Europe Summit, Vienna, 9 October 1993; see NQHR, Vol. 11, No. 4, 1993, p. 513.

92 See *infra*, Chapter 4.

93 Declaration of the Committee of Ministers of the Council of Europe of 10 November 1994 on Compliance with Commitments accepted by Member States of the Council of Europe, Yearbook XXXVII (1994), pp. 461-462.

94 See Monitor/Inf (2005)1, 19 January 2005, p. 2.

3.4.2.1 Thematic Monitoring

Thematic monitoring was set up in 1996 and covers all member States. In the 1996-2004 ten themes were dealt with by the Committee of Ministers, namely: dom of expression and information; Functioning and protection of demo institutions; Functioning of the judicial system; Local democracy; Capital punish Police and security forces; Effectiveness of judicial remedies; Non-discrimination emphasis on the fight against intolerance and racism; Freedom of conscienc religion and Equality between women and men. Work on these themes has now terminated.[95]

Further to discussions on the theme relating to the functioning of democratic tutions, the Committee of Ministers, by virtue of paragraph 4, second indent, of 1994 Declaration, forwarded a communication to the Parliamentary Asse in January 2000 on the basis of its thematic monitoring on the functioning of de cratic institutions.[96]

In June 2000 and 2001, following the examination of the theme 'Freedom of pression and information', the Secretary General was instructed, by virtue of parag 4, first indent, of the 1994 Declaration, to make contacts and collect information this theme.[97] The Secretary General carried out the request through, notably, in visits to 4 Member States in 2000 and 2001 (Albania, the Russian Federation, Tu and Ukraine) and to nine Member States in 2002 and 2003 (the four States previo mentioned as well as Azerbaijan, Georgia, Moldova, Romania and the former Yugo Republic of Macedonia).[98]

3.4.2.2 Specific Post Accession Monitoring

Since Armenia and Azerbaijan joined the Council of Europe in 2001, an ad h Ministers' Deputies Monitoring Group (GT-SUIVI.AGO) has reviewed democra developments in both countries through dialogue and *in loco* visits. Progress repo are discussed by the Committee of Ministers on a regular basis. Independent exper appointed by the Secretary General and assisted by the Monitoring Department, ha examined cases of alleged political prisoners in both countries.

95 Monitor/Inf (2005)1, 19 January 2005, p. 3.

96 See document CM/Monitor(2000)2 (also issued as AS/Inf(2000)01). See also Resolution 1308 (20 on *restrictions concerning political parties in the member States of the Council of Europe* adopted the Assembly in November 2002, as well as, for instance, Assembly Resolutions 1280 (2002), 1 (2004) and 1363 (2004) on the functioning of democratic institutions in Azerbaijan, Moldova Georgia.

97 See Monitor/Inf (2005)1.

98 See CM/Monitor(2003)8 final 2.

Regular monitoring procedures have been instituted with respect to the obligations and commitments of Bosnia and Herzegovina, Georgia, and Serbia and Montenegro. The reports, which are submitted on a quarterly basis with respect to Bosnia and Herzegovina, and Serbia and Montenegro, and on a six-monthly basis with respect to Georgia, are examined by the Ministers' Deputies' Rapporteur Group on Democratic Stability.

3.4.3. CONCLUDING OBSERVATIONS

Although the monitoring mechanism has been in existence for more then ten years, it is still difficult to make an evaluation of its functioning. It in fact does not provide the Committee of Ministers with more powers than it already had. It also may result in even less willingness on the part of the member States to make use of the inter-State complaint mechanism under Article 33 of the Convention. The new mechanism has, however, the advantage that it may create a platform for the Committee of Ministers and the Member States to discuss and examine on a structural basis the human rights situation in all Member States of the Council of Europe. It also provides a more convenient tool for the Member States to employ a kind of 'early warning system' when there are indications that one of the Member States does not fulfil its obligations. If the Member States are fully aware of their responsibilities concerning the collective enforcement of human rights, the new mechanism may add a new dimension to the protection of human rights in Europe. In the more than 50 years of the Council of Europe's existence, there have been situations in which silent diplomacy might have had a better result than the existing complaint procedures.

Since the adoption of its 1994 Declaration on compliance with commitments, the Committee of Ministers has developed three distinct and sometimes interrelated, monitoring procedures: monitoring the application of the 1994 Declaration, thematic monitoring and specific post-accession monitoring. The 1994 Declaration may be perceived as a special mechanism that enables the Committee of Ministers to examine any situation or subject related to the implementation of commitments in the fields of democracy, human rights and the rule of law and to take specific action, when required. Thematic monitoring is a Committee of Ministers' tool which permits it to verify the implementation of commitments accepted by member States from the angle of specific topics. This procedure can lead to the re-adjustment of co-operation and assistance programmes and intergovernmental work, where appropriate. Specific action, in application of the 1994 Declaration, may also be taken to this effect. The Committee of Ministers has also set up country specific post-accession monitoring procedures in order to closely follow progress achieved and difficulties encountered by new Member States with respect to their specific obligations and commitments.

CHAPTER 4
THE SUPERVISORY FUNCTION OF THE SECRETARY GENERAL OF THE COUNCIL OF EUROPE

REVISED BY JEROEN SCHOKKENBROEK

INDEX

4.1 INTRODUCTION

In addition to the complaint procedure, the Convention provides for yet another procedure for supervising the observance by the Contracting States of their obligations under the Convention. This form of supervision is based on Article 52 (formerly Article 57) of the Convention and is entrusted to the Secretary General of the Council of Europe. Article 52 reads as follows:

> *On receipt of a request from the Secretary General of the Council of Europe any High Contracting Party shall furnish an explanation of the manner in which its internal law ensures the effective implementation of any of the provisions of this Convention.*

This provision originates from the work of the United Nations. In 1947, within the context of the *travaux préparatoires* of what later developed into the Universal Declaration and the two Covenants on Human Rights, a text was drawn up which related to civil and political rights. This text contained a provision according to which the Secretary General of the United Nations would have the right to request States, after they had become Parties to the treaty then under preparation, to report on the manner in which the effective implementation of the provisions of the treaty was ensured in their internal law. During the preparation of the European Convention this idea was

adopted in a British proposal to the Committee of Experts and accepted by the Committee.

Under international law there are several examples of procedures in which States have to submit reports to make possible the assessment of the observance of their obligations. This system of supervision, which in general is referred to as the reporting procedure, may also constitute an effective instrument of control in the field of the protection of human rights.

Treaties for the protection of human rights are not concerned primarily with the interests of the State, but with the interests of the individual. If such a treaty provides for an inter-State complaint procedure, the Contracting States' decisions on whether to file an application will also depend on political considerations. And precisely because the interests of a State are affected to a lesser extent by a violation, States are likely to lodge an application against another State only in very exceptional cases. In this respect, the practice with regard to Article 33 (formerly 24) of the European Convention is self-explanatory.[1] As a result of the lack of initiative on the part of States to start a complaint procedure, a gap in the supervision of the treaty concerned may readily arise. A reporting procedure, such as is provided for in Article 52, may fill this gap, because the initiative for the reporting procedure may be taken by an international organ and is not dependent on a decision of one of the Contracting States.

In the case of treaties providing for an individual right of complaint, the States' lack of initiative to start the complaint procedure has less serious consequences, because the initiative may also be taken by those individuals who have a personal and direct interest at stake. It should, however, be borne in mind that the individual right of complaint is optional under most human rights treaties that provide for such a right, which implies that it can only be exercised if the State concerned has accepted this possibility. In this respect the Convention constitutes an exception. Since the entry into force of Protocol No. 11 on 1 November 1998 the right of individual application has been set out in Article 34 without any condition or requirement as to acceptance of this right by Contracting States. However, situations which allegedly conflict with the Convention but have not yet created any victims in the sense of Article 34, can be submitted for review by the Court only by Contracting States.[2] In such cases the supervision of the observance of the obligations under the Convention, therefore, is largely dependent on the lodging of a complaint by a State, with all the disadvantages and restrictions involved. Here again a reporting procedure may have an important complementary value. Moreover, there may be situations where there *are* victims, who, however, for one reason or another, do not take the initiative to lodge a complaint.

1 See *supra*, 1.12.5.

2 See *supra*, 1.12.2 and 1.13.3.1.

Even apart from the question of whether the complaint procedure provided for in a human rights treaty functions effectively or not and whether or not the initiative has been laid also in the hands of the individual concerned, the existence of a reporting procedure side by side with a complaint procedure may be of great value. A reporting procedure may, precisely because its character differs from that of a complaint procedure, enhance the effectiveness of the international supervision in a number of respects. Thus, via a reporting procedure all the Contracting States can be supervised at the same time, while in a complaint procedure usually the acts or omissions of only one State are examined. The first advantage of this is that the resistance to the supervision may be less if all the States are equally subjected to examination. Further, because of the possibility of comparison, a more balanced picture may be obtained of the state of affairs with respect to the implementation of the treaty in question within the whole group of Contracting States, which may facilitate the taking of measures for the improvement of the situation. In addition, the reporting procedure makes it possible to complete the picture of implementation, because this form of supervision may comprise all the provisions of the treaty in question simultaneously, while in a complaint procedure only one, or at best a few of the provisions at a time will be examined. Furthermore, a reporting procedure has the advantage that the international organ concerned may assure a certain continuity in the supervision, because it can itself decide which aspects are to be examined and when, while in the case of a complaint procedure one must wait until a complaint is submitted, in which case the supervision has more of an *ad hoc* character. The continuity of the reporting procedure allows a comparison with the situation in the past and may thus greatly enhance the effectiveness of the supervision. Finally, the reporting system will in general assume a form that is more flexible than the much more formal complaint procedure.

In view of the above-mentioned advantages it is not surprising that many international instruments for the protection of human rights, both those concerning civil and political rights and those concerning economic, social and cultural rights, provide for a reporting procedure.[3]

3 See, *e.g.*, Articles 22 and 23 of the Constitution of the International Labour Organisation; Article 9 of the Convention on the Elimination of All Forms of Racial Discrimination; Articles 40 *et seq.* of the International Covenant on Civil and Political Rights; Articles 16 *et seq.* of the International Covenant on Economic, Social and Cultural Rights; Article 19 of the Torture Convention; Article 18 of the Convention on the Elimination of all forms of Discrimination against Women, Article 44 of the Convention on the Rights of the Child. At the European level, see, *e.g.*, Article 21 of the European Social Charter and Articles 24-26 of the Framework Convention for the Protection of National Minorities.

4.2 THE REPORTING PROCEDURE UNDER ARTICLE 52 OF THE CONVENTION

In comparison with most other human-rights treaties that contain report... gations for the Contracting States the provision of Article 52 of the European C... tion is very concise and leaves a great number of questions unanswered. Mos... lack of clarity, however, has been removed by practice. At any rate it is clear f... text of the article that the Secretary General has the power to request the Cont... States to furnish an explanation of the manner in which in their internal law ... fective implementation of the provisions of the Convention is ensured, and th... Contracting States have the duty to provide him with this information. For t... mainder, little can be inferred with certainty from the article itself and it is thus ... tant to look at the practice which has developed under this provision.

To date, the Secretary General has used the power under Article 52 on ... occasions. On the first five occasions, all Contracting States were invited to ... reports on the application of the rights laid down in the Convention.[4] An impo... development of the practice was initiated in December 1999, when for the firs... the Secretary General addressed a request to a single Contracting Party, name... Russian Federation, asking it "to furnish, in the light of the case-law of the Eur... Court of Human Rights, explanations concerning the manner in which the Conv... is currently being implemented in Chechnya, and the risks of violation which ... result therefrom." And the next recourse to the Article 52 procedure (in Febr... 2002) also concerned a single State: Moldova was requested to provide explan... about the implementation of the Convention in the light of certain recent dev... ments in that country.

As regards the subject-matter of the request for explanations under Article 5... Secretary General has, on some occasions, referred to all or to a few of the provi... of the Convention, and in others to only one of them. In 1964 the Contracting ... were requested to furnish information on the question of "how their laws, their ... law and their administration practice give effect to the fundamental rights ... freedoms guaranteed by the Convention and its first Protocol". In that case, there ... they had to report on all the rights set forth in the Convention and the Protoco... 1970, on the other hand, the request of the Secretary General concerned only Ar... 5(5), while in 1975 information was required on the application of Articles 8, ...

[4] In October 1964, July 1970, April 1975, March 1983 and July 1988, respectively. In a very ... development, which therefore cannot be examined further in this edition, the Secretary Gener... Article 52 for the eighth time on 21 November 2005, requesting all Contracting Parties to p... certain explanations in the context of media and NGO reports about operations conducted by ... agencies on the territory of Contracting Parties involving unacknowledged deprivation of ... and transport of individuals suspected of terrorist activities: Council of Europe Document S... (2006) 5.

and 11. Moreover, on the latter occasion the Secretary General reserved for himself the right to ask for a further explanation of certain points in connection with the reports submitted by the States. In 1983 the Secretary General carried out an enquiry into the implementation of the Convention "in respect of children and young persons placed in care or in institutions following a decision of the administrative or judicial authorities", while in 1988 the request concerned Article 6(1).[5] The 1999 enquiry concerning the Russian Federation referred to recent developments in Chechnya (notably the armed intervention by Russian forces in the autumn of 1999) which raised serious questions concerning the effective implementation of the Convention. The request was not limited to one or more specific provisions of the Convention.[6] The use of the Article 52 procedure in relation to Moldova was prompted by the decision of the Moldovan authorities to suspend for one month the activities of a political opposition party and to lift the administrative parliamentary immunity of three leaders of that party. The request concerned all provisions of the Convention and additional Protocols, but fixed a shorter deadline for the explanations to be given concerning Articles 9-11, 13 and 14 of the Convention.[7]

This practice shows that, compared to traditional reporting procedures provided for under human rights treaties, the Article 52 procedure is unique in that the Secretary General's power is of a discretionary nature.

As early as 1964, before the first use was made of this procedure, then under Article 57 of the Convention, the Secretary General expressed this view in a statement made before the Legal Committee of the Parliamentary Assembly: "The Secretary General in making a request under Article 57 is acting under his own responsibility and at his own discretion, in virtue of powers conferred upon him by the Convention independently of any powers he may have in virtue of the Statute of the Council of Europe. His power under Article 57 is not subject to control or instruction."[8] To date not a single Contracting State has officially objected to this interpretation by the Secretary General of his supervisory powers. It may, therefore, be assumed that the above-mentioned statement constitutes a generally accepted interpretation of Article 52. This is not to say, however, that the Secretary General's actions in this field are always welcomed by the Contracting States. Three States have refused to furnish a reply to his fourth

[5] Council of Europe, *Information Sheet*, No. 21, Strasbourg, 1988, p. 95.

[6] *Request for explanations concerning the manner in which the Convention is implemented in Chechnya and the risks of violation which may result therefrom, Report by the Secretary General on the use of his powers under Article 52 of the European Convention on Human Rights in respect of the Russian Federation*, Council of Europe document SG/Inf (2000) 21 and Addendum of 10 May 2000.

[7] *Report by the Secretary General on the use of his powers under Article 52 of the European Convention on Human Rights in respect of Moldova*, Council of Europe document SG/Inf (2002) 20 of 6 May 2002.

[8] *Statement by the Secretary General on Art. 57 of the European Convention on Human Rights made before the Legal Committee of the Consultative Assembly in Oslo on 29 August 1964*, Council of Europe, *Collected Texts*, Strasbourg, 1994, pp. 235-236.

request: the Federal Republic of Germany, Iceland and Malta, while his fifth
has met with broad opposition so far. The sixth request has not been met by
explanations from the Russian authorities.[9] It should be noted, however, that
recent practice of using Article 52 powers in respect of a single State has
contested by any Contracting Party, including the two States concerned.

It follows from the discretionary nature of this power that the Secretary
has discretion notably in deciding whether and when to issue the request, in
the State or States to which it will be addressed, in determining the subject-
the request, and in fixing time-limits for the submission of the explanations.
appears from the above-mentioned practice under Article 52.

An interesting development occurred in the context of the 1999 request to the
Federation about Chechnya. The Secretary General considered that the lengthy
reply from the Russian authorities only referred to the Convention in a general
summary way and that it did not contain the explanations requested. He sent a
letter to clarify his request, referring *inter alia* to the requirement of strict proportion-
ity of the use of force set out in Article 2 of the Convention and asking for
details of precautions taken by the authorities in the choice of means and
of the operation of the federal forces in Chechnya so as to respect the obligations
Article 2. The second reply was still not considered satisfactory and a subsequent
to a third and last letter of the Secretary General did not add much either. In a
transmitted to the Committee of Ministers and the Parliamentary Assembly,
Secretary General, therefore, concluded that the "affirmations of a general
contained in the replies "cannot be considered as satisfactory 'explanations' for
purposes of Article 52 of the Convention". He requested a team of recognised
in international human rights law to analyse the correspondence in greater
the light of the obligations incumbent on a High Contracting Party which
recipient of a request under Art 52".[11]

The report submitted by the three experts opens with a general analysis of the
framework of the Secretary General's request set out in Article 52.[12] They affirmed
discretionary nature of the power (which includes the possibility of
information from one specific Contracting Party in a specific context), but added

9 The recent request about detention and transport of suspects of terrorism has not met with
refusal, but some of the reactions led to a second round.

10 Copies were sent, for information, to the European Court of Human Rights, the Council of
Commissioner for Human Rights and the United Nations High Commissioner for Human

11 See *supra* note 6.

12 *Consolidated report containing an analysis of the correspondence between the Secretary General
Council of Europe and the Russian Federation under Article 52 of the European Convention on
Rights*, prepared by Tamas Ban, Frédéric Sudre and Pieter van Dijk, Council of Europe
SG/Inf (2000) 24 of 26 June 2000. The three individual reports which formed the basis for
consolidated report are contained in document SG/Inf (2000) 24 Addendum of the same

this does not mean that there are no guiding principles at all for the exercise of this discretionary power.[13] The experts' report listed six principles derived from the effectiveness principle, which is the principle according to which the provisions of the Convention shall be interpreted and applied in such a manner as will make them effective. These principles are:

- the Secretary General's choice of the State and of the occasion must be obvious or based on sound arguments;
- the request for explanations must be as specific as possible;
- the Article 52 procedure must be exercised in an objective manner;
- the answer(s) must be adequate and sufficiently detailed; if necessary, additional information must be requested and provided;
- channels for dialogue must be open;
- the Secretary General must draw conclusions from the outcome of the procedure and submit these to the political and legal bodies within the framework of the Council of Europe.[14]

As regards the obligations of a recipient State, the experts stressed that such a State has the obligation to provide truthful explanations about the effective implementation of the Convention in its internal law. This is an obligation of result: the State cannot limit itself to giving explanations of a formal nature. Bearing in mind also the obligation to execute treaty obligations in good faith (Article 26 of the 1969 Vienna Convention on the Law of Treaties), the State must provide precise and adequate explanations which make it possible to verify whether the Convention is actually implemented in its internal law. According to the experts, this necessarily implies that sufficiently detailed information must be provided about national law and practice, particularly about judicial authorities, and about their conformity with Convention and the case law of its supervisory organs.[15]

After having analysed the correspondence under Article 52 in light of these requirements, the experts concluded that the replies were not adequate and that the Russian Federation had failed in its legal obligations as a Contracting State under Article 52 of the Convention.[16]

13 *Ibidem*, paras 4 and 5.

14 *Ibidem*, para. 7.

15 *Ibidem*, para. 6.

16 *Ibidem*, para. 32.

4.3 THE FOLLOW-UP TO EXPLANATIONS RECEIVED UNDER ARTICLE 52

Practice under Article 52 has also produced some clarity concerning the question of what is to be done with the reports submitted by the Contracting States and of consequences, if any, may be attached to a violation of the Convention discovered this way. The Secretary General compiles the answers of the Contracting States requests in a document which is subsequently brought to the notice of all the Contracting States and of the Parliamentary Assembly of the Council of Europe.[17]

Therefore, the answers of the Contracting States are made public. This in itself already constitute an element of sanction for those cases in which, according to answers, there has been a violation of the Convention. For that purpose some of (comparative) analysis with the assistance of independent experts might desirable, as was done with the results of the third inquiry by the Secretary Ge

In this way the defaulting State is exposed to criticism of the other States, Parliamentary Assembly and public opinion. However, it is doubtful whether, w serious violations have been found, this sanction will be sufficiently effective to an end to the violation. The Secretary General has not been empowered to refer a via a complaint procedure to the Court. Such a possibility might enhance the effectiveness of the supervision under Article 52, although one may wonder whether this would not place the Secretary General too far outside his proper function. It w seem more appropriate to place such a right of application in the public interest a separate institution. During the drafting of Protocol No. 14 to the Conven (opened for signature on 13 May 2004) the Council of Europe Commissioner Human Rights suggested that he be given such a right of application. The drafting body, the Steering Committee for Human Rights, considered that such an 'accusatory' role could easily interfere with the Commissioner's main tasks defined in Committee of Ministers Resolution (99) 50, which are based on a co-operative relationship between the Commissioner and the Member States. However, the Steering Committee did agree that it would be useful to give the Commissioner a right (as opposed to merely the option of asking to be invited, which already existed) to intervene as third party in proceedings before a Chamber or Grand Chamber of the Court, as a way of strengthening the general interest factor in Convention proceedings.[18] This result in Article 13 of Protocol No. 14, which introduces a new third paragraph in Article 36 of the Convention, granting the Commissioner such a right of intervention.

Under the present circumstances, in many cases a violation found via the report procedure can be subjected to a further examination resulting in a binding decision

[17] The more recent reports were also transmitted, for information purposes, to other bodies, including the Court.

[18] Explanatory Report to Protocol No. 14, paras 86-88.

only if one of the other States is prepared – perhaps also on the basis of the information obtained by means of Article 52 – to make use of its right under Article 33, provided that the admissibility conditions of Article 35(1) are fulfilled. It should be noted, however, that, as concerns the compliance with the Convention by Russia in the context of its actions in Chechnya, no inter-State application was brought during or following the conclusion of the Article 52 procedure, despite clear appeals from the Parliamentary Assembly.[19]

The Secretary General himself can do little else but bring the issue, if there has been a very serious violation, to the notice of the Committee of Ministers. Under a political monitoring procedure created by the Committee of Ministers' Declaration on compliance with commitments accepted by Member States of the Council of Europe (10 November 1994), Member States, the Secretary General or the Parliamentary Assembly may refer matters to the Committee of Ministers regarding 'questions of implementation of commitments concerning the situation of democracy, human rights and the rule of law in any member State.' This is in fact what the Secretary General did in June 2000, after having received the expert analysis of his correspondence with the Russian Federation under Article 52. In October 2000 the Committee of Ministers decided to deal with this matter as part of the regular discussions on the Council of Europe's contribution to re-establishing the rule of law, respect for human rights and democracy in Chechnya.[20] No measures were taken on the ground of Article 8 of the Statute of the Council of Europe.

By contrast, there was specific follow-up to the next Article 52 enquiry. The replies received from the Moldovan authorities not only indicated that the decision to suspend the activities of the opposition party in question had been revoked but also that they recognised that there were numerous elements of Moldovan law which raised serious questions as to their conformity with the Convention. In his report the Secretary General also noted some essential additional problems of compatibility and stated that he expected the Moldovan authorities to conduct a thorough review of domestic law and practice and to take steps rapidly to rectify the shortcomings already found. Furthermore, he expected the authorities to provide him with further information resulting from these actions. This indicates that the Article 52 procedure in respect of Moldova was left open, pending receipt of information about such domestic follow-up measures.[21] The Committee of Ministers subsequently adopted a targeted co-operation programme which was partly designed to assist the Moldovan authorities in conducting the necessary reviews of domestic law and practice in areas identified

[19] Parliamentary Assembly Resolution 1221 (2000) on the conflict in the Chechen Republic, para. 22.

[20] See *Council of Europe monitoring procedures: an overview*, Council of Europe document Monitor/Inf (2004) 2 of 5 April 2004, para. 12.

[21] See *supra* note 7, paras 35-36.

in the Article 52 procedure. The Council of Europe has on many occasions ... comments by Convention experts on existing and draft legislation. This ... not yet been completed.

The comparison with the follow-up given to the Article 52 procedure in ... of the Russian Federation concerning Chechnya indicates that, especially in ... allegations of massive and serious human rights violations, recourse to Article ... not bring any practical results if the State concerned is not willing to ... obligations under Article 52 and if the procedure's outcome is not backed ... political support, notably from the Committee of Ministers. On the other hand, ... the State co-operates in the procedure, and if the Committee of Ministers is ... to act, the procedure has the potential to lead to concrete steps to improve ... with the Convention.

CHAPTER 5
THE SYSTEM OF RESTRICTIONS

REVISED BY YUTAKA ARAI

CONTENTS

5.1 INTRODUCTION

This Chapter deals with the nature and scope of restrictions that are contemplated in the Convention. The analysis of the case law reveals four types of restrictions: first, the general type of restrictions applicable to all the substantive rights under Articles 2-14 of the Convention and under the Protocols; second, the limitation clauses attached to Articles 8-11 of the Convention, Article 2 of Protocol No. 4, and Article 1 of Protocol No. 7; third, the possibility of restrictions allowed to demarcate or delimit the scope of protection of certain Convention rights; and fourth, the question of inherent or implied limitations. The first type of restrictions on the Convention rights include qualifications on the rights of individuals as contemplated under Articles 15,

17-18, which are discussed in connection with these articles.[1] This section focuses on the other three types of restrictions. The assessment starts with restrictions by the limitation clauses and thereafter turns to 'limitations by delimitation' and the theory of inherent limitations.

5.2 LIMITATION CLAUSES AND THE CRITERIA FOR APPRAISAL

5.2.1 GENERAL REMARKS

The structure of the second paragraphs of Articles 8-11 of the Convention and third paragraph of Article 2 of Protocol No. 4 is almost identical, with these paragraphs designed to qualify the exercise of the rights guaranteed under the first paragraph of those provisions.[2] The limitations based on similar textual formula are also seen in the second sentence of Article 6(1) relating to the right to a public trial, and Article 1 of the Seventh Protocol which guarantees the right of an alien lawfully resident in the territory of a Member State not to be expelled.[3] Despite a variety of denominations used to describe possibilities of qualifying the exercise of Convention rights in these paragraphs, such as 'interference',[4] 'limitations',[5] 'restrictions',[6] 'formalities, conditions, restrictions or penalties',[7] 'depriv[ation]'[8] and 'control',[9] they can all be categorized as 'limitations'.

With respect to the limitation clauses under Articles 8-11 of the Convention, Article 2 of the Fourth Protocol, the same principles apply in assessing the compatibility of interference with the requirements of the Convention provisions (*Convention*). When the Court identifies an interference with a right provided in these provisions, a further examination is required to determine whether such interference can be justified on the basis of the three standards laid down in the Convention and elaborated upon in the case law. The first standard demands that any interference with the Convention right must be 'in accordance with law' or 'prescribed by law'. Such

1 *Infra* Chapters 34, 36 and 37.

2 In the case of Article 2(3) of the Fourth Protocol, this clause qualifies the rights under the first paragraph and the second paragraph.

3 The case law on Article 1 of the Seventh Protocol is limited to admissibility decisions. See, for instance, decision of 8 July 2004, *Bolat* (admissible).

4 Article 8(2) of the Convention.

5 Article 9(2) of the Convention.

6 First and second sentences of Article 11(2) of the Convention; and Article 2 (3) and (4) of the Fourth Protocol.

7 Article 10(2) of the Convention.

8 Second sentence of Article 1(1) of the First Protocol.

9 Article 1(2) of the First Protocol.

such interference must pursue any of the legitimate aims that are exhaustively laid down in the second paragraphs of Articles 8-11. Third, an interfering measure must be considered as 'necessary in a democratic society'. The methodology established in the case law is to examine the three standards in sequence. Yet, it is clear that in case of any finding of a breach of the first or the second standard, this will obliterate the need for evaluations based on the third standard, save in very special circumstances where the nature of issues relating to these standards is such as to require examinations in conjunction.[10] A survey of the case law reveals the tendency of the Court to focus its rigorous scrutiny on the third standard.[11] As regards cases relating to the second paragraphs of Articles 8-11, the general policy of the Court has been to stress the fundamental importance of those rights in a democratic society and to intensify the standard of review, taking as a point of departure that "those paragraphs of Articles of the Convention which provide for an exception to a right guaranteed are to be narrowly interpreted"[12] and any restriction "must be convincingly established".[13]

As regards restrictions on the rights under Article 11, a caveat must be entered that the second sentence of Article 11(2) expressly recognises 'lawful restrictions' on the exercise of the Article 11 rights by members of the armed forces, the police or the administration of the State. Where such issues arise, the Strasbourg organs have evaluated the merits exclusively under the second sentence, finding it unnecessary to examine it under the first sentence. This methodology may be considered as a variation of the 'limitations by delimitation', which will be discussed below. It is submitted that rather than allowing the implicit operation of the margin of appreciation to justify this evasive technique,[14] the principle of proportionality should be deployed to examine such restrictions as well. The Court has stressed that the phrase 'lawful restrictions' must be interpreted in the same manner as the expressions 'in accordance with the law' and 'prescribed by law' in the second paragraphs of Articles 8-11 and entail the requirements of foreseeability and of non-arbitrariness.[15] However, the case law has left open the question of whether the principle of proportionality can be deduced from that phrase.[16]

Furthermore, the first and second paragraphs of Article 1 of Protocol No. 1 contemplate certain restrictions based on deprivation of possession or on control of the use of property. The survey of the case law reveals elaborate criteria for assessing the lawfulness of such restrictions, including the legal basis test, which is similar

10 See, for instance, judgment of 22 February 1994, *Raimondo*, paras. 39-40; and judgment of 23 May 2001, *Denizci and Others*, para. 406 (Article 2 of Protocol No. 4).

11 See, for instance, judgment of 28 October 1999, *Wille*, paras 55-56.

12 Judgment of 25 March 1983, *Silver and Others*, para. 97. See also judgment of 6 September 1978, *Klass and Others*, para. 42.

13 See, for example, judgment of 25 February 1993, *Funke*, para. 55.

14 Report of 9 July 1998, *Rekvényi*, paras. 62-64; and judgment of 20 May 1999, para. 61.

15 Judgment of 20 May 1999, *Rekvényi*, para. 59.

16 See, in particular, Appl. 11603/85, *Council of Civil Service Unions and Others*, 50 D&R (1987), p. 228.

to the 'in accordance with law' standard (or the requirement of law), legitimate aims, the public interest test, the fair balance test, and the proportionality.[17] The development of the case law has also seen the recog the test of accessibility and precision/foreseeability as part of the require lawfulness[18], and of the principle of legitimate expectation inherent to the proportionality.[19] In that sense, restrictions as allowed under Article 1 of Protocol can be assimilated with the limitation clauses as seen under the paragraph of Articles 8-11 and are discussed in detail in the context of the property.[20]

5.2.2 PRESCRIBED BY LAW/IN ACCORDANCE WITH THE LAW

The English text uses the different terms 'in accordance with the law'[21] 'prescribed by law',[22] as well as 'subject to the conditions provided for by law',[23] but it has been established in the case law that all of them must be interpreted in the light of the general principles.[24] The French text, which is equally authentic, uses the expression, '*prévue(s) par la loi*', in the second paragraphs of Articles 8-11 of Convention and Article 2(3) of the Fourth Protocol. The requirement does not mean literal conformity with national law. What matters most here is the 'quality of law'. The case law reveals three essential components of the notion of 'quality of First, the national legal provision that provides for an interfering measure must be accessible to the citizens, which means that "the citizen must be able to have an indication that is adequate, in the circumstances, of the legal rules applicable to a given case".[26] The test of accessibility does not require States to codify every law, allowing room for common law.[27] It is sufficient that the law is at the reasonable disposal of the citizens with the advice of legal experts. The test of adequate accessibility has not given rise to serious problems for national authorities, and the Strasbourg organs' assessment based on this test has remained relatively curt.

Second, the law must be formulated in such a way as to enable citizens to foresee with precision the exact scope and meaning of the provision so as to enable them to regulate their conduct. The Court has noted that a citizen 'must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail'[28] This foreseeability or precision test has been deployed as a crucial interpretive device to heighten the standard of review. It furnishes a crucial safeguard for the citizen, requiring the law at issue to be 'sufficiently clear' and precise, with 'adequate indication' as to the conditions under which any intrusive measures, such as secret surveillance and interception, are to be employed.[29]

Third, as enunciated in the *Olsson (No. 1)* Case,[30] the notion of 'quality of the law' requires that, as a corollary of the foreseeability test, adequate safeguards against abuses must be proffered in a manner that would clearly demarcate the extent of the authorities' discretion and define the circumstances in which it is to be exercised.[31] The Court has continuously stressed the importance of such safeguards, linking the notion of 'in accordance with law' with the overarching principle of the rule of law. According to the Court, a law that confers discretion is not in itself contrary to the requirement of foreseeability. However, such law must satisfy the condition that "the scope of the discretion and the manner of its exercise are indicated with sufficient clarity, having regard to the legitimate aim of the measure in question, to give the individual adequate protection against arbitrary interference".[32] The need for legal safeguard against arbitrary intrusions is all the more important where the executive exercises a power in

17 See, for instance, the report of 8 October 1980, *Sporrong and Lönnroth*, B. 46, para. 42.

18 Judgment of 22 September 1994, *Hentrich*, paras 42 and 47; judgment of 27 September 2005, *G' Ltd and Mebaghishvili*, paras 61-63.

19 Judgment of 6 October 2005 (Grand Chamber), Maurice, para. 88.

20 As will be discussed, Article 1 of the First Protocol is the only provision that is equipped with qualifying phrases akin to limitation clauses but is nonetheless subject to inherent limitations.

21 Article 8(2) of the Convention, Article 2(3) and (4) of the Fourth Protocol, and Article 1(1) Seventh Protocol.

22 Articles 9(2), 10(2), 11(2) of the Convention as well as Article 2(2) of the Seventh protocol.

23 Article 1 of the First Protocol.

24 Judgment of 25 March 1983, *Silver and Others*, para. 85; and judgment of 2 August 1984, para. 66. See also judgment of 26 April 1979, *Sunday Times* (No. 1), paras 47 and 49.

25 See, for instance, the judgment of 26 April 1979, *Sunday Times* (No. 1), para. 49; judgment March 1983, *Silver and Others*, paras 86-88; judgment of 24 March 1988, *Olsson (No. 1)*, and judgment of 20 May 1999, *Rekvényi*, para. 34.

26 See, *inter alia*, the judgment of 26 April 1979, *Sunday Times* (No. 1), paras 47 and 49; 25 November 1999, *Hashman and Harrup*, para. 31(Article 10); judgment of 25 March 1983 *and Others*, paras 86-88 (Article 8); judgment of 24 February 1998, *Larissis and Others*, p. 378, para. 40 (Article 9); judgment of 17 February 2004 (Grand Chamber), *Maestri*, para. 30 (Article 11); and judgment of 4 June 2002, *Landvreugd*, para. 54 (Article 2 of Protocol No. 4).

27 For instance, in judgment of 26 April 1979, *Sunday Times* (No. 1), paras 46-53, the issue was the common law notion of contempt of court.

28 See, *inter alia*, judgment of 26 April 1979, *Sunday Times* (No. 1), paras 47 and 49 (Article 10); judgment of 25 March 1983, *Silver and Others*, paras 86-88 (Article 8); judgment of 24 February 1998, *Larissis and Others*, p. 378, para. 40 (Article 9); judgment of 17 February 2004 (Grand Chamber), *Maestri*, para. 30 (Article 11); and judgment of 4 June 2002, *Landvreugd*, para. 54 (Article 2 of Protocol No. 4).

29 See, for instance, judgment of 25 June 1997, *Halford*, para. 49; and judgment of 25 March 1998, *Kopp*, paras 64 & 72. See also judgment of 24 April 1990, *Kruslin*, para. 33; and judgment of 24 April 1990, *Huvig*, para. 32.

30 Judgment of 24 March 1988, para. 61.

31 See, *inter alia*, judgment of 2 August 1984, *Malone*, para. 67; judgment of 24 March 1988, *Olsson* (No. 1), para. 61; and report of 11 April 1997, *Valenzuela Contreras*, para. 52; and judgment of 30 July 1998, paras 59-60.

32 See, for instance, judgment of 24 November 1986, *Gillow*, p. 21, para. 51; and judgment of 24 March 1988, *Olsson (No. 1)*, para. 61.

secret.[33] The Court has, however, recognized the relative nature of the level of
required, which depends on three factors: the content of the legislative
the field it is designed to cover, and the number and status of addressees
matter, the Court has consistently recognised that "many laws are inevitably
in terms which, to a greater or lesser extent, are vague and whose interpreta
application are questions of practice", referring to the impossibility of
absolute certainty in framing laws and the risk that the search for certainty
excessive rigidity.[35]

The 'in accordance with law' standard has served as a crucial interpretive
condemn national measures under Article 8. With respect to surveillance of
cation and a prisoner's right to correspondence, the foreseeability test has been
to curb the Member State's discretionary power.[36] In relation to the rights of
or detainees to correspondence[37] as well as the protection of private life
veillance measures,[38] the Court has engaged in thorough and solid
impugned national measures on the basis of the foreseeability or precision
contrast, the same standard has not provided much of an elaborate analysis
Strasbourg organs under Articles 9,[40] 10 and 11 of the Convention and
Protocol No. 4, except for a small number of cases.[41] Yet, when ascertaining

33 See, *inter alia*, judgment of 24 April 1990, *Kruslin*, para. 25; and Commission's report of 27
1996, *Kalaç*, para. 42.

34 Judgment of 25 August 1993, *Chorherr*, para. 25; and report of 27 February 1996, *Kalaç*,
See also judgment of 25 March 1983, *Silver and Others*, p. 33, para. 88; judgment of 28
Groppera Radio AG and Others, para. 68; and judgment of 24 September 1992, *Herczegfalv*
para. 89.

35 See, among others, judgment of 26 April 1979, *Sunday Times*, p. 31, para. 49; judgment of
1999, *Rekvényi*, para. 34; judgment of 21 December 2004, *Busuioc*, para. 52. See also the
of 4 June 2002, *Landvreugd*, para. 61 (Article 2 of the Fourth Protocol).

36 Very exceptionally, a State has been condemned for the violation of Article 8 by reason of
of any formal law authorising interference. See, *inter alia*, judgment of 25 June 1997,
judgment of 25 March 1998, *Kopp*.

37 See, among others, judgment of 25 March 1983, *Silver and Others*; judgment of 24 Septembe
Herczegfalvy; and judgment of 13 September 2005, *Ostrovar*, paras 100-102 and 107-108.

38 See, *inter alia*, judgment of 2 August 1984, *Malone*; and judgment of 24 April 1990, *Kruslin*.

39 See the Commission's meticulous assessment of the foreseeability test in: report of 27 Februar
Kalaç, paras 41 *et seq.*

40 Here again, this standard has been construed as meaning that "the law in question must be
adequately accessible to the individual and formulated with sufficient precision to enable
regulate his conduct". This suggests the requirements of accessibility and foreseeability.
instance, judgment of 24 February 1998, *Larissis and Others*, para. 44.

41 For findings of violation of Article 9 based on the stringent evaluation of the foreseeability
for instance, judgment of 26 October 2000, *Hasan and Chaush*, para. 86. In the context of
10, see, for instance, judgment of 25 November 1999, *Hashman and Harrup*; and Commis
Report of 9 July 1998, *Rekvényi* (the Court, in contrast, found the requirement of sufficient
to be met: judgment of 20 May 1999). With respect to a decisive role played by the foreseeab
under Article 11, see, for instance, judgment of 17 February 2004 (Grand Chamber), *Maestri*

touching on the inner core of freedom of religion and conscience under Article 9, the Court has at least called for enhanced vigilance in applying the precision test. For instance, where the relevant law allows public authorities discretion to impose sanctions on military officers for breach of the constitutional principle of secularism, the respondent State must define the scope of such discretion and the manner of its exercise with sufficient clarity and provide them with an "adequate protection against arbitrary interference".[42]

Apart from the limitation clauses under Articles 8-11, the test of foreseeability or precision can be inferred from the expressions 'lawful' and 'in accordance with a procedure prescribed by law' in Article 5(1).[43] This test also serves as a crucial safeguard in the evaluation of the notion of 'very essence' as regards the right of access to a court under Article 6.[44] Further, the development of the tests of accessibility and foreseeability has been instrumental in ascertaining the principle of *nullum crimen, nulla poena sine lege* embodied in Article 7,[45] and its derivative principle that criminal law must not be extensively construed to the detriment of the accused, for instance, by analogy.[46]

5.2.3 LEGITIMATE AIM(S)

States may invoke legitimate aims or purposes laid down in the limitation clauses under Articles 8-11 of the Convention and Article 2 of Protocol No.4. The catalogue of such aims includes interests of national security, territorial integrity or public safety, the prevention of disorder or crime, the protection of health or morals, the interest

42-42 Reference should also be made to judgment of 5 October 2004, *Presidential Party of Mordovia*, para. 32 (clear absence of legal basis for the interference in question). As to the detailed evaluation based on the foreseeability requirement under Article 2 of Protocol No. 4, see, for instance, judgment of 4 June 2002, *Landvreugd*, paras 59-66 (no breach of the foreseeability test in a close vote of four to three); and the joint dissenting opinion of Judges Gaukur Jörundsson, Türmen and Maruste (breach of the foreseeability test); judgment of 4 June 2002, *Olivieira*, paras 52-59 (no breach of the foreseeability test in a close vote of four to three); and the joint dissenting opinion of Judges Gaukur Jörundsson, Türmen and Maruste (breach of the foreseeability test). Note should also be taken of judgment of 23 May 2001, *Denizci and Others*, paras 405-406 (sheer absence of legal basis for the interference in question, and the lack of necessity).

43 Report of 27 February 1996, *Kalaç*, paras 44-5. While the Commission found the precision test to be breached, the Court, apparently relying on the theory of inherent limitations, did not consider that there existed any interference: judgment of 1 July 1997.

44 Judgment of 23 September 1998, *Steel and Others*, para. 54.

45 See, for instance, judgment of 23 October 1996, *Levage Prestations Services*, para. 42; and judgment of 28 October 1998, *Pérez de Rada Cavanilles*, para. 47.

46 The Court has recognized that the requirements of certainty and foreseeability are inherent in Article 7: judgment of 25 May 1993, *Kokkinakis*, p. 22, para. 52; and judgment of 24 February 1998, *Larissis and Others*, para. 34.

Judgment of 22 November 1995, *SW*, para. 35; and judgment of 22 November 1995, *CR*, para. 33.

of well-being of the country, the protection of public order, the maintenance of *public*, the protection of the reputation, the protection of rights and freedoms, the prevention of the disclosure of information received in confidence, the maintenance of the authority and impartiality of the judiciary. The list of legitimate purposes enumerated under the second paragraphs of Articles 8-11 and the third paragraph of Article 2 of Protocol No. 4 is exhaustive. The Strasbourg organs have very rarely found a violation of Convention rights by reference to the legitimate aim standard.[47] This can be explained partly by the strong commitment to democratic governance and the protection of human rights, which is a precondition for membership of the Council of Europe. A more substantial reason is that the assessment of this standard is normally carried out in conjunction with the third standard, 'necessary in a democratic society', and in particular, with the application of proportionality.

5.2.4 NECESSARY IN A DEMOCRATIC SOCIETY

The Strasbourg organs' detailed assessment of the merits is concerned mostly with the third standard, 'necessary in a democratic society', which is commonly found in the limitation clauses (the second paragraph of Articles 8-11 and third paragraph of Article 2 of Protocol No. 4). It is the concept of democratic necessity that has spawned the most significant principles of interpretation, including the margin of appreciation doctrine, the principle of proportionality, the evolutive interpretation, the less restrictive alternative doctrine[48] and the chilling effect doctrine. The Court has consistently held that the adjective 'necessary' is not synonymous with 'indispensable', neither has it the flexibility of such expressions as 'admissible', 'ordinary', 'useful', 'reasonable' or 'desirable',[49] but it suggests that the interference must, *inter alia*, correspond to a 'pressing social need' and be 'proportionate to the legitimate aim pursued'.[50]

47 See, for example, judgment of 23 October 1990, *Darby*, in which the Court found that the refusal to exempt a non-registered foreign worker, as opposed to a registered foreign worker from such tax, did not pursue the legitimate aim.

48 For the application of this doctrine under Article 9, see judgment of 16 December 2004, *Supreme Holy Council of the Muslim Community*, para. 97. For its application under Article 10, see, for instance, judgment of 9 June 1998, *Incal*, para. 54; judgment of 8 July 1999, *Ceylan*, para. 37; Commission's report of 4 April 1995, *Ahmet Sadik*, para. 51; judgment of 8 July 1999, *Arslan*, paras 46-50; judgment of 8 July 1999, *Baskaya and Okçuoglu*, paras 62-67. In the context of Article 11, see, for instance, judgment of 25 May 1998, *The Socialist Party and Others*, para. 51.

49 Judgment of 25 March 1983, *Silver and Others*, para. 97.

50 See, *inter alia*, judgment of 25 March 1983, *Silver and Others*, para. 97 (Article 8); judgment of 14 December 1999, *Serif*, paras 49 and 54; judgment of 13 December 2001, *Metropolitan Church of Bessarabia and Others*, paras 119 and 121 (Article 9); judgment of 7 December 1976, *Handyside*, paras 48-49; and judgment of 25 November 1996, *Wingrove*, para. 53 (Article 10); judgment of 8 July 1998, *The Socialist Party and Others*, para. 49 (Article 11); judgment of 22 May 2001, *Baumann*, 67; judgment of 4 June 2002, *Landvreugd*, para. 74; judgment of 17 July 2003, *Luordo*, paras 96-97 (Article 2 of Protocol No. 4).

Contracting States enjoy a 'certain but not unlimited margin of appreciation' in evaluating such 'pressing social need',[51] including the necessity and extent of the interfering measure. Yet, the Court has consistently emphasized that it is for the Court to give the final ruling on whether the limitations as applied are compatible with the Convention.[52]

The Strasbourg organs have held that the principle of proportionality employed under the second paragraph of Articles 8-11 entails a subsidiary requirement that the reasons adduced by a respondent State for justifying interference must be both 'relevant and sufficient'.[53] The 'relevant reasons' test, which is related to the legitimate aim standard, can readily be met. In contrast, the 'sufficient reasons' test requires a more careful analysis of factors including the nature, severity and effects of obstructing measures in tandem with any expected harm caused to the rights of a citizen.[54] It is closely intertwined with the proportionality assessment, with the failure to meet the sufficient reasons test resulting in the proportionate balance being upset.[55] Assessment of the sufficiency of reasons can be facilitated by the method of evolutive interpretation,[56] which allows a departure from precedent through a progressive decision-making

51 See, for instance, judgment of 7 December 1976, *Handyside*, paras 48-49; judgment of 17 February 2004 (Grand Chamber), *Gorzelik and Others*, para. 96.

52 See, *inter alia*, judgment of 25 March 1983, *Silver and Others*, para. 97 (Article 8); judgment of 25 May 1993, *Kokkinakis*, para. 47; judgment of 26 September 1996, *Manoussakis and Others*, para. 44 (Article 9); judgment of 21 January 1999, *Janowski*, para. 30; and judgment of 16 November 2004, *Karhuvaara and Iltalehti*, para. 38 (Article 10).

53 For cases recognizing the 'relevant and sufficient reasons' test under Article 8, see, *inter alia*, judgment of 22 October 1981, *Dudgeon*, para. 54; judgment of 24 March 1988, *Olsson* (No. 1), para. 68; and judgment of 27 November 1992, *Olsson* (No. 2), para. 87. For cases involving Article 10, see, *inter alia*, judgment of 7 December 1976, *Handyside*, para. 50; judgment of 26 April 1979, *The Sunday Times (No. 1)*, p. 38, para. 62; judgment of 8 July 1986, *Lingens*, para. 40; judgment of 22 February 1989, *Barfod*, para. 28; judgment of 11 January 2000, *News Verlags GmbH & CoKG*, para. 52; judgment of 29 June 2004, *Chauvy and Others*, para. 70; judgment of 17 December 2004, *Pedersen and Baadsgaard*, para. 70 (Article 10). For cases relating to Article 11, see, for instance, judgment of 30 January 1998, *The United Communist Party of Turkey and Others*, paras 46-47; judgment of 13 February 2003, *Refah Partisi (The Welfare Party) and Others*, para. 100; and judgment of 17 February 2004 (Grand Chamber), *Gorzelik and Others*, para. 96. In contrast, with respect to Article 9 of the Convention and to Article 2 of Protocol No. 4, the Strasbourg organs, presumably due to the meager body of the relevant case law, have yet to enunciate the 'relevant and sufficient reasons' test.

54 See, for instance, the judgment of 8 July 1999, *Ceylan*, para. 37; judgment of 6 February 2001, *Tammer*, para. 69; judgment of 11 March 2003, *Lešník*, para. 63; judgment of 16 November 2004, *Selistö*, paras 63-70; and judgment of 21 December 2004, *Busuioc*, para. 95.

55 See, for instance, the judgment of 16 November 2004, *Karhuvaara and Iltalehti*, para. 54; and judgment of 11 January 2005, *Halis*, para. 38.

56 The first clear recourse to this interpretative method was seen in the *Tyrer* case, which involved birching inflicted on a teenager as a form of judicial corporal punishment. When finding the exercise of whipping to constitute 'degrading treatment' as proscribed by Article 3, the Court held that "the Convention is a living instrument which . . . must be interpreted in the light of present-day conditions. In the case now before it the Court cannot but be influenced by the developments and

policy. Further, the chilling effect doctrine comes into operation in this conte
the Court emphasizing the importance that obstructing measures must not h
deterrent effect on the exercise of the rights by the general public. However, ra
on this doctrine in the case law is limited to cases concerning freedom of exp
and freedom of association. Applied under Article 10, this doctrine means tha
nalists, press or the public in general should not be discouraged from criticizing g
authorities by the threat of criminal or civil proceedings for defamation. In vi
the 'dominant position' that it occupies, a Government must display restra
sanctions against freedom of expression and show prudence in choosing the me
of a less restrictive kind.[57]

5.3 LIMITATIONS ARISING FROM DELIMITATIO

Restrictions on the Convention rights may ensue from the way in which a righ
been formulated, with a clause or phrase delimiting the scope of protection of
rights and explicitly excluding specific areas or persons from their scope of protec
or 'delegating' to State authorities the responsibility of regulating the exercise of
rights. First, such 'limitations by delimitation' can be seen in the case where provi
expressly refer to certain areas or subject-matters as not encompassed by their
of application *ratione materiae*. Article 2(2) expressly rules out three circumst
as not constituting a violation of Article 2, subject to the condition that the use of
that results in deprivation of life is no more than absolutely necessary. Similarly, A
4(3) excludes from the notion of 'forced or compulsory labour' within the mea
of the second paragraph the four types of service or work, whereas Article 5
envisages six exhaustive cases of lawful arrest or detention as exceptions to the
to liberty and security as provided in the first sentence.

Second, 'limitations by delimitation' may be conceived in circumstances w
a provision expressly states that national authorities should take certain positive
such as regulatory measures, to govern their scope of guarantees. In other wo
national authorities are given a margin of appreciation in demarcating the scop
application of certain rights, with the result that certain areas are excluded from
reach of those rights. The phrase under Article 12 'according to the national laws g
ning the exercise of this right' suggests that national authorities are entrusted w
task of delineating the ambit of protection of the right to marriage based on their

commonly accepted standards in the penal policy of the member States of the Council of Eur
in this field"; judgment of 25 April 1978, *Tyrer*, para. 31.

57 See, for instance, judgment of 23 April 1992, *Castells*, para. 46; judgment of 27 March 1996, Goo
para. 39; judgment of 28 October 1999, *Wille*, para. 50; judgment of 21 March 2002, *Nikula*,
54; judgment of 13 November 2003, *Elci and Others*, para. 714; judgment of 16 November
Selistö, para. 53; and judgment of 17 December 2004, *Cumpănă and Mazăre*, para. 114.

and providing both 'institutional guarantees' and conditions for the exercise of the rights under this provision. The national authorities are 'assigned' to govern the scope of application of certain rights also in relation to the four rights guaranteed under Protocol No. 7. The present chapter does not examine issues relating to those provisions, as the 'restrictions' of this nature are discussed in connection with the respective rights and freedoms.

5.4 THE DOCTRINE OF INHERENT LIMITATIONS

5.4.1 INTRODUCTION

For a long time the Commission took a view that, apart from expressly provided restrictions, the scope of the Convention rights may be subordinated to implied limitations.[58] Unlike 'limitations' flowing from delimitation as described above, the legal basis of inherent limitations cannot be found in the express textual formulation. According to the theory of 'inherent limitations', restrictions on certain Convention rights are considered as not amounting to 'interference' on the ground that they are 'ingrained' in the scope of guarantee of these rights. When invoked in relation to the Convention rights that are subject to limitation clauses, denying that a specific restricting measure amounts to interference would exonerate national authorities and the Strasbourg Court from scrutinizing whether or not such a measure can be justified under the limitation clauses based on the established criteria. It must, however, be noted that four non-derogable rights are logically impervious to implied limitations under any circumstances, even with respect to 'special categories of persons'.

An analysis of the case law demonstrates that the Court's recognition of 'implied limitations' is confined to specific contexts (rather than in a general manner). This may be seen in relation to the right of access to court, which, as an implied right derived from Article 6(1), has been held to be susceptible to inherent limitations.[59] Further, the theory of 'implied limitations' has been invoked by the Court to broaden the width of the margin of appreciation in relation to the right to vote and to stand for election under Article 3 of the First Protocol.[60]

58 See, for instance, Appl. 2749/66, *Kenneth Hugh de Courcy*, *Yearbook* X (1967), p. 388.

59 See, *inter alia*, the judgment of 21 February 1975, *Golder*, paras 21, 37-41; judgment of 29 July 1998, *Omar*, para. 34; and judgment of 28 October 1998, *Osman*, para. 147. See also the dissenting opinion of Judge Loucaides in the judgment of 21 November 2001, *McElhinney*, para. 6 (as regards the doctrine of sovereign immunity which had an effect of denying the applicant the right to a judicial determination of his compensation claim, Judge Loucaides recognized that Article 6 may be subject to 'inherent limitations', albeit he stressed that these limitations should not affect the 'core' of the right).

60 See, for instance, the judgment of 2 March 1987, *Mathieu-Mohin and Clerfayt*, para. 52; judgment of 1 July 1997, *Gitonas*, para. 39; and judgment of 18 February 1999, *Matthews*, para. 63.

The application of implied limitations can also be seen with respect to limi
on the right to property under Article 1 of Protocol I. According to the Cour
law, restrictions on the right to property as guaranteed under this provision m
be analysed under the second sentence of the first paragraph. It must be asce
whether a contested measure amounts to a deprivation or expropriation of
perty concerned. Then it must be examined whether such interference constitu
control of use of properties within the meaning of the second paragraph. Even
these two possibilities of limitations are found to be incapable of justifyi
interference in question, this may fall within the 'inherent' limitations under
sentence of the first paragraph. The Court has repeatedly observed that the "he
the permits fell within the ambit neither of the second sentence of the first para
nor of the second paragraph does not mean that the interference with the said
violated the rule contained in the first sentence of the first paragraph".[61] The C
justified the recognition of implied limitations under the first sentence of the firs
graph on the basis of the need to strike a fair balance between the general inte
the community as a whole and the individual's right to property.[62]

The most controversial application of the theory of inherent limitations is the
relation to the rights accompanied by express limitation clauses, such as the s
paragraphs of Articles 8-11. In its earlier decisions the Commission flirted wi
theory concerning prisoners' rights under Articles 8 and 10.[63] For instance, i
K.H.C. Case the Commission took the view that with respect to the contro
stopping of a prisoner's letters in general 'the limitation of the right of a de
person to conduct correspondence is a necessary part of his deprivation of li
which is *inherent* in the punishment of imprisonment... not disclos[ing] any vio
of Article 8, paragraph (1)'.[64] However, such methodology was expressly rejec

61 This principle has been established since the judgment of 23 September 1982, *Sporrong and Lo*
para. 69. See also the judgment of 23 October 1997, *The National & Provincial Building Soc*
Leeds Permanent Building Society and The Yorkshire Building Society, para. 78.

62 According to the Court, the search for such a balance is inherent in the whole of the Conv
and reflected in the structure of Article 1: judgment of 23 September 1982, *Sporrong and Lo*
para. 69; and judgment of 27 October 1994, *Kotte Klitsche de la Grange*, para. 42.

63 See, for instance, Appl. No. 1860/63, *X v. Federal Republic of Germany*, which concerned th
by the prison authorities to make available to a prisoner a copy of the provisional regulation
execution of penalties. The Commission observed that 'the limitations imposed on the right
to in Article 10 are the consequence of a prisoner's special situation': Decision of 15 Decem
Yearbook VIII (1965), p. 204 (216). See also Appl. No. 5270/72, *X v. the United Kingdom*, d
of 8 July 1974, Coll. 46 (1972), para. 7 ('THE LAW') (a prisoner's complaint of the stop
periodicals outside the quota under Articles 8 and 10).

64 Appl. No. 2749/66, *Kenneth Hugh de Courcy*, decision of 11 July 1967, *Yearbook* X (1967)
(emphasis added).

the Court's subsequent decisions in the *Vagrancy*[65] *and Golder* Cases[66] on the ground that the possibility of lawful restrictions on the Convention rights are enumerated in an exhaustive manner, with no room for 'inherent limitations'. Similarly, in the context of the right to public pronouncement of judgments under Article 6(1) the Court has rejected any room for the notion of implied limitations.[67] However, in the *Klamecki (No. 2)* Case the Court recognized that a detention regime is susceptible to 'inherent limitations' on the exercise of certain Convention rights, such as the right to private and family life.[68] Similarly, a methodology akin to the theory of implied limitations, which would justify the non-recognition of interference itself, resurfaced in the Court's approach in the *Kalaç* Case. There, the Court, contrary to the Commission, did not find any interference with the right under the first paragraph of Article 9 in relation to the forced retirement of a judge advocate from the air force due to his alleged sympathy with Islamic fundamentalism.[69] These cases must be treated as deviations in the case law. There is an encouraging sign that, except for *Kalaç*, whenever such fundamental rights as freedom of religion or free speech are involved, the Court has engaged in critical evaluation of the merits under the second paragraphs of Articles 9 and 10.[70]

5.4.2 THE THEORY OF SPECIAL STATUS REGIME AND INHERENT LIMITATIONS

Akin to national constitutional theories,[71] the Commission developed the doctrine of inherent limitations specifically to justify greater restrictions on certain Convention rights exercised by persons of a special legal status or regime, such as detained persons, psychiatric patients, soldiers and civil servants. For instance, the Commission held

65 Judgment of 18 June 1971, De Wilde, Ooms and Versyp (Vagrancy Case), para. 93 (the supervision of detained persons' correspondence).

66 The Commission expressly rejected the submission of the respondent State based on this doctrine, whereas the Court simply refused to follow the methodology of implied limitations and examined the complaint under the second paragraph of Article 8: judgment of 21 February 1975, *Golder*, paras 44-45.

67 See, for instance, judgment of 28 June 1984, *Campbell and Fell*, para. 90; and judgment of 24 April 2001, *B. and P. v. the United Kingdom*, para. 44; concurring opinion of Judge Bratza, para. 1; dissenting opinion of Judge Loucaides, joined by Judge Tulken, para. 2.

68 Judgment of 3 April 2003, *Klamecki (No. 2)*, paras. 144 and 152.

69 Judgment of 1 July 1997, paras 27 *et seq.*

70 See, for instance, *Vereinigung Demokratischer Soldaten Österreichs and Gubi*, para. 36; judgment of 25 November 1997, *Grigoriades*.

71 See, for instance, A. Bleckmann, *Staatsrecht II – Die Grundrechte*, 4th ed., (1997) section 3, para. 24; and section 12, paras 94 *et seq.*

that the right to respect for family life[72] and correspondence[73] under Article
susceptible to broader restrictions with respect to a detained person.
interpretation of the Convention may support possible exceptions for
categories of individuals such as members of the military and civil service
Articles 4(3) and under the second sentence of 11(2).[74] According to these
and practices, the rights of those belonging to such a special regime, such as
of the army, can be subject to inherently greater limitations than a civilian on
of hierarchical and disciplinary features of the military. Such categories of
subject to the application of inherent limitations, with the consequence
restrictions on their rights do not amount to 'interference', and hence that in
the affected provisions containing limitation clauses there is no need of
under these clauses, such as under the second paragraphs of Articles 8-11. It
questioned whether the Convention ever allows room for inherent restrictions
rights of individuals pertaining to 'special regime'. The implications flowing
controversial approach would be that the State or local government could
rights and freedoms of those belonging to this special power relationship
specific legal basis, and that they could be denied the right of judicial review.

5.4.3 CRITICISMS OF THE DOCTRINE OF INHERENT LIMITATIONS

Three arguments can be put forward to support the exclusion of inherent limitations
applied in the context of rights susceptible to limitation clauses.[75] First, both the
paragraphs of Articles 8-11 and the requirement for public pronouncements
judgments under Article 6(1) are formulated in such a way as to leave no room
the concept of implied limitations. This textual formulation needs to be interpreted
in light of the fact that the ECHR is a law-making treaty designed to create and
effect to rights of individuals, as can be supported by Article 1 of the Convention

72 Appl. No. 2676/65, *X v. Austria*, Coll. 23 (1967), p. 31.

73 Appl. No. 2375/64, *X v. Federal Republic of Germany*, Coll. 22 (1967), p. 45; and No. 2749/66, *Knoo Hugh de Courcy*, Yearbook X (1967) p. 388.

74 The Strasbourg organs consider that once the two requirements of foreseeability and arbitrariness are met under the second sentence of Article 11(2), there is no separate need for examinations based on the three common standards in the first sentence: judgment of 20 May 19 *Rekvényi*, para. 61. In the context of Article 10(2), the Strasbourg organs have interpreted the 'duties and responsibilities' as providing a justification for 'a certain margin of appreciation' para. 43; and judgment of 28 October 1999, *Wille*, para. 64.

75 The one exception of inherent limitations that the Court has allowed with respect to accompanied by limitation clauses relates to the issues of positive obligations under Article 8 so far examined these issues solely under the first paragraph to the exclusion of having them examined under the second paragraph.

the effective protection principle.[76] The limitation clauses include phrases such as '[t]here shall be no interference (...) except such as',[77] 'shall be subject only to such limitations as'[78] or '[n]o restrictions shall be placed on the exercise of these rights other than such as'.[79] The absence of a comparable, qualifying adverbial expression and the use of 'may' under Article 10(2)[80] suggests that the enumerated list of public objectives may be exemplary and not exhaustive. However, in line with the effective protection principle that requires any possible restrictions on the rights to be construed 'narrowly', it is more consistent to argue that all the limitation clauses must be interpreted in the same fashion for the benefit of applicants. Once the exhaustive nature of the legitimate aims enumerated in the second paragraph of Articles 8-11, which can be adduced to justify restrictions on the rights under the first paragraph of those provisions, is ascertained, the better view should be that possibilities of limitations are provided equally in an exhaustive manner and only in express form.[81] If the drafters had wished to allow special restrictions on the rights of particular categories of persons, they could have expressly stated this in each individual provision. Second, the principle of non-discrimination as recognized under Article 14 militates against 'inherently' greater restrictions on the rights of certain categories of individuals. As the Commission clarified in the *Kalaç* Case,[82] any exclusion of the Convention's application and the Strasbourg organs' judicial review will run counter to Articles 1 and 14. It held that 'everyone within [the] jurisdiction' of the Contracting States shall enjoy the Convention rights and 'without discrimination on any ground'. Third, Article 18 ensures that the restrictions allowed under the Convention may not be applied for any purpose other than those for which they have been prescribed.

76 The Court has expressly recognized the law-making, rather than, contracting, character of the ECHR. See, for instance, *Wemhoff*, in which the Court emphasized that "[g]iven that it [the Convention] is a law-making treaty, it is also necessary to seek the interpretation that is most appropriate in order to release the aim and achieve the object of the treaty, and not that which would restrict to the greatest possible degree the obligations undertaken by the parties": judgment of 27 June 1968, para. 8. See also judgment of 21 February 1975, *Golder*, para. 36. A similar tenor can be found in *Austria v. Italy*, in which the Commission observed that "the purpose of the High Contracting Parties in concluding the Convention was not to concede to each other reciprocal rights and obligations in pursuance of their individual national interest but (...) to establish a common public order of the free democracies of Europe with the object of safeguarding their common heritage of political traditions, ideals, freedom and the rule of law": Appl. No. 788/60, *Yearbook* IV (1961), p. 116 (138).

77 Article 8(2) of the Convention.

78 Article 9(2) of the Convention.

79 Article 11(2) of the Convention. See also Article 2(3) of the fourth Protocol.

80 See also the second sentence of Article 6(1) of the Convention, and Article 1(2) of the Seventh Protocol.

81 Note also the Commission's Report of 19 July 1974 in *Engel and Others*, in which the Commission observed that "[f]rom this analysis of the Convention, and the method adopted therein, it is clear that the Convention is not conceived in terms of whose rights shall be protected but in terms of what rights shall be guaranteed and to what extent": B.20 (1978), p. 58.

82 Commission's Report of 27 February 1996, para. 35.

It is submitted that the theory of implied limitations in the sense of cri... review of interfering measures cannot be applied in the Convention without ... overhaul. Its application must be confined to cases where certain Convention ... visions, which are susceptible to derogation, lack express reference to limit... whether by limitation clauses or by 'limitations by delimitation'. In particular, ... of restrictions on the rights subject to limitations clauses, they must be assessed ... these clauses based on established criteria. A caveat must be entered that even in ... circumstances the application of an amorphous doctrine of the margin of apprecia... in evaluating the rights of persons belonging to 'special categories' such as pris... and members of armed forces might result in as wide a scope of restrictions as ca... contemplated by the inherent limitations doctrine.[83] Yet, this methodology of ... Court should be capable of providing greater transparency, as all the limitations ... at least subordinated to the judicial scrutiny under the limitations clauses of Arti... 8-11 and to the general restriction clauses such as Article 18.[84]

Whenever the theory of implied limitations is invoked in relation to provisi... accompanied neither by limitation clauses nor by qualifying phrases purporting ... delimit their scope of protection, the Court must scrutinise the lawfulness of su... limitations based on transparent and consistent criteria. For instance, in relation ... the 'implied right' of access to a court under Article 6(1) the Court has emulated ... methodology of assessing the limitation clauses of Articles 8-11, enunciating t... principle of proportionality. It is submitted that the articulation of this princi... should serve to ascertain whether a contested measure applied to specific categor... of persons are 'ordinary and reasonable', as envisaged within the framework of spec... regimes such as prisons and military hierarchy.[85] The proportionality appraisal should ... include critical evaluations of the necessity and severity of restrictions as well as t... nature of the rights affected.

5.4.4 VARIATIONS OF IMPLIED LIMITATIONS: POSITIVE OBLIGATIONS

The variation of inherent limitations can be seen in the Strasbourg organs' approa... in assessing the scope of positive obligations under Article 8 of the Convention. Th...

[83] See, for instance, judgment of 21 February 1975, *Golder*.

[84] See the observations made by the Commission in its report of 11 October 1980, *Silver and Others*, B. 51 (1987), p. 72.

[85] Judgment of 21 February 1975, *Golder*, para. 45. See also *Engel*, where the Court speaks of 'special demands' of military service and 'normal restrictions' under Article 5: judgment of 8 June 1976, para. 59. In relation to detained persons, common European standards as to modern penitentiary requirements must be taken into account. See, for instance, *Hamer*, report of 13 December 1979, DR 24 (1981), p. 5, where the Commission considered that a two-year delay in a detained persons' possibility of marrying would be an encroachment on this right to marry.

methodology of the Court has been to treat a failure to comply with a certain positive duty as not amounting to 'interference' within the meaning of the first paragraph of Article 8, excluding the possibility that contested omissions relating to the right to private and family life can be examined pursuant to the tripartite criteria under the second paragraph. In *Abdulaziz* Judge Bernhardt criticized that the Court's reasoning that there is no 'lack of respect' for family life under Article 8(1) would result in recognition of 'inherent limitations' not susceptible to justifications by reference to the second paragraph of Article 8.[86]

On this matter the reasoning of the Court suggests that the applicable principles are the same both in relation to negative obligations and to positive duties under Article 8, with the notion of fair balance serving as a criterion.[87] However, the very notion of fair balance is obscure and amenable to a varying margin of appreciation, with the Court broadening the scope of margin in respect of issues of positive obligations. In that way issues of positive obligations have not attracted rigorous scrutiny, which in turn suggests that though not explicitly mentioned, they may be subject to 'inherent limitations'. In the *Stjerna* Case Judge Wildhaber proposed a 'unified' approach to issues of both positive and negative obligations, arguing that the word, 'interference' under the first paragraph should be interpreted as covering both action and omissions,[88] but his proposal has not been followed in the case law. However, the perusal of the case law demonstrates two innovative features of the Court's assessment of a 'fair balance' with respect to the bounds of positive duties. First, the Court has come to embrace elements of legitimate aims under the second paragraph of Article 8 as factors relevant for assessing a fair balance under the first paragraph of this provision.[89] Second, it has incorporated the principle of effective protection (the requirement that the Convention rights must be 'practical and effective', and 'not theoretical or illusory') into this assessment and reinforced the rigour of review.[90] However, the Court has yet to integrate the principle of proportionality into the appraisal of implied limitations relating to positive duties.

[86] Judgment of 28 May 1985, *Abdulaziz, Cabales and Balkandali*, concurrent opinion of Judge Bernhardt, para. 1.

[87] See, *inter alia*, the judgment of 26 May 1994, *Keegan*, para. 49; and judgment of 24 February 1998, *Botta*, para. 33.

[88] Judgment of 25 November 1994, concurring opinion of Judge Wildhaber.

[89] See, for instance, the judgment of 7 August 2003, *Hatton and Others*, para. 98; and judgment of 16 November 2004, *Moreno Gómez*, para. 55.

[90] See, for instance, the judgment of 16 November 2004, *Moreno Gómez*, paras 56, 61-62; and judgment of 10 November 2004, *Taşkin and Others*, para. 117. Note that in cases involving environmental pollution raised under Article 8, the Court also emphasized the procedural safeguards, such as appropriate investigations and studies into effects of certain economic activities on environment, and access to conclusions of such studies by the public: judgment of 19 February 1998, *Guerra and Others*, para. 60; judgment of 9 June 1998, *McGinley and Egan*, para. 97; and judgment of 10 November 2004, *Taşkin and Others*, para. 119.

Limitations can also be deemed as 'inherent' in respect of
a greater degree of positive obligations on the part of State aut
to effective (domestic) remedies under Article 13 of the Con
education and to periodic free elections under Articles 2 and 3,
No. 1. The fact that these provisions do not contain limitatio
for the notion of implied limitations to be slipped into the ap
protection.

CHAPTER 6
TO LIFE (Article 2)

EVISED BY LEO ZWAAK

ICLE 2

ll be protected by law. No one shall be deprived of his life
ecution of a sentence of a court following his conviction
enalty is provided by law.
t be regarded as inflicted in contravention of this Article
se of force which is no more than absolutely necessary:

(a) in defence of any person from unlawful violence;
(b) in order to effect a lawful arrest or to prevent the escape of a per... lawfully detained;
(c) in action lawfully taken for the purpose of quelling a riot or insurrec...

6.2 INTRODUCTION

Article 2 is formulated in a somewhat strange way. Unlike the corresponding ... 6 of the Covenant, it does not expressly recognise the existence of the right to li... imposes upon the national authorities an obligation to protect everyone's right... followed by a prohibition of intentional deprivation of life.

As to that prohibition, the question may be raised whether this is address... to the national authorities or also to private persons. In any case, Article 2 ... invoked in Strasbourg only when its violation is (also) due to a lack of protect... the part of the national authorities, because complaints can only be directed a... acts and omissions for which the State bears responsibility.[1] The prohibition of ... tional deprivation of life implies the duty to abstain from acts which need... endanger life.[2]

The duty to protect the right to life seems to have been imposed by Artic... particular on the legislator: 'shall be protected by law'. What does this oblig... imply? Is a State in default under this provision if, for instance, drivers are not ... jected to certain speed limits, although such a measure might reduce the numb... road victims? The right to life does not afford a guarantee against all threats to ... but against intentional deprivation and careless endangering of life. The latter ... be prohibited and made punishable by law except for those cases in which Artic... permits such deprivation of life. The protection provided by the law, however, ... reality only if that law is implemented. Omission on the part of the authorities to ...

1 The Contracting State's obligation to guarantee protection against the acts and omissions ... individuals may be deemed implied in the first sentence of Article 2 in conjunction with the gen... of Article 1. The content and the scope of this obligation, however, are difficult to indicate ... *abstracto*. For the issue of *Drittwirkung* in general, see *supra* 1.7.

2 See, *e.g.*, Appl. 5207/71, *X v. Federal Republic of Germany*, Yearbook XIV (1971), p. 698 (710) ... a complaint based on Article 2 on account of an order of the national court to evict a person ... health from her house was not considered manifestly ill-founded by the Commission; Appl. 6... *Simon-Herold v. Austria*, Yearbook XIV (1971), p. 352 (394-398), where the complaint ... Artcile 2 concerned the medical care in a prison; Appl. 7154/75, *Association X v. the United King...* D&R 14 (1979), p. 31 (32-33), where the Commission decided that in the case of a vacc... programme to which certain risks to life were attached, it could not be said that the Gover... envisaged such possible consequences; and Appl. 7317/75, *X v. Switzerland*, Yearbook XX (1... p. 412 (436-438), where extradition to the United States was concerned and the person in q... feared reprisals on the part of the CIA, but the Commission held that this fear had been ... insufficiently concrete.

and prosecute the offender in case of an unlawful deprivation of life is, therefore, in principle subjected to review by the Court.[3] Consequently, the first sentence of the first paragraph is not addressed exclusively to the legislator, but refers to a general obligation of the authorities to take appropriate measures for the protection of life.[4] In its decision in *X v. Austria* the Commission held that Article 2 "does (...) primarily provide protection against deprivation of life only". At the same time it did not wish to entirely rule out the possibility that protection of physical integrity also comes under this provision, but if so, then exclusively protection against such injuries as involve a threat to life.[5] Other injuries to the physical – and mental – integrity may in many cases be brought under Article 3.

6.3 POSITIVE OBLIGATIONS

6.3.1 INTRODUCTION

To what extent are the authorities obliged to prevent deprivation of life by individuals? They can hardly be required to put a bodyguard at the disposal of each citizen.[6] Their task of guarding public security does involve, however, the duty to observe a certain vigilance with respect to the lives of the individual citizens, but in this duty they cannot go so far that their obligations towards other citizens are jeopardised. They will have

3 See the report of the Committee of Experts on Human Rights to the Committee of Ministers, *Problems arising from the Co-Existence of the United Nations Covenants on Human Right and the European Convention on Human Rights*, Doc. H(70)7, Strasbourg, 1970, where it speaks of "an obligation of States to take the necessary deterrent measures with a view to preventing by law (i.e. by adequate legislation and its enforcement) intentional interference with life whether by a State or by individuals". Of course, certain discretion will have to be allowed to the national authorities as regards the prosecution policy, but the fundamental character of the right to life stringently restricts that scope. As in the case of an individual complaint the applicant must be able to prove that he himself is the victim of the omission of the authorities, a complaint concerning deprivation of life will be possible only in the case of a so-called 'indirect' victim; see *supra*, 1.13.3.5.

4 Whereas in Appl. 6839/74, *X v. Ireland*, D&R 7 (1977), p. 78, the Commission still left open the question of whether Article 2 may also entail an obligation to take measures, it held in Appl. 7154/75, *Association X v. the United Kingdom*, D&R 14 (1979), p. 31 (32), that the State has a duty to take appropriate steps to safeguard life. See also Appl. 9348/81, *W v. the United Kingdom*, D&R 32 (1983), p. 190 (199-200) and Appl. 16734/90, *Dujardin v. France*, D&R 72 (1992), p. 236 (243), where the Commission stated that Article 2 "may indeed give rise to positive obligations on the part of the State".

5 Appl. 8278/78, D&R 18 (1980), p. 154 (156).

6 In Appl. 9348/81, *W v. the United Kingdom*, D&R 32 (1983), p. 190 (200) and Appl. 9829/82, *X v. the United Kingdom and Ireland* (not published), the Commission added, that from Article 2 one cannot deduce a positive obligation to exclude any possible violence.

to weigh these obligations against each other and the way they do this may be re
in Strasbourg for its reasonableness.[7]

Thus, in the *Dujardin* Case weighing the protection of the individual's rig
against the State's legitimate interests, the Commission decided that the fact
French amnesty law adopted in the context of a settlement between various co
ties in New Caledonia, resulting in a discontinuation of the prosecution of
pected murderers of the applicants' close relatives, did not infringe the right pr
by Article 2.[8] In the *Taylor, Crampton, Gibson and King families* Case the app
submitted that the State, in view of its positive obligation to protect the righ
where an unlawful killing or life-threatening attack has taken place in an envir
for which it is responsible, must show that it has sought out the perpetra
brought him/her to justice. The Commission held that the obligation to pro
includes a procedural aspect, involving the minimum requirements of a med
whereby the circumstances of a deprivation of life by agents of a State receive
and independent scrutiny. In this case the death and serious injuries of the chil
of the applicants in a public hospital had been caused by a nurse suffering from
illness. According to the Commission the procedural requirements of Article
satisfied because there had been criminal proceedings against the nurse, which
her conviction and imprisonment.[9] In *Cyprus v. Turkey* the balance of
weighed in favour of the applicant State. Cyprus accused the Turkish invasion
of having murdered citizens, including women and aged people, in cold blood.
cases were declared admissible by the Commission,[10] and the Committee of M
decided on the basis of the Commission's report "that events which occurred in
constitute violations of the Convention".[11]

In the *Ergi* Case the Court held that under Article 2 of the Convention, rea
conjunction with Article 1, the State may be required to take certain measures
to 'secure' an effective enjoyment of the right to life.[12]

7 However, in Appl. 9348/81, *W v. the United Kingdom*, D&R 32 (1983), p. 190 (200), where
applicant complained about her husband's and her brother's death in Northern Ireland.
Commission came to the conclusion that it was not its task, when examining a complaint u
Article 2, to consider in detail the appropriateness and efficiency of the measures taken by the
Kingdom to combat terrorism in Northern Ireland.

8 Appl. 16734/90, D&R 72 (1992), p. 236 (243-244).

9 Appl. 23412/94, D&R 79-A (1993), p. 127 (136).

10 Appls 6780/74 and 6950/75, *Yearbook* XVIII (1975), p. 82 (124).

11 Resolution of the Committee of Ministers, DH(79)1 of 20 January 1979, Yearbook XXII (19
p. 440. See the report of 10 July 1976, *Cyprus v. Turkey*, in particular paras 352-354, pp. 11

12 Judgment of 28 July 1998, para. 79.

6.3.2 OBLIGATION TO PROTECT LIFE

It has been firmly established in the Court's case law that where an individual is taken into police custody in good health but is later found dead, it is incumbent on the State to provide a plausible explanation of the events leading to his death, failing which the authorities will be held responsible under Article 2 of the Convention.[13] Thus, in the *Salman* Case the Court ruled that where the events in issue lie wholly, or in large part, within the exclusive knowledge of the authorities, as in the case of persons within their control in detention, strong presumptions of fact will arise in respect of injuries and death occurring during that detention. Indeed, the burden of proof may be regarded as resting on the authorities to provide a satisfactory and convincing explanation.[14] The general principle applied by the Court in such instances is the 'beyond reasonable doubt' standard of proof. Such proof may follow from the co-existence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of facts. As persons in custody are in a vulnerable position, the authorities are under a duty to protect them and to provide a plausible explanation of how injuries in custody have been caused.[15]

The obligation on the part of the authorities to account for the treatment of an individual in custody is particularly stringent where that individual dies. Deprivations of life in such context are generally subjected to the most careful scrutiny by the Court, which takes into consideration not only the actions of State agents but also all the surrounding circumstances.[16] Thus in the *Velikova* Case, in which the applicant complained about the death of a relative in police custody following intentional infliction of injuries and subsequent failure of the authorities to provide him with adequate medical help, the Court noted the implausibility of the explanation by the Government that Mr. Tsonchev had fallen, and thus injured himself, in light of the autopsy reports detailing severe injuries inflicted through beating. Considering further the failure of the authorities to provide any evidence that Mr. Tsonchev had been examined by a medical professional while in custody with care warranted by the severity of his condition, the Court concluded that there had been a violation of Article 2.[17] In the *Anguelova* Case the Court observed that the fact that police officers were not medical professionals, did not relieve them from the responsibility for failing to detect a medical emergency, particularly in the light of strong evidence that death had occurred

13 Judgment of 18 May 2000, *Velikova*, para. 70; judgment of 27 June 2000, *Salman*, para. 99; judgment of 10 July 2001, *Avşar*, para. 391; judgment of 18 June 2002, *Orhan*, para. 326

14 Judgment of 27 June 2000, para. 100. See also the judgment of 8 July 1999, *Çakici*, para. 85; judgment of 9 May 2000, *Ertak*, para. 32; judgment of 13 June 2000, *Timurtaş*, para. 82; judgment of 18 June 2002, *Orhan*, para. 327. See also the judgment of 14 February 2004, *Ipek*, para. 164.

15 Judgment of 27 August 1992, *Tomasi*, para. 108; judgment of 28 July 1999, *Selmouni*, para. 87

16 Judgment of 27 June 2000, *Salman*, para. 99. See also the judgment of 13 June 2000, *Timurtaş*, para. 327; judgment of 18 June 2002, *Orhan*, para. 327; judgment of 14 February 2004, *Ipek*, para. 165.

17 Judgment of 18 May 2000, para. 97.

in their custody and also in light of their failure to provide a credible explan... to the skull fracture and serious bodily injuries of the applicant's relative. Th... held that there had been a violation of Article 2.[18]

In the *Tanli* Case the Court noted that, where an individual was taken in... custody in good health and died, it was incumbent on the State to provide a ... explanation. The Court recalled that Mahmut Tanli, a 22-year-old man, was ... health when taken into custody, with no medical history of illness. He had co... his military service one year before without any medical problems. However, ... twenty four to thirty six hours after being taken into custody, he died ... interrogation at the Uluyol police station. The Court considered that the post ... procedure was defective in fundamental aspects. The Istanbul Forensic M... Institute, which carried out a second examination of the body on 12 June 199... there had been no dissection of the heart. It concluded that in these circumstan... findings in the first report were without scientific value. The expert report pr... by the applicant also considered that the alleged basis for the cause of death ... insufficiently recorded or detailed to be relied on. Nor did the examination of th... rebut the allegations made by the applicant that his son was tortured to death. N... apt to establish the presence of subtle signs of torture were carried out. The doc... post mortem procedures accordingly failed to provide an explanation for M... Tanli's death. It certainly could not be considered as established, as submitted by ... Government, that he had died from natural causes. The Court, therefore, found ... the Government had not accounted for the death of Mahmut Tanli during ... detention at the Uluyol police station and that their responsibility for his death ... engaged.[19]

The Court has also dealt, in a number of cases, with allegations that the State ha... fulfilled its positive obligation to protect the right to life of prisoners under its ... diction, who either committed suicide or were killed by other prisoners while detai... In such circumstances the Court applies a two-pronged analysis in the determina... of whether a State has failed in its positive obligation under Article 2. Firstly, ... ascertained whether the authorities knew or ought to have known that the indivi... concerned was in any real and immediate risk, and secondly, it considers whether ... authorities took all necessary operational measures that could reasonably be expe... from them to prevent that risk from materialising. In the *Keenan* Case the appli... complained that the prison authorities, through their treatment of her son pri... his suicide, had failed to protect his right to life contrary to Article 2. She alleg... particular that by not assessing properly his fitness for segregation and by inflic... disciplinary punishment on him, the prison authorities had increased the stress ... her son's schizophrenic mind and had, therefore, induced his suicide. In its judgment the Court noted that there was no formal evidence pointing to the fact that the applicant's son was suffering from schizophrenia and concluded that the applicant's allegations were to some extent speculative as the reason for Mark Keenan's suicide had not been established. Despite the lack of evidence pointing to Mark Keenan suffering from schizophrenia, the prison authorities, being put on notice upon his detention that he exhibited suicidal tendencies, considered that his unstable mental condition required that he be monitored carefully for symptoms of deterioration. Therefore, in all the various instances in which Mark Keenan evinced suicidal tendencies, he was placed in hospital care and subjected to regular consultations with psychiatrists. In these circumstances the Court was of the opinion that the authorities had taken all steps that could reasonably be expected from them to protect the life of the applicant's son. Accordingly, the Court concluded that there had been no violation of Article 2.[20]

A breach of Article 2 was found, however, in the *Paul and Audrey Edwards* Case, in which the applicants complained of the authorities' failure to protect their son's life while in detention. Christopher Edwards was killed while detained on remand by a dangerous, mentally ill prisoner, Richard Linford, who was placed in his cell. Noting the failure of the different agencies involved in the case – medical profession, police, prosecution and court – to pass information about the condition of Richard Linford (of which condition they were all aware as it was considered to permanently commit Linford to mental care) on to the prison authorities, and also taking notice of the inadequate nature of the screening process on Richard Linford's arrival in prison (during which process it was observed that his behaviour was disturbing), the Court held that the State had failed in its positive obligation to protect the life of Christopher Edwards in violation of Article 2.[21]

In the Case of *L.C.B. v. the United Kingdom*, where the applicant, who suffered from leukaemia, was the daughter of a soldier who had been on Christmas Island during the United Kingdom's nuclear tests, the Court noted that it was not suggested that the State had intentionally sought to deprive her of her life but examined under Article 2 whether the State had done all that could have been required of it to prevent the applicant's life from being avoidably put at risk. It found that the State had not failed in this regard.[22]

[18] Judgment of 13 June 2002, paras 126-131.
[19] Judgment of 10 April 2001, paras 143-146.
[20] Judgment of 3 April 2001, paras 97-104.
[21] Judgment of 14 March 2002, para. 64.
[22] Judgment of 9 June 1998, paras 36-41.

6.3.3 OBLIGATION TO PROTECT THE LIFE OF INDIVIDUALS AGAINST THE ACTS OF THIRD PARTIES

The Court has firmly established in its case law that the first sentence of Art... enjoins the State not only to refrain from the intentional and unlawful taking... but also to take appropriate steps to safeguard the lives of those within its juris...

The *Osman* Case concerned the alleged failure of the authorities to prote... right to life of the first applicant's husband and of the second applicant, her ... son, from the threat posed by an individual, and the lawfulness of restrictions ... applicants' right to access to a court to sue the authorities for damage caused ... said failure. The Court noted that it was not disputed that Article 2 may in well-de... circumstances imply a positive obligation on the authorities to take preventive ... tional measures to protect an individual whose life is at risk from the criminal ... another individual. As to the scope of that obligation the Court considered ... bearing in mind the difficulties involved in policing modern societies, the unpre... ability of human conduct and the operational choices which must be made in ... of priorities and resources, any such obligation must be interpreted in a way ... does not impose an impossible or disproportionate burden on the authorities. A... dingly, not every claimed risk to life can entail for the authorities a Conven... requirement to take operational measures to prevent that risk from materialising. ... a positive obligation to arise it must be established that the authorities knew or ... to have known at the time of the existence of a real and immediate risk to the li... an identified individual or individuals from the criminal acts of a third party and ... they failed to take measures within the scope of their powers which, judged reasona... might have been expected to avoid that risk.

According to the Court it is common ground that the State's obligation in ... respect extends beyond its primary duty to secure the right to life by putting in pl... effective criminal law provisions to deter the commission of offences against the per... backed up by law-enforcement machinery for the prevention, suppression and sanc... ning of breaches of such provisions. Another relevant consideration is the need ... ensure that the police exercise their powers to control and prevent crime in a manne... which fully respects the due process and other guarantees which legitimately pla... restraints on the scope of their action to investigate crime and bring offenders ... justice. In the particular case the Court did not accept the Government's view that ... failure to perceive the risk to life in the circumstances known at the time or to ta... preventive measures to avoid that risk must be tantamount to gross negligence ... willful disregard of the duty to protect life. Such a rigid standard must be considere... to be incompatible with the requirements of Article 1 of the Convention and the ob... gations of Contracting States under that Article to secure the practical and effecti... protection of the rights and freedoms laid down therein, including Article 2. Having ...

regard to the nature of the right protected by Article 2, a right fundamental in the scheme of the Convention, it is sufficient for an applicant to show that the authorities did not do all that could be reasonably expected of them to avoid a real and immediate risk to life of which they have or ought to have knowledge. This is a question which can only be answered in the light of all the circumstances of any particular case. In the case under consideration the Court noted that the applicants had failed to point to any decisive stage in the sequence of the events leading up to the tragic shooting when it could be said that the police knew or ought to have known that the lives of the victims were at real and immediate risk from the shooter. Therefore, the Court found no violation of Article 2 in this case.[23]

In the *Denizci* Case the Court held that there was nothing to suggest that, even supposing that the applicant's son feared that his life was at real and immediate risk, he had ever reported these fears to the Cypriot police. Nor was there anything to indicate that the Cypriot authorities ought to have known that the applicant's son was at risk of attack from criminal acts of a third party and failed to take steps to protect him. For these reasons the Court concluded that there had been no violation of Article 2 of the Convention on this account.[24]

The *Mastromatteo* Case concerned the murder of the applicant's son by three criminals who were making their getaway after robbing a bank. It was subsequently proved that two of the three had been serving prison sentences pursuant to final criminal convictions for repeated violent offences. At the material time one of these two, who had fired the fatal shot, had been released on prison leave; the other was subject to a semi-custodial regime. The judges responsible for the execution of their sentences had granted prison leave and the semi-custodial measure on the ground that, according to the prison authorities' reports on their conduct in prison, they were not a danger to society. The three criminals were later sentenced to lengthy terms of imprisonment. The applicant applied for compensation under a law which made provision for aid to be paid to the victims of terrorism and organised crime, but his claim was refused, first by the Minister of the Interior and then by the President of Italy. Relying on Article 2 of the Convention, the applicant alleged that the decisions of the judges responsible for the execution of sentences who had granted his son's killers prison leave, had led to his death.

In this regard the Court recalled the situations it had earlier examined in the *Osman* and *Paul and Audrey Edwards* Cases concerning the requirement of personal protection of one or more individuals identifiable in advance as the potential target of a lethal act. It held, however, that the *Mastromatteo* Case differed from those cases in that it

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23 Judgment of 28 October 1998, *Osman*, paras 115-116. See also the judgment of 28 March 2000, *Kiliç*, para. 62; judgment of 23 May 2001, *Denizci*, para. 375; judgment of 17 January 2002, *Calvelli and Ciglio*, para. 55; judgment of 18 June 2002, *Öneryildiz*, para. 63; judgment of 20 December 2004, *Makaratzis*, para. 57.

24 Judgment of 23 May 2001, paras 376-377.

was not a question here of determining whether the responsibility of the au
was engaged for failing to provide personal protection to Mastromatteo. W
at issue was the obligation to afford general protection to society against the po
acts of one or of several persons serving a prison sentence for a violent crime
determination of the scope of that protection. On the question of whether the
of alternative measures to imprisonment engaged the responsibility of the State
Article 2 of the Convention, the Court observed that one of the essential functi
a prison sentence was to protect society, but it recognised the legitimate aim of
of social reintegration. The Court noted that Italian legislation laid down restr
on alternative measures where crimes committed by members of criminal orga
tions were concerned. It considered that the system introduced in Italy pro
sufficient protective measures for society, as evidenced by the statistics suppli
the respondent State, which showed that few crimes were committed by pris
subject to a semi-custodial regime or by prisoners who had absconded while on
leave. Accordingly, there was nothing to suggest that the system of reintegra
measures applicable in Italy at the material time should be called into question
Article 2.

As to whether the adoption and implementation of the alternative mea
disclosed a breach of the duty of care required in this area by Article 2 of the C
vention, the Court pointed out that the relevant risk in the present case was a ri
life for members of the public at large rather than for one or more identified ind
duals. In granting the alternative measures the judges responsible for the exec
of sentences had based their decisions on reports from the prison authorities w
gave positive accounts of the conduct of the two prisoners. The Court considered
there was nothing to make the national authorities fear that the release of these
men might pose a real and immediate threat to life. Nor was there anything to a
the authorities to the need to take additional measures against them once they
been released. Admittedly, one of them had been granted prison leave after an acc
plice had taken advantage of his own prison leave to abscond, but that did not, in
Court's view, establish a special need for caution, since there was no way of know
that they would commit an offence which would result in the loss of life.

Consequeutly, the Court considered that it had not been established that the pri
leave granted to the prisoners gave rise to any failure on the part of the judi
authorities to protect the right to life of the applicant's son. It concluded that th
had been no violation of Article 2 as regards the complaint relating to the authori
lack of diligence.[25] As the killers had been prisoners in the State's charge at the mat
time, the Court indicated that a procedural obligation arose to determine the circu
stances of the applicant's son's death. As a result of the investigation the criminal
been found guilty of murder, sentenced to lengthy terms of imprisonment and order

[25] Judgment of 24 October 2002, paras 69-76.

to compensate the applicant. Consequently, the Court was of the opinion that the State had satisfied the obligation under Article 2 of the Convention to guarantee a criminal investigation. As to whether the procedural obligations under Article 2 required a remedy by which a claim could be lodged against the State, the Court noted that the applicant's compensation claim had been dismissed on the ground that the statute relied on was not applicable to the case. However, he could have sued the State for negligence, for which purpose there had been two remedies available to him, namely an action against the State under Article 2043 of the Civil Code and an action against the judges responsible for the execution of sentences under the Judges' Liability Act. In that connection the Court observed that Article 2 of the Convention did not impose on States an obligation to provide compensation on the basis of strict liability. Consequently, the Court held that the procedural requirements under Article 2 of the Convention had been satisfied.[26]

In the Case of *L.C.B v. the United Kingdom* the applicant claimed that both the State's failure to warn her parents of the possible risk to her health caused by her father's participation in the nuclear tests and its earlier failure to monitor her father's radiation dose levels, gave rise to violations of Article 2 of the Convention. The Court held that the first sentence of article 2(1) enjoins the State not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction. The Court's task is to determine whether the State did all that could have been required of it in order to prevent the applicant's life from being avoidably put at risk.[27] Having examined the evidence submitted to it, the Court was not satisfied that it had been established that there was a causal link between the exposure of the father to radiation and the leukemia found in a child that was subsequently conceived. Therefore, the Court could not reasonably hold that at the time of the nuclear testings the United Kingdom could or should have taken action in respect of the applicant. In addition, the Court found it clearly uncertain whether monitoring of the applicant's health from birth would have lead to earlier diagnosis and medical intervention such as to diminish the severity of her disease.[28]

In the *Calvelli and Ciglio* Case the Court held that the same principles applied in the public-health sphere as well. The positive obligations implied in Article 2 require States to make regulations compelling hospitals, whether public or private, to adopt appropriate measures for the protection of patients' lives. They also require an effective independent judicial system to be set up so that the cause of death of patients in the care of the medical profession, whether in the public or the private sector, can be

[26] *Ibidem*, paras 92-97.

[27] Judgment of 9 June 1998, para. 36. See also the judgment of 28 March 2000, *Kaya*, para. 85; judgment of 17 January 2002, *Calvelli and Ciglio*, para. 48; judgment of 18 June 2002, *Öneryildiz*, para. 62.

[28] *Ibidem*, paras 38-41.

determined and those responsible made accountable. However, if the infr
of the right to life or to personal integrity was not caused intentionally, th
obligation imposed by Article 2 to set up an effective judicial system does
sarily require the provision of a criminal law remedy in every case. In the
sphere of medical negligence the obligation may, for instance, also be sati
legal system affords victims a remedy in the civil courts, either alone or in co
with a remedy in the criminal courts, enabling any liability of the doctors co
to be established and any appropriate civil redress, such as an order for dam
for the publication of the decision, to be obtained. Disciplinary measures
be envisaged.[29]

In the particular case the applicants complained of a violation of Article
Convention on the ground that, due to procedural delays, a time-bar ha
making it impossible to prosecute the doctor responsible for the delivery of the
that had died shortly after birth. The applicants' complaint was essentially
criminal penalty was imposed on the doctor found liable for the death of the
in the criminal proceedings at first instance because of the operation of the ti
The Court noted that, in cases of death through medical negligence, the Italia
system affords injured parties both mandatory criminal proceedings and the po
of bringing an action in the relevant civil court. The Government had affirm
the applicants did not deny, that disciplinary proceedings could be brough
doctor was held liable in the civil courts. Consequently, the Italian system
litigants remedies which, in theory, meet the requirements of Article 2. Howeve
provision will not be satisfied if the protection afforded by domestic law exi
in theory: above all, it must also operate effectively in practice within a time-spa
that the courts can complete their examination of the merits of each indi
case. The Court noted that the criminal proceedings instituted against the doctor
cerned became time-barred because of procedural shortcomings that led to
particularly during the police inquiry and judicial investigation. Howeve
applicants were also entitled to institute proceedings in the civil courts and that
they did. It was true that no finding of liability was ever made against the doc
a civil court. However, the case file showed that in the civil proceedings in the Co
Court of First Instance, the applicants entered into a settlement agreement wi
doctor's and the clinic's insurers and voluntarily waived their right to pursue th
proceedings, which could have led to an order against the doctor for the payme
damages and possibly to the publication of the judgment in the press.

The Court accordingly considered that the applicants had denied themselves
to the best means – and one that, in the special circumstances of the instant case,
have satisfied the positive obligations arising under Article 2 – of elucidating the c
of the doctor's responsibility for the death of their child. Consequently, the

[29] Judgment of 17 January 2002, para. 53.

concluded that, where a relative of a deceased person accepts compensation in settlement of a civil claim based on medical negligence, he or she is in principle no longer able to claim to be a victim. That conclusion made it unnecessary for the Court to examine, in the special circumstances of the instant case, whether the fact that a time-bar prevented the doctor being prosecuted for the alleged offence was compatible with Article 2.[30]

The Öneryildiz Case concerned the death of nine members of the family of the applicant who lived in a shanty town that comprised a collection of slums haphazardly built on land surrounding a rubbish tip which had been used jointly by four district councils since the 1970s and was under the authority and responsibility of the main City Council of Istanbul. An expert report drawn up on 7 May 1991 at the request of the Üsküdar District Court, to which the case had been referred by the Ümraniye District Council, drew the authorities' attention to, among other things, the fact that no measure had been taken with regard to the tip in question to prevent a possible explosion of the methane gas being given off by the decomposing refuse. The report gave rise to a series of disputes between the mayors concerned. Before the proceedings instituted by either of them had been concluded a methane-gas explosion occurred on 28 April 1993 on the waste-collection site and the refuse erupting from the pile of waste buried eleven houses situated below it, including the one belonging to the applicant, who lost nine members of his family. The Turkish Government submitted that the operation of an installation for the storage of household waste, which involved only a very slight risk, should not be regarded as the exercise of a potentially dangerous activity or situation, comparable to those pertaining to the spheres of public health and nuclear or industrial installations.

Referring to the principle set out in the *Osman* Case, the Grand Chamber held that, if it is established that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an individual or individuals, they had a positive obligation under Article 2 of the Convention to take such preventive measures as were necessary and sufficient to protect those individuals, especially as the authorities themselves had set up the rubbish site and authorised its operation, which gave rise to the risk in question.[31] Among these preventive measures particular emphasis should be placed on the public's right to information, as established in the case law of the Convention institutions. This obligation indisputably applies in the particular context of dangerous activities, where, in addition, special emphasis must be placed on regulations geared to the special features of the activity in question, particularly with regard to the level of the potential risk to human lives. They must govern the licensing, setting up, operation, security and supervision of the activity and must

[30] *Ibidem*, paras 58-61.

[31] Judgment of 30 November 2004, *Öneryildiz*, para. 101.

make it compulsory for all those concerned to take practical measures to ensure effective protection of citizens whose lives might be endangered by the inherent The Grand Chamber held that this right, which had already been recognised Article 8,[32] may also, in principle, be relied on for the protection of the right particularly as this interpretation is supported by current developments in standards. In any event, the relevant regulations must also provide for appropriate procedures, taking into account the technical aspects of the activity in question identifying shortcomings in the processes concerned and any errors committed those responsible at different levels.[33]

The Court continued by considering that the obligations deriving from Article do not end there. Where lives have been lost in circumstances potentially engaging the responsibility of the State, that provision entails a duty for the State to ensure, all means at its disposal, an adequate response – judicial or otherwise – so that legislative and administrative framework set up to protect the right to life is properly implemented and any breaches of that right are repressed and punished.[34] In infringement of the right to life or to physical integrity is not caused intentionally positive obligation to set up an 'effective judicial system' does not necessarily require criminal proceedings to be brought in every case and may be satisfied if civil, administrative or even disciplinary remedies were available to the victims.[35]

According to the Court, however, in areas such as that in issue in the Öneryildiz Case, the applicable principles are rather to be found in those which the Court has already had occasion to develop in relation notably to the use of lethal force, principles which lend themselves to application in other categories of cases. In this connection it should be pointed out that in cases of homicide the interpretation of Article 2, entailing an obligation to conduct an official investigation is justified not only because any allegations of such an offence normally give rise to criminal liability[36] but because often, in practice, the true circumstances of the death are, or may be, known confined within the knowledge of State officials or authorities.[37] Where it is established that the negligence attributable to State officials or bodies on that account goes beyond an error of judgment or carelessness, in that the authorities in question, fully realising the likely consequences and disregarding the powers vested in them, failed to take measures that were necessary and sufficient to avert the risks inherent in a dangerous activity, the fact that those responsible for endangering life have not been charged

32 Judgment of 19 February 1998, *Guerra and Others*, para. 228.
33 Judgment of 30 November 2004, *Öneryildiz*, paras 89-90.
34 See also judgment of 28 October 1998, *Osman*, paras 115-116.
35 Judgment of 30 November 2004, *Öneryildiz*, paras 91-92. See also the judgment of 17 January 1970, *Calvelli and Ciglio*, para. 51; judgment of 24 October 2002, *Mastromatteo*, para. 90; judgment of 8 July 2004, *Vo*, para. 90.
36 Decision of 11 January 2000, *Caraher*.
37 Judgment of 27 September 1995, *McCann*, paras 157-164.

criminal offence or prosecuted may amount to a violation of Article 2, irrespective of any other types of remedy which individuals may exercise on their own initiative; this is amply evidenced by developments in the relevant European standards.[38]

The Court summed up its position as follows: "the judicial system required by Article 2 must make provision for an independent and impartial official investigation procedure that satisfies certain minimum standards as to effectiveness and is capable of ensuring that criminal penalties are applied where lives are lost as a result of a dangerous activity if and to the extent that this is justified by the findings of the investigation. In such cases, the competent authorities must act with exemplary diligence and promptness and must of their own motion initiate investigations capable of, firstly, ascertaining the circumstances in which the incident took place and any shortcomings in the operation of the regulatory system and, secondly, identifying the State officials or authorities involved in whatever capacity in the chain of events in issue. That said, the requirements of Article 2 go beyond the stage of the official investigation, where this has led to the institution of proceedings in the national courts; the proceedings as a whole, including the trial stage, must satisfy the requirements of the positive obligation to protect lives through the law. It should in no way be inferred from the foregoing that Article 2 may entail the right for an applicant to have third parties prosecuted or sentenced for a criminal offence or an absolute obligation for all prosecutions to result in conviction, or indeed in a particular sentence. On the other hand, the national courts should not under any circumstances be prepared to allow life-endangering offences to go unpunished. This is essential for maintaining public confidence and ensuring adherence to the rule of law and for preventing any appearance of tolerance of or collusion in unlawful acts. The Court's task therefore consists in reviewing whether and to what extent the courts, in reaching their conclusion, may be deemed to have submitted the case to the careful scrutiny required by Article 2 of the Convention, so that the deterrent effect of the judicial system in place and the significance of the role it is required to play in preventing violations of the right to life are not undermined."[39]

With respect to the responsibility borne by the State for the deaths in the *Öneryildiz* Case, the Court noted at the outset that there were safety regulations in force in Turkey in both of the fields of activity central to the present case – the operation of household-refuse tips and the rehabilitation of slum areas. The expert report submitted on 7 May 1991 had specifically referred to the danger of an explosion due to methanogenesis, as the tip had had "no means of preventing an explosion of methane occurring as a result of the decomposition" of household waste. The Court considered that neither the reality nor the immediacy of the danger in question was in dispute, seeing that the risk of an explosion had clearly come into being long before it was highlighted in the

38 Judgment of 30 November 2004, *Öneryildiz*, para. 93.
39 Judgment of 30 November 2004, *Öneryildiz*, paras 94-96.

report of 7 May 1991 and that, given the site's continued operation in ... conditions, that risk could only have increased over time. It was impossible ... administrative and municipal departments responsible for supervising and ... the tip not to have known of the risks inherent in methanogenesis or of the ... preventive measures, particularly as there were specific regulations on the ...

The Court likewise regarded it as established that various authorities had ... aware of those risks, at least by 27 May 1991, when they had been notified of the ... of 7 May 1991. Since the Turkish authorities had known or ought to have kno... there was a real or immediate risk to persons living near the rubbish tip, they ha... an obligation under Article 2 of the Convention to take such preventive oper... measures as were necessary and sufficient to protect those individuals, espec... they themselves had set up the site and authorised its operation, which had gi... to the risk in question. However, Istanbul City Council had not only failed to ... necessary urgent measures but had also opposed the recommendation by the ... Minister's Environment Office to bring the tip into line with the applicable sta... It had also opposed the attempt, in August 1992, by the mayor of Ümraniye to ... a court order for the temporary closure of the waste-collection site. As to the G... ment's argument that the applicant had acted illegally in settling by the rubbi... the Court observed that in spite of the statutory prohibitions in the field of town... ning, the Turkish State's consistent policy on slum areas had encouraged the ... tion of such areas into the urban environment and had thus acknowledged ... existence and the way of life of the citizens who had gradually caused them to ... up since 1960, either of their own free will or simply as a result of that policy, ... 1988 until the accident of 28 April 1993 the applicant and his close relatives had ... entirely undisturbed in their house, in the social and family environment they ... created. It also appeared that the authorities had levied council tax on the appl... and other inhabitants of the Ümraniye slums and had provided them with ... services, for which they were charged. Accordingly, the Government could not ... tain that they were absolved of responsibility on account of the victims' negli... or lack of foresight.

As to the policy required for dealing with the social, economic and urban probl... in that part of Istanbul, the Court acknowledged that it was not its task to subst... its own views for those of the local authorities. However, the timely installation ... gas-extraction system at the Ümraniye tip before the situation became fatal could ... been an effective measure which would have complied with Turkish legislation ... general practice in such matters without placing an impossible or excessive bu... on the authorities. Such a measure would also have been a better reflection of ... humanitarian considerations which the Government had relied on before the C... to justify the fact that they had not taken any steps entailing the immediate and wi... sale destruction of the slum areas. The Court further noted that the Government ... not shown that any measures had been taken to provide the slum inhabitants ...

information about the risks they were running. In any event, even if the Turkish authorities had respected the right to information, they would not have been absolved of responsibility in the absence of more practical measures to avoid the risks to the slum inhabitants' lives. In conclusion the Court held that the regulatory framework applicable in the present case had proved defective in that the tip had been allowed to operate and there had been no coherent supervisory system. That situation had been exacerbated by a general policy which had proved powerless in dealing with general town-planning issues and had undoubtedly played a part in the sequence of events leading to the accident. The Court accordingly held that there had been a violation of Article 2.[40]

6.3.4 OBLIGATION TO CONDUCT AN EFFECTIVE INVESTIGATION

In the *McCann* Case the parents of the victims who were shot dead in Gibraltar by members of the Special Air Service (SAS), which is a regiment of the British Army, alleged a violation of Article 2. The Court held that the obligation to protect the right to life required some form of effective official investigation when individuals have been killed as a result of the use of force by agents of the State. However, the Court did not deem it necessary to decide what form such an investigation should take and under what conditions it should be conducted, since public inquest proceedings in which the applicants were legally represented and which involved the hearing of seventy-nine witnesses, had in fact taken place. Moreover, the lawyers acting on behalf of the applicants were able to examine and cross-examine key witnesses, including the military and police personnel involved in the planning and conduct of the anti-terrorist operation, and to make the submissions they wished to make in the course of the proceedings. Against this background the Court did not consider that the alleged shortcomings in the inquest proceedings substantially hampered the carrying out of a thorough, impartial and careful examination of the circumstances surrounding the killings. In this respect there had thus been no breach of Article 2(1).[41]

A different conclusion was reached in the *Jordan* Case, in which the applicant also submitted that there had been no effective investigation into the circumstances surrounding the death of his son, who had been shot and killed by a police officer. The Court considered that a number of factors distinguished this case from the *McCann* Case. Firstly, the investigation into the killing was headed and carried out by police officers who, albeit subject to the supervision of an independent police monitoring authority, were hierarchically linked to the officer subject to the investigation.

40 *Ibidem*, paras 97–110.
41 Judgment of 27 September 1995, para. 162.

Secondly, the investigation report did not contain any reasoned justification as
the shooting was to be regarded as not disclosing a criminal offence or as not
a prosecution of the officer concerned. The lack of such reasoned opinion
Court's view, could not be considered compatible with Article 2 as it did not
a concerned public and the relatives affected that the rule of law had been
Thirdly, the inquest proceedings conducted into the killing of the applicant's
not provide, according to the Court, the same procedural guarantees as those
McCann Case. In Northern Ireland, unlike in England and Wales, not every
suspected of causing death could be compelled to give evidence. In the particular
under consideration, the failure of the authorities to require the officer
for the killing to provide them with his testimony, detracted, in the Court's view,
the inquest's capacity to establish the facts immediately relevant to the death,
fically the lawfulness of the use of force, and thereby to comply with the
of Article 2. Furthermore, the absence of legal aid for the representation of the
family in the proceedings and the non-disclosure of witness statements prior to
appearance (on the basis of public interest immunity, without a fair balance
struck between the interests of the two sides concerned) at the inquest, prejudiced,
according to the Court, the ability of the applicant to participate in the inquest
contributed to the long adjournments of proceedings. Lastly, the Court consid
that the inquest had not been pursued with reasonable expedition as at the date
Court's judgment, more than eight years after the inquest's initiation, proceedings
had still not been concluded. On the basis of the aforementioned considerations
Court concluded that the procedural shortcomings of the investigation into
applicant son's death had been such so as to substantially hamper an independent
thorough examination into the killing in question. Accordingly, Article 2 had
breached.[42]

A slightly different set of circumstances compelled the Court to also find a viol
of Article 2 in the *McKerr* Case, in which the applicant alleged that his father had
unjustifiably killed by security forces and that there had been no effective investigation
into his death. It was noted that the existence of an independent police authority
supervising the officers carrying out the investigation could not be regarded as
sufficient safeguard where the investigation itself had been – for all practical purposes
– conducted by police officers connected to those being investigated.[43] Moreover,
although three police officers were put to criminal trial for the death of the applicant's
father, the same shortcomings of the inquest procedure, as those detailed above with
reference to the *Jordan* Case, did oblige the Court to find a breach of Article 2.
Different from the *Jordan* Case, however, the afore-mentioned considerations were
evalnated in a broader context, warranted by a violation of the procedural requirements
[illegible]

[42] Judgment of 4 May 2001, para. 145.
[43] Judgment of 4 May 2001, para. 67.

ments of Article 2 on one additional account – particularly disturbing in the Court's
view – namely, the decision of the authorities not to charge the three police officers,
alleged as responsible for the killing of the applicant's father, with an attempt to pervert
the course of justice. Although in the course of investigation it had been established
that they were instructed to withhold information concerning their belonging to a
special police branch unit and their acting on intelligence information, the inquest
proceedings failed to properly examine the matter. The Court, in its turn, considered
that the attempts at concealment of information and the investigators' failure to react
adequately, raised serious and legitimate doubts as to the integrity of the investigative
process, particularly in a case in which it had been established that a person had been
killed in the course of security operations – a situation raising issues pertaining to the
proportionate use of force in counter-terrorism procedures.[44]

A similar failure on the part of the national authorities to include in the inquest
proceedings concerns about possible collusion by security force personnel in the
targetting and killing of the applicant's son in the *Shanaghan* Case, led the Court to
the conclusion that there had been a breach of the procedural requirements of Article
2. The Court noted that, although the investigating officers had been made aware of
evidence pointing to the fact that Patrick Shanaghan had been subjected to harassment
and threats by the police force, it had not been deemed necessary to extend the inquest
to allegations concerning events having taken place before the particular incident
under consideration. Considering this drawback of the investigation proceedings in
the light of the failure of the authorities to identify the perpetrator of the applicant
son's killing, the lack of independence of the investigating authorities and the general
defects of the inquest procedure in Northern Ireland (as discussed above with reference
to the *Jordan* Case and the *McKerr* Case), the Court concluded that there had been
a breach of Article 2.[45]

The inadequacy of inquest procedures in Northern Ireland and the lack of independence of the authorities investigating allegations of police involvement in killings, as detailed in the cases of *Jordan*, *McKerr* and *Shanaghan* above, were once again confirmed by the Court in the *Kelly* Case[46] and in the more recent *Finucane*[47] Case, in which the procedural requirements of Article 2 were deemed violated, the Court's reasoning and conclusion being in conformity with its previous judgments. The Court re-affirmed the requirement, imposed on States by Article 2, to carry out effective official investigation when individuals had been killed as a result of the use of force, and particularly when there had been allegations of complicity of police or security

[44] *Ibidem*, para. 76.
[45] Judgment of 4 May 2001, paras 122-125.
[46] Judgment of 4 May 2001, para. 139.
[47] Judgment of 1 July 2003, para. 84.

forces in the killings.[48] It also stressed the need for the investigating authorities independent – hierarchically, institutionally and also practically – from those implicated in the events under investigation.[49] The Court further emphasised the obligation of States to ensure promptness of the investigation and a degree of scrutiny, which may vary from case to case but must always allow for the involvement of the next-of-kin of victims in all investigative proceedings so as to safeguard their legitimate interests.[50]

In the *Denizci* Case the Court noted that with respect to the investigation immediately after the killing was reported to the authorities, the police went to the scene, a plan of the incident site was drawn up and a list of the objects found was established. Relevant samples were taken and scientifically examined. A pathologist who arrived at the scene a few hours after the killing proceeded to the post mortem examination and, later on the same day, carried out an autopsy on the bodies. The Court also noted the numerous acts accomplished by the local police during the investigation opened into the killing of the applicant's son and his friend, which led, in less than a year, to a case-file of more than 600 pages. In the light of the above and having examined the investigation file submitted by the domestic authorities, the Court found no element which would allow it to conclude that the investigation into the killings was inadequate. There had been accordingly no violation of Article 2 on this account.

In the *Öneryildiz* Case, discussed *supra* in subsection 6.3.3, the positive obligation under Article 2 to conduct an independent and impartial investigation was also at issue. With respect to the responsibility borne by the State as regards the nature of the investigation the Court considered that the administrative remedy used by the applicant to claim compensation could not satisfy the requirement to conduct an effective investigation into the deaths of the applicant's close relatives. As to the criminal remedies used, the Court considered that the investigating authorities could be regarded as having acted with exemplary promptness and as having shown diligence in seeking to establish the circumstances that had led both to the accident of 28 April 1993 and to the ensuing deaths. Those responsible for the events in question had been identified and prosecuted, eventually being sentenced to the minimum penalty applicable under the Criminal Code. However, the sole purpose of the criminal proceedings in the present case had been to establish whether the authorities could be held liable for 'negligence in the performance of their duties' under Article 230 of the Criminal Code, which provision did not in any way relate to life-endangering acts

48 See, *mutatis mutandis*, the judgment of 27 September 1995, *McCann*, para. 161; and decision of 20 February 1995, *Kaya*, para. 86.

49 See, *mutatis mutandis*, the judgments of 4 May 2001, *Kelly and Others*, para. 95; *McKerr*, para. 121; and *Hugh Jordan*, para. 106; judgment of 27 July 1998, *Güleç*, paras 81-82; and judgment of 23 July 1998, *Ergi*, paras 83-84.

50 *Ibidem*.

51 Judgment of 23 May 2001, paras 378-379.

to the protection of the right to life within the meaning of Article 2. The judgment of 4 April 1996 had left in abeyance any question of the authorities' possible responsibility for the death of the applicant's close relatives. Accordingly, it could not be said that the Turkish criminal justice system had secured the full accountability of State officials or authorities for their role in the tragedy, or the effective implementation of provisions of domestic law guaranteeing respect for the right to life, in particular the deterrent function of criminal law. The Court, therefore, held that there had also been a violation of Article 2 concerning the inadequate investigation into the deaths of the applicant's close relatives.[52]

In the *Makaratzis* Case, even though an administrative investigation had been carried out following the incident, the Court observed that there had been striking omissions in its conduct. In particular, the Court attached significant weight to the fact that the domestic authorities had failed to identify all the policemen who had taken part in the chase. Some policemen had left the spot without identifying themselves and without handing over their weapons so that some of the firearms which were used had never been reported. It also appeared that nothing had been done to identify the policemen who had been on duty in the area when the incident had taken place. Moreover, it was remarkable that only three bullets had been collected and that, other than the bullet which had been removed from Mr Makaratzis's foot and the one which was still in his buttock, the police had never found or identified the other bullets which had injured the applicant. Those omissions had prevented the Greek court from making as full a finding of fact as it might otherwise have done and had resulted in the acquittal of the police officers on the gronnd that it had not been shown beyond reasonable doubt that it was they who had injured the applicant, since many other shots had been fired from unidentified weapons. In those circumstances the Court concluded that the authorities had failed to carry out an effective investigation into the incident. The incomplete and inadequate character of the investigation was highlighted by the fact that, even before the Court, the Government had been unable to identify all the officers who had been involved in the shooting and wounding of the applicant. The Court concluded that there had accordingly been a violation of Article 2 of the Convention in that respect. Having regard to that conclusion, it did not find it necessary to determine whether the failings identified in this case were part of a practice adopted by the authorities, as asserted by the applicant.[53]

52 Judgment of 30 November 2004, paras 111-118.

53 Judgment of 20 December 2004, paras 76-80.

6.3.5 MEASURES AND PROCEDURES IN TURKEY DU... THE EMERGENCY SITUATION OF THE 1990S

The Court has also examined a great number of complaints against Turkey co... the emergency situation in the South-East region in the 1990s, which compla... produced a series of findings of failures by the authorities to investigate al... of wrongdoing by the security forces, both in the context of the procedural ob... under Article 2 of the Convention and the requirement for effective remedies in... by Article 13 of the Convention.[54] A common feature of these cases is a findi... the public prosecutor had failed to pursue complaints by individuals claiming ... security forces were involved in an unlawful act, for example not interviewing or... statements from members of the security forces implicated, accepting at face ... the reports of incidents submitted by members of the security forces and attri... incidents to the PKK on the basis of minimal or no evidence.

In the *Ergi* Case the Court observed that the responsibility of the State wo... confined to circumstances where there was significant evidence that misdirect... from agents of the State has killed a civilian. It may also be engaged where the... to take all feasible precautions in the choice of means and methods of a sec... operation mounted against an opposing group with a view to avoiding and, ... event, to minimising incidental loss of civilian life. Thus, even though it had not ... established beyond reasonable doubt that the bullet which killed the victim had ... fired by the security forces, the Court had to consider whether the security for... operation had been planned and conducted in such a way as to avoid or mini... to the greatest extent possible, any risk to the lives of the villagers, including from ... firepower of the PKK members caught in the ambush. In this case the ambush ope... tion took place in a village. Even though the security forces had been careful no... hit the civilians in their fire, the terrorists of the PKK could not be assumed to do ... same. Therefore, the Court found that it could reasonably be inferred that insuffic... precautions had been taken to protect the lives of the civilian population. As for t... investigation of the situation by the State, the Court attached particular weight to ... procedural requirement implicit in Article 2. It recalled that, according to its case-... the obligation to protect the right to life under Article 2, read in conjunction with ... State's general duty under Article 1, requires by implication that there should be ... form of effective official investigation when individuals have been killed as a re... of the use of force by agents of the State. However, this obligation is not confined ...

[54] Judgment of 19 February 1998, *Kaya*, paras 86-92; judgment of 28 July 1998, *Ergi*, paras 82... judgment of 2 September 1998, *Yaşa*, paras 98-108; judgment of 8 July 1999, *Çakici*, para... judgment of 8 July 1999, *Tanrikulu*, paras 101-111; judgment of 9 May 2000, *Ertak*, paras 134... judgment of 13 June 2000, *Timurtaş*, paras 87-90; judgment of 14 November 2000, *Demiray*, pa... 48.

cases where it has been established that the killing was caused by an agent of the State, nor is it decisive whether members of the deceased's family or others have lodged a formal complaint about the killing with the relevant investigatory authority. In the case under consideration the mere knowledge of the killing on the part of the authorities gave rise to an obligation under Article 2 to carry out an effective investigation into the circumstances surrounding the death.[55]

In the *Ertak* Case the Court noted one particular omission in that the investigating officer responsible for the preliminary investigation did not have in his possession the case file in which was to be found, among other documents, a deposition referring to other people who had been in custody, and had not in the course of his investigations taken a statement from the applicant or other persons named by the applicant in his complaint.[56]

In the *Akkoç* Case the Court found that it had not been established beyond reasonable doubt that any State agent or person acting on behalf of the State authorities was involved in the killing of Zübeyir Akkoç. It found that Zübeyir Akkoç, a teacher of Kurdish origin and engaged in trade union activities perceived by the authorities as unlawful and against the State interest, was at particular risk of falling victim to an unlawful attack. The authorities were aware of this risk, in particular as he and the applicant had informed the public prosecutor that they had received telephone calls during which threats to their lives were made. The authorities were also aware, or ought to have been aware, of the possibility that this risk derived from the activities of persons or groups acting with the knowledge or acquiescence of elements in the security forces. The Court, therefore, had to consider whether the authorities had done all that could be reasonably expected of them to avoid the risk to Zübeyir Akkoç. While there were large numbers of security force personnel in the south-east and a framework of law in place with the aim of protecting life, the implementation of criminal law in respect of unlawful acts allegedly carried out with the involvement of the security forces disclosed particular characteristics in the south-east region during this period. Firstly, where offences were committed by State officials in certain circumstances, the public prosecutor's competence to investigate was removed to administrative councils which took the decision whether or not to prosecute. The Court had already found in two previous cases that these councils, made up of civil servants under the orders of the Governor, did not provide an independent or effective procedure for investigating deaths implicating the security forces. Secondly, the attribution of responsibility for incidents to the PKK had particular significance as regards investigations and judicial procedures, since jurisdiction for terrorist crimes had been given to the State Security Courts, which had been found by the Court not to fulfil the requirement of independence imposed by

[55] Judgment of 28 July 1998, paras 82-85.
[56] Judgment of 9 May 2000, para. 135.

Article 6 of the Convention, due to the presence of a military judge whose pa
gave rise to legitimate fears that the court may be unduly influenced by cons
extraneous to the case.

The Court found that these defects undermined the effectiveness of cri
protection, permitting or fostering a lack of accountability of members of the
forces for their actions incompatible with the rule of law in a democratic
respecting the fundamental rights and freedoms guaranteed under the Con
This removed from Zübeyir Akkoç the protection which he should have rec
law. Furthermore, the Government had not provided any information con
steps to investigate the existence of contra-guerrilla groups or the extent to wh
officials were implicated in unlawful killings during this period. Nor had any ste
taken by the public prosecutor in response to the applicant's petitions concer
threats to their lives. The Court concluded that in the circumstances of this c
authorities had failed to take reasonable measures available to them to preven
and immediate risk to the life of Zübeyir Akkoç and, accordingly, there had b
violation of Article 2.[57] The Court also noted that the investigation into the k
the gendarmes had effectively ended by 25 January 1993. Only one statement wa
at the scene. Though Seyithan Araz, tried for separatist offences as a Hiz
member, was alleged in an indictment before the Diyarbakir State Security Co
have killed Zübeyir Akkoç, there was no direct evidence linking him with that
cular crime. There was no explanation either as to why he had not been charge
the killing of the teacher, shot with the same gun at the same time as Zübeyir A
Seyithan Araz was in any event acquitted of the offences. No steps had been ta
investigate the possible source of the threats to the applicant and her husband
to the shooting. Having regard, therefore, to the limited scope and short dura
the investigation in this case, the Court found that the authorities failed to car
an effective investigation into the circumstances surrounding the death of Z
Akkoç. It concluded that there had been, in this respect too, a violation of Artic

In the *Tanli* Case, concerning a 22-year old individual who was taken into
custody in good health but died during interrogation twenty-four to thirty-six
later, the Court observed that the autopsy investigation was of critical importa
determining the facts surrounding Mahmut Tanli's death. This investigation,
launched promptly by the public prosecutor, had been shown to be defectiv
number of fundamental respects. It also appeared that the doctors who had
the post mortem report were not qualified forensic pathologists, notwithstandi
provision in the Code of Criminal Procedure which required the presence of a fo
doctor. In the light of the defective forensic investigation it was not surprisin
the court proceedings resulted in the acquittal for lack of evidence of the three

[57] Judgment of 10 October 2000, paras 83-94.
[58] *Ibidem*, paras 95-99.

officers who had been interrogating Mahmut Tanli before he died. The Court concluded that the authorities failed to carry out an effective investigation into the circumstances surrounding Mahmut Tanli's death.[59]

In the *Avşar* Case the Court held that the mere fact that the authorities were informed of the abduction of Mehmet Şerif Avşar by village guards and others holding themselves out as security officers, following which he was found dead, gave rise of itself to an obligation under Article 2 to carry out an effective investigation into the circumstances surrounding this incident. The Court concluded that the investigation by the gendarmes and public prosecutor, and before the criminal court, did not provide a prompt or adequate investigation of the circumstances surrounding the killing of Mehmet Şerif Avşar and was, therefore, in breach of the State's procedural obligation to protect the right to life. This rendered recourse to civil remedies equally ineffective in the circumstances. The Court, therefore, held that there had been a violation of Article 2 in this respect. The Court was satisfied that Mehmet Şerif Avşar might be regarded as having died after having been taken into custody by agents of the State. It did not accept that the crime was committed by persons acting in their private capacity without the knowledge of the authorities and thereby beyond the scope of the State's responsibility. The Court recalled that there was a lack of accountability as regards the security forces in south-east Turkey in or about 1993 and further noted that this case additionally highlighted the risks attached to the use of civilian volunteers in a quasi-police function. It had been established in this case that guards were used regularly on a variety of official operations, including the apprehension of suspects. According to the regulations provided by the Government, village guards were hierarchically subordinate to the district gendarme commander. However, it was not apparent what supervision was, or could be exerted over guards who were engaged in duties outside the jurisdiction of the district gendarme commander. Nor, as the village guards were outside the normal structure of discipline and training applicable to gendarmes and police officers, was it apparent what safeguards there were against wilful or unintentional abuses of position carried out by the village guards either on their own initiative or under the instructions of security officers who themselves were acting outside the law. Although there had been a prosecution which had resulted in the conviction of the village guards and Mehmet Mehmetoğlu, there was a failure to investigate promptly or effectively the identity of the seventh person, the security official, and thereby to establish the extent of official knowledge of or connivance in the abduction and killing of Mehmet Şerif Avşar. As the investigation and court proceedings had not provided sufficient redress for the applicant's complaints concerning the authorities' responsibility for his brother's death, he might still claim to be a victim, on behalf of his brother, of a violation of Article 2. No justification for the killing of Mehmet Şerif Avşar being provided, the Court concluded that the Turkish Govern-

[59] Judgment of 10 April 2001, paras 147-151.

ment was liable for his death. There had accordingly been a breach of Article
respect.[60]

With regard to the investigative measures taken following a complaint, th
noted in the *Demiray* Case, firstly, that the Lice public prosecutor's office did
pear to have arranged a visit to the site of the incident in order to carry out any
gations or, at the very least, to confirm the accuracy of the sketch map drawn
the gendarmes. Furthermore, none of the gendarmes present at the scene of
Demiray's death appeared to have been questioned. Lastly, the autopsy was per
by a general practitioner and contained little forensic evidence. The authority
clusion that a classic autopsy by a forensic medical examiner was not necessary
in the Court's view, inadequate given that a death occurred in the circumst
described in the present case. The Lice public prosecutor's office appeared to
confined itself to giving a decision on 29 May 1996 that it had no jurisdiction r
materiae. In that decision it established that Ahmet Demiray had been killed
booby-trapped grenade planted by the PKK. The Lice public prosecutor's office
that conclusion solely on two documents which had been sent to it by the provin
gendarmerie command which constituted "all the information in the case file"
Court considered, in the light of its observations on the lack of investigative mea
that such a conclusion could be regarded as hasty given the scant amount of
mation available at the time to the Lice public prosecutor's office. The subsequ
investigation carried out by the administrative bodies hardly remedied the shortc
ings referred to above. The Government asserted that this investigation was
pending, but had not provided any concrete information on the progress of the inv
gation despite the fact that four years had elapsed since the case file was transfe
to the Kocaköy District Commissioner's Office. The Court felt it important to p
out, as it had done in earlier cases, that serious doubts arose as to the ability o
administrative authorities concerned to carry out an independent investigation
required by Article 2 of the Convention, having regard to their nature and comp
tion. Lastly, the investigation referred to by the Government, which they maintain
was initiated in order to identify and arrest those suspected of having murdered
applicant's husband, was apparently also pending, but the Government had not p
duced any evidence concerning such an investigation. The Court considered that
authorities had failed to carry out an effective investigation into the circumstance
Ahmet Demiray's death. It found that the authorities concerned had disregarded th
essential responsibilities in this respect. The Court was prepared to take into acco
as indicated in the *Yaşa* Case and *Tanrikulu* Case, the fact that loss of life was a fre
and frequent occurrence in the context of the security situation in south-east Tu
which might have hampered the search for conclusive evidence. Nonetheless,

[60] Judgment of 10 July 2001, paras 399-416.

circumstances could not have the effect of relieving the authorities of the obligation imposed by Article 2 to carry out an effective investigation.[61]

In the *Gül* Case the Court found that, while an investigation into the incident had been carried out by the public prosecutor, there were a number of significant omissions. Furthermore, although the actions of the officers involved required careful and prompt scrutiny by the responsible authorities, the public prosecutor did not take any statements from them. Nor were the officers required to account for the use of their weapons and ammunition. As regards the investigation by the administrative council, the Court noted its previous findings that the investigations undertaken by administrative councils into killings by security forces failed to satisfy the requirements of an independent investigation, in particular since the council and the officers under investigation were both hierarchically subordinate to the governor. The Court considered whether the criminal proceedings cured the defects in the investigation into the events up to that date. The criminal court heard evidence from the three officers charged, who gave brief statements. It called no other witnesses. The applicant and members of his family were not informed that the proceedings were taking place and were not afforded the opportunity of submitting to the court their very different version of events. The court requested two expert opinions (from a gendarme lieutenant and from police experts) which contained an evaluation of events based on the assumption that the police officers' account was the correct one. They both reached conclusions as to the lack of fault of the officers which were based on that general evaluation rather than on any findings of technical expertise. The court's decision to acquit the three officers was based entirely on the opinion that there was no fault. There was no reasoning as to why the police officers' account was preferred to that of the family. In basing itself without any additional explanation on the experts' legal classification of the officers' actions, the court in this case effectively deprived itself of its jurisdiction to decide the factual and legal issues of the case.[62]

In the *Şemse Önen* Case the Court held that rather than carrying out a serious and effective investigation in the preliminary phase, the competent authorities appeared to have proceeded on the assumption that it was the PKK, not State security forces or gendarmes, who were responsible for the killings. Similar criticism could also be made about the subsequent investigation before the State Security Court. The Court noted that, since the conclusion of those proceedings, nothing had come to light which suggested that the authorities had taken further investigative measures that could be regarded as effective for the purposes of Article 2. The Court, therefore, found that the authorities had failed to carry out an adequate and effective investigation into

[61] Judgment of 14 November 2000, paras 51-53.
[62] Judgment of 14 December 2000, paras 88-93.

the circumstances surrounding the killings and that there had been a viola
Article 2 in that respect.[63]

6.3.6 MISSING PERSONS

In the Case of *Cyprus v. Turkey* the applicant Government upheld that the
of missing Greek-Cypriots was 1,485 and that the evidence clearly pointed to
that the missing Greek-Cypriots were either detained by, or were in the cus
under the actual authority and responsibility of the Turkish army or its milita
were last seen in areas which were under the effective control of the respondent
They maintained, in addition, that the Court should proceed on the assumptio
the missing persons were still alive, unless there was evidence to the contrary
Court noted at the outset that the applicant Government had not contested the
as found by the Commission. Like the Commission the Court did not consi
appropriate to estimate the number of persons that fell into the category of "mis
persons". It limited itself to observing that figures were communicated by the appl
Government to the United Nations Committee on Missing Persons ("CMP")
revised in accordance with the most recent information which became avail
Furthermore, the Court shared the Commission's concern to limit its inquir
ascertaining the extent, if any, to which the authorities of the respondent State
clarified the fate or whereabouts of the missing persons. It was not its task to m
findings on the evidence on whether any of these persons were alive or dead or
been killed in circumstances which engaged the liability of the respondent State

The Court observed that the applicant Government contended first and foremo
that the missing persons must be presumed to be still alive unless there was
evidence to the contrary. Although the evidence adduced before the Commission
firmed a very high incidence of military and civilian deaths during the military op
tions of July and August 1974, the Court reiterated that it could not speculate a
whether any of the missing persons had in fact been killed by either the Turkish fo
or Turkish-Cypriot paramilitaries into whose hands they might have fallen. It was
that the head of the "TRNC", Mr Denktaş, broadcasted a statement on 1 March
admitting that the Turkish army had handed over Greek-Cypriot prisoners to Turk
Cypriot fighters under Turkish command and that these prisoners had then b
killed. It was equally the case that, in February 1998, Professor Yalçin Küçük, who
a serving Turkish officer in 1974, asserted that the Turkish army had engaged in w
spread killings of civilians. Although all of these statements had given rise to
doubted concern, especially in the minds of the relatives of the missing persons
Court considered that they were insufficient to establish the respondent State's lia

[63] Judgment of 14 May 2002, paras 88-92.

for the deaths of any of the missing persons. It was mere speculation that any of these persons were killed in the circumstances described in these accounts. The Court noted that the evidence given of killings carried out directly by Turkish soldiers or with their connivance, related to a period which was outside the scope of the present application. Indeed, it was to be noted that the Commission had been unable to establish on the facts whether any of the missing persons were killed in circumstances for which the respondent State could be held responsible under the substantive limb of Article 2 of the Convention. The Court concluded, therefore, that it could not accept the applicant Government's allegations that the facts disclosed a substantive violation of Article 2 of the Convention in respect of any of the missing persons.

The Court recalled that there was no proof that any of the missing persons had been unlawfully killed. However, in its opinion, and of relevance to the instant case, the above-mentioned procedural obligation also arose upon proof of an arguable claim that an individual, who was last seen in the custody of agents of the State, subsequently disappeared in a context which might be considered life-threatening. Against this background the Court observed that the evidence bore out the applicant Government's claim that many persons now missing were detained either by Turkish or Turkish-Cypriot forces. Their detention occurred at a time when the conduct of military operations was accompanied by arrests and killings on a large scale. The Commission correctly described the situation as life-threatening. That the missing persons disappeared against this background could not be denied. The Court could not but note that the authorities of the respondent State had never undertaken any investigation into the claims made by the relatives of the missing persons that the latter had disappeared after being detained in circumstances in which there was real cause to fear for their welfare. It must be noted in this connection that there was no official follow-up to Mr Denktaş's alarming statement. No attempt was made to identify the names of the persons who were reportedly released from Turkish custody into the hands of Turkish-Cypriot paramilitaries or to inquire into the whereabouts of the places where the bodies were disposed of. It did not appear either that any official inquiry was made into the claim that Greek-Cypriot prisoners were transferred to Turkey. The Court noted that, although the CMP's procedures were undoubtedly useful for the humanitarian purpose for which they were established, they were not of themselves sufficient to meet the standard of an effective investigation required by Article 2 of the Convention, especially in view of the narrow scope of that body's investigations. The Court concluded that there had been a continuing violation of Article 2 on account of the failure of the authorities of the respondent State to conduct an effective investigation aimed at clarifying the whereabouts and fate of Greek-Cypriot missing persons who had disappeared in life-threatening circumstances.[64]

[64] Judgment of 10 May 2001, paras 125-136.

6.3.7 FORCED DISAPPEARANCES

It was not until 1998 that the Court had to deal with the question of forced d
ances. In the *Kurt* Case the applicant requested the Court to find on the ba
facts established by the Commission that the disappearance of her son enga
responsibility of the respondent State under Articles 2, 3 and 5 of the Conventi
that each of those Articles had been violated. The Court recalled at the outs
had accepted the Commission's findings of fact in respect of the detention
applicant's son by soldiers and village guards. Subsequent to this detention almo
and a half years had passed without information as to his whereabouts or fate.
ding to the applicant, in such circumstances there were compelling groun
drawing the conclusion that her son had in fact been killed in unacknowledged
at the hands of his captors. However, the Court held that it would have to ca
scrutinise whether there in fact existed concrete evidence, which would lea
conclude that the applicant's son was, beyond reasonable doubt, killed by the
rities either while in detention or at some subsequent stage. It noted that in thos
where it had found that a Contracting State had a positive obligation under Art
to conduct an effective investigation into the circumstances surrounding an all
unlawful killing by the agents of that State, there had existed concrete evidence
fatal shooting, which had brought that obligation into play.[65]

Turning to the particular case before it, the Court then observed that the applic
claims rested entirely on presumptions deduced from the circumstances of her
initial detention, bolstered by more general analyses of an alleged officially tole
practice of disappearances and associated ill-treatment and extra-judicial killing
detainees in the respondent State. The Court considered that these arguments w
not in themselves sufficient to compensate for the absence of more persuasive ind
tions that the applicant's son had in fact met his death in custody. As to the applica
argument that there existed a practice of violations of, *inter alia*, Article 2 in t
respondent State, the Court considered that the evidence which she had adduced
not substantiate such a claim. In the light of these considerations the Court conclu
that the applicant's assertions that the respondent State had failed in its obligation
protect her son's life in the circumstances described fell, instead, to be assessed fr
the standpoint of Article 5 of the Convention.[66]

In the *Çakici* Case the applicant put forward a similar claim alleging that his brot
had been taken into unacknowledged detention and had since disappeared. Accord
to the Court, however, this case had to be distinguished from the *Kurt* Case wher
although the applicant's son had been taken into detention, no other elements
evidence existed regarding his treatment or fate subsequent to that. In the *Çakici* Ca

[65] Judgment of 27 September 1995, *McCann*; judgment of 19 February 1998, *Kaya*.

[66] Judgment of 25 May 1998, paras 106-109.

the Court pointed out that very strong inferences could be drawn from the authorities' claim that the identity card of the applicant's brother was found on the body of a dead terrorist. The Court considered on that basis that there was sufficient circumstantial evidence, based on concrete elements, on which it could be concluded beyond reasonable doubt that the applicant's brother had died following his apprehension and detention by the security forces.[67] The Court furthermore held that, as Ahmet Çakici had to be presumed dead following an unacknowledged detention by the security forces, the responsibility of the respondent State for his death was, therefore, engaged. It observed that the authorities had not offered any explanation as to what had occurred following his apprehension, nor any ground of justification in respect of any use of lethal force by the Government's agents. Liability for Ahmet Çakici's death was, therefore, attributable to the respondent State and there had accordingly been a violation of Article 2 on that account. Furthermore, having regard to the lack of effective procedural safeguards, disclosed by the inadequate investigation carried out into the disappearance and the alleged finding of Ahmet Çakici's body, the Court found that the respondent State had failed in its obligation to carry out an effective investigation into Ahmet Çakici's death. Accordingly, there had been a violation of Article 2 of the Convention on this account also.[68]

Despite its initial reluctance, as evidenced by the *Kurt* Case, to accept that there existed in south-east Turkey in the early 1990s an officially tolerated practice of forced disappearances, ill-treatment and extra-judicial killings by security forces of detainees, suspected of PKK involvement, the Court subsequently re-examined its position. The landmark cases, which served as a central point of reference in later cases concerning forced disappearances and alleged killings, were the *Mahmut Kaya* Case and the *Kiliç* Case.[69] In both of these cases the Court considered that for lack of concrete evidence it could not be established beyond reasonable doubt that any State agents were involved in the alleged killings. However, the Court did acknowledge the so-called 'unknown perpetrator phenomenon' increasingly spreading in the south-east parts of Turkey.[70] It also deemed that the Turkish authorities were aware, or ought to have been aware, that this phenomenon was largely attributable to the activities of persons or groups acting with the knowledge or acquiescence of certain elements in the security forces. In reaching this conclusion the Court based itself on a report by a 1993 Parliamentary Investigation Commission, presented to the Turkish Prime Minister's Office. The report provided strong substantiations for allegations, current at the time

[67] Judgment of 8 July 1999, para. 85. See also the judgment of 9 May 2000, *Ertak*, para. 131; judgment of 13 June 2000, *Timurtaş*, para. 85.

[68] Judgment of 8 July 1999, para. 87.

[69] Judgments of 28 March 2000.

[70] See also judgment of 2 September 1998, *Yaşa*, para. 106.

and since, that certain 'counter-guerrilla' groups, involving terrorists and
were targetting individuals perceived to be acting against the State intere
support of the PKK, with the acquiescence and possible assistance of mem
security forces. Although the Turkish Government had refused to accede
value to this report, it had relied on it in taking appropriate counter-
Therefore, the report was considered by the Court to be a significant docu

Furthermore, the Court recalled previous judgments in which it had
that there existed substantial defects undermining the effectiveness of the
afforded by criminal law in south-east Turkey during the emergency
1990s against alleged unlawful acts on the part of the security forces, nam
lingness of the prosecution authorities to undertake investigations of alleg
doings and also lack of independent and impartial procedure for investiga
involving security agents. In the light of the above considerations the Court
that any person, identified by the security forces as a PKK suspect and there
hended and detained, could be considered as having been exposed to a real
diate risk of being killed, especially if disappearance upon detention had
unaccounted for by the authorities. The failure of the State to prevent such a
materialising, even in the absence of a body, and to carry out a prompt and
investigation into any instance of disappearance involving security forces, d
Court's opinion, suffice to engage the responsibility of the State under Article
Convention.[72]

In the *Timurtaş* Case the Court held as follows: "Article 5 imposes an obl
on the State to account for the whereabouts of any person taken into detent
who has thus been placed under the control of the authorities (...). Whether the
on the part of the authorities to provide a plausible explanation as to a detain
in the absence of a body, might also raise issues under Article 2 of the Conven
depend on all the circumstances of the case, and in particular on the exist
sufficient circumstantial evidence, based on concrete elements, from which
concluded to the requisite standard of proof that the detainee must be presu
have died in custody (...). In this respect the period of time which has elapse
the person was placed in detention, although not decisive in itself, is a relevant
to be taken into account. It must be accepted that the more time goes by with
news of the detained person, the greater the likelihood that he or she has di
passage of time may therefore to some extent affect the weight to be attached
elements of circumstantial evidence before it can be concluded that the pers
cerned is to be presumed dead. In this respect the Court considers that this si
gives rise to issues which go beyond a mere irregular detention in violation of
5. Such an interpretation is in keeping with the effective protection of the right

71 Judgment of 28 March 2000, *Kaya*, para. 91; judgment of 28 March 2000, *Kiliç*, para. 68.

72 Judgment of 28 March 2000, *Kaya*, paras 94-99; judgment of 28 March 2000 *Kiliç*, paras 7

afforded by Article 2, which ranks as one of the most fundamental provisions in
Convention (...)."[73]

The Court considered that there were a number of elements distinguishing this
from cases such as the *Kurt* Case. In the first place, six and a half years had elapsed
since Abdulvahap Timurtaş was apprehended and detained – a period markedly longer
than the four and a half years between the taking into detention of the applicant's son
and the Court's judgment in the *Kurt* Case. Furthermore, whereas Üzeyir Kurt was
last seen surrounded by soldiers in his village, it had been established in the present
case that Abdulvahap Timurtaş was taken to a place of detention – first at Silopi, then
at Şirnak – by authorities for whom the State is responsible. Finally, there were few
elements in the *Kurt* Case file identifying Üzeyir Kurt as a person under suspicion by
the authorities, whereas the facts of the present case left no doubt that Abdulvahap
Timurtaş was wanted by the authorities for his alleged PKK activities. In the general
context of the situation in south-east Turkey in 1993 it could by no means be excluded
that an unacknowledged detention of such a person would be life-threatening. It was
recalled that the Court had held in the *Kiliç* Case and the *Mahmut Kaya* Case that
defects undermining the effectiveness of criminal law protection in the south-east
region during the period relevant also to this case permitted or fostered a lack of
accountability of members of the security forces for their actions. The Court was
satisfied that Abdulvahap Timurtaş must be presumed dead following an unacknowl-
edged detention by the security forces. Consequently, the responsibility of the respon-
dent State for his death was engaged. Noting that the authorities had not provided any
explanation as to what occurred after Abdulvahap Timurtaş's apprehension and that
they did not rely on any ground of justification in respect of any use of lethal force
by their agents, it followed that liability for his death was attributable to the respondent
State.[74]

In the *Taş* Case the Court observed that, although the applicant's son was taken
into custody on 14 October 1993, no entries were subsequently made in any custody
records and that no reliable evidence has been forthcoming as to where he was held.
Although he was injured in the knee by a bullet, there were no medical records showing
that he had continued to receive treatment after being seen by Dr Can at Şirnak
Military Hospital on the day of his apprehension. When, finally, more than a month
later, the applicant received news of his son on or about 18 November 1993, he was
told that his son had escaped from the security forces during an operation with them
in the Gabar mountains on 9 November 1993. This assertion, based on a report by
three officers who allegedly used code names and could not be identified by the

73 Judgment of 13 June 2000, paras 82-83. See also the judgment of 27 February 2001, *Çiçek*, para. 145; judgment of 18 June 2002, *Orhan*, para. 329; judgment of 14 February 2004, *Ipek*, para. 166.

74 Judgment of 13 June 2000, *Timurtaş*, para. 86; See also judgment of 14 November 2000, *Taş*, paras 66; judgment of 27 February 2001, *Çiçek*, para. 146; judgment of 18 June 2002, *Orhan*, para. 330.

Government, was lacking entirely in credibility and was not substantiated by reliable evidence. The Court drew very strong inferences from the lack of documentary evidence relating to where Muhsin Tas was detained and from the failure of the Government to provide a satisfactory and plausible explanation as to what happened to him. It also observed that in the general context of the situation in south-east Turkey in 1993, it could by no means be excluded that an unacknowledged detention of such a person would be life-threatening. For these reasons the Court found that Muhsin Taş must be presumed dead following his detention by the security forces. Consequently, the responsibility of the respondent State for his death was engaged. Noting that the authorities had not accounted for what happened during Muhsin's detention and that they did not rely on any ground of justification in respect of any use of lethal force by their agents, it followed that liability for his death was attributable to the respondent Government. Accordingly, there had been a violation of Article 2 on that account.[75] The Court recalled that the public prosecutor at Cizre undertook no investigative steps in response to the petitions of the applicant, in which he expressed his fear that his son had been killed in detention. While the Government maintained that the public prosecutor was not required to investigate an unsubstantiated claim, the Court observed that it is incumbent on the competent authorities to ensure that persons in detention enjoy the safeguards accorded by law and judicial practice. The lack of any reaction to a report that the security forces had 'lost' a person detained on suspicion of committing serious offences was incompatible with this obligation. Also in the light of its previous case-law the Court found that the investigation carried out into the disappearance of the applicant's son was neither prompt, adequate nor effective and, therefore, disclosed a breach of the State's procedural obligations to protect the right to life.[76]

The Court further refined its reasoning in the *Çiçek* Case,[77] in which the applicant complained about the unacknowledged detention and disappearance of her two sons who had been taken into custody during a military operation in the south-east region of Turkey. Six and a half years had elapsed since their detention but the whereabouts of the applicant's sons and their fate had remained unknown. They had last been seen in the hands of soldiers. It was considered that a number of elements distinguished this case from the *Kurt* Case and, therefore, warranted a different conclusion. The applicant's sons were identified as persons under suspicion by the authorities; they were taken to a place of detention by state security forces and subsequently disappeared. The Government for their part had failed to adduce any information concerning the whereabouts of the applicant's sons, although the facts of the case had established that the two men had been taken to a detention centre by authorities for whom the respondent State was responsible. The Court also recalled that in the context of the situation in south-east Turkey in the period relevant to the case, it could by no means be excluded that the unacknowledged detention of a person, regarded as suspicious by the security forces, would be life-threatening.[78] For the above reasons the Court was satisfied that the applicant's sons could be presumed dead and held that the responsibility of the respondent State for their death was engaged. Accordingly, there had been a violation of Article 2 on that account. As the official investigation into Tahsin and Ali Çiçek's deaths had gone on for an unreasonably long time, the authorities failing to procure sufficient testimony from co-detainees of the Çiçek brothers and ignoring various relevant information, the Court also found that the investigation had been inadequate and, therefore, in breach of the State's procedural obligations to protect the right to life. There had accordingly been a violation of Article 2 on this account also.

In the *Akdeniz* Case the Court observed that, although the applicants' relatives were detained on or about 9 to 12 October 1993, no entries were subsequently made in any custody records. The evidence of the applicants and other villagers indicated that they were held at Kepir until about 17 to 19 October 1993, at which point some of them at least were seen being loaded onto a helicopter. There had been no news of the missing men since. The Court drew very strong inferences from the length of time which had elapsed, the lack of any documentary evidence relating to their detention, and the inability of the Government to provide a satisfactory and plausible explanation as to what had happened to them. It also observed that in the general context of the situation in south-east Turkey in 1993, it could by no means be excluded that an unacknowledged detention of such persons would be life-threatening. The Court also recalled that in two recent judgments it had held that defects undermining the effectiveness of criminal law protection in the south-east region during the period relevant also to this case permitted or fostered a lack of accountability of members of the security forces for their actions. For these reasons the Court concluded that the applicants' relatives might be presumed dead following their detention by the security forces. Consequently, the responsibility of the respondent State for their death was engaged. Noting that the authorities had not accounted for what happened during the period of alleged detention and that they had not relied on any ground of justification in respect of any use of lethal force by their agents, the Court found that the liability for the deaths of the applicants' relatives was attributable to the respondent Government. Accordingly, there had been a violation of Article 2 on that account.[79]

75 Judgment of 14 November 2000, paras 65-67.
76 *Ibidem*, paras 68-71.
77 Judgment of 27 February 2001.
78 Judgment of 13 June 2000, *Timurtaş*, para. 85; judgment of 18 June 2002, *Orhan*, para. 330.
79 Judgment of 31 May 2001, paras 87-89.

The Court followed the same line of reasoning, and reached the same conclusion, in the *Avşar* Case,[80] in the *Bilgin* Case,[81] and in the *Orhan* Case.[82]

In July 2002 the Committee of Ministers adopted an interim resolution on the above-mentioned judgments, where the Court had established a violation of Article 2 in respect of forced disappearances. The Committee of Ministers took regard to the Court's two judgments and decisions finding that Turkey was responsible for numerous breaches of the Convention relating notably to homicides, torture and destruction of property inflicted by its security forces and the lack of effective domestic remedies against the State officers who had committed these abuses. It also mentioned a number of other cases involving similar complaints which were struck off the list by the Court following friendly settlements or other solutions found, notably on the basis of the Government's undertaking to take rapid remedial measures. The Committee of Ministers noted that most of the violations in the cases here discussed took place against a background of the fight against terrorism in the first half of the 1990s, recalling that each member State, in combating terrorism, must act in full respect of its obligations under the Convention, as set out in the European Court's judgments. It recalled that since 1996-1997, when the Court adopted its first judgments relating to the violations of the Convention committed by the Turkish security forces, it has consistently emphasised that Turkey's compliance with them must *inter alia* entail the adoption of general measures so as to prevent new violations similar to those found in these cases.

The Committee of Ministers also referred to its earlier Interim Resolution, in which it noted with satisfaction some progress in the adoption of such measures, while at the same time calling on Turkey to rapidly adopt further comprehensive measures. The Committee of Ministers finally urged Turkey to accelerate without delay the reform of its system of criminal prosecution for abuses by members of the security forces, in particular by abolishing all restrictions on the prosecutor's competence to conduct criminal investigations against State officials, by reforming the prosecutor's office and by establishing sufficiently deterring minimum prison sentences for persons found guilty of grave abuses such as torture and ill-treatment, and decided to pursue the supervision of the execution of the judgments concerned until all necessary measures had been adopted and their effectiveness in preventing new similar violations had been established.[84]

[80] Judgment of 10 July 2001, para. 416.
[81] Judgment of 17 July 2001, para. 144.
[82] Judgment of 18 June 2002, paras 330-331.
[83] Interim Resolution DH(99)434 of 9 June 1999.
[84] Interim Resolution ResDH(2002)98 of 10 July 2002.

6. BEGINNING AND END OF PHYSICAL LIFE

6.1 ABORTION

The most difficult interpretation problem that Article 2 raises concerns the question of the beginning and the end of the physical life of the human person.

The word 'everyone' does not exclude the possibility that unborn life falls under the protection of Article 2, no more than this is true of 'every human being' in Article 6 of the Covenant.[85] If one takes the view that such protection is indeed included, it implies that *abortus provocatus* must in principle be prohibited by the legislator and prosecuted by the authorities.

On this point, however, there is no consensus yet at the national and the international level.[86] The question was expressly left open by the Commission in its report in the *Brüggeman and Scheuten* Case.[87] In a later decision in *X v. the United Kingdom* the Commission held with respect to the word 'everyone' in Article 2 that both the use of this term in the Convention in general and the context in which the term has been used in Article 2 (for this, the Commission paid attention in particular to the exceptions mentioned in Article 2, which apply exclusively to individuals already born) indicate that the term is not meant to include the unborn child.[88] The Commission did not confine itself to this, but subsequently examined whether the term 'life' in Article 2 refers only to the life of an individual already born or also includes the unborn life. In this connection it stated, first of all, that the views as to the question at what moment there is life tend to diverge widely, and that the term 'life' may also have a different meaning according to the context in which it is used.[89] Next, the Commission distinguished the following three possibilities: (1) Article 2 is not applicable to the foetus at all; (2) Article 2 recognises the right to life of the foetus with specific implied restrictions; or (3) Article 2 recognises an unqualified right to life for the foetus.[90]

[85] As to the latter article this point was expressly left open: UN Doc. A/3764, para. 112.
[86] See Recommendation 874 (1979) of the Parliamentary Assembly concerning a "European Charter on the Rights of the Child", Parl. Ass., *Documents*, Doc. 4376, which contains the words "the right of every child to life from the moment of conception". See also Recommendation 1046 (1986) on the use of human embryos and foetuses for diagnostic, therapeutic, scientific, industrial and commercial purposes, where the Parliamentary Assembly stresses that a definition of the biological status of the embryo is necessary and expresses its awareness of the fact that scientific progress has made the legal position of the embryo and foetus particularly precarious, and that their legal status is at present not defined by law.
[87] Report of 12 July 1977, D&R 10 (1978), p. 100 (116).
[88] Appl. 8416/78, D&R 19 (1980), p. 244 (249-250). This argument would not seem very convincing, since, as the Commission itself mentioned, Article 4 of the American Convention, which uses the term 'every person', expressly protects the unborn life.
[89] *Ibidem*, pp. 250-251.
[90] *Ibidem*, p. 252.

The third possibility was excluded by the Commission, since from the
that Article 2 also protects the life of the mother, certain restrictions ensue
to the life of the unborn child, as it cannot have been intended by the
priority should be given to the latter life, particularly in view of the fact that
Convention was drafted, nearly all the States Parties allowed abortion for
tion of the mother's life.[91] The Commission subsequently noted that there
for it to take a position in a general sense on the two other possibilities,
case under discussion concerned an interruption of pregnancy in the early
pregnancy and exclusively on medical opinion. Even if one were to assume
2 is applicable to the first months of pregnancy, in any case an implied
concerned here, *viz.* the protection of the life and the health of the mother.

The line of reasoning of the Commission makes it all too evident
confronted here with a complicated question, which it thought could
answered in a general way.[93] The rejection of the third possibility was
problematic. However, the Commission subsequently seemed to extend the
tional case in which abortion is necessary to spare the life of the mother
to the situation where it is not the life of the mother that is at stake, but the
is considered desirable for some other medical reason. There is, however, an
difference between the protection of the life of the mother as a ground for
which ensues directly from Article 2 itself and is narrowly defined, and the much
ground 'medical opinion', which Article 2 is held to also imply. Even if one
that a woman's right to physical and mental integrity, which may be based on
3,[94] may be interpreted in so wide a manner that it provides protection
conscious injury to physical and mental health, and if on the other hand one
rule out that Article 2 protects the unborn life, it is by no means self-evident
former right has priority, so that the protection of that right implicitly
enjoyment of the latter right by the foetus. The only point that has been
by the Commission is, therefore, that, in the Commission's opinion, in the
case, even if one assumes that Article 2 protects the unborn life, the rights and
involved had been weighed against each other in a reasonable way. As long
question of whether Article 2 is applicable to the unborn life has not been
in the negative, this reasonableness will have to be reviewed in each individual
Since a generally accepted standard still seems to be lacking, such a review is
be a rather marginal one.

91 *Ibidem.*

92 *Ibidem*, pp. 252-253.

93 As in other difficult and highly controversial cases, here too it is astonishing that the
declared the complaint to be *manifestly* ill-founded; *ibidem*, p. 253.

94 Article 2 protects the physical integrity only insofar as an injury to it constitutes a
supra 6.2. and Appl. 8278/78, *X v. Austria*, D&R 18 (1980), p. 154 (156).

In a later decision the Commission took a somewhat different approach, but with a rather far-reaching result. Here again it started by observing that it did not exclude that in certain circumstances the foetus may enjoy a certain protection under Article 2, notwithstanding the fact that the Contracting States show a considerable divergence of views on whether or to what extent Article 2 protects the unborn life. The Commission continued that it did not have to decide this question because it was clear that national laws on abortion differ considerably. In these circumstances, and assuming that the Convention may be considered to have a certain bearing in this field, the Commission found that in such a delicate area the Contracting States must have a certain discretion. The Norwegian legislation in this respect was rather liberal. It allowed self-determined abortion within the first 12 weeks of pregnancy. From the 12th week until the 18th week of pregnancy, a termination could be authorised by a board of doctors, if certain conditions had been fulfilled. After the 18th week, termination was not allowed, unless there were serious reasons for such a step. According to the Commission, this legislation did not exceed the discretion allowed to States in this matter.[95]

It follows from the aforementioned recapitulation of the position of the Commission that in the circumstances examined by it – i.e. regarding various national laws on abortion – it did not consider the unborn child as a 'person' directly protected by Article 2 of the Convention and that, in its opinion, even if the 'unborn child' were to be considered having a 'right to life', such a right is implicitly limited by the mother's rights and interests. It did not rule out, however, the possibility that in certain circumstances safeguards might be extended to the unborn child notwithstanding the fact that there is in the Contracting Parties a considerable divergence of views on whether or to what extent Article 2 protects unborn life, and accordingly notwithstanding the discretion afforded to member States in this area. This is what appears to have been contemplated by the Commission in the *Brüggeman and Scheuten* Case, where it held that "pregnancy cannot be said to pertain uniquely to the sphere of private life. Whenever a woman is pregnant, her private life becomes closely connected with the developing foetus".[96]

As far as the Court's case law is concerned, in the *Boso* Case, although holding that it was not required to determine "whether the foetus may qualify for protection under the first sentence of Article 2", the Court went on to also examine the claim in the particular case under the supposition that in certain circumstances the foetus's right to life might be protected by Article 2. Although this did not alter the Court's conclusion that Italian law had struck a fair balance between the woman's interests and the need to ensure the protection of the foetus, the Court did leave open the

95 Appl. 17004/90, *H v. Norway*, D&R 73 (1992), p. 155 (167).

96 *Brüggeman and Scheuten v. Federal Republic of Germany*, D&R 10 (1978), pp. 116-7.

possibility that Article 2 might apply to the unborn child, provided [illegible] conditions are in place. However, no indication was given as to what these [illegible] might be. Nor is the Court's hesitation on this point a guarantee that [illegible] the course of further case law development, the protection of Article 2 will be [illegible] to the unborn child. In any case each particular complaint will have to be [illegible] on its own merits by weighing the rights, freedoms and interests of parents [illegible] to one another or vis-à-vis an unborn child.[97]

The Court re-affirmed its position in the *Vo* Case, in which it was [illegible] complaint by a woman who intended to carry her pregnancy to term [illegible] unborn child was expected to be viable, but whose pregnancy was termina[illegible] result of a negligent error of a doctor. She claimed that the refusal of the [illegible] authorities to classify the taking of her unborn child's life as unintentional [illegible] was in breach of Article 2 of the Convention. In its judgment the Court co[illegible] that it was neither possible, nor desirable, to answer in the abstract the qu[illegible] whether an unborn child is a person for the purpose of Article 2. The Court re[illegible] the lack of consensus – scientific and legal – as to the nature and status of the [illegible] and/or foetus, the difficulty in seeking the harmonisation of national laws a[illegible] the inappropriateness of imposing one exclusive moral code. It, therefore, ru[illegible] that the issue of when the right to life begins comes within the margin of appre[illegible] which States enjoy.

The Court furthermore affirmed, albeit indirectly, the position it had take[illegible] earlier case law, stipulating that the lack of a clear legal status, under either na[illegible] or Convention law, did not necessarily deprive the unborn child's life of all prote[illegible] As Article 2 imposes on States a duty to refrain from intentional killing as well [illegible] obligation to take appropriate steps to safeguard the lives of those within [illegible] jurisdictions, States are required to regulate their public health sector so as to pro[illegible] patients' rights. This requirement extends also to the existence of an effective [illegible] pendent judicial system, set up so as to hold medical professionals accountable for [illegible] misconduct. When such misconduct, however, has resulted in a negligent infringe[illegible] of the right to life, the positive obligation imposed on States by Article 2 does [illegible] necessarily require the provision of a criminal-law remedy in every case; an admini[illegible] tive procedure accompanied by all requisite safeguards, including the possibili[illegible] civil redress, should suffice. As such a procedure had been available to the appl[illegible] in the particular case under consideration the Court considered that there had [illegible] no procedural violation of Article 2 of the Convention. Thus the Court once [illegible] re-affirmed its unwillingness to rule on whether an unborn child enjoys the direct [illegible] tection of Article 2 but left open the possibility that Article 2 might have some [illegible]

97 Decision of 5 September 2002.

[illegible] to abortion cases, although always subject to certain restrictions derived from [illegible] parents' rights and interests.[98]

[illegible] who is entitled to complain in the case of abortion? Apart from the highly unlikely [illegible] case of a complaint by a State, the parents will be entitled to vindicate the rights of their [illegible] unborn child. However, they will proceed to do so only if abortion has been performed against their will or without their consent or the consent of one of them. If such a case concerns parents who are married or are living together in an extramarital relationship, it would seem more appropriate for them to invoke Article 8 (the right to respect for private and family life)[99] or Article 12 (the right to found a family).[100]

6.4.2 EUTHANASIA

The question not as to the beginning, but as to the end of the life protected in Article 2, arises in connection with euthanasia. Here again a uniform regulation in the laws of the Contracting States and an international standard are lacking. It would seem, however, that even in those situations where it must in reason be assumed that human life still exists, euthanasia does not *per se* conflict with the Convention. It might be argued that the value of the life to be protected should be weighed against other rights of the person in question, particularly his right, laid down in Article 3, to be protected from inhuman and degrading treatment. Whether the will of the person is decisive in such a case, depends on whether the right to life is or is not to be regarded as inalienable. In this respect, too, a certain trend may be discerned, but not yet a *communis opinio*.[101] There is as yet hardly any standard for a strict review by the

[illegible] Judgment of 8 July 2004, paras 91-95.

[illegible] See Appl. 6959/75, *Brüggemann and Scheuten v. Federal Republic of Germany*, D&R 10 (1978), p. 100; and Appl. 8416/78, *X v. the United Kingdom*, D&R 19 (1980), p. 244 (253). In its decision on Appl. 11045/84, *Knudsen v. Norway*, D&R 42 (1985), p. 247 (256), the Commission took the position that, since the applicant was not a potential father, but a minister of religion within a State church, he was not affected differently by the abortion legislation than other citizens and therefore could not claim to be a victim. That he lost his office was, according to the Commission, not due to the Abortion Act but to the fact that he, because of his views on the Act, refused to perform functions that were duties of his office.

[illegible] This holds good also for cases of sterilisation and other forms of birth control against the will of the person concerned, or at least without the latter's consent. In fact, in these cases there is not yet any question of destruction of life. It is therefore curious that in connection with a man's complaint about the sterilisation of his wife without his consent the Commission held that "an operation of this nature might in certain circumstances involve a breach of the Convention, in particular of Articles 2 and 3"; in Appl. 1287/61, *X v. Denmark* (not published) it was postulated that the right to life and the right to produce life are not to be equated.

[illegible] See the discussion of the so-called 'euthanasia declaration' in the Hubinek/Voogd report concerning the rights of the sick and the dying, which was submitted early in 1976 in the Parliamentary Assembly of the Council of Europe; Council of Europe, Parl. Ass., Twenty-Seventh Session, *Documents*, Doc. 3699.

Strasbourg organs, neither as to the weighing between the various rights [illegible] in question, nor as to the establishment of the dividing line between human [illegible] vegetative life.[102]

According to the Strasbourg case law as it stands at the moment, the [illegible] whether to permit euthanasia and assisted suicide falls within the State's [illegible] appreciation. According to the Court Article 2 cannot be said to guarantee [illegible] a right to die, and, therefore, it cannot be regarded as an avenue for [illegible] national legislation prohibiting euthanasia. The aforementioned was expressed [illegible] blished by the Court in the *Pretty* Case. There the Court recalled that in all [illegible] it had dealt with concerning Article 2, it had consistently placed the emphasis [illegible] positive obligation to protect life. The Court was also explicit in stating that [illegible] 2 is unconcerned with issues having to do with the quality of living or what [illegible] chooses to do with his or her own life. Such issues, as far as they require protection [illegible] from State interference, might be reflected in other Articles of the Convention [illegible] Article 8) or other international human rights instruments. However, to [illegible] Article 2 creates a right to self-determination in the sense of conferring on the [illegible] vidual an entitlement to choose death rather than life, would in the Court's view [illegible] stitute a gross distortion of interpretation. Therefore, the Court held that [illegible] applicant's claim that the national authorities' refusal to permit her to commit [illegible] suicide, despite her suffering and imminent death, and her having taken the decision [illegible] on the basis of informed consent, violated Article 2, was ill-founded. As to the question [illegible] of whether countries that do permit euthanasia, are to be considered in breach [illegible] Article 2, the Court noted that the extent to which a State permits, or seeks to regulate [illegible] the possibility for the infliction of harm on individuals at liberty, by their own [illegible] another's hand, may raise conflicting considerations of personal freedom and [illegible] interest that can only be resolved on examination of the concrete circumstances [illegible] each particular case.[103]

6.5 EXCEPTIONS

6.5.1 DEATH PENALTY

Article 2 mentions a number of cases to which the prohibition of deprivation [illegible] does not apply.

[102] The Hubinek/Voogd report mentioned in the preceding note, also only indicates the frame[illegible] a more uniform regulation. It holds that "the prolongation of life should not in itself constitute [illegible] overriding aim of medical practice, which must be concerned equally with the relief of suffering [illegible] The report contains a recommendation to the Committee of Ministers to invite the Governments [illegible] of the Member States to set up committees for the drafting of ethical rules; Doc. 3699, pp. [illegible]

[103] Judgment of 29 April 2002, para. 41.

[illegible] in the first paragraph, in the very formulation of the prohibition, an exception is made for the case where a person is deprived of his life in the execution of a sentence of a court following his conviction of a crime for which the death penalty is provided by law. Consequently, execution of the death penalty or extradition to a country where the death penalty is still executed, does not in itself constitute a violation of Article 2. In the meantime however, Protocol No. 6 concerning the abolition of the death penalty has entered into force.[105] And for those States which have not yet ratified this protocol, it follows from other provisions of the Convention that not every death sentence pronounced by a court is permitted under the Convention: (1) the judicial decision in question must have been preceded by a fair and public hearing in the sense of Article 6; (2) the punishment must not be so disproportionate to the crime committed, and the choice of the place and manner of execution must not be such, that these amount to an inhuman and degrading treatment in the sense of Article 3; (3) under Article 7 the crime must have been punishable by death at the moment it was committed; (4) under Article 14 no discrimination is permitted in the imposition and execution of the death penalty, and in the granting of pardon.[106] Finally, Protocol No. 13 concerning the abolishment of the death penalty in all circumstances has entered into force.[107] Therefore, the issue of whether the death penalty is still allowed under the Convention has to be considered in the context of several Convention provisions.

As appears from the *Kirkwood* Case,[108] a difficult dilemma may present itself with regard to appeal proceedings, which will inevitably delay execution of the death sentence and during which the convicted person will be gripped with uncertainty as to the outcome of his appeal and, therefore, as to his fate. On the one hand, a prolonged appeal system generates acute anxiety over long periods owing to the uncertain, but possibly favourable outcome of each successive appeal. This anxiety could possibly constitute an inhuman or degrading treatment and punishment contrary to Article 3. On the other hand, a sound appeal system serves to ensure protection of the right to life as guaranteed by Article 2 and to prevent arbitrariness. The Commission declared the application inadmissible, because the applicant had not been tried or convicted, and it could therefore not be established whether the treatment to which the applicant would be exposed, and the risk of his exposure to it, was so serious as to constitute an inhuman or degrading treatment or punishment contrary to Article 3. The British Government had taken the position that, since the second sentence of Article 2(1) of the Convention expressly provides for the imposition of the death sentence by a court,

[illegible] Appl. 10227/82, *H v. Spain*, D&R 37 (1984), p. 93.

[illegible] This Protocol entered into force on 1 March 1985. See *infra*, Chapter 24.

[illegible] In the case of States which have abolished the death penalty in general, but have maintained it in respect of acts committed in time of war or imminent threat of war, the requirements under (1) and (4) apply only to the extent that derogation from them is not justified under Article 15.

[illegible] This Protocol entered into force on 1 July 2002. See *infra*, Chapter 31.

[illegible] Appl. 10479/83, D&R 37 (1984), p. 158 (181-190).

following conviction for a crime for which that penalty is provided by
associated with the appeal procedure must be assumed to be compatible
2 and Article 3 of the Convention read together.

The Commission rejected this argument. It acknowledged that the
must be read as a whole, but it stressed on the other hand that "its respective
must be given appropriate weight where there may be implicit overlap
Convention organs must be reluctant to draw interferences from one text
restrict the express terms of another. As both the Court and the Commis
recognized, Article 3 is not subject to any qualification. Its terms are bald and
This fundamental aspect of Article 3 reflects its key position in the structure
rights of the Convention, and is further illustrated by the terms of Article 15(2)
permit no derogation from it even in time of war or other public
threatening the life of the nation. In these circumstances the Commission
that notwithstanding the terms of Article 2(1), it cannot be excluded that the
stances surrounding the protection of one of the other rights contained in
vention might give rise to an issue under Article 3."[109]

The *Soering* Case concerned the imminent extradition of the applicant
United Kingdom to the United States of America, where he feared being
to death on a charge of capital murder and would be subjected to the 'death
phenomenon'. The Court held that extradition of a person to a country where
the death penalty could not, in itself, raise any issue under either Article 2 or
3 of the Convention. The Court considered that Article 3 could not "have
intended by the drafters of the Convention to include a general prohibition
death penalty since that would nullify the clear wording of Article 2(1)". As
opening for signature in 1983 of Protocol No. 6 showed that "the intention
Contracting Parties as recently as 1983 was to adopt the normal method of amen
of the text in order to introduce a new obligation to abolish capital punishment
of peace and, what is more, to do so by an optional instrument allowing each
choose the moment when to undertake such an engagement."[110] The Court
however, that the manner in which the death penalty is imposed or execu
personal circumstances of the condemned person and a disproportionality
gravity of the crime committed, as well as the condition of the detention must
such that an inhuman treatment in the sense of Article 3 arises.[111]

[109] *Ibidem*, p. 184. For further details, see the discussion of Article 3, *infra* 7.6.2.

[110] Judgment of 7 July 1989, para. 103.

[111] *Ibidem*. See also the discussion in this respect in connection with Art. 3, *infra* 7.6.2.

6.5.2 MORE FORCE THAN ABSOLUTELY NECESSARY

In the second paragraph three cases of deprivation of life are mentioned which also do not fall under the prohibition of the first paragraph. These are cases where deprivation of life results from the use of force for a given purpose. This is, however, subject to the condition that the force used 'is no more than absolutely necessary'. There must, therefore, be proportionality between the measure of force used and the purpose pursued, which moreover must be among the purposes mentioned in the second paragraph. Thus, for instance, the use of force in the case of an arrest, where the arrested person neither uses force nor attempts to flee, but only refuses to furnish certain data, will not be proportional and consequently cannot constitute a justification for a resulting deprivation of life. Moreover, the words 'absolutely necessary' have to be interpreted in such a way that there must also be some proportionality between the force used and the interest pursued. Thus, the use of force resulting in death will not be justified in the case of the escape of a prisoner, or to effect an arrest, when no serious danger is reasonably to be feared from the person concerned.

When the widow of a man killed by the police during a riot complained of a breach of Article 2 by the Belgian State, the Commission declared her complaint to be 'manifestly ill-founded', arguing that it was a case of lawful self-defence of a policeman who felt himself threatened, while there was no reason to assume that the latter had intended to kill the man.[112] By the latter argument the Commission obviously referred to the fact that the prohibition of deprivation of life in the first paragraph of Article 2 speaks of 'intentionally'. Since there was no question of intent in the case under discussion, in the Commission's reasoning there was no need to examine whether the force used was absolutely necessary for one of the purposes mentioned in the second paragraph. However, in this way the Commission largely deprived the second paragraph of its meaning. In fact, in the cases mentioned in the second paragraph the killing will seldom be intentional, but on the contrary will be the unintended result of the force used for a different purpose. This is also evident from the words 'when it results from the use of force'. It has, therefore, to be presumed that the function of the second paragraph is not merely to impose a restriction on the prohibition in the second sentence of the first paragraph. If the latter was intended, it would have been more appropriate to add the cases, mentioned in the second paragraph, to the exception of capital punishment in the first paragraph, or to refer expressly to the second sentence of the first paragraph in the second paragraph. Instead, the second paragraph contains the words 'in contravention of this Article', which imply at the same time a reference to the first sentence of the first paragraph and the general protection of the right to life contained therein. The correct interpretation, therefore, seems to be that the second paragraph prohibits any use by the authorities of force in such a

[112] Appl. 2758/66, *X v. Belgium*, Yearbook XII (1969), p. 174 (192).

measure or form that it results in death, with as the only exceptions
mentioned there and irrespective of the question whether the result was
not.

This interpretation was indeed adopted by the Commission in its deci
Stewart Case. The case concerned the death of a boy as a consequence of
caused by a plastic baton, fired by a British soldier during a riot in Northern
The Commission had to examine whether the death of the boy was a cons
the use of force contrary to Article 2. The British Government submitted tha
2 extends only to intentional acts and has no application to negligent or
acts". The Commission, however, adopted the broader view that the sphere
tection afforded by Article 2 goes beyond the intentional deprivation of life.
of the object and purpose of the Convention the Commission was of the opi
it could not accept another interpretation. The text of Article 2, read as a whole
cates in the Commission's opinion that paragraph 2 does not primarily defi
tions where it is permitted intentionally to kill an individual, but situations
use of violence is permitted, which may then, as an unintentional consequence
in a deprivation of life. This use of force has to be absolutely necessary for one
purposes in subparagraphs (a), (b) or (c). With regard to this last condi
Commission held, with reference, *inter alia*, to the *Sunday Times* Case, th
'necessary' implies a 'pressing social need'; (2) the 'necessity test' include
assessment as to whether the interference with the Convention right was propor
to the legitimate aim pursued; and (3) the qualification of the word 'neces
Article 2(2) by the adverb 'absolutely' indicates that a stricter and more
test of necessity must be applied. This led the Commission to the conclus
Article 2(2) permits the use of force for the purposes enumerated in (a), (b)
under the condition that the employed force is strictly proportionate to the a
ment of the permitted purpose. In assessing whether this condition is fulfilled
must be had to "the nature of the aim pursued, the dangers to life and limb
in the situation and the degree of risk that the force employed might result
life".[113]

The Commission followed the same line of reasoning in a case where a
Northern Ireland had been shot by soldiers as he attempted to drive round a
checkpoint in a stolen car. In the circumstances of the case and having regard
background of events in Northern Ireland, which was facing a situation in
killings had become a feature of life, the soldiers had reasons to believe that

[113] Appl. 10044/82, D&R 39 (1985), p. 162 (169-171). See also Appl. 9013/80, *Farrell v. the Kingdom*, Yearbook XXV (1982), p. 124 (143); Appl. 16734/90, *Dujardin v. France*, D&R 7 p. 236 (243).

dealing with terrorists. Therefore, the use of force was justified in the terms of the second paragraph of Article 2.[114]

In the *McCann* Case the Court also applied a very strict proportionality test. The Court held that Article 2, which safeguards the right to life and sets out the circumstances when deprivation of life may be justified, ranks as one of the most fundamental provisions in the Convention, from which no derogation is permitted. Together with Article 3 it also enshrines one of the basic values of the democratic societies making up the Council of Europe. The circumstances in which deprivation of life may be justified must, therefore, be strictly construed. The object and purpose of the Convention as an instrument for the protection of individual human beings also requires that Article 2 be interpreted and applied so as to make its safeguards practical and effective.[115] The text of Article 2, read as a whole, demonstrates that it covers not only intentional killing but also the situations where it is permitted to 'use force' which may result, as an unintended outcome, in the deprivation of life. The deliberate or intended use of lethal force is, however, only one factor to be taken into account in assessing its necessity. Any use of force must be no more than 'absolutely necessary' for the achievement of one or more of the purposes set out in sub-paragraphs (a) to (c). This term indicates that a stricter and more compelling test of necessity must be employed from that normally applicable when determining whether State action is 'necessary in a democratic society' under paragraphs 2 of Articles 8 to 11 of the Convention. Consequently, the force used must be strictly proportionate to the achievement of the permitted aims.[116] In the light of the importance of the protection afforded by Article 2, the Court must subject deprivations of life to the most careful scrutiny, taking into consideration not only the actions of State agents but also all the surrounding circumstances.

In the *McCann* Case the British, Spanish and Gibraltar authorities were aware that the Provisional IRA was planning a terrorist attack on Gibraltar. The intelligence assessment of the British and Gibraltar authorities was that an IRA unit (which had been identified) would carry out an attack by means of a car bomb which would probably be detonated by a remote control device. It was decided that the three suspects should be arrested. Soldiers of the SAS in plain clothes were standing by for that purpose. Allegedly thinking that the three suspects were trying to detonate remote control devices, the soldiers shot them at close range. No weapons or detonator devices

[114] Appl. 17579/90, *Kelly v. the United Kingdom*, D&R 74 (1993), p. 139 (146-147).

[115] Judgment of 27 September 1995, paras 146-147. See also the judgment of 9 October 1997, *Andronicou and Constantinou*, para. 171; judgment of 28 July 1998, *Ergi*, para. 79; judgment of 22 June 2001, *Salman*, paras 97-98; judgment of 10 July 2001, *Avşar*, para. 390; judgment of 18 June 2002, *Orhan*, para. 325; judgment of 17 February 2004, *Ipek*, para. 163.

[116] Judgment of 27 September 1995, *McCann*, paras 148-149; judgment of 27 June 2000, *Ilhan*, para. 74; judgment of 20 December 2004, *Makaratzis*, para. 56.

were found on the bodies of the three suspects. The car which had been parked of the suspects was revealed on inspection not to contain any explosive device. The Court accepted that the soldiers believed that it was necessary to shoot the in order to prevent them from detonating a bomb and causing serious loss of actions which they took, in obedience to superior orders, were thus pre absolutely necessary in order to safeguard innocent lives. The Court held that of force by agents of the State in pursuit of one of the aims delineated in para 2 of Article 2 may be justified under this provision where it is based on an honest which is perceived, for good reasons, to be valid at the time, but which subsequently turns out to be mistaken. Having regard to the dilemma confronting the soldiers in the circumstances of the case, the reactions of the soldiers did not, in those give rise to a violation of Article 2.[117]

In connection with the control and organisation of the operation, the Court observed that it had been the intention of the authorities to arrest the suspects at appropriate stage and that evidence had been given at the inquest that such procedures had been practised by the soldiers and that efforts had been made to find a suitable place to detain the suspects after their arrest. The Court questioned, however, why the three suspects had not been arrested at the border immediately on their entry in Gibraltar and why the decision was not taken to prevent them from entering Gibraltar if they were believed to be on a bombing mission. Having had the benefit of warning of the terrorists' intentions, it would certainly have been possible for the authorities to have mounted an arrest operation. The security services and the police authorities had photographs of the three suspects, knew their names, as well as their aliases, and would have known what passports to look for. The Court further noted that the authorities had made a number of key assessments, in particular, that the terrorists would not use a blocking car; that the bomb would be detonated by a remote controlled device; that the detonation could be effected by the pressing of a button; that it was likely that the suspects would detonate the bomb if challenged; that they would be armed and would be likely to use their arms if confronted. In the event, each of these crucial assumptions, apart from the terrorists' intention to carry out an attack, turned out to be erroneous. In the Court's view insufficient allowances appeared to have been made for other assumptions. A series of working hypotheses were converted by the authorities to the soldiers as certainties, thereby making the use of force unavoidable. In the Court's view, the above failure to make provision for the margin of error had to be considered in combination with the training of the soldiers to continue shooting once they opened fire until the suspect was dead. As noted by the coroner in the inquest proceedings, all four soldiers shot to kill the suspects. Against this background the authorities were bound by their obligation to respect the right to life of the suspects to exercise the greatest of care in evaluating the informa-

[117] Judgment of 27 September 1995, para. 200.

their disposal before transmitting it to soldiers whose use of firearms automatically involved shooting to kill. This failure by the authorities suggested a lack of appropriate care in the control and organisation of the arrest operation. In sum, the Court was not persuaded that the killing of the three terrorists constituted a use of force which was no more than absolutely necessary in defence of persons from unlawful violence within the meaning of Article 2(2)(a). There thus had been a breach of Article 2.[118]

In the *İlhan* Case the applicant alleged that his brother had been unlawfully subjected to a life-threatening attack by gendarmes and that the authorities had failed to carry out an adequate and effective investigation into the attack. He argued that there had been a breach of Article 2 of the Convention. The Court recalled that the force used against Abdüllatif İlhan was not in the event lethal. This does not exclude an examination of the applicant's complaints under Article 2. In three previous cases the Court had examined complaints under this provision where the alleged victim had not died as a result of the impugned conduct.[119] In the *Osman* Case the applicant had been shot and seriously injured when a man fired a shotgun at close range at him and his father. His father had died. The Court concluded on the facts of that case that the United Kingdom authorities had not failed in any positive obligation under Article 2 to provide protection of their right to life within the meaning of the first sentence of Article 2.[120]

In the *Yaşa* Case the applicant was shot in the street by an unknown gunman, receiving eight bullet wounds but surviving. The Court, finding that the authorities had not failed to protect the applicant's life, held nonetheless that they had failed to comply with the procedural obligation under Article 2 to conduct an effective investigation into the attack.[121]

In the *İlhan* Case the Court noted that Abdüllatif İlhan suffered brain damage following at least one blow to the head with a rifle butt inflicted by gendarmes who had been ordered to apprehend him during an operation and who kicked and beat him when they found him hiding in some bushes. Two contemporaneous medical reports identified the head injury as being of a life-threatening character. This had left him with a long-term loss of function. The seriousness of his injury was, therefore, not in doubt. However, the Court was not persuaded in the circumstances of this case that the use of force applied by the gendarmes when they apprehended Abdüllatif İlhan, was of such a nature or degree as to breach Article 2 of the Convention. Nor did any separate issue arise in this context concerning the alleged lack of prompt

[118] *Ibidem*, paras 206-213.
[119] Judgment of 27 June 2000, para. 75.
[120] Judgment of 28 October 1998, paras 115-122.
[121] Judgment 22 September 1998, paras 92-108.

medical treatment for his injuries. It followed that there had been no v
Article 2 of the Convention.[122]

The *Andronicou and Constantinou* Case concerned the death of a coupl
armed intervention by a unit of the Special Police Forces ("MMAD"). Fo
domestic dispute between Lefteris Andronicou and Elsie Constantinou, the
called by neighbours to the flat which they shared. Mr Andronicou was
armed and was apparently holding Ms Constantinou against her will. The
a lengthy period of negotiations involving, among others, senior police
Andronicou's doctor and members of Ms Constantinou's family. Throug
afternoon, efforts were made to persuade him to release Ms Constantinou. T
of Police decided to approve a MMAD rescue plan. Earlier he had telep
Minister of Justice, who had left the decision to the police authori
post-mortem examination found that death was caused by a shot fired
submachine gun. As regards the planning and control the Court held that
concern should be to evaluate whether in the circumstances the planning and
of the rescue operation showed that the authorities had taken appropriate
ensure that any risk to the lives of the couple had been minimised and that th
not negligent in their choice of action. Within the framework of this evalua
Court had particular regard to the context in which the incident occurred a
to the way in which the situation developed over the course of the day. As fa
context was concerned the Court stated that the fact that the kidnapper was
taken together with the fact that the woman was constantly shouting for hel
the State's special armed forces every right to enter the apartment where the
was being held and to use force in order to free her and to arrest the kidnap
addition, the armed forces where strictly instructed as to when and in what w
their weapons. Moreover, the State never intended to use weapons; in fa
authorities were very anxious to avoid any harm to the couple. The officers f
the kidnapper dead were justified in their belief that it was necessary to kill
order to save the life of the woman and their own lives. Therefore, the use
under Article 2(2) is justified where it is based on an honest belief which is pe
for good reasons, to be valid at the time but subsequently turns out to be mi
To hold otherwise, according to the Court, would impose an unrealistic bu
the State and its law-enforcement personnel in the execution of their duty, in
the officers were entitled to open fire for the purpose of saving lives and to
measures which they honestly and reasonably believed were necessary to el
any risk. Furthermore, the accuracy of the officers' fire was impaired thro
kidnapper's action in clinging on to the woman and thereby exposing her
Therefore, there was no breach of Article 2 (2) (a) of the Convention.[123]

to life of the suspects to exercise the pre

[122] Judgment of 27 June 2000, *Ilhan*, paras 77-78.

[123] Judgment of 9 October 1997, paras 183-186.

In the *Gülec* Case the Court held again that the use of force may be justified under
para. (2)(c) of Article 2, provided that a balance is struck between the aim pursued
and the means employed to achieve it. The gendarmes had used a very powerful
weapon, since they did not have any lighter weapons available to them. The lack of
such lighter equipment was all the more incomprehensible and unacceptable because
the province in which the demonstration in question took place, was a region in which
a state of emergency had been declared and where at that time disorder could have
been expected. As to the question of whether there were armed terrorists among the
demonstrators, the Court noted that the Government produced no evidence to support
that assertion. In the first place, no gendarme sustained a bullet wound either in the
place where the applicant's son died or in other places passed by the demonstration.
Secondly, no weapons or spent cartridges supposed to have belonged to PKK members
were found at the spot. Moreover, prosecutions brought in the Diyarbakir National
Security Court against the owners of thirteen rifles confiscated after the incidents, from
which spent cartridges had been collected by the security forces, ended in acquittals,
because the defendants had not taken part in the events in issue. In conclusion, the
Court considered that the force used to disperse the demonstrators, which caused the
death of Ahmet Güleç, was not absolutely necessary within the meaning of Article 2.[124]

In the *Nachova* Case the applicants complained that their relatives had been
deprived of their life in violation of Article 2(2) of the Convention, as they had died
as a result of deficient law and practice, which permitted the use of lethal force without
absolute necessity, and thus violated Article 2(1) per se. The applicants' relatives had
been fatally shot by police officers in an operation to effect their lawful arrest.
Considering the circumstances of the case the Court noted that the two men shot had
escaped from detention, where they had been serving short sentences for being absent
without leave from compulsory military service. They had escaped without using
violence, simply by leaving their place of work, which was outside of the detention
facility. Neither man was armed or represented a danger to the police officers or to
third parties, as neither man had a previous record of violence. Against this back-
ground the Court considered that it was in no circumstances 'absolutely necessary'
within the meaning of Article 2(2) to use firearms to arrest a person suspected of a
non-violent offence who was known not to pose a threat to life or limb, even where
the failure to do so might have resulted in the opportunity to arrest the fugitive being
lost.

The Court further took notice of evidence suggesting that automatic rifles had been
used in place of handguns, that the fugitives had been shot while attempting to
surrender and that at no point had the police officers attempted to minimise the risk
of loss of life. Observing in a broader context that relevant national regulations on the
use of firearms by the police were not published, did not make the use of firearms

[124] Judgment of 27 July 1998, paras 71-73.

dependant on an assessment of the surrounding circumstances, and most [illegible] did not require an evaluation of the nature of the offence committed by [illegible] and of the threat that he or she posed, the Court concluded that there [illegible] violation of Article 2 of the Convention. The Court was furthermore [illegible] differentiate this case from earlier judgments in which the use of firearms [illegible] to have been justified. All of these other cases concerned situations where [illegible] involved had acted in the belief that there was a threat of violence or [illegible] apprehend fugitives suspected of violent offences.[125]

In the *Makaratzis* Case the applicant complained that the police [illegible] pursued him used excessive firepower against him, putting his life at risk, and [illegible] authorities failed to carry out an adequate and effective investigation into [illegible] dent. The applicant had been chased by a large number of police officers [illegible] made repeated use of revolvers, pistols and submachine guns. According to [illegible] it was clear from the evidence adduced before it that the police had used their [illegible] in order to immobilise the applicant's car and effect his arrest, this being [illegible] instances contemplated by the second paragraph of Article 2. Having regard [illegible] circumstances of the case and in particular to the degree and type of force [illegible] Court concluded that, irrespective of whether or not the police had actually [illegible] to kill him, the applicant had been the victim of conduct which, by its very nature, put his life at risk, even though, in the event, he had survived. Article 2 was applicable.[126] Although the Greek State had since passed a new law in 2003 regulating the use of firearms by the police, at the relevant time the applicable legislation dated from the Second World War when Greece had been occupied by German armed forces. Greek law did not contain any other provisions regulating the use of weapons by police actions or laying down guidelines on planning and control of police operations. Having regard to the criminal conduct of the applicant and to the climate at the time marked by terrorist actions against foreign interests, the Court accepted that the use of force against him had been based on an honest belief which had been perceived, for good reasons, to be valid at the time. However, the Court was struck by the [illegible] way in which the firearms had actually been used by the police and serious questions arose as to the conduct and the organisation of the operation. While accepting that the police officers who had been involved in the incident, had not had sufficient time to evaluate all the parameters of the situation and to carefully organise their operation, the Court considered that the degeneration of the situation had largely been due to the fact that at that time neither the individual police officers nor the chase, as a collective police operation, had had the benefit of the appropriate structures which should have been provided by domestic law and practice. At the time the [illegible]

125 Judgment of 26 February 2004, para. 105; judgment of 6 July 2005 (Grand Chamber), para. 119.

126 Judgment of 20 December 2004, paras 50-55.

weapons by State officials had still been regulated by an obsolete and incomplete law [illegible] a modern democratic society. The system in place had not afforded to law-enforcement officials clear guidelines and criteria governing the use of force in peacetime. The police officers concerned had thus enjoyed a greater autonomy of action and had been able to take unconsidered initiatives, which would probably not have been the case had they had the benefit of proper training and instructions. Consequently, the Court found that the Greek authorities had failed to comply with the positive obligation to put in place an adequate legislative and administrative framework and had not done all that could be reasonably expected of them to afford to citizens the level of safeguards required by Article 2. Accordingly, the Court held that there had been a violation of Article 2 of the Convention.[127]

6.6 THE RIGHT TO LIFE IS NON-DEROGABLE

Article 2 has been included in the list of articles from which under Article 15(2) no derogation is permitted in any circumstances; it belongs to the so-called 'non-derogable' rights.[128] Consequently, as was correctly submitted by the Irish Government in the case of *Ireland v. the United Kingdom*, the British declarations addressed to the Secretary General, announcing that with respect to Northern Ireland measures derogating from the Convention had been taken, could not be invoked against accusations of violation of Article 2.[129]

In the *McCann* Case the Court held that Article 2 ranks as one of the most fundamental provisions in the Convention, from which no derogation is permitted. Together with Article 3 it also enshrines one of the basic values of the democratic societies making up the Council of Europe. The circumstances in which deprivation of life may be justified must, therefore, be strictly construed. The object and purpose of the Convention as an instrument for the protection of individual human beings also requires that Article 2 be interpreted and applied so as to make its safeguards practical and effective.[130]

127 *Ibidem*, paras 61-72.

128 Article 3 of Protocol No. 6 and Article 2 of Protocol No. 13 concerning the abolition of the death penalty also prohibits any derogation from Article 15 of the Convention.

129 Appl. 5310/71, Yearbook XV (1972), p. 76 (96).

130 Judgment of 27 September 1995, para. 146; See also the judgment of 27 June 2000, *Salman*, para. 97; judgment of 9 October 1997, *Andronicou and Constantinou*, para. 171; judgment of 13 June 2002, *Anguelova*, para. 110.

CHAPTER 7

FREEDOM FROM TORTURE AND OTHER INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT (Article 3)

REVISED BY BEN VERMEULEN

CONTENTS

7.1 TEXT OF ARTICLE 3

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

7.2 TORTURE; INHUMANT TREATMENT OR PUNISHMENT; DEGRADING TREATMENT PUNISHMENT

Article 3 undoubtedly is one of the core provisions of the Convention. It [illegible] submitting a person to torture, inhuman treatment or punishment, and [illegible] treatment or punishment. The distinction between the notion of torture [illegible] inhuman or degrading treatment or punishment "derives principally from a [illegible] in the intensity of the suffering inflicted."[1] As the Commission stated in [illegible] the *Greek* Case: "It is plain that there may be treatment to which all these [illegible] apply, for all torture must be inhuman and degrading treatment, and inhuman [illegible] ment also degrading." Starting from the concept of inhuman treatment, the [illegible] sion elaborated the following specifications: "The notion of inhuman treatment [illegible] at least such treatment as deliberately causes severe suffering, mental or [illegible] which, in the particular situation, is unjustifiable. The word 'torture' is often [illegible] describe inhuman treatment, which has a purpose, such as the obtaining of [illegible] mation or confession, or the infliction of punishment, and is generally an aggrava[illegible] form of inhuman treatment.[2] Treatment or punishment of an individual may be [illegible] to be degrading if it grossly humiliates him before others or drives him to act [illegible] his will or conscience."[3] In the *Greek* Case the Commission came to the conclu[illegible] that it had been established that in several individual cases torture or ill-treatment [illegible] been inflicted, that there had been a practice of torture and ill-treatment by the [illegible] Security Police and that the conditions in the cells of the Security Police building [illegible] contrary to Article 3.[4]

In its report in *Ireland v. the United Kingdom* the Commission based itself [illegible] on this definition. In doing so, it held unanimously that the challenged [illegible] techniques of interrogation – obliging the interrogated persons to stand for [illegible] period on their toes against the wall, covering their heads with black hoods, subject[illegible] them to constant intense noise, depriving them of sleep and sufficient food and [illegible] – constituted torture and inhuman treatment in the sense of Article 3.[5]

However, in the same case the Court reached the conclusion that these techniq[illegible] of interrogation did involve inhuman treatment, but not torture. It mentioned [illegible] distinctive element that by the term 'torture' a special stigma is attached to "delibe[illegible] treatment causing very serious and cruel suffering",[6] and held that the particular acts complained of "did not occasion suffering of the particular intensity and cruelty implied by the word torture as so understood".[7] In addition to the severity of this treatment there must, according to the Court, be a purposive element, as has been recognised in the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which defines torture in terms of the intentional infliction of severe pain or suffering.[8]

In the *Aksoy* Case the Court, referring to the qualification in the *Ireland v. the United Kingdom* judgment, for the first time found that treatment had to be described as torture. It concerned an applicant who was subjected to 'Palestinian hanging': he was stripped naked, with his arms tied together behind his back, and suspended by the arms. The Court argued that "this treatment could only have been deliberately inflicted; indeed, a certain amount of preparation and exertion would have been required to carry it out. It would appear to have been administered with the aim of obtaining admissions or information from the applicant. In addition to the severe pain which it must have caused at the time, the medical evidence shows that it led to a paralysis of both arms which lasted for some time [...]. The Court considers that this treatment was of such a serious and cruel nature that it can only be described as torture."[9]

In the *Aydin* Case the Court concluded that the accumulation of acts of physical and mental violence inflicted on the applicant and the especially cruel act of rape amounted to torture, considering that "rape of a detainee by an official of the State must be considered to be an especially grave and abhorrent form of ill-treatment given the ease with which the offender can exploit the vulnerability and weakened resistance of his victim. Furthermore, rape leaves deep psychological scars on the victim which do not respond to the passage of time as quickly as other forms of physical and mental violence. The applicant also experienced the acute physical pain of forced penetration, which must have left her feeling debased and violated both physically and emotionally."[10]

In the *Selmouni* Case the Court again concluded that the physical and mental violence inflicted on the applicant caused severe pain and suffering, and was so serious and cruel that it amounted to torture. The body of the applicant was covered with a large number of blows, he was dragged along by his hair, had to run along a corridor

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1 Judgment of 18 January 1978, *Ireland v. the United Kingdom*, para. 167.

2 Cf. Article 1 of the Declaration on the protection of all persons from being subjected to torture and other cruel, inhuman or degrading treatment or punishment, UNGA Res. 3452 (XXX) of 9 December 1975: "Torture constitutes an aggravated and deliberate form of cruel, inhuman and degrading treatment or punishment".

3 Report of 5 November 1969, *The Greek Case*, Yearbook XII (1969), p. 186.

4 *Ibidem*, pp. 503-505.

5 Report of 25 January 1976, B.23/I (1976-1978), p. 411.

6 Cf. also the judgment of 18 December 1996, *Aksoy*, para. 63.

7 Judgment of 18 January 1978, *Ireland v. the United Kingdom*, para. 167.

8 Judgment of 27 June 2000, *Salman*, para. 114.

9 Judgment of 18 December 1996, para. 64. The Court's interpretation of the notion of "torture" probably has been inspired by the definition of "torture" in Article 1 of the 1984 UN Convention against torture and other cruel, inhuman or degrading treatment or punishment. Cf. also the judgment of 27 June 2000, *Salman*, para. 114.

10 Judgment of 25 September 1997, paras 83 and 86.

with police officers positioned at either side to trip him up, had to [illegible] officer's penis, was urinated upon and was threatened with a blowlamp [illegible]

In the *Ilaşcu* Case the applicant had spent a very long period on death [illegible] tainty and fear of execution, and while this sentence had no legal basis [illegible] he was detained in very strict isolation, his cell was unheated and had no [illegible] or ventilation, he was deprived of food as a punishment, could take shower [illegible] rarely and did not receive appropriate health care. The Court concluded that [illegible] sentence coupled with the harsh conditions he was living in were particularly [illegible] and cruel so that they could be considered to amount to torture.[12]

Finally, in the *Krastanov* Case the Court found that the treatment was [illegible] but that it could not be qualified as torture, because it did not appear to be [illegible] on the applicant intentionally for the purpose of, for instance, making him [illegible] or breaking his physical and moral resistance, and because it lasted only for a [illegible] period of time.[13]

The difference between inhuman treatment or punishment and degrading [illegible] or punishment is likewise one of gradation in the suffering inflicted, though it [illegible] be kept in mind that the Court does not always draw a sharp distinction and [illegible] qualifications such as 'inhuman *and* degrading treatment'.[14] In the *Kudla* Case the Court held that it "has considered treatment to be 'inhuman' because, *inter alia*, [illegible] premeditated, was applied for hours at a stretch and caused either actual bodily [illegible] or intense physical or mental suffering. It has deemed treatment to be 'degrading' [illegible] because it was such as to arouse in the victims feelings of fear, anguish and inferiority [illegible] capable of humiliating and debasing them."[15]

Inhuman treatment can take many forms. For instance, in the *Selçuk and Asker* Case the Court held that the destruction of the applicant's homes, considering their personal circumstances, caused them suffering of sufficient severity to be classified as inhuman treatment. The applicants were 54 and 60 years old at that time and had lived in the village all their lives. The destruction of their homes and most of their property forced them to leave their village. The destruction was premeditated and carried out without respect for the feelings of the applicants: they were taken unprepared to watch the burning of their homes, their safety was not adequately secured, their protests were ignored and no assistance was provided afterwards. The Court considered that the destruction had the purpose of preventing their homes being used by [illegible] as a discouragement to others, this would not provide a justification for [illegible] treatment.[16]

In the *Tyrer* Case the Court held "that the suffering occasioned must attain a [illegible] level before a punishment can be classified as 'inhuman' within the meaning [illegible]".[17] The complaint concerned the punishment of caning for certain offences, [illegible] was provided by law and actually applied in the Isle of Man to boys between [illegible] and seventeen. The Court concluded, in conformity with the opinion of the Commission, that this did not constitute torture or inhuman punishment.[17] Then it examined whether the punishment was to be considered degrading. Assuming that every [illegible] punishment involves an element of degradation, the Court indicated as a distinctive [illegible] element of degrading punishment the degree of humiliation, which must then be [illegible] assessed according to the circumstances of each separate case, in particular "the nature [illegible] and context of the punishment itself and the manner and method of its execution."[18] [illegible] current views were decisive, rather then the views at the moment the Convention was [illegible] drawn up, since "the Convention is a living instrument which (...) must be interpreted [illegible] in the light of present-day conditions".[19] Having regard to all the circumstances, the Court, according particular weight to the fact that physical force was used by a com[illegible] against a stranger in an institutionalized form, concluded that the punishment concerned [illegible] was degrading.[20]

As may be gathered from the *Tyrer* Case, a serious degree of humiliation or debasement can be an important argument to qualify a certain treatment or punishment as degrading. Publicity can be a relevant factor to assess whether a punishment is degrading, but the absence of publicity will not necessarily mean that the punishment is not degrading, because the victim can be humiliated in his own eyes.[21] So, in a number of cases the Commission held that there is question of a degrading treatment or punishment of the person concerned "if it grossly humiliates him before others or drives him to act against his will or conscience".[22]

In the *Tyrer* Case the Court held that humiliation or debasement of a particular level may be regarded as 'degrading'.[23] In the *Albert and Le Compte* Case it ruled that

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11 Judgment of 28 July 1999, paras 102-105.

12 Judgment of 8 July 2004, paras 435-440.

13 Judgment of 30 September 2004, para. 53.

14 Cf. the judgment of 27 August 1992, *Tomasi*, para. 115; judgment of 4 December 1995, *Ribitsch*, para. 36; report of 7 March 1996, *Mentes, Turhalli, Turhalli and Uvat*, para. 190 (burning of the applicants' homes by security forces amounts to "inhuman and degrading treatment within the meaning of Article 3 of the Convention").

15 Judgment of 26 October 2000, para. 92.

16 Judgment of 24 April 1998, paras 77-79. See also the judgment of 8 January 2004, *Ayder*, paras 109-110.

17 Judgment of 25 April 1978, para. 29.

18 *Ibidem*, para. 30.

19 *Ibidem*, para. 31.

20 *Ibidem*, para. 33.

21 *Ibidem*, para. 32.

22 Report of 5 November 1969, *Greece v. the United Kingdom*, Yearbook XII (1969), p. 186; report of 25 January 1976, *Ireland v. the United Kingdom*, B.23-I (1976-1978), p. 388; report of 14 December 1976, *Tyrer*, B.24 (1977-1978), p. 23; and report of 7 December 1978, *Guzzardi*, B.35 (1979-1980), p. 33.

23 Judgment of 25 April 1978, para. 30. Cf. also the judgment of 26 October 2000, *Kudla*, para. 92.

while the withdrawal from the register of the *Ordre des médicins* had ... imposition of a sanction for misconduct and not the debasement of ... it did not amount to a breach of Article 3;[24] and in the *Abdulaziz* ... *Balkandali* Case the Court observed that the difference of treatment ... United Kingdom immigration policy, while it did not denote any ... of respect for the personality of the applicants and was not designed to ... humiliate or debase them, could not, therefore, be regarded as degrading ... Case, however, the Court held that the mere absence of a purpose to ... debase cannot conclusively rule out a finding of violation of Article 3.[25]

A family member of a 'disappeared person' can himself be a victim of ... contrary to Article 3. Relevant elements which should be taken into account ... proximity of the family tie – in that context, a certain weight will attach to ... child bond – the particular circumstances of the relationship, the extent to ... family member witnessed the events in question, the involvement of the ... member in the attempts to obtain information about the disappeared person ... way in which the authorities responded to those enquiries".[27]

The Court often applies as standard of proof that the applicant must show ... beyond reasonable doubt that a violation of Article 3 took place. This is a rather ... criterion. However, "such proof may follow from the coexistence of sufficiently ... clear and concordant inferences or of similar unrebutted presumptions of fact ... conduct of the Parties when evidence is being obtained has to be taken into ... Furthermore, this standard is not always applied; not, for instance in deter... (see 7.5) and in asylum cases (see 7.6.3).

From Article 3 flow some important positive obligations, especially of a proc... nature. In the case that an individual raises an arguable claim that he has been ... ill-treated by the police or other State agents – unlawfully and in breach of Art... – this provision requires that there should be an effective official investigation. ... should be capable of leading to the identification and punishment of those respo... Otherwise the protection of Article 3, "despite its fundamental importance, w... ineffective in practice and it would be possible in some cases for agents of the ... rights of those within their control with virtual impunity".[29] The Court ... held that authorities who are confronted with clear information in official ... concerning a possible violation of Article 3 and are not competent to take ... preventive steps themselves, should bring this information to the attention of ... authorities who are competent in the matter.[30]

... procedural obligation under Article 3 is more or less similar to the obligation ... carry out an effective investigation under Article 2.[31] Under Article 2 there are some ... conditions for the investigation to be effective: it should be independent from ... implicated in the events, all reasonable steps available should be taken to secure ... evidence concerning the incident, including eye witness testimony, forensic evi... or an autopsy, it should be a prompt response and a reasonable expedition and ... must be a sufficient element of public scrutiny.[32]

It is not clear why the Court sometimes discusses flaws in procedures and investi... under Article 3 and sometimes under Article 13.[33] In the *Jabari* Case it found ... the automatic and mechanical application of short time-limits for submitting an ... application violated Article 13 as well as Article 3.[34]

A relevant element in answering the question of whether a family member of a ... disappeared person' is a victim of treatment contrary to Article 3, is the way in which ... authorities respond to inquiries of the family. Here the violation does not lie in ... fact of the 'disappearance' but rather concerns the reactions of the authorities and ... attitudes to the situation when it is brought to their attention.[35]

It has to be noted that in asylum and extradition cases States also have an obligation ... abstain from removing aliens when the Court or its President by way of interim ... measures based on Rule 39 of the Rules of Court has so requested. In general such re... questions concern cases where Article 3 plays a prominent role. In the *Mamatkulov* Case ... Court ruled that by virtue of Article 34 of the Convention States undertake to ... refrain from any act or omission that may hinder the effective exercise of the right of ... application, and that a failure of a State to comply with such interim measures must ... be regarded as preventing the Court from effectively examining the complaint and ...

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24 Judgment of 10 February 1983, para. 22.

25 Judgment of 28 May 1985, para. 91. Cf. also Judgment of 25 February 1982, *Campbell and Cosans*, paras 28-30.

26 Judgment of 19 April 2001, para. 74.

27 Judgment of 8 July 1999, *Çakici*, para. 98; judgment of 17 February 2004, *Ipek*, para. 181; judgment of 31 May 2005, *Akdeniz*, para. 121.

28 See for instance the judgment of 18 January 1978, *Ireland v. the United Kingdom*, para. 161; judgment of 25 September 1997, *Aydin*, para. 73; judgment of 28 July 1999, *Selmouni*, para. 88; judgment of 12 April 2005, *Chamaïev*, para. 338.

29 Judgment of 28 October 1998, *Assenov and Others*, para. 102; judgment of 6 April 2000, *Labita*, para. 131.

30 Judgment of 6 April 2004, *Ahmet Özkan*, para. 359.

31 Judgment of 28 October 1998, *Assenov*, para. 102 ("this investigation, as with that under Article 2"); judgment of 27 July 2004, *Slimani*, para. 31 ("an investigation of that sort (under Article 2) must also be carried out where an individual makes a credible assertion that he has suffered treatment infringing Article 3").

32 Judgment of 4 May 2001, *Kelly*, paras 95-98; judgment of 27 July 2004, *Slimani*, para. 32.

33 Judgment of 27 June 2000, *Ilhan*, paras 91-93; judgment of 31 May 2005, *Yasin Ates*, para. 134.

34 Judgment of 11 July 2000, paras 39-40 and 49-50.

35 Judgment of 8 July 1999, *Çakici*, para. 98; judgment of 17 February 2004, *Ipek*, para. 181; judgment of 31 May 2005, *Akdeniz*, para. 121.

as hindering the effective exercise of his right to complain, and thus as a [illegible] Article 34.[36]

States are also required to take measures designed to ensure that individuals [illegible] their jurisdiction are not subjected to treatment by private individuals [illegible] Article 3. "Children and other vulnerable individuals, in particular, are entitled [illegible] protection, in the form of effective deterrence, against serious breaches of [illegible] integrity."[37] In the Case of *A. v. the United Kingdom* a nine years old boy was [illegible] his stepfather with a garden cane applied with considerable force on more [illegible] occasion. The stepfather was charged with assault, but the jury did not find him [illegible] because the treatment was considered to amount to 'reasonable chastisement'. [illegible] Court held that the law did not provide adequate protection to the boy against [illegible] ill-treatment, which constituted a violation of Article 3.[38] In the Case of *Z. and Others v. the United Kingdom* the four applicant children suffered appalling neglect, [illegible] physical and psychological injury and had been subjected in their home to [illegible] experiences. Although the Court acknowledged the difficult and sensitive [illegible] facing social services and the important countervailing principle of respecting [illegible] preserving family life, it concluded that the failure of the system to protect [illegible] children from serious, long-term neglect and abuse amounted to a violation of Article 3.[39] And although the treatment complained of in the *Costello-Roberts* Case was [illegible] act of a headmaster of an independent school, the State could be held responsible [illegible] under the Convention if that treatment was incompatible with Article 3.[40]

7.3 MINIMUM LEVEL OF SEVERITY

"The borderline between harsh treatment on the one hand and a violation of Article 3 on the other is sometimes difficult to establish."[41] There is no abstract, clear standard for the kinds of treatment and punishment prohibited by Article 3. The question whether treatment or punishment is inhuman or degrading must depend by the circumstances of the case and the prevalent views of the time. Thus, in [illegible] in the *Greek* Case, the Commission considered with respect to the treatment of detainees: "It appears from the testimony of a number of witnesses that [illegible]

[36] Judgment of 6 February 2003, paras 109-111; judgment of 4 February 2005 (Grand Chamber), *Mamatkulov*, para. 128.

[37] Judgment of 23 September 1998, *A. v. the United Kingdom*, para. 22; judgment of 10 May 2001, *Z. and Others v. United Kongdom*, para. 73.

[38] Judgment of 23 September 1998, paras 23-24.

[39] Judgment of 10 May 2001, para. 74.

[40] Judgment of 25 March 1993, para. 28.

[41] Report of 4 May 1989, *McCallum*, para. 77.

[illegible] of treatment of detainees by both police and military authorities is tolerated [illegible] detainees and even taken for granted (...). This underlines the fact that the [illegible] in which prisoners and the public may accept physical violence as being [illegible] nor excessive, varies between different societies and even between [illegible] sections of them."[42] And in its judgment in *Ireland v. the United Kingdom* the Court held: "ill-treatment must attain a minimum level of severity if it is to fall [illegible] the scope of Article 3. The assessment of this minimum is, in the nature of [illegible] relative; it depends on all the circumstances of the case, such as the duration [illegible] treatment, its physical or mental effects and, in some cases, the sex, age and state [illegible] of the victim."[43]

[illegible] a certain qualification is introduced in a norm formulated in absolute terms, [illegible] almost inevitable in the case of the application of an abstract norm, containing [illegible] concepts, to concrete cases. For instance, the question whether a penalty [illegible] or not may depend on the crime committed. "An exceptionally harsh [illegible] for a trivial offence might raise a question under Article 3",[44] while the [illegible] could be acceptable in case of a more serious crime. Likewise a [illegible] for a certain crime may be so out of proportion because of the age or the [illegible] physical condition of the offender that there may be an issue under Article 3, [illegible] such a punishment is entirely justified for others having committed the same [illegible] crime. And an unfair procedure resulting in a sentence may make it inhuman, [illegible] the sentence as such is not.[45]

[illegible] to be stressed, however, that the national authorities are often allowed a wide [illegible] of appreciation. The Commission has held that "the Convention does not [illegible] such any general right to call into question the length of a sentence imposed [illegible] competent court."[46] Only under exceptional circumstances a particular sentence [illegible] raise an issue under Article 3. For instance, the mere fact "that an offence is [illegible] more severely in one country than in another does not suffice to establish [illegible] the punishment is inhuman or degrading".[47] So, although the death penalty has [illegible] been abolished in Western Europe, having regard to Article 2 that expressly [illegible] it, the Court has not yet been prepared to state explicitly that this penalty [illegible] now be considered as an inhuman and degrading punishment within the mea-

[illegible] Report of 5 November 1969, Yearbook XII (1969), p. 501.

[illegible] Judgment of 18 January 1978, para. 162. Cf. also the judgment of 25 April 1978, *Tyrer*, paras 29-30 [illegible] judgment of 7 July 1989, *Soering*, para. 100.

[illegible] Appl. 5871/72, *X. v. the United Kingdom*, Coll. 43 (1973), p. 160 (160).

[illegible] Judgment of 12 March 2003, *Öcalan*, paras 212-213 and judgment of 12 May 2005 (Grand Chamber), *Öcalan*, paras 174-175.

[illegible] Appl. 5871/72, *X. v. the United Kingdom*, D&R 1 (1975), p. 54 (55); Appl. 7057/75, *X. v. Federal Republic of Germany*, D&R 6 (1977), p. 127 (127).

[illegible] Appl. 11017/84, *C. v. Federal Republic of Germany*, D&R 46 (1986), p. 176 (181).

ning of Article 3.[48] However, the legal status of the death penalty has [illegible] considerable evolution since the *Soering* Case. All Contracting States [illegible] Protocol No. 6 concerning abolition of the death penalty, and almost all [illegible] ratified it. Moreover, Protocol No. 13 provides for the abolition of the [illegible] in time of war. Consequently, the Court has adopted the position that "it [illegible] be excluded, in the light of the developments that have taken place in [illegible] the States have agreed through their practice to modify the second sentence [illegible] 2 para. 1 in so far as it permits capital punishment in peacetime. Against [illegible] background it can also be argued that the implementation of the death [illegible] be regarded as inhuman and degrading treatment contrary to Article 3".[49] This [illegible] that the Court may qualify the death penalty as inhumant treatment in the [illegible] However, in the *Öcalan* Case the Court found it not necessary to reach [illegible] conclusion on this point.[50]

In the *Weeks* Case the Court found a sentence of life imprisonment for a [illegible] year-old who had committed an armed robbery, to be not inhuman, albeit with [illegible] reservations: "Having regard to Mr. Weeks' age at the time and to the particular [illegible] of the offence he committed (...), if it had not been for the specific reasons [illegible] for the sentence imposed, one could have serious doubts as to its compatibility [illegible] Article 3 of the Convention, which prohibits, *inter alia*, inhuman punishment [illegible]

In the *Bonnechaux* Case both the Commission and the Committee of Ministers agreed that there was no violation of Article 3 in the case of a 74 year old man suffering from diabetes and cardiovascular disease who had been detained on remand for [illegible] months.[52] More generally, the Commission seemed unwilling, in dealing with the conditions of detention, to attach much importance to developments in penitentiary views.[53]

that the answer to the question whether Article 3 has been violated, although [illegible] on all the circumstances of the case, including such factors as the mental [illegible] on the person concerned, is not entirely dependent on his subjective appreciation [illegible] feelings. So, in the *East African Asians* Case the Commission did not accept [illegible] subjective definition that the treatment of a person is degrading in the sense of [illegible] "if it lowers him in rank, position, reputation or character, whether in his [illegible] or in the eyes of other people", and argued that – given the general purpose [illegible] the provision to prevent interferences with the dignity of man of a particularly [illegible] nature – "an action which lowers a person in rank, position, reputation or [illegible] character can only be regarded as 'degrading treatment' in the sense of Article 3 where [illegible] reaches a certain level of severity".[54] And in *B. v. France* the Commission found that [illegible] situation in which there is a discrepancy between the appearance of a transsexual [illegible] and her identity papers, although creating embarrassment for her in respect of third [illegible] to whom she is forced to reveal her particular situation, does not attain the [illegible] minimum degree of severity for an infringement of Article 3.[55]

The Court has followed the same approach. For instance, in the *Campbell and Cosans* Case, when it had to rule on the application of corporal punishment in British schools, the Court reached the conclusion that in that case it could not be said that degrading treatment was involved, because the corporal punishment had not been actually applied to the children of the two applicants and the gravity of the punisbment and its degrading effect on the person concerned could not therefore be measured. They might have experienced feelings of apprehension, disquiet or alienation, but "these effects fall into a different category from humiliation or debasement".[56] And in the *Marckx* Case the Court held that "while the legal rules at issue probably present aspects which the applicants may feel to be humiliating, they do not constitute degrading treatment coming within the ambit of Article 3."[57]

Thus, like the Commission, the Court is of the opinion that ill-treatment must reach a certain (objective) level of severity in order to fall within the ambit of Article 3.[58] In the *Costello-Roberts* Case the Court once again had to address the issue of corporal punishment in British schools. The applicant was a young boy punished in accordance with the disciplinary rules of his school. The Court distinguished the circumstances of this punishment from those in the *Tyrer* Case which was found to

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48 Judgment of 7 July 1989, *Soering*, para. 103.

49 Judgment of 12 March 2003, paras 195-198; judgment of 12 May 2005 (Grand Chamber), [illegible] paras 164-165.

50 *Ibidem*. It is rather surprising that in the judgment of 12 April 2005, *Chamaiev*, para. 333, [illegible] reaffirmed the position it took in the *Soering* Case, that Article 3 can not be interpreted as [illegible] prohibiting the death penalty because that would nullify the clear wording of Article 2(1).

51 Judgment of 2 March 1987, para. 47.

52 Appl. 8224/78, D&R 15 (1979), p. 211 (241) and Report of 5 December 1979, D&R 18 (1979), p. 100 (148); Resolution DH (80)1, D&R 18 (1980), p. 149.

53 In this connection, see the "Minimum Rules for the Treatment of Prisoners", Resolution [illegible] the Committee of Ministers, European Yearbook XXI (1973), pp. 322-350; and more recently, "European Prison Rules", laid down in Resolution (87)3, adopted by the Committee of Ministers on 12 February 1987. In its decision on Appl. 7341/76, *Eggs*, Yearbook XX (1977), p. 448 (46[illegible]), Commission took the position that "the conditions of detention which in certain aspects [illegible] come up to the standard of the 'Minimum Rules' did not thereby alone amount to inhuman [illegible] degrading treatment". See also Appl. 7408/76, *X. v. Federal Republic of Germany*, D&R 10 (1[illegible]), p. 221 (222), where, on the one hand, the Commission found that the punishment imposed [illegible] applicant was not in conformity with modern views of penitentiary policy, but, on the other [illegible] came to the conclusion that the treatment was not inhuman or degrading.

54 Report of 14 December 1973, D&R 78-A (1994), p. 5 (55). Cf. also *ibidem*, p. 57: "The Commission [illegible] finally recalls its own statement in the First Greek Case that treatment of an individual may be said [illegible] to be 'degrading' in the sense of Article 3 'if it grossly humiliates him before others or drives him [illegible] to act against his will or conscience'. This definition is similar to the indication reached (...) above; in particular, the word 'grossly' indicates that Article 3 is only concerned with 'degrading treatment' which reaches a certain level of severity."

55 Report of 6 September 1990, paras 84-87.

56 Judgment of 25 February 1982, paras 25-30.

57 Judgment of 13 June 1979, para. 66.

58 Judgment of 18 January 1978, *Ireland v. the United Kingdom*, para. 162.

be degrading within the meaning of Article 3. Tyrer was sentenced in a [illegible] to three strokes of the birch on the bare posterior; his punishment was [illegible] three weeks later in a police station where he was held by two policemen [illegible] administered the punishment. Costello-Robert's punishment, on the [illegible] amounted to being slippered three times on his buttocks through his shorts [illegible] shoe by the headmaster in private. In his case the Court found that the minimum of severity required to conclude that Article 3 was violated, was not attained.

In several other cases the Court likewise ruled that the treatment, [illegible] unpleasant or even harsh, did not amount to inhuman or degrading treatment. The situation of Mr. *Guzzardi*, detained on an island, was "undoubtedly unpleasant, irksome"; nevertheless, his treatment did not attain the level of severity [illegible] it falls within the scope of Article 3.[60] The refusal to grant Mr. *Berrehab* a new permit after his divorce and his resulting deportation did not infringe Article 3 as he did not undergo suffering of a degree corresponding to the concepts of "inhuman" or "degrading" treatment.[61] The conditions in which Mrs *López Ostra* and her family lived – near a plant for the treatment of liquid and solid waste, which despite its partial shutdown continued to emit fumes, repetitive noise and strong smells – did not amount to degrading treatment within the meaning of Article 3.[62] And the suffering that Mr. *Popov* might have experienced due to the non-execution of the judgment to give him back his parents' house was insufficient to amount to inhuman and degrading treatment.[63]

7.4 OTHER GENERAL ASPECTS

7.4.1 MENTAL SUFFERING

Both the Commission and the Court have left no doubt about the fact that Article 3 does not refer exclusively to the infliction of physical but also of mental suffering. The Commission defined the latter as covering "the infliction of mental suffering, causing a state of anguish and stress by means other than bodily assault".[64] Even this does not necessarily require a "physical act or condition".[65]

Usually there will be a combination of mental and physical suffering, as may be seen in *X and Y v. the Netherlands*, in which the Commission dealt with the question of mental suffering as a result of the sexual abuse of the victim.[66] There the Commission stated that "mental suffering leading to acute psychiatric disturbances also falls into the category of treatment prohibited by Article 3 of the Convention".[67] However, as was stressed in 7.3, not every measure taken by a public authority that has psychological consequences of any kind for the individual falls within the scope of inhuman treatment, but only such measures as "inflict severe mental or physical suffering on an individual".[68]

7.4.2 INTENTION AND MOTIVE

Does the intention or motive of the acting person to cause physical or mental suffering, or in addition to the suffering inflicted or the humiliation experienced, constitute a necessary element of the types of treatment prohibited in Article 3? It is obvious, for example, that a medically necessary operation or treatment, however painful it may be for the patient, is not to be considered as torture or inhuman or degrading treatment, provided that unnecessary suffering is avoided. So, in the *Herczegfalvy* Case the Court held that mental patients are under the protection of Article 3, but that the "established principles of medicine are (...) decisive in such cases; as a general rule, a measure which is therapeutic cannot be regarded as inhuman or degrading."[69] But, of course, the national courts and the Strasbourg Court must satisfy themselves as to the medical necessity of a particular form of treatment. Thus, a medical experiment may for lack of this necessity infringe Article 3, although the aim is not to inflict

59 Judgment of 25 March 1993, paras. 31-32. The United Kingdom has responded to this by passing legislation to prohibit corporal punishment in schools.

60 Judgment of 6 November 1980, para. 107.

61 Judgment of 21 June 1988, paras. 30-31.

62 Judgment of 9 December 1994, para. 60.

63 Judgment of 18 January 2005, paras 26-27.

64 Report of 5 November 1969, *The Greek Case*, Yearbook XII (1969), p. 461. For the Court, see, *inter alia*, the judgment of 7 July 1989, *Soering*, para. 100.

65 Report in *The Greek Case*, ibidem; report of 14 December 1973, *East African Asians*, D&R 78-A (1994), p. 5 (56). Cf. also the definition of "torture" in Article 1 of the UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment: "the term 'torture' means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person".

66 Report of 5 July 1983, para. 93. In its judgment of 26 March 1985 in that case, para. 34, the Court, having found a violation of Article 8, decided that it was not necessary to examine the case under Article 3 as well.

67 *Ibidem*.

68 Appl. 9171/80, *X. v. Federal Republic of Germany* (not published). See also the judgment of 28 October 2004, *Zengin*, para. 55-57: that the governor has declared that Zengin's husband was a terrorist and was legally killed did not fall within the scope of Article 3.

69 Judgment of 24 September 1992, para. 82.

suffering, but to advance medical science.[70] In the *Herczegfalvy* Case the [illegible] had concluded by unanimous vote that there had been a violation of Art[illegible] the treatment accorded to the applicant, who had been diagnosed as suffering from a mental illness, went beyond what was strictly necessary and extended beyond the period necessary to serve its purpose: he was forcibly administered [illegible] neuroleptics, isolated, and attached with handcuffs to his security bed for [illegible] weeks.[71] Rather surprisingly, the Court, though expressing its worries concerning the length of time during which the handcuffs and security bed were used, considered the necessity test to be met.[72]

In the *Peers* Case the Court held that the absence of a purpose to humiliate or debase, cannot conclusively rule out a finding of degrading treatment under Article 3. Similarly treatment of a detainee which in itself is inhuman does not lose that character through the mere fact that its only motive is the enhancement of security or the fight against crime. As the Court stated in the *Tomasi* Case, the requirements of investigation and the undeniable difficulties inherent in the fight against terrorism can result in limits being placed on the protection by Article 3 to be afforded in respect of the physical integrity of individuals.[74]

It is, therefore, not the intention of the acting person, but the nature of the act and its effect on the person undergoing the treatment which are decisive. Therefore the Court used too general a phrase when it observed in the *Albert and Le Compte* Case that the disciplinary measure of withdrawal of the right to practise, imposed on a doctor, had as its object the imposition of a sanction and not the debasement of personality; not this is decisive but the question raised next by the Court, viz. whether the consequences of the measure adversely affected the doctor's personality in a manner incompatible with Article 3.[75]

7.4.3 CONSENT

It cannot be said in general whether the absence of consent to the treatment on the part of the person in question constitutes a necessary element of the prohibition

[70] See, for example, Appl. 9974/82, *X. v. Denmark*, D&R 32 (1983), p. 282 (283-284), concerning an experiment made with a slightly different instrument, but which did not change the principle of the operation as such. According to the Commission, the operation "cannot be considered as a medical experiment which, if carried out without consent, could constitute a violation of Article 3 of the Convention".

[71] Report of 1 March 1991, paras 245-254.

[72] Judgment of 24 September 1992, para. 83.

[73] Judgment of 19 April 2001, para. 74.

[74] Judgment of 27 August 1992, para. 115; cf. also the judgment of 4 December 1995, para. 38.

[75] Judgment of 10 February 1983, para. 22.

[illegible] evidently it is a relevant factor.[76] The consent of the person concerned [illegible] an act, which would be felt by another to be inhuman or degrading, of [illegible] character. However, experiments and treatments are conceivable which are so [illegible] degrade the human person to such an extent that the person in question, [illegible] his previous consent, may feel himself to be the victim of a violation of [illegible]. And in any case the consent of a particular victim need not bar a complaint [illegible] indirect victim[77] or an abstract complaint by a State concerning a general [illegible]. On the other hand, the absence of consent does not in all cases give an [illegible] character to treatment affecting human integrity. Thus the Commission [illegible] that the enforced administration of medicine to a mentally deranged detainee [illegible] not have that character, since that treatment had been declared medically necessary [illegible] had been confirmed by a court decision.[78] The Court endorsed a similar view [illegible] *Herczegfalvy* Case.[79] However, the will of the person in question, in so far as he [illegible] be deemed capable of expressing it, must weigh heavily, since in principle he must [illegible] himself to decide about his life and body as long as the life and the health of [illegible] are not at stake.

7.5 IMPRISONMENT, DETENTION AND ARREST

It is not surprising that in the Strasbourg case law Article 3 has frequently been an issue in connection with detained persons. Of course, as the Court held in the *Kudla* Case, it cannot be said that the execution of detention on remand in itself raises an issue under Article 3 of the Convention. Nor can that Article be interpreted as laying down a general obligation to release a detainee on health grounds or to place him in a civil hospital to enable him to obtain a particular kind of medical treatment."[80] Nevertheless, a balancing of interests is necessary. In the *Kröcher and Möller* Case the Commission opined that "the question that arises is whether the balance between the requirements of security and basic individual rights was not disrupted to the detriment of the latter."[81] In this case the prison conditions included, *inter alia*, isolation, constant artificial lighting, permanent surveillance by closed-circuit television, denial of access to newspapers and radio and the lack of physical exercise. Although the Commission expressed "serious concern with the need for such measures, their usefulness and their compatibility with Article 3 of the Convention", it concluded that the special conditions imposed on the applicants could not be construed as inhuman or degrading treat-

[76] Appl. 9974/82, *X. v. Denmark*, D&R 32 (1983), p. 282 (283-284).

[77] On this, see *supra*, 1.13.3.5.

[78] Appl. 8518/79, *X. v. Federal Republic of Germany*, D&R 20 (1980), p. 193 (194).

[79] Judgment of 24 September 1992, paras 82-83.

[80] Judgment of 26 October 2000, para. 93.

[81] Report of 16 December 1982, D&R 34 (1983), p. 52.

ment. This conclusion was reached after it had been sufficiently shown [illegible] of the Commission, that these conditions were necessary to ensure [illegible] outside the prison. Furthermore, the applicants were considered dangerous [illegible] alleged to be terrorists and there was a risk of escape and collusion.[82] Other [illegible] have been accepted by the Commission to justify stringent measures are [illegible] dangerous behaviour of the prisoner, the ability to manipulate [illegible] encourage other prisoners to acts of indiscipline, the safety of the applicant [illegible] use of firearms at the time of arrest.[83]

In the *Kudla* Case the Court held that "a State must ensure that a person [illegible] in conditions which are compatible with respect for his human dignity [illegible] manner and method of the execution of the measure do not subject him [illegible] or hardship of an intensity exceeding the unavoidable level of suffering [illegible] detention and that, given the practical demands of imprisonment, his health [illegible] being are adequately secured by, among other things, providing him with the [illegible] medical assistance".[84] The Court further observed that, when assessing conditions [illegible] detention, account has to be taken of the cumulative effects of these conditions [illegible] as the applicant's specific allegations.[85] Attention should be paid to "all the circumstances, such as the size of the cell and the degree of overcrowding, sanitary [illegible] opportunities for recreation and exercise, medical treatment and supervision [illegible] prisoner's state of health".[86] That the detention centre is not adequately funded [illegible] justification: "lack of resources cannot in principle justify prison conditions [illegible] are so poor as to reach the threshold of treatment contrary to Article 3".[87]

As may be concluded from the *Weeks* Case,[88] life imprisonment is not in itself [illegible] of Article 3. Further, the Commission has held that Article 3 can not be [illegible] requiring that an individual serving a lawful sentence of life imprisonment [illegible] that sentence reconsidered by a national authority, judicial or administrative, [illegible] a view to its remission or termination".[89]

It is as yet unclear whether a death penalty in peacetime in itself is contrary to Article 3 (*supra* 7.3). It is at least clear, however, that additional factors may cause a sentence to be contrary to this provision. Relevant factors are "the manner in which a death sentence is imposed or executed, the personal circumstances of the condemned person and a disproportionality to the gravity of the crime committed, as well as the conditions of detention awaiting execution".[90] Moreover, according to the Court, "to subject a person to a death sentence on a person after an unfair trial is to subject that person to treatment contrary to the fear that he will be executed. Having regard to the rejection by the vast majority of the Contracting Parties of capital punishment, which is no longer seen as having any justification or place in a democratic society, the imposition of a capital sentence after an unfair trial must be considered, in itself, to amount to a form of inhuman treatment."[91] Although the Court seems prepared to take into account a moratorium on executions, on the assumption that feelings of fear and anxiety may diminish as time goes on and the moratorium continues in force,[92] Nevertheless, in every single case regard must be had to the likelihood that the sentence in the long run will be implemented.[93]

In cases where the question was raised of whether solitary confinement of a detainee constituted an inhuman treatment, the Commission took the position that such confinement was in principle undesirable, particularly when the prisoner concerned was in detention on remand, and might only be justified for exceptional reasons. For the question of whether an inhuman or degrading treatment is concerned, regard must be had to the surrounding circumstances, including the particular conditions, the stringency of the measure, its duration, the objective pursued and its effects on the person concerned, and also the question of whether a given minimum of possibilities for human contact has been left to the person in question.[94] Absolute sensory isolation combined with complete social isolation can destroy the personality and constitutes an inhuman treatment for which no security requirements can form a justification in view of the absolute character of the right laid down in Article 3.[95] Moreover, the Commission has made a distinction between absolute sensory and social isolation on the one hand, and "removal from association with other prisoners for security, disciplinary and protective reasons" on the other, and has taken the view that the latter form of segregation from the prison community normally does not amount to

82 *Ibidem*, pp. 52 and 57, respectively.
83 See, respectively, Appl. 9907/82, *M. v. the United Kingdom*, D&R 35 (1984), p. 13 (34); Appl. [illegible] *X. v. the United Kingdom*, not published; Appl. 8241/78, *X. v. the United Kingdom*, not published; Appls. 7572/76, 7586/76, 7587/76, *Ensslin, Baader and Raspe*, Yearbook XXI (1978), p. 418 (456).
84 Judgment of 26 October 2000, para. 94; *cf.* the judgment of 24 July 2001, *Valašinas*, para. 102.
85 Judgment of 6 March 2001, *Dougoz*, para. 46.
86 Judgment of 28 October 1998, *Assenov and Others*, para. 135.
87 Judgment of 29 April 2003, *Poltoratskiy*, para. 148.
88 Judgment of 2 March 1987, para. 47.
89 Appl. 7994/77, *Kotälla*, D&R 14 (1979), p. 238 (240); Appl. 15776/89, *B., H. and L.*, D&R 64 (1990), p. 264 (270).
90 Judgment of 7 July 1989, *Soering*, para. 104.
91 Judgment of 12 March 2003, *Öcalan*, para. 207; judgment of 12 may 2005 (Grand Chamber), *Öcalan*, para. 169.
92 Judgment of 11 March 2004, *G.B. v. Bulgaria*, para. 80; judgment of 11 March 2004, *Iorgov*, para. 79. Judgment of 12 March 2003, *Öcalan*, paras 209-210; judgment of 12 May 2005 (Grand Chamber), *Öcalan*, paras. 171-172.
93 Appl. 6038/73, *X. v. Federal Republic of Germany*, Coll. 44 (1973), p. 115 (119); Appl. 6166/73, *Baader, Meins, Meinhof and Grundmann*, Yearbook XVIII (1975), p. 132 (144-146); Appls 7572/76, 7586/76, and 7587/76, *Ensslin, Baader and Raspe*, Yearbook XXI (1978), p. 418 (454-460); report of 16 December 1982, *Kröcher and Möller*, D&R 34 (1983), p. 24 (51-55); judgment of 4 February 2003, *Van der Ven*, para. 51.
94 Appls 7572/76, 7586/76 and 7587/76, *Ensslin, Baader and Raspe*, Yearbook XXI (1978), p. 418 (456).

inhuman or degrading treatment or punishment.[96] In the latter case it is ... to meet prison officers, medical officers, lawyers, relatives etc., and to have ... with the outside world through newspapers, radio and television. Accord... Court in the *Sadak* Case and the *Yurttas* Case, the duration of the isolation ... be taken into account to decide whether this measure is in accordance ... 3.[97] However, in the *Ramirez Sanchez* Case, in which the applicant was ... relative social isolation, because otherwise he could use communication ... outside the prison to re-establish contact with members of his terrorist ... to proselytise other prisoners or prepare an escape, the Court held that "... of its duration (eight years and two months), which in itself is regrettable, ... cant's continued solitary confinement has not, given his age and health ... suffering of the level of severity required to constitute a violation of Article ...

On the other hand, a detention cell may not be overcrowded and ... sufficient sanitary and sleeping facilities.[99] The European Committee for the ... of Torture and Inhuman and Degrading Treatment or Punishment (CPT) ... square metres per prisoner as a desirable guideline. It is not surprising, then, ... Court concluded in the *Kalashnikov* Case that a detention cell where there ... square metres of space per inmate, is severely overcrowded, which in itself ... issue under Article 3.[100] In the *Novoselov* Case the Court concluded that "the ... the detainee was obliged to live, sleep and use the toilet in the same cell with ... other inmates and with less that 1 square metre of personal space was itself ... to cause distress or hardship of an intensity exceeding the unavoidable level of ... inherent in detention".[101] In the *Peers* Case the applicant had to share a cell of ... mately 7 square metres with another inmate. The Court concluded that there ... violation of Article 3 because the applicant had to use the toilet in the presence ... other inmate and had to spend almost the whole 24-hour period practically ...

[96] Report of 25 January 1976, *Ireland v. the United Kingdom*, B.23/I, p. 379; Appls 7572/76, ... and 7587/76, *Ensslin, Baader and Raspe*, Yearbook XXI (1978), p. 418 (456); Appl. 8317/78, ... D&R 20 (1980), p. 44 (82); report of 16 December 1982, *Kröcher and Möller*, D&R 34 (1983), ... (53); Appl. 10263/83, *R. v. Denmark*, D&R 41 (1985), p. 149; Appl. 14610/89, *Treholt*, D&R 71 ... p. 168 (190-191). See for example the decision of 8 June 1999, *Messina*, where the Court ... that the relative social isolation (prevention of meeting prisoners subject to different pri... prevention of receiving visits from persons other than family members and making ... prohibition of recreational and sporting activities and handicraft work in his cell, limited ... outdoor exercise and withdrawal of the right to receive certain foods and objects from ... was in accordance with Article 3 because of the danger that the applicant might re-establish ... with criminal organizations and the risk of bringing dangerous tools into the prison's high ... wing.

[97] Judgment of 8 April 2004, para. 46; judgment of 27 May 2004, para. 48.

[98] Judgment of 27 January 2005, paras 113 and 120.

[99] Judgment of 6 March 2001, *Dougoz*, para. 45. The Court, concluding that Article 3 was ... observed that "it was even impossible for him to read a book because his cell was so over...

[100] Judgment of 15 July 2002, para. 97.

[101] Judgment of 2 June 2005, para. 43.

... in a cell where there was neither ventilation nor a window.[102] In contrast, ... *Kalashnikov* Case no violation of Article 3 was found, because the restricted space ... the sleeping facilities was counterbalanced by the unlimited freedom of movement ... during the day.[103]

... Article 3 imposes an obligation on the State to protect the physical well-being of ... persons deprived of their liberty. Health, age and severe physical disability are amongst ... the most relevant factors to be taken into account.[104] In the *Keenan* Case the Court held that the vulnerability and inability of mentally ill persons had to be taken into account. Treatment of a mentally ill person could be incompatible with Article 3, even though the person may not be able to complain coherently, or to point to any specific ill-effects.[105] In the *Price* Case the Court concluded that to detain a person who was severely disabled, in conditions which were inappropriate to her state of health, constituted degrading treatment.[106] The detention of elderly, sick persons for a prolonged period was discussed in the *Papon* Case, where the Court held that this situation could amount to a violation of Article 3.[107] In the *Mouisel* Case the Court concluded that the treatment of a detainee suffering from cancer amounted to inhuman and degrading treatment, because the prison was scarcely equipped to deal with his illness, while no special measures were taken and he was handcuffed and kept in chains while taken to a hospital.[108]

In a series of cases violation of Article 3 was alleged, because of the adverse effects of the mere fact of being detained on the health of the detainee. In such cases reports by medical experts appear to be of great importance.[109] The question to be answered is whether the (mental) health of the detainee is directly affected by his detention. Furthermore, the frequency of visits by medical staff and medical treatment are taken into account,[110] as well as the question of whether the detainee has sought medical ... [111] However, the latter does not take away the primary responsibility of the authorities for the medical care of the detainees.

In some cases it is not the negative consequences of detention as such on the health of the detainee, but the lack of proper medical care while being detained which is the

[102] Judgment of 19 April 2001, para. 75.

[103] Judgment of 24 July 2001, paras 103 and 107.

[104] Judgment of 14 November 2002, *Mouisel*, paras 38-40.

[105] Judgment of 3 April 2001, paras 111 and 113. See also the judgment of 30 July 1998, *Aerts*, para. 66.

[106] Judgment of 10 July 2001, para. 30.

[107] Decision of 7 June 2001.

[108] Judgment of 14 November 2002, paras 46-48.

[109] See, for example, Appl. 9554/81, *X. v. Ireland* (not published) and the report of 7 October 1981, *B. v. the United Kingdom*, D&R 32 (1983), p. 5 (35).

[110] See for example the report of 8 December 1982, *Chartier*, D&R 33 (1983), p. 41 (57-58); Appl. 21915/93, *Lukanov*, D&R 80-A (1995), p. 108 (128-130); judgment of 29 April 2003, *McGlinchey*, para. 57.

[111] Appl. 9813/82, *X. v. the United Kingdom*, not published.

main issue.[112] In the *Hurtado* Case the Commission found that it constitu... of Article 3 not to bring the applicant to a doctor for a medical examinat... days after his arrest in the course of which he suffered a fracture of one of... In the *Nevmerzhitsky* Case the applicant contracted various skin diseases ... detained in an unsanitary environment with no respect for basic hygiene ... concluded that these conditions had a detrimental effect on his health and ... and amounted to degrading treatment. Furthermore, the force-feeding of ... without any medical justification was considered to amount to torture.

In two cases the Commission declared the applications admissible of ... detained in a mental hospital who complained of violation of Article 3 on ... the treatment and living conditions in the hospitals in question. It held ... sight these complaints were sufficiently well-founded to justify further ... a case which concerned the question of whether a detainee who was not ... deranged, could be detained in a closed ward of a mental hospital, a friendly ... was reached with the respondent Austrian Government; the Minister of Justice ... a general order that was to prevent such treatment in the future.[116] The placing ... a mentally deranged person in a normal prison was considered acceptable by the ... mission after it had found that the person in question received adequate care. ... Segregation of accused persons from convicted persons is not prescribed ... Convention, nor does it ensue *per se* from Article 3.[118]

In subsection 7.2 it was mentioned that the Court often applies a 'beyond ... nable doubt'-test as standard of proof, but that "such proof may follow from ... coexistence of sufficiently strong, clear and concordant inferences or of ... unrebutted presumptions of fact. The conduct of the Parties when evidence ... has to be taken into account."[119] It seems that this rather strict standard is ... when detention conditions are concerned. This was not always manifest in ... law of the Commission. As regards the effects on detainees, the Commission ... applicants to submit medical evidence to show that the prison conditions ... adverse effects on their mental or physical health.[120] This medical evidence should ... only show that there is a direct relationship between the prison conditions ... and the deteriorating health of the applicant,[121] but also that these ... were such that they could "destroy the personality and cause severe mental ... physical suffering" to the applicant.[122] From the Court's case law we may also ... that an important source of evidence concerning detention conditions are ... Reports of the European Committee for the Prevention of Torture and ... or Degrading Treatment or Punishment (CPT).[123]

... clear from the above discussion of the case law concerning solitary confine... other major elements the Commission regularly has taken into account in ... the question whether a violation of Article 3 has occurred, are the behaviour ... detainee, his personality and the seriousness of his crimes. In particular, when ... measures complained of were a result of the unco-operative attitude of the de... the Commission has been very reticent in concluding that a violation had ... For this reason the Commission declared complaints of IRA prisoners ... the situation in the Maze prison and the treatment they received there inad... However its decision does contain the important finding that the fact of ... detainees carrying on a campaign against the authorities does not relieve the latter ... their obligations under Article 3.[126]

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112 See Appl. 7994/77, *Kotälla*, Yearbook XXI (1978), p. 522 (528), where the Commission ... view of the Dutch court that the deterioration of the physical and mental condition of the ... was not due to his detention. See also the report of 7 December 1978, *Guzzardi*, B 35 (1... pp. 34-35 and the report of 5 December 1979, *Bonnechaux*, D&R 18 (1980), p. 100 (1...

113 Report of 8 July 1993, paras 75-80. Cf. also the judgment of 29 April 2003, *McGlinchey*, ...

114 Judgment of 5 April 2005, paras 87 and 98.

115 Appl. 6840/74, *X. v. the United Kingdom*, Yearbook XXI (1978), p. 250 (282); Appl. 6038/... *the United Kingdom*, D&R 10 (1978), p. 37 (67). In the first-mentioned case a friendly ... was reached, by which the authorities promised a clearer regulation concerning solitary confi... of patients: D&R 20 (1980), p. 5 (8-11). In the latter case, the Commission concluded in ... of 7 October 1981 that, although the facilities in the hospital at that time were ... unsatisfactory", they did not amount to inhuman or degrading treatment contrary to Art. ... Convention: D&R 32 (1983), p. 5 (30).

116 Appl. 4340/69, *Simon-Herald*, Coll. 38 (1972), p. 18.

117 Appl. 5229/71, *X. v. the United Kingdom*, Coll. 42 (1973), p. 140.

118 Appl. 6337/73, *X. v. Belgium*, D&R 3 (1976), p. 83 (85). See, however, Article 10(2)(b) ... International Covenant on Civil and Political Rights. See also Article 11(3) 3 of the European ... Rules, which stipulates that "in principle untried prisoners shall be detained separately from ... persons unless they consent to being accommodated or involved together in organised ... beneficial to them".

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119 See, for instance, the judgment of 18 January 1978, *Ireland v. the United Kingdom*, para. 161.

120 See, for example, Appl. 8116/77, *X. v. the United Kingdom*, not published, and Appl. 8601/79, *X. v. Switzerland*, not published.

121 In the applications of *Ensslin, Baader and Raspe*, medical reports were presented, but they did not "make it possible to establish accurately the specific effect of this isolation in relation to their physical and mental health, as compared with other factors", Yearbook XXI (1978), p. 418 (458).

122 Appl. 8158/78, *X. v. the United Kingdom*, D&R 21 (1981), p. 95 (99) and report of 16 December 1982, *Krocher and Möller*, D&R 34 (1983), p. 24 (56).

123 Judgment of 6 March 2001, *Dougoz*, paras. 46-47; judgment of 15 July 2002, *Kalashnikov*, para. 97; judgment of 2 June 2005, *Novoselov*, para. 43.

124 See, e.g., Appl. 8231/78, *X. v. the United Kingdom*, D&R 28 (1982), p. 5 (27-28), where the detainee refused to wear prison clothes, and the report of 7 October 1981, *B. v. the United Kingdom*, D&R 34 (1983), p. 5 (34-35 and 38), where the applicant had constantly refused to accept medical treatment and had refused to clean his cell himself. See also Appls. 9911/82 and 9945/82, *R., S., A., and C. v. Portugal*, D&R 36 (1984), p. 200 (208).

125 Appl. 8317/78, *McFeeley*, D&R 20 (1980), p. 44 (77-89). See also Appl. 8231/78, *X. v. the United Kingdom*, D&R 28 (1982), p. 5 (27-33) concerning the obligation to wear prison clothes.

126 Appl. 8317/78, *McFeeley*, D&R 20 (1980), p. 44 (81). See also Appls. 7572/76, 7586/76 and 7587/76, *Ensslin, Baader and Raspe*, Yearbook XXI (1978), p. 418 (458-460); and Appl. 9907/82, *M. v. the United Kingdom*, D&R 35 (1984), p. 130 (133-136). In the latter case the measures taken with respect to the detainee were the result of his extremely dangerous behaviour.

Not infrequently the complaint concerns physical force used against an arrested person or a detainee by policemen or prison officers. On the one hand, it is obvious that the use of a certain amount of force in case of resistance to arrest, an attempt to escape or an assault on a prison officer or fellow prisoner may be inevitable. On the one hand, the form as well as the intensity of the force used should be proportionate to the circumstances and the seriousness of the resistance or threat.

The Court has laid down some general principles, which to a certain extent alleviate the applicant's burden of proof. In the *Ribitsch* Case the Court, [illegible] inspired by the concurring opinion of Judge De Meyer in the *Tomasi* [illegible], ruled that "in respect of a person deprived of his liberty, any recourse to physical force which has not been made strictly necessary by his own conduct diminishes human dignity and is in principle an infringement of the right set forth in Article 3". Of course, it has to be established that the injuries actually occurred in the way alleged by the applicant, in that they resulted from physical force applied during the detention.[129] In the *Aksoy* Case – making explicit the principle underlying the *Ribitsch* – the Court considered that "where an individual is taken into police custody in good health but is found to be injured at the time of release, it is incumbent on the State to provide a plausible explanation as to the causing of the injury, particularly if those allegations were backed up by medical reports, failing which a clear issue arises under Article 3".[130] In the *Salman* Case the Court held that in a situation "where the events in issue lie wholly, or in large part, within the exclusive knowledge of the authorities, as in the case of persons within their control in custody, strong presumptions of fact will arise in respect of injuries and death occurring during such detention. Indeed, the burden of proof may be regarded as resting on the authorities to provide a satisfactory and convincing explanation."[131] A fact also taken into account by the Court is the time the applicant has been waiting before he seeks medical help. In the *Balogh* Case the applicant waited two days, but immediately sought medical assistance on his arrival in his home town. The Court stated to be "reluctant to attribute decisive importance to this delay, which, in any event, cannot be considered significant as to undermine his case under Article 3."[132] Finally, it is important to note that neither the acquittal of the police officers suspected of having inflicted ill-treatment

[127] Concurring opinion attached to the judgment of 27 August 1992.

[128] Judgment of 4 December 1995, para. 38. See the judgment of 19 May 2004, *R.L. and M.-J.D.*, paras. 69-72, where the Court concluded that the force used by the police was not excessive while on the one hand the police intervened because of a simple breach of the peace and had reasons to assume that the applicants were violent, dangerous or armed, and on the other the applicants had many and significant marks of inflictions on their body, and after their release temporarily unable to work.

[129] Appl. 18764/91, *Hippin*, D&R 79-A (1994), p. 23 (29).

[130] Judgment of 18 December 1996, para. 61. See also the judgment of 28 July 1999, *Selmouni*, [illegible]

[131] Judgment of 27 June 2000, para. 100.

[132] Judgment of 20 July 2004, para. 49.

successful prosecution of State agents, nor the failure to find State agents guilty [illegible] against detainees absolves the State of its responsibility under Article 3.[133] [illegible] not normally for the Court to substitute its own assessment of the facts for [illegible] the domestic courts. This has been made particularly clear in the *Klaas* Case. [illegible] Klaas was requested to provide a specimen of breath after allegedly committing [illegible] road offence. A struggle ensued, resulting in Mrs Klaas being handcuffed. She suffered bruising, was unconscious for a short period when she banged her head on [illegible] ledge and received a serious long-lasting injury to her shoulder. The Commission, basing itself on the *Tomasi* judgment, concluded that the Government had [illegible] produced any convincing explanation and the treatment of Mrs Klaas, therefore, [illegible] could be regarded as a disproportionate use of force that violated Article 3. The Court disagreed with the Commission. According to the Court the injuries were consistent with either the applicant's and the arresting officers' version of events. While the criminal courts found against the applicant and while there were no cogent reasons [illegible] induced to depart from their findings, the Court had to assume that the officers had not used excessive force and no violation of Article 3 had occurred.[134] The relevant factor distinguishing this case from the *Tomasi* and *Ribitsch* Cases seems to be that in the latter the Governments were not able to provide a plausible explanation of how the applicant's injuries were caused.

7.6. ADMISSION AND ASYLUM, EXPULSION AND EXTRADITION

7.6.1. GENERAL OBSERVATIONS

The Convention does not contain a general right of admission to a certain country and does not contain an explicit right to asylum. Article 3 of Protocol No. 4 prohibits the expulsion of nationals, and gives them the right to be admitted to their country; Article 4 of Protocol No. 4 prohibits only collective expulsion of aliens; and Article 1 of Protocol No. 7 only contains certain procedural guarantees against expulsion.[135] The refusal of admission to or the expulsion of an alien from a country may, however, constitute treatment that infringes Article 3. In the *East African Asians* Case the Com-

[133] Judgment of 8 January 2004, *Çolak and Filizer*, para. 33; judgment of 20 July 2004, *Balogh*, para. 51; judgment of 5 April 2005, *Afanasyev*, para. 64.

[134] Judgment of 22 September 1993, paras 29-30.

[135] Judgment of 30 October 1991, *Vilvarajah and Others*, para. 102: "the Court observes that Contracting States have the right, as a matter of well-established international law and subject to their treaty obligations including Article 3, to control the entry, residence and expulsion of aliens (...). Moreover, it must be noted that the right to political asylum is not contained in either the Convention or its Protocols."

mission concluded that legislation imposing restrictions on admission ... Kingdom of UK citizens and Commonwealth residents in East Africa ... against persons of Asian origin on the ground of race and thus constitu... ference with their human dignity which amounted to "degrading trea... sense of Article 3.[136] A report of 1983 seems to imply that "sexual and ... discrimination" in immigration rules may also have such degrading aspects ... 3 may be applicable.[137] However, because these aspects had already ... in connection with Article 14, the Commission did not consider it nece... a further examination in the light of Article 3.[138] Furthermore, repeated ... an individual whose identity is impossible to establish, to a country ... admission is not guaranteed, may raise an issue under Article 3.[139]

Expulsion and extradition may infringe Article 3 because of their dir... or mental effects. The Strasbourg case law indicates the application of ... criteria. The Commission has held that extradition within a day after a second ... to commit suicide did not violate Article 3.[140] In the *Cruz Varas* Case the ... not consider that the applicant's expulsion to Chile exceeded the thresh... Article 3, although he suffered from a post-traumatic stress disorder ... expulsion and his mental health deteriorated following his return to Chile. ... the *Nsona* Case the return of a nine-year-old child to Zaïre that took ... of which was unaccompanied, was not regarded as inhuman or degrading treat...

An issue under Article 3 may also arise in that expulsion might result in ... in question being separated from a person or group of persons with whom ... close link, even apart from the protection of family life under Article 8.[...]

Finally, the violation of Article 3 may also consist in ill-treatment – torture, ... or degrading treatment or punishment – to which, on the basis of objective ... may be expected to be subjected in the country to which he will ... removed. According to established case law of the Commission, "the deportation ... another might, in exceptional circumstances, raise an issue under Article 3 of ... Convention where there is serious reason to believe, that the deportee would be ... in the country of destination, to treatment prohibited by this provision."[141] ... the *Soering* Case, that concerned extradition, the Court had to deal for the first ... with the question whether deportation would engage the responsibility of the ... State. The Court, confirming the Commission's jurisprudence, gave an ... affirmative answer. It held as follows: "That the abhorrence of torture has such impli... is recognised in Article 3 of the United Nations Convention Against Torture ... Other Cruel, Inhuman or Degrading Treatment or Punishment, which provides ... no State Party shall (...) extradite a person where there are substantial grounds ... believing that he would be in danger of being subjected to torture'. The fact that ... specialised treaty should spell out in detail a specific obligation attaching to the ... prohibition of torture does not mean that an essentially similar obligation is not ... clearly inherent in the general terms of Article 3 of the European Convention. It would ... hardly be compatible with the underlying values of the Convention, that 'common ... heritage of political traditions, ideals, freedom and the rule of law' to which the ... Preamble refers, were a Contracting State knowingly to surrender a fugitive to another ... State where there were substantial grounds for believing that he would be in danger ... of being subjected to torture, however heinous the crime allegedly committed. Extra... dition in such circumstances, while not explicitly referred to in the brief and general ... wording of Article 3, would plainly be contrary to the spirit and intendment of the ... Article, and in the Court's view this inherent obligation not to extradite also extends ... to cases in which the fugitive would be faced in the receiving State by a real risk of ex... posure to inhuman or degrading treatment or punishment prescribed by that ... Article."[142]

In other cases the Court has applied this principle also to expulsion.[146] The reasoning behind it is based on the idea that a State is violating Article 3 if its act of extradition or expulsion constitutes a crucial link in the chain of events leading to torture or inhuman treatment or punishment in the State to which the person is returned. Therefore, in such a case the State expelling or extraditing him must be held indirectly responsible for the imminent treatment in that other State, regardless of whether that treatment is to be expected from public authorities or from non-State actors,[147] regard-

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136 Report of 14 December 1973, D&R 78-A (1994), p. 5 (62).

137 Report of 12 May 1983, *Abdulaziz, Cabales and Balkandali*, paras 121-122.

138 *Ibidem*. In its Judgment of 28 May 1985 in this case, para. 91, the Court did not find a ... Article 3, because the difference of treatment did not denote any contempt or lack of ... personality of the applicants and the measures complained of were not designed to ... humiliate or debase them.

139 Report of 17 July 1980, *Giama*, D&R 21 (1981), p. 73 (89).

140 Appl. 25342/94, *Raidl*, D&R 82-A (1995), p. 134 (146-147).

141 Judgment of 20 March 1991, para. 84. Cf. also the decision of 22 October 2002, *Aamo...*

142 Judgment of 28 November 1996, para. 99.

143 Judgment of 24 March 1988, *Olsson*, para. 86, where the applicants alleged a violation ... 3 mainly in two different respects. First, they contended that the taking away of the ... them without sufficient reasons was a deprivation of the children's right to grow up in ... Secondly, they put forward the frequent moving of one child from one home to another ... treatment in his foster-family. In the Court's view, the allegations were not substantiated.

Appl. 10730/84, *Berrehab and Koster*, D&R 41 (1985), p. 196 (209), where the Commission ... that where an expulsion raises issues under Article 8, a complaint under Article 3 on the ... should not, for that reason alone, be declared inadmissible.

See, *e.g.*, Appl. 11933/86, *A. v. Switzerland*, D&R 46 (1986), p. 257 (269).

Judgment of 7 July 1989, para. 88.

See for instance, the judgment of 15 November 1996, *Chahal*, paras. 73-74; judgment of 17 December 1996, *Ahmed*, para. 39; judgment of 2 May 1997, *D. v. the United Kingdom*, paras. 47-49; judgment of 11 July 2000, *Jabari*, para. 38; judgment of 6 March 2001, *Hilal*, para. 59.

Judgment of 17 December 1996, *Ahmed*, para. 46; judgment of 29 April 1997, *H.L.R. v. France*, para. 40.

less of how great the – evidently not completely successful – efforts of [illegible] have been to prevent such treatment[148] and regardless of whether the [illegible] is not a party to the Convention.[149] In exceptional circumstances the [illegible] person to a country where his situation would be inhuman because of [illegible] cannot be attributed to human interference in that country – for [illegible] adequate medical facilities – may equally engage the responsibility of the [illegible] State:[150] the existence of the obligation under Article 3 is not dependent [illegible] of the risk. Finally, the expulsion by State A to State B that then removes [illegible] to State C where he might run the risk of torture or inhuman or degrading [illegible] or punishment, may create a responsibility for State A for that risk, even [illegible] B is (also) a party to the Convention.[151]

7.6.2 DEATH PENALTY AND LOSS OF LIFE

In the *Kirkwood* Case and in the *Soering* Case the Commission developed the [illegible] since Article 2 of the Convention expressly permits the imposition of the death [illegible] extradition of a person to a country where he risks the death penalty cannot [illegible] raise an issue under either Article 2 or Article 3 of the Convention, but that [illegible] not exclude the possibility of an issue arising under Article 3 in respect of the [illegible] and circumstances in which the death penalty is implemented. The Commission [illegible] as an example protracted delay in carrying out the death penalty. In the *Kirkwood* [illegible] which concerned a possible extradition to California, the Commission [illegible] factors to be considered in assessing whether such a delay during the appeal [illegible] (the 'death row phenomenon') amounts to inhuman treatment, the relevant [illegible] appeal system for the protection precisely of the right to life, the delays caused [illegible] backlog of cases before the appeal courts and the control over them, and the [illegible] of a commutation of sentence by the very reason of the duration of the [illegible] the 'death row'. The Commission reached the following conclusion: "The [illegible] purpose of the California appeal system is to ensure protection for the right [illegible] to prevent arbitrariness. Although the system is subject to severe delays, [illegible] themselves are subject to the controlling jurisdiction of the courts. In the [illegible] the applicant has not been tried or convicted and his risk of exposure to [illegible]

148 Judgment of 7 July 1989, *Soering*, paras 97-98.

149 See, *e.g.*, Appl. 1802/63, *X. v. Federal Republic of Germany*, Yearbook VI (1963), p. 462 (480); Appl. 8088/77, *X. v. the Netherlands* and Appl. 9822/82, *X. v. Spain*, not published, the Commission has, however, take into account as a positive factor that the case concerned extradition to one of the Parties to the European Convention which had accepted the right of individual petition [illegible] 10308/83, *Altun*, D&R 36 (1984), p. 209 (233-234), in which the fact that Turkey had not accepted the right of individual petition was taken into account as a negative factor.

150 Judgment of 2 May 1997, *D. v. the United Kingdom*, para. 49.

151 Decision of 7 March 2000, *T.I. v. the United Kingdom*.

[illegible] In the light of these reasons (...) the Commission finds that it has not been [illegible] that the treatment to which the applicant will be exposed, and the risk of [illegible] to it, is so serious as to constitute inhuman or degrading treatment or [illegible] contrary to Article 3 of the Convention."[152] The element which the Commission added here to its considerations, *viz.* that the applicant has not been tried or convicted and that his conviction to the death penalty is still uncertain, is a rather [illegible] since that will often be the case when the complaint concerns extradition [illegible]; what matters in those cases is that there is a real risk of the applicant [illegible] sentenced to death.

In the *Soering* Case, which concerned a possible extradition to Virginia (USA), the [illegible] Government had contended that the applicant did not in reality risk the death [illegible] pointing to the assurance that had been given by the Commonwealth Attorney [illegible] trial judge would be informed of the wish of the British Government that the [illegible] penalty should not be imposed or carried out. The Commission observed that [illegible] sentencing judge was not obliged under Virginia law to accept the representation [illegible] to him on behalf of the British Government and that it could not be assumed [illegible] he would have regard to the diplomatic considerations relating to the continuing [illegible] of the extradition relationship between the two countries. Therefore, the [illegible] that the applicant would be sentenced to death was considered a serious one.[153] The Commission repeated the view endorsed in *Kirkwood* that extradition of a person [illegible] a country where he risks the death penalty cannot, in itself, raise an issue either [illegible] Article 2 or Article 3 of the Convention. As to the question whether an issue [illegible] under Article 3 in respect of the manner and circumstances in which the death [illegible] would be implemented, the Commission reached the conclusion – be it with [illegible] votes against five – that there was no indication that the machinery of justice [illegible] which the applicant would be subjected, was an arbitrary or unreasonable one. [illegible] the treatment was not contrary to Article 3.[154]

The Court likewise held that the Convention has to be read as a whole and that [illegible] should therefore be construed in harmony with the provisions of Article 2: [illegible] this basis Article 3 evidently cannot have been intended by the drafters of the [illegible] to include a general prohibition of the death penalty since that would [illegible] the clear wording of Article 2, paragraph 1."[155] Furthermore, the Court emphasised that Protocol No. 6, as a subsequent written agreement, showed the intention

[illegible] 10479/83, D&R 37 (1984), p. 158 (190).

[illegible] Report of 19 January 1989, paras 114-120. In the same sense the Court in its judgment of 7 July 1989 in this case, paras 97-99. In appl. 22742/93, *Aylor-Davis*, D&R 76-B (1994), p. 164 (172), the Commission considered that there was no issue under Article 3, while the undertaking under oath of the Dallas County prosecutor that he would not call for the death penalty excluded the risk that the applicant, after France had extradited her to the United States, would be sentenced to death and would be exposed to the 'death row phenomenon'.

[illegible] Report of 19 January 1989, *Soering*, paras 151-152.

[illegible] Judgment of 7 July 1989, *Soering*, para. 103.

of the contracting States to adopt the normal method of amendment to
order to introduce a new obligation to abolish capital punishment and to
optional instrument allowing each State to choose the moment when to
such an engagement. In these conditions Article 3 could not be interpre
prohibiting the death penalty.[156]

The Court added, however, that this did not mean that the circumstan
to a death sentence could never give rise to an issue under Article 3. Wh
treatment or punishment was to be brought under Article 3 in this case
the particular circumstances of the case, the length of detention prior to
conditions on death row and the applicant's age and mental state. The C
with the Commission that the machinery of justice to which the applicant
subject in the United States, was in itself neither arbitrary nor unreasona
rather, respected the rule of law and afforded considerable procedural
the defendant in a capital trial. Nevertheless, it concluded – unlike the
– that in this case the decision to extradite would amount to a violation of
It held as follows: "However, in the Court's view, having regard to the very long
of time spent on death row in such extreme conditions, with the ever pres
mounting anguish of awaiting execution of the death penalty, and to the
circumstances of the applicant, especially his age and mental state at the time
offence, the applicant's extradition to the United States would expose him
risk of treatment going beyond the threshold set by Article 3. A further consid
of relevance is that in the particular instance the legitimate purpose of ensu
could be achieved by another means which would not involve suffering of such
tional intensity or duration. Accordingly, the Secretary of State's decision to
the applicant to the United States would, if implemented, give rise to a breach
Article 3."[157]

Although the Court held in the *Soering* Case that the death penalty as such
incompatible with Article 3, there has since been a considerable evolution
tracting States have signed Protocol No. 6 and almost all States have ratified
Moreover, Protocol No. 13 provides for the abolition of the death penalty in
of war. The Court observed in the *Öçalan* Case that "it cannot now be excluded
the light of the developments that have taken place in this area, that the States
agreed through their practice to modify the second sentence in Article 2 para. 1
far as it permits capital punishment in peacetime. Against this background it
be argued that the implementation of the death penalty can be regarded as

156 *Ibidem.*

157 *Ibidem*, para. 111.

...grading treatment contrary to Article 3".[158] This suggests that at the present time ... extradition to a country where the person involved runs the risk of a death ... should be regarded as a breach of Article 3. Although in the *Öcalan* Case the ... found that it was not necessary to reach any firm conclusion on this point, it ... surprising that the Court, in its judgment in the *Chamaïev* Case, reaffirmed ... position it took in the *Soering* Case, that Article 3 cannot be interpreted as ... prohibiting the death penalty because that would nullify the clear wording ... 2(1).[159]

... a real risk that a person after deportation will lose his life, not as a conse... of the execution of a death sentence within the meaning of Article 2(1) but ... it seems that deportation will amount to a violation of Article 2 and/or ... 3. The Commission considered that in such a case a real risk of loss of life ... not as such necessarily suffice to make expulsion 'an intentional deprivation ... prohibited by Article 2, although it would amount to inhuman treatment within ... meaning of Article 3."[160] The Court, however, has not yet decided whether ... deportation would then amount to an infringement of Article 2, or Article 3, or both ...[161]

ASYLUM

... recent years Article 3 has become a very important factor in asylum cases, although ... right to political asylum as such is not contained in either the Convention or its ... Protocols.[162] While it is not the task of the Court to decide whether the expulsion of ... an asylum seeker violates the Refugee Convention,[163] expulsion of an asylum ... seeker/refugee to his country of origin in violation of the prohibition of *refoulement* ... (Article 33(1) of the Refugee Convention) may also infringe Article 3 when he is thus ... exposed to a real risk of being subjected to treatment going beyond the threshold set ... by Article 3. As the Court held in the *Vilvarajah* Case (and many other cases), ... expulsion by a Contracting State of an asylum seeker may give rise to an issue under ... Article 3, and hence engage the responsibility of that State under the Convention, ... where substantial grounds have been shown for believing that the person concerned ...

158 Judgment of 12 March 2003, paras 195–198; judgment of 12 May 2005 (Grand Chamber), paras ... 101 to ...

159 Judgment of 12 April 2005, para. 333.

160 Report of 13 September 1996, *Bahaddar*, para. 78.

161 See the decision of 29 June 1999, *Gonzalez*.

162 See, for instance, the judgment of 30 October 1991, *Vilvarajah*, para. 102 and the judgment of ... 17 December 1996, *Ahmed*, para. 38.

163 Appl. 4165/69, *X. v. the Federal Republic of Germany*, Yearbook XIII (1970), p. 806 (822).

faced a real risk of being subjected to torture or to inhuman or degrading
or punishment in the country to which he was returned."[164]

This raises the question what the relation is between Article 3 and
Convention. It is submitted that these norms are overlapping, in that if a
the sense of Article 1(A) of the Refugee Convention – has a well-founded
persecuted in his country of origin, his forced return to this country
Article 3. It has to be admitted that for a long time the Strasbourg case
differentiated between these norms. The Commission has held that
whether or not a decision to deport is "covered by the Geneva Convention
on the Status of Refugees is not at issue as such",[165] and has ruled that
political persecution, as such, cannot be equated to torture, inhuman or
treatment".[166] The Commission has often stressed that the right to asylum
not figure among the Convention rights, and that the expulsion or extradition
individual could prove to be a breach of Article 3 only in exceptional
circumstances.[167] This case law implies that *refoulement* only raises an
Article 3 if the ensuing persecution will reach a high level of severity.[168] Consequently
refoulement of refugees leading to persecution that does not reach that level of
has been held by the Commission to be compatible with Article 3.[169]

The protection to asylum-seekers provided by Article 3 has been further
that the Commission and the Court have adopted a rather restrictive approach
regard to the assessment of the risk of ill-treatment. According to their case-law
decision to expel an asylum-seeker only gives rise to an issue under Article 3
substantial grounds have been shown for believing that the person concerned
a real risk of being subjected to torture or to inhuman or degrading treatment

164 Judgment of 30 October 1991, para. 103. Constant case law, see for instance the judgment of 15 November 1996, *Chahal*, paras 73-74, and the judgment of 17 December 1996, *Ahmed*.

165 Appl. 4165/69, *X. v. the Federal Republic of Germany*, Yearbook XIII (1970), p. 806 (822).

166 Appl. 10760/84, *C. v. the Netherlands*, D&R 38 (1984), p. 224 (226).

167 Appl. 4162/69, *X. v. Federal Republic of Germany*, Yearbook XIII (1970), p. 806 (822); Appl. *X. v. Federal Republic of Germany*, Yearbook XIII (1970), p. 900 (902); Appl. 6315/73, *X. v. Federal Republic of Germany*, D&R 1 (1973), p. 73 (75); Appl. 7465/76, *X. v. Denmark*, D&R 7, p. Appl. 11017/84, *C. v. Federal Republic of Germany*, D&R 46 (1986), p. 176 (181); Appl. *Lukka*, D&R 50 (1987), p. 268 (273).

168 Appl. 10633/83, *X. v. the Netherlands* (not published): "although the risk of political as such, cannot be equated to torture, inhuman or degrading treatment, the Commission exclude that expulsion or 'refoulement' may, in a particular case, raise an issue under brings about a prejudice for the individual concerned which reaches such level of severity it within the scope of this provision"; cf. also Appl. 10760/84, *C. v. the Netherlands*, D&R p. 224 (226).

169 Appl. 4162/69, *X. v. Federal Republic of Germany*, Yearbook XIII (1970), p. 806 (822-24); 10032/82, *X. v. Sweden*, not published.

in the country to which he is to be returned.[170] It did not come as a
that in the *Cruz Varas* Case the Court found that such substantial grounds
were shown: the (Chilean) asylum-seeker had remained silent about his alleged
activities and torture until more than 18 months after the first interroga-
by the Swedish authorities; each time he was interviewed he changed his story;
the meantime democratic reform was taking place in Chile which had led to
developments in the political situation.[171] However, in the *Vilvarajah* Case concerning
removal of five Tamil asylum-seekers to Sri Lanka, where a civil war was going
the 'substantial grounds' test was applied by the Court in a rather restrictive way:
the evidence before the Court concerning the background of the applicants, as well
the general situation, does not establish that their personal situation was any worse
than the generality of other members of the Tamil community or other young male
Tamils who were returning to their country. Since the situation was still unsettled there
existed the possibility that they might be detained and ill-treated as appears to have
occurred previously in the cases of some of the applicants (...). A mere possibility of
ill-treatment, however, in such circumstances, is not in itself sufficient to give rise to
a breach of Article 3. It is claimed that the second, third and fourth applicants were
in fact subjected to ill-treatment following their return (...) Be this as it may, however,
there existed no special distinguishing features in their cases that could or ought to
have enabled the Secretary of State to foresee that they would be treated in this way."[172]

It is respectfully submitted that this approach is open to criticism. The crux of the
Court's reasoning seems to be that, because of the absence of special distinguishing
features in their cases, there was only a general risk – "a mere possibility" – that the
asylum-seekers upon return would be treated in a manner inconsistent with Article
3. This risk, that every young male Tamil returning to his country would run, was in
itself not sufficiently high to qualify as a 'real risk' to bring their removal within the
scope of Article 3. From the facts of the case, however, it appears that there were
sufficient special distinguishing features to conclude that there was a real risk that the
asylum-seekers would be exposed to inhuman treatment. Indeed, after the applicants
had been removed to Sri Lanka in February 1988, appeals were instituted on their
behalf. In March 1989 the Adjudicator concluded that the applicants had had a well-
founded fear of persecution, and that they were entitled to political asylum and should
be returned to the United Kingdom. In fact, they were allowed to return. The
Adjudicator largely believed the accounts given by the applicants of their personal
situations.[173] The Government did not contest these findings, nor did the Court. It
is therefore difficult to understand why the Court held that these facts were not

170 Judgment of 20 March 1991, *Cruz Varas and Others*, paras 69-70; judgment of 30 October 1991, *Vilvarajah*, para. 103.

171 Judgment of 20 March 1991, paras 77-82.

172 Judgment of 30 October 1991, *Vilvarajah*, paras 111-112.

173 *See ibidem*, paras 9-66.

sufficient as special distinguishing features justifying the conclusion that
indeed a real risk of treatment contrary to Article 3 after the deportation to
The Court applied a standard of assessment that was even more restrictive
already very strict test in refugee law that the asylum-seeker has to show
"singled out for persecution". Such a restrictive approach would seem to be
ble with the Court's position that its examination of a risk of ill-treatment
of Article 3 must be a rigorous one in view of the absolute character of this

It seems, however, that in more recent cases a more liberal approach has
which amounts to the assumption that returning a person to his country
where he has a well-founded fear of being persecuted *ipso facto* violates
Commission had already applied concepts that were related to the refugee
in earlier case law. For instance, in a case concerning extradition the
found it necessary "to determine whether in this case there would be a
prosecution for political reasons which could lead to an unjustified or
sentence being passed on the applicant and as a result inhuman treatment".
criterion is often applied in refugee cases.[176] A more explicit reference to the
of refugee can be found in the Commission's report concerning a Somalian
Ahmed, whose refugee status was forfeited by the Austrian authorities on
that he was convicted for particularly serious crimes within the meaning of
33(2) of the Refugee Convention. The Commission "attached particular
fact that the applicant was granted asylum in May 1992. The Austrian
the Interior (...) found that he would risk persecution in Somalia. In the
proceedings, the Austrian authorities had to consider basically the same
under Austrian law as the Commission must consider under Article 3." As the
in Somalia had not changed fundamentally since the time when the
granted asylum, the Commission concluded that he still would risk
returned to Somalia, and found that substantial grounds had been shown for
that the applicant would then face a real risk of being subjected to treatment
of Article 3.[177] The Court followed the same reasoning, and reached a
sion.[178] In the same way in the *Jabari* Case the Court, in concluding that
would give rise to a violation of Article 3, attached great weight to the
UNHCR that the applicant qualified as a refugee.[179]

174 *Ibidem*, para. 108.
175 Appl. 10308/83, *Altun*, D&R 36 (1984), p. 209 (233); cf. also Appl. 11933/86, *A. v. Switzerland*, 46 (1986), p. 257 (271).
176 See UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status*, Geneva, paras 57, 85 and 169.
177 Report of 5 July 1995, paras 65, 66 and 70.
178 Judgment of 17 December 1996, paras 42-47.
179 Judgment of 11 July 2000, *Jabari*, paras 18 and 41-42.

...however, there seems to be a tendency in the Strasbourg case law to adopt a less ...real risk" criterion, which is not fundamentally different from a liberal "singling ...out" test. That the Commission adopted a less stringent standard of proof is evident ...the *Bahaddar* Case, in which it concluded that expulsion of the applicant to ...Bangladesh would be in violation of Article 3, although he had not supplied much ...documentary evidence the Commission gave him the benefit of the doubt while it considered ...his account to be credible and on the whole consistent.[180]

...Whether the Court also applies a more liberal criterion is less clear. The fact is that ...the Court has not expressly repeated that there should be 'special distinguishing ...features' in order to assume that there is a real risk. In several post-Vilvarajah judg-...ments the Court has reached the conclusion that there was a violation of Article 3. In ...the *Chahal* Case the deportation to India of an alleged Sikh terrorist was regarded as ...infringing Article 3; particular weight was accorded to the general situation, especially ...the non-observance of human rights.[181] In the *Ahmed* Case the Court found that ...Article 3 would be violated by the deportation because the asylum-seeker earlier was ...recognized by the State as a refugee and the situation in his country of origin had not ...changed.[182] In the *Jabari* Case the Court concluded that no substantive examination ...had taken place, and regarded as a relevant factor that UNHCR had recognized the ...applicant as a refugee.[183] In the *Hilal* Case it was found that the 'internal flight option' ...on which the British Government had relied, was not really secure.[184] Finally, in the ...*Said* Case the Court held that in the light of credible statements of the asylum seeker ...in the context of general information concerning the situation in Eritrea, expulsion ...of the asylum seeker would amount to a violation of Article 3.[185]

Another indication of a more liberal approach is provided by the decision in the *T.I. v. the United Kingdom* Case. This case was about the removal of the applicant by the United Kingdom to Germany and the risk that Germany would subsequently deport the asylum seeker to his home country, Sri Lanka. The Court found it sufficient to observe that the facts gave "rise to concerns as to the risks faced by the applicant would be returned to Sri Lanka", and only after a thorough investigation of the German asylum system did the Court come to the conclusion that removal to Germany would not create a risk of a violation of Article 3.[186]

Nevertheless, it is not clear whether and to what extent the Court has departed from the individualizing *Vilvarajah*-test. Chahal had a high profile as a leading figure

...Report of 13 September 1996, paras 83-102. The Court did not decide on the merits of this case, ...because it found that the local remedies had not been exhausted: judgment of 19 February 1988, ...para. 49.
...Judgment of 15 November 1996, paras 98-107.
...Judgment of 17 December 1996, paras 42-47.
...Judgment of 11 July 2000, paras 18 and 41-42.
...Judgment of 6 March 2001, para. 67.
...Judgment of 5 July 2005, paras 50-52.
...Decision of 7 March 2000.

supporting the cause of Sikh separatism which in itself set him apart from ... general, and thus made it plausible that he was "singled out".[187] And Ahmed ... were recognized as refugees by the Government and by UNHCR, respectively ... also implied that to a certain extent they were 'targeted'.

It is, therefore, plausible to assume that the Court still requires that the ... personal situation gives substantial grounds for believing that he would face ... of being subjected to treatment contrary to Article 3.[188] However, ... individualization and what standard of proof is applied is yet uncertain. ... that the Court does not demand that there be 'special distinguishing ... more. In the *Said* Case, a combination of consistent, more or less credible ... and information of a general nature supporting these statements were ... sufficient to conclude that deportation to his home country would expose ... real risk of being treated contrary to Article 3.[189] Furthermore, from the ... may be concluded that the standard of proof that the Court has recently ... extraditions – the criterion of a proof 'beyond reasaonable doubt'[190] – is not ... in asylum cases.

A conceptual argument against the thesis that the deportation of an ... country where he has a well-founded fear of being persecuted in principle ... amounts to a violation of Article 3 might be, that persecution in the sense ... 1(A) of the Refugee Convention does not always attain the minimum level of ... required to fall within the scope of Article 3. Such a counter-argument misunderstands ... the said thesis, which does not equate "persecution" with "treatment prohibited ... Article 3", but posits that the deportation of a person to a country where he has a *well-founded fear* of being persecuted will in general amount to *a real risk* of being ... to ill-treatment in the sense of Article 3. It may be true that not every act of persecution ... can be qualified as torture or inhuman or degrading treatment or punishment, ... it is plausible to assume that when a well-founded fear has been established ... person, if returned to his country, will suffer from such an act of persecution, ... is a real risk that he will also be subjected to (additional) harsh treatment ... within the scope of Article 3.

It, therefore, may be concluded that a person who has a well-founded ... persecution within the meaning of Article 1(A) of the Refugee Convention ... the prohibition of *refoulement* in Article 33(1) of the same Convention, ... that he may not be returned to his country of origin because that would ... to a real risk of being subjected to treatment prohibited by Article 3. The ... does not hold: Article 3 has a wider scope than Article 33(1) of the Refugee ... A person who fulfils the criteria of Article 1(A) of the Refugee Convention ... the protection of Article 33(1) when there are serious reasons for consi- ... that he has committed crimes as mentioned in Article 1(F), as well as when he ... reasonably be regarded as a danger to the security of the country of reception or ... having been convicted of a particularly serious crime, constitutes a danger to ... community of that country (Article 33(2) of the Refugee Convention). In all these ... is still protected by Article 3. As the Court observed, "the activities of the ... individual in question, however undesirable or dangerous, cannot be a material ... consideration." The protection afforded by Article 3 is thus wider than that provided ... Article 32 and 33 of the United Nations 1951 Convention on the Status of ... Refugees.

The protection afforded by Article 3 is also wider than the prohibition of ... *refoulement* in that the concept of persecution in Article 1(A) of the Refugee Con- ... vention and thus the protection against *refoulement* (Article 33(1)) is often believed ... to presuppose the existence of State authority, and is linked to a limited number of ... grounds of persecution (race, religion, nationality, membership of a particular social ... group or political opinion), whereas the applicability of Article 3 solely depends on ... the character of the treatment, not on the source or the grounds of this treatment. Thus ... the Commission held that the "position of the Austrian authorities that there is no ... substantial risk for the applicant since the State authority had ceased to exist in Somalia ... cannot be accepted. It is sufficient that those who hold substantial power within the ... State, even though they are not the Government, threaten the life and security of the ... applicant."[191] And Soering was protected by Article 3 although the inhuman treatment ... that he feared was not related to one of the persecution grounds mentioned in the ... Refugee Convention.[192]

187 Judgment of 15 November 1996, *Chahal*, para. 106.

188 Decision of 22 October 2002, *Ammari*; judgment of 17 February 2004, *Venkadajalasarma*; judgment of 17 February 2004, *Thampibillai*, paras 62-66; judgment of 26 July 2005, ... paras 162-165.

189 Judgment of 5 July 2005, paras 50-56.

190 Judgment of 12 April 2005, *Chamaiev*, para. 338. It is respectfully submitted that the ... such a strict standard in extradition cases is difficult to be reconciled with the *Soering* ... 7 July 1989.

191 Judgment of 15 November 1996, *Chahal*, para. 80; judgment of 17 December 1996, *Ahmed*, para. 41. Cf. also the judgment of 7 July 1989, *Soering*, para. 88: "it would hardly be compatible with the underlying values of the Convention (...) were a Contracting State knowingly to surrender a fugitive to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture, however heinous the crime allegedly committed."

192 Report of 3 July 1995, *Ahmed*, para. 68. Cf. also the judgment of 17 December 1996, *Ahmed*, para. 46: the conclusion the applicant's deportation to Somalia would amount to a violation of Article 3 is not invalidated by "the current lack of State authority in Somalia".

Judgment of 7 July 1989.

7.6.4 MEDICAL CASES

In exceptional circumstances the removal of a person to a country where [illegible] would be inhuman because of factors that cannot be attributed to human [illegible] in that country, may engage the responsibility of the removing State [illegible] the obligation under Article 3 is not dependent on the source of the risk [illegible] mostly concern the lack of adequate medical facilities in the country [illegible] deported to. In *D. v. the United Kingdom* the Court concluded that the [illegible] terminally ill person (in the final stage of AIDS) to a country where [illegible] adequate medical care, would expose him to a real risk of dying under [illegible] circumstances and would thus amount to inhuman treatment.[194] However, [illegible] Court stressed in this judgment, aliens cannot in principle claim any entitlement [illegible] remain on the territory of a State in order to benefit from medical, social [illegible] forms of assistance.[195] The mere fact that the circumstances elsewhere would be [illegible] favourable than those in the country where one is currently staying, is not [illegible] from the point of view of Article 3.[196] And indeed, that *D. v. the United Kingdom* [illegible] an exceptional case becomes clear in the *Bensaid* Case concerning a schizophrenic patient. The Court did not deny the seriousness of the applicant's condition, that there would be difficulties in obtaining medication in the country where he was to be deported to, nor that the suffering associated with a relapse could fall within the scope of Article 3. Nevertheless, it found that the risk that the applicant would suffer a deterioration in his condition if returned and that, if he did, he would not receive adequate support or care, was to a large extent speculative. The Court considered that his removal would not violate Article 3.[197]

Recent decisions also arrive at the conclusion that although adequate medical or social care will be scarce, removal will not violate Article 3. As in the *Bensaid* Case, the main factors are that it does not appear that the applicant's illness has attained an advanced or final stage, nor that he has no prospect of medical care or family support in his country of origin.[198]

7.7 DEROGATION

Article 3, which "enshrines one of the fundamental values of the democratic societies making up the Council of Europe",[199] is included in the list of rights which are [illegible]

194 Judgment of 2 May 1997, para. 53.
195 *Ibidem*, para. 54.
196 Judgment of 6 February 2001, *Bensaid*, para. 38.
197 *Ibidem*, paras 36-41.
198 Decision of 23 June 2003, *Henao*; decision of 20 January 2004, *Meho*; decision of 22 [illegible] *Ndangoya*; decision of 29 June 2004, *Salkic*.
199 Judgment of 7 July 1989, *Soering*, para. 88.

[illegible] in Article 15(2). It guarantees an absolute right, not only in the sense [illegible] provision itself leaves no scope for limitations by law, as a number of other [illegible] do, but also in the sense that no derogation is permitted, not even in the [illegible] public emergency threatening the life of the nation.[201] The Commission [illegible] set forth in its report in *Ireland v. the United Kingdom*: "It follows that the [illegible] under Article 3 of the Convention is an absolute one and that there can [illegible] under the Convention, or under international law, a justification for acts in [illegible] such provision."[202] This implies, for instance, that "it is never permissible [illegible] recourse to punishments which are contrary to Article 3, whatever their [illegible] effect may be."[203] Likewise, the requirements of the investigation of, and the [illegible] inherent in the fight against crime, cannot result in limits being placed on [illegible] protection afforded by this provision.[203] "Even in the most difficult circumstances, [illegible] the fight against terrorism and organised crime, the Convention prohibits in [illegible] terms torture and inhuman or degrading treatment or punishment."[204]

[illegible] prohibition provided by Article 3 against ill-treatment is equally absolute in [illegible] and extradition cases. The States, even when protecting their communities [illegible] terrorist violence, cannot invoke national interests to override the interests of [illegible] individual where substantial grounds have been shown for believing that he would be subjected to ill-treatment when expelled.[205] Nor can they invoke the interest of the international community that suspected offenders who flee abroad should be brought to justice. That the State might be allowed to do so was suggested by the Court in the *Soering* judgment, where it remarked that the risk of undermining the foundations of extradition was included among the factors to be taken into account in the interpretation and application of Article 3.[206] However, in the *Chahal* Case the Court made it clear that from these remarks it should *not* be inferred "that there is any room for balancing the risk of ill-treatment against the reasons for expulsion in determining whether a State's responsibility under Article 3 is engaged."[207]

[illegible] Judgment of 18 January 1978, *Ireland v. the United Kingdom*, para. 163; judgment of 15 November 1996, *Chahal*, para. 79; judgment of 17 December 1996, *Ahmed*, para. 40.
[illegible] Report of 25 January 1976, B.23-I (1976-1978), p. 390.
[illegible] Judgment of 25 April 1978, *Tyrer*, para. 31.
[illegible] Judgment of 27 August 1992, *Tomasi*, para. 115.
[illegible] Judgment of 28 July 1999, *Selmouni*, para. 95; judgment of 6 April 2000, *Labita*, para. 119.
[illegible] Judgment of 15 November 1996, *Chahal*, paras 78-80; cf. also the judgment of 17 December 1996, *Ahmed*, paras 40-41.
[illegible] Judgment of 7 July 1989, para. 89.
[illegible] Judgment of 15 November 1996, para. 81.

HAPTER 8
FROM SLAVERY,
AND FORCED OR
Y LABOUR (Article 4)

ED BY LEO ZWAAK

E 4

r servitude.
orm forced or compulsory labour.
he term 'forced or compulsory labour' shall not

one in the ordinary course of detention imposed
s of Article 5 of this Convention or during condi-
tention;
haracter or, in case of conscientious objectors in
ecognised, service exacted instead of compulsory

of an emergency or calamity threatening the life
unity;
forms part of normal civic obligations.

8.2 INTRODUCTION

In Article 4 slavery and servitude are dealt with separately from forced and compulsory labour. The first two terms refer to the entire status or situation of the person concerned. Slavery indicates that the person is wholly in the legal ownership of another person, while servitude concerns less far-reaching forms of restraint and relates, for instance, to the total of the labour conditions and/or of the obligations to render services from which the person in question cannot escape and which he cannot change.[1] Forced labour and compulsory labour, on the other hand, do not relate to the entire situation of the person concerned, but exclusively to the involuntary character of the work and services to be performed by him, which may, and usually will, have a temporary or incidental character.

Since the entry into force of Protocol No. 11, the Court has very rarely dealt with complaints concerning Article 4. For this reasons, the present analysis is based primarily, on the decisions and reports of the former Commission.

8.3 SLAVERY AND SERVITUDE

The first paragraph of Article 4 has been invoked mainly in connection with complaints of detainees against the obligation to perform work in prison. In those cases the Commission took the position that the terms 'slavery' and 'servitude' are not applicable to such a situation, while from the third paragraph under (a) of Article 4 it is evident that the drafters of the Convention did not wish to prohibit the imposition of such an obligation.[2]

In the *Van Droogenbroeck* Case the applicant submitted that the fact that he had been placed at the disposal of the Government as a recidivist, had reduced him to a condition of servitude, since in fact he was subject to arbitrary supervision by the administrative authorities. The Commission took the view that there was no question of servitude, because the measure was one of limited duration only, was subject to judicial review and did not affect the legal status of the person in question.[3]

The first paragraph was also invoked before the Commission by four young men who, at the age of 15 and 16, had joined the Navy for a period of nine years and had some time had applied for discharge. In their complaint against the refusal of the authorities to discharge them they claimed, *inter alia*, that in view of their age [illegible]

1 See the report of 9 July 1980, *Van Droogenbroeck*, B.44 (1985), p. 30: "in addition to the obligation to provide another with certain services, the concept of servitude includes the obligation on the part of the 'serf' to live on another's property and the impossibility of changing his condition."

2 Appls 3134/67, 3172/67 and 3188-3206/67, *Twenty-one detainees v. Federal Republic of Germany*, Yearbook XI (1968), p. 528 (552). See also Appl. 7549/76, *X v. Ireland* (not published).

3 Report of 9 July 1980, B.44 (1985), p. 30.

[illegible] constituted a form of servitude in the sense of Article 4(1). After first having stated that military service did form an exception to the second, but not necessarily to the first paragraph, the Commission rejected the complaint as being manifestly ill-founded. This finding was based in particular on the circumstance that the relevant law prescribed for minors the consent of the parents and that in this case such consent had indeed been given.[4]

8.4 FORCED OR COMPULSORY LABOUR

The second paragraph of Article 4 has played a greater part in the case law. Hitherto the Commission and the Court have refrained from giving a definition of the term 'forced or compulsory labour'. However, in the *Schmidt* Case the Court reiterated that paragraph 3 of Article 4 is not intended to 'limit' the exercise of the right guaranteed by paragraph 2, but to 'delimit' the very content of that right, for it forms a whole with paragraph 2 and indicates what the term 'forced or compulsory labour' shall not include (ce qui n'est pas considéré comme 'travail forcé ou obligatoire'). This being so, paragraph 3 serves as an aid to the interpretation of paragraph 2. The four subparagraphs of paragraph 3, notwithstanding their diversity, are grounded on the governing idea of the general interest, social solidarity and what is normal in the ordinary course of affairs.[5]

Both the Commission and the Court have made reference to conventions of the International Labour Organisation, which contain far more detailed norms in this respect.[6] For the meaning of the term 'forced or compulsory labour', the Commission referred to the five categories enumerated in Convention No. 105 of the International Labour Organisation: "political coercion or education or as a punishment for holding or expressing political views or views ideologically opposed to the established political, social, or economic system; mobilising and using labour for purposes of economic development; labour discipline; punishment for having participated in strikes; and racial, social or religious discrimination."[7]

Elements of the concept 'forced or compulsory labour' mentioned by the Commission are "first, that the work or service is performed by the worker against his will

4 Appls 3435-3438/67, *W, X, Y and Z v. the United Kingdom*, Yearbook XI (1968), p. 562 (596-598).

5 Judgment of 18 July 1994, para. 22.

6 See, e.g., the references to ILO Convention No. 29 by the Court in its judgment of 23 November 1983, *Van der Mussele*, para. 32.

7 Appl. 7641/76, *X and Y v. Federal Republic of Germany*, D&R 10 (1978), p. 224 (230).

and, secondly, that the requirement that the work or service be perform... or oppressive or the work or service itself involves avoidable hardship...

With respect to the first element – its involuntary nature – the Com... adopted the view that consent, once given, deprives the work or service ... sory character. If the decision mentioned above concerning the boys who ... the Navy, which related to the first paragraph, were followed ... connection with the second paragraph, the consent of the parents could ... take the place of that of their children under age.

Such an interpretation of 'forced' and 'compulsory' would appear ... restrictive. Even if a person has voluntarily entered into a labour contract or ... to perform certain services, the circumstances may change in such a way as ... tions to the work in question, especially in engagements of long duration, ... so far-reaching that holding the person unqualifiedly to his consent may ... in issue Article 4(2). It is submitted that this provision implies in such ... alternative possibilities should be offered to the person in question, for ... different work if the objections are directed against the nature of the work ... nation of the contract coupled with the obligation to pay a reasonable compen... And, indeed, in the *Van der Mussele* Case the Court did not hold the issue ... to be decisive.[9]

Within the framework of the second criterion, *viz.* that the obligation to ... the work must have an unjustifiable or oppressive character, or that the work ... involves avoidable hardship for the person concerned, the Commission has intro... a number of elements which allow a considerable margin of discretion to the ... authorities. If this second criterion were to be applied cumulatively to the fi... in fact a general ground of justification would be added to the specific grounds ... third paragraph to be discussed hereafter. Even work or a service which a per... to perform against his will and which is felt by him to be oppressive would, ... view, constitute a violation of Article 4(2), provided that the national authorities ... submit *prima facie* evidence that this oppressive character is not as bad as it ... or that the hardship was unavoidable. The text of Article 4 would thus be strained ... therefore, the second criterion should rather be handled *alternatively* in the ... suggested above, *viz.* that even work or a service to which the person concerned ... previously consented may assume a compulsory character for him if the obligations ... resulting therefrom involve such unjustified or avoidable hardship that they can ... longer be deemed to be covered by his consent. In its report in the *Van der Mus...*

The Commission indeed speaks of 'a subsidiary argument' in connection with ... criterion.[10]

...have been considerable dissension within the Commission about the elements ... concept of 'forced' labour. This is evident from the *Iversen* Case. In that case ... Norwegian legislation was brought into issue concerning the basis on which ... might be required to fill a vacancy for some time that had failed to be filled ... having been duly advertised. The complaint was declared by the Commission ... manifestly ill-founded. Two of the members of the Commission belonging to ... majority considered the Norwegian measure justified on the ground ... to the third paragraph under (c), *viz.* 'emergency or calamity threatening ... well-being of the community'.[11] Four members of the majority of six, how... said that there was no question of forced or compulsory labour, because the ... to be rendered was exacted for a limited time, was properly remunerated and ... in keeping with the profession chosen by Iversen, while the law in question had ... been applied against him in an arbitrary or discriminatory manner.[12] A minority ... of the members of the Commission, finally, were of the opinion that the above-men... circumstances did not exclude the applicability of the second paragraph, and ... the possible application of the third paragraph called for a further examination.[13] ... In the light of this diversity of views within the Commission it is very curious indeed ... the complaint was rejected as being manifestly ill-founded, which barred a ... thorough examination of the facts and a decision of the Court on this evidently contro... legal interpretation of the second paragraph.

In the case of a German lawyer who complained about having to act as unpaid or ... insufficiently paid defence counsel the Commission decided that the imposed obli... was not unreasonable and did not, therefore, fall under the prohibition of ... Article 4(2). The Commission did not review this form of compulsory service for its ... conformity with the third paragraph. In fact, the Commission based its decision partly ... on the consideration that anyone who voluntarily chooses the profession of a lawyer ... knows that under German law lawyers are obliged to defend clients who lack the means ... to pay counsel's fees, in those cases where they have been nominated to do so by a ... legal body. In those circumstances it could not be said that such a service had to ... be rendered against the will of the person in question.[14] Here the Commission seems

8 Appl. 4653/70, *X v. Federal Republic of Germany*, Yearbook XVII (1974), p. 148 (172). Likewise ... 8410/78, *X v. Federal Republic of Germany*, D&R 18 (1980), p. 216 (219) and Appl. 9322/81, ... *Netherlands*, D&R 32 (1983), p. 180 (182-183); Appl. 27633/95, *Stadler v. Austria* (not publi...

9 Judgment of 23 November 1983, para. 36.

10 Report of 3 March 1982, B.55 (1987), p. 33.

11 Appl. 1468/62, Yearbook VI (1963), p. 278 (328-330).

12 *Ibidem*, pp. 326-328.

13 *Ibidem*, pp. 330-332.

14 Appl. 4653/70, *X v. Federal Republic of Germany*, Yearbook XVII (1974), p. 148 (172). Previously, ... two complaints of an Austrian lawyer about free legal aid had been declared admissible by the ... Commission, on the ground that "these complaints raise issues of a complex nature" and could not ... therefore be declared manifestly ill-founded: Appls 4897/71 and 5219/71, *Gussenbauer v. Austria*, ... Coll. 42 (1973), p. 41 (48) and Yearbook XV (1972), p. 558 (562) respectively. These cases led to a ... friendly ...

to follow the reasoning which already was hinted at by four of its members in the *Iversen* Case, *viz.* that when certain obligations are attached to a profession, choosing that profession accepts those obligations implicitly.

A similar decision was taken in the case of a notary public who complained about the system according to which in specific cases he was only allowed to charge fees for his services. The Commission observed first of all that the applicant had advanced that he had been forced in one way or another to give his services in such cases, so that the question might be asked whether the first element had been met. With respect to the second element the Commission found that the impugned system could not be qualified as 'unjust or oppressive', since it related to a normal part of the tasks of a notary public and ensued from his almost exclusive competence as regards the services concerned.[15] And also in the case of a Dutch football player who complained that he was, after renouncing the contract with his former football club, prevented from joining another football club in view of the prohibitive transfer sum imposed by the former, the Commission took the view that the applicant freely chose to become a professional football player, knowing that by doing so he would be affected by the rules governing the relationships between his future employers. Moreover, the Commission was of the opinion that the system complained of, even if it could cause certain inconveniences for the applicant, could not be considered as being oppressive or constituting avoidable hardship, especially since it did not directly affect his contractual freedom.[16]

The above-mentioned argument applies only if the obligations form part of the normal exercise of a profession. The Commission, therefore, speaks of 'normal professional work'.[17] The obligation to lend free legal aid formed part of the normal obligations of a lawyer in the Federal Republic of Germany, as it does in most member States of the Council of Europe, and the obligation to take for some time, if necessary, a position in the public dental service in the northern part of the country formed part of the normal obligations of a dentist in Norway after he has completed his studies.[18] This does not, however, alter the fact that it must still be ascertained in each individual case whether the concrete content of the obligation in question is not so oppressive for the person concerned that he can no longer be assumed to have consented to it by choosing his profession.

In a number of case where a lawyer invoked Article 4(2) on account of his obligation to act as a free legal aid counsel, the Commission followed a somewhat different line of reasoning. It referred to Article 6(3)(c) and submitted that, since in the Convention context the right to free legal aid has been recognised, the obligation for a lawyer to give legal assistance in a concrete case cannot constitute forced or compulsory labour in the sense of Article 4(2).[19] The connection established here by the Commission between the two provisions does not seem to be a very logical one. Indeed, the right to legal aid *per se* does not say anything about the way in which the authorities must effectuate this right and does not necessarily imply that this should be done via an obligation for lawyers to render such legal aid under conditions to be laid down by the authorities. In its report in the *Van der Mussele* Case the Commission impliedly indicated that this line of reasoning is rather unsatisfactory, by holding that the obligation of the State to provide free legal aid was not decisive in that case because legal aid was organised by the Bar association. It, therefore, again emphasised that the obligation imposed on the applicant formed part of his normal professional work and left him so much freedom that one could not speak of forced or compulsory labour, though the Commission considered it unfortunate that pupil barristers such as the applicant were not paid at all when appointed to defend indigent persons.[20]

In the same *Van der Mussele* Case the Court took a somewhat different approach. It used as a starting point for the interpretation of 'compulsory labour' the definition given in Article 2 of ILO Convention No. 29:[21] "all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily."[22] Although a refusal to act as a free legal aid counsel was not punishable by any sanction of a criminal law character, the Court concluded that there was a 'menace of any penalty', since with such a refusal the applicant would run the risk of his name being struck off the roll of pupils or of a rejection of his application for entry in the register of advocates.[23] As regards the voluntary character of the service exacted, the Court held that the argument used by the Commission that the applicant consented in advance "correctly reflects one aspect of the situation; nevertheless, the Court cannot attach decisive weight thereto".[24] The Court subsequently observed that the applicant had to accept the requirement concerned, whether he wanted to or not, in order to become an *avocat* and that his consent was determined by the normal conditions of exercise of the profession at the relevant time. Moreover, according to the Court, it should not be overlooked that the acceptance by the

friendly settlement, so that the merits have not been dealt with; report of 8 October 1974, B *Taking on the European Convention on Human Rights. A periodic Note on the Concrete Results Under the Convention. The First Thirty Years: 1954 Until 1984*, Strasbourg 1984, p. 125.

15 Appl. 8410/78, *X v. Federal Republic of Germany*, D&R 18 (1980), p. 216 (219).

16 Appl. 9322/81, *X v. the Netherlands*, D&R 32 (1983), p. 180 (182-183).

17 Appl. 4653/70, *X v. Federal Republic of Germany*, Yearbook XVII (1974), p. 148 (172).

18 See, however, the report of 3 March 1982, *Van der Mussele*, B.55 (1987), p. 34, where the Commission distinguishes the situation from that of the *Iversen* Case.

19 Appl. 7641/76, *X and Y v. Federal Republic of Germany*, D&R 10 (1978), p. 224 (230).

20 Report of 3 March 1982, B.55 (1987), p. 34.

21 International Labour Office, *Conventions and Recommendations 1919-1966* (1966), p. 155.

22 Judgment of 23 November 1983, *Van der Mussele*, paras 32-33.

23 *Ibidem*, para. 35.

24 *Ibidem*, para. 36.

applicant was the acceptance of a legal regime of a general character [illegible] decide whether the service required fell within the prohibition of compulsory [illegible] the Court held that it should have regard to all the circumstances of the [illegible] light of the underlying objectives of Article 4.[26]

At first sight the approach of the Court seems different from that of the [illegible] sion, especially since the Court distances itself from the second criterion [illegible] by the Commission, *viz.* that of the 'unjust' or 'oppressive' character of the [illegible] be performed.[27] It is, however, striking to see that most of the circumstances [illegible] case taken into consideration by the Court have also been dealt with by the [illegible] sion in its report. In fact, the main difference lies in the weight attached to the [illegible] of 'consent in advance'. Indeed, the view expressed by the Commission in this [illegible] was too restrictive. The approach of the Court, therefore, is to be welcomed. [illegible] the Court also fails to give clear guidelines with respect to the interpretation of [illegible] or compulsory labour'. It restricts itself to an investigation of all the circumstances [illegible] of the case, each of which, according to the Court, "provides a standard [illegible] evaluation".[28] These standards were in this case the following: the services did not [illegible] outside the ambit of the normal activities of an *avocat*; a compensatory factor [illegible] be found in the advantages attaching to the profession; the services contributed to the [illegible] professional training of the applicant; the service is a means of securing the [illegible] laid down in Article 6(3)(c), and can be seen as a 'normal civic obligation' [illegible] to in Article 4(3)(d); and, lastly, the burden imposed was not disproportionate [illegible] it only took up about 18 hours of working time.[29]

Both the Commission and the Court concluded that, although the situation [illegible] be characterised as unsatisfactory because of the absence of any fee and the [illegible] reimbursement of incurred expenditure, it did not constitute a violation of [illegible] of the Convention.[30]

8.5 EXCEPTIONS

With respect to the exceptions mentioned in the third paragraph the following [illegible] vations may be made. The exception formulated under (a) for the work of detainees [illegible] and conditionally released persons is put in quite general terms and – unlike Article [illegible] 2(2)(c) of ILO Convention No. 29 – does not exclude work on behalf of [illegible]

25 *Ibidem.*
26 *Ibidem.*
27 *Ibidem*, para. 37.
28 *Ibidem*, para. 39.
29 *Ibidem*, para. 39. Cf. the report of 3 March 1982, *Van der Mussele*, B.55 (1987), p. 34.
30 *Ibidem*, para. 40. See also Appl. 20781/92, *Ackerl, Grötzback, Glawischnig, Schwalm, Klein and Limberger v. Austria*, D&R 78-A (1994), p. 116 (118).

[illegible] and foundations. Complaints with respect to work of such a character have, [illegible] been declared inadmissible by the Commission.[31]

[illegible] exception under (a) applies only to work 'in the ordinary course of detention'. [illegible] *Vagrancy* Cases these words were interpreted by the Court to mean that it must [illegible] directed at the rehabilitation of the prisoner.[32] Moreover, the Court's [illegible] would seem to imply that Article 4 is violated if the detention itself, in the [illegible] of which the work must be performed, conflicts with the first paragraph of [illegible]. However, the view of the Commission that also in case of a conflict with [illegible] fourth paragraph of Article 5 reliance on Article 4(3)(a) by the authorities is [illegible] was not adopted by the Court. This is curious, since the authorities may [illegible] refer to a detention which is found to be in conformity with Article 5(1), but [illegible] lawfulness – contrary to Article 5(4) – the applicant has not been able to have [illegible] by the domestic court. Such a review could precisely result in the domestic [illegible] ordering his release, as a consequence of which the ground for the obligation [illegible] would have ceased to exist.[33] It should finally be pointed out with respect to [illegible] exception under (a) that this exception does not relate exclusively to convicts – [illegible] as is the case in ILO Convention No. 29 – nor exclusively to persons whose [illegible] is based on a judicial order – as Article 8 of the UN Covenant on Civil and [illegible] Rights provides – but to all the situations of lawful deprivation of liberty [illegible] in the first paragraph of Article 5.[36]

[illegible] formulation of the exception under (b) departs from that of Convention No. 29, [illegible] Article 2(2)(a) speaks of 'any work or service exacted in virtue of compulsory [illegible] service laws for work of a purely military character'. Due to the fact that in [illegible] Article 4(3)(b) the confinement to 'compulsory military service' has not been adopted, [illegible] Commission concluded that "it was intended to cover also the obligation to [illegible] a service entered into on a voluntary basis".[37] However, in view of the [illegible] of this exception, as it appears in particular from the reference to the service

Appls 3134/67, 3172/67 and 3188-3206/67, *Twenty-one detainees v. Federal Republic of Germany*, Yearbook XI (1968), p. 528 (552-558) and Appl. 9449/81, *X v. Austria* (not published). In some of the Contracting States, however, the courts will have to apply that restriction on the ground of the direct applicability of ILO Convention No. 29, ratified by those States.
Judgment of 18 June 1971, para. 90. See also Appl. 8500/79, *X v. Switzerland*, D&R 18 (1980), p. 238 (248-249), where in the case of the detention of a minor the Commission examined under Article 5(1)(d) whether the required work "was abnormally long or arduous in view of the applicant's age [illegible] was of no educational value".
Judgment of 18 June 1971, para. 89.
Report of 19 July 1969, *De Wilde, Ooms and Versyp ('Vagrancy' Cases)*, B.10 (1971), pp. 96-97. One could argue that the respondent State should be confronted here with the adage *nemo suam turpitudinem allegans audiendum est*. However, the Commission followed the Court in its report of 5 May 1980, *Van Droogenbroeck*, B.44 (1985), p. 31.
Appl. 8500/79, *X v. Switzerland*, D&R 18 (1980), p. 238 (248), which was a case under Article 5(1)(d).
Appls 3435-3438/67, *W, X, Y and Z v. the United Kingdom*, Yearbook XI (1968), p. 562 (594).

exacted instead of compulsory military service, such an application [illegible] for those cases where this voluntary military service takes the place of [illegible] military service. In fact, in other cases it is not self-evident that military [illegible] be entitled to a special position as compared with other public services [illegible] interest, such as, for instance, service in public medical institutions or [illegible] companies.

The fact that Article 4(3)(b) also mentions (civil) service exacted [illegible] pulsory military service in case of conscientious objectors does not in itself [illegible] the Convention contains a right to such alternative service for conscientious [illegible] the provision contains the limitation 'in countries where they are recognised' [illegible] a right for conscientious objectors is not recognised in a given country, this [illegible] might have to be reviewed for its conformity with Article 9.[38]

The exception mentioned under (c) is self explanatory. Here the central [illegible] situation an 'emergency or calamity threatening the life or well-being of the [illegible] nity' is involved. As has been pointed out above, in the opinion of some [illegible] the Commission even a shortage of dentists could constitute such a situation. [illegible] would, however, appear to be more in keeping with the terminology used [illegible] here of structural inconveniences like those concerned in that case, but of a [illegible] emergency with a temporary character. Thus, one should think of services such [illegible] in extinguishing a fire, urgent repairs of transport systems and dams, supply [illegible] and food in case of a sudden shortage, transport of wounded persons or the evacuation of persons threatened by some danger, and similar incidental services which are required of everyone in the public interest depending on everybody's capabilities/possibilities.

The exception mentioned under (d), on the contrary, refers to 'normal' civic obligations, which means that no urgent and unforeseen calamity is required. It is restricted, however, to work and services in the general interest. The difference with the provision under (c) is mainly one of degree: the circumstances do not have to be as serious and urgent, but on the other hand the duties which are imposed may not be as burdensome for the person involved.[40] The formulation of the provision does not exclude special duties for particular professions in the public interest. In fact, the word 'normal' does not necessarily refer to what may be required equally of everyone [illegible] relate to what in the given circumstances may be required of the person [illegible] according to general usage.[41] The rationale of the provision implies that [illegible] refer to the normal obligations resulting from a profession, such as free [illegible] given by lawyers, normal night duties for nurses and the like, since no com- [illegible] in the real sense is involved, as the person concerned may resign from the job. [illegible] Commission would seem to have stretched the concept of 'normal civic [illegible] beyond any specification in a decision in which it declared this term to [illegible] applicable to the obligation of the lessor to keep the rented premises in good [illegible]

[illegible] is to be noted that a practice based on any of the above-mentioned excep- [illegible] loses its permissible character if it involves discrimination. By virtue of Article [illegible] then assumes the character of compulsory labour contrary to the Convention. [illegible] question played a part, for instance, in the *Grandrath* Case, where a member of [illegible] Jehovah's Witnesses complained that alternative civil service had been required [illegible] as a conscientious objector to military service, although within his religious [illegible] he held a function similar to that of ministers of other religions, who were [illegible] exempted from service.[43] In the *Schmidt* Case the applicant complained about the system which made it compulsory for men, but not women, to serve in the fire brigade or pay [illegible] financial contribution in lieu of such service. He claimed to be the victim of discri- [illegible] mination on the ground of sex in breach of Article 14 taken in conjunction with Article [illegible] 4(3)(d). The Court considered that compulsory fire service constituted "normal civic [illegible] obligations" envisaged in Article 4(3)(d). It observed further that the financial contri- [illegible] bution which was payable – in lieu of service – was a "compensatory charge". The Court therefore concluded that, on account of its close links with the obligation to serve, the obligation to pay also fell within the scope of Article 4(3)(d). However, the Court found a violation of Article 14 taken in conjunction with Article 4(3)(d).[44]

8.6 DEROGATION

Under Article 15(2) no derogation from the first paragraph of Article 4 is permitted under any circumstances. Derogations from the second paragraph, apart from the cases mentioned in the third paragraph, are allowed only under the conditions and restrictions mentioned in Article 15.

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38 Appl. 10640/83, *A v. Switzerland*, D&R 38 (1984), p. 219 (222-223).

39 See *supra* 8.4.

40 In the Strasbourg case law a clear distinction has not yet been made, as appears from the decision on Appl. 9686/82, *S v. Federal Republic of Germany*, D&R 39 (1985), p. 90 (91), where the obligation of a person enjoying shooting rights in a hunting district (*Jagdpächter*) to participate in the [illegible] of fox holes was considered to be justified either under (c) or under (d) in view of the public interest to control epidemics.

41 Judgment of 23 November 1983, *Van der Mussele*, para. 36.

42 Appl. 5593/72, *X v. Austria*, Coll. 45 (1974), p. 113.

43 Appl. 2299/64, *Grandrath v. Federal Republic of Germany*.

44 Judgment of 18 July 1994, paras 23-29.

CHAPTER 9
RIGHT TO LIBERTY AND SECURITY OF PERSON (Article 5)

REVISED BY EDWIN BLEICHRODT

CONTENTS

9.1 TEXT OF ARTICLE 5

1. *Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:*
   - *(a) the lawful detention of a person after conviction by a competent court;*
   - *(b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;*
   - *(c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;*
   - *(d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;*
   - *(e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;*
   - *(f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.*
2. *Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.*
3. *Everyone arrested or detained in accordance with the provisions of paragraph 1 of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.*
4. *Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.*
5. *Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation.*

9.2 INTRODUCTION

In Article 5 the right to liberty of person and that to security of person are mentioned in the same breath, while in the following part of the article it is only the right to liberty of person that is elaborated. The right to security of person must be seen in the light of the right to liberty of person and the protection of the individual against arbitrariness. The right to security of person has played a role in cases where prisoners have disappeared. In the *Kurt* Case the Court observed that the authorities did not conduct any meaningful investigation into the applicant's insistence that the individual concerned was in detention and that she was concerned for his life. The unacknowledged detention in the absence of the safeguards of Article 5 was considered a particularly grave violation of the right to liberty and the right to security of person.[1]

In the *Bozano* Case the Court held as follows: "The Convention here (...) also requires that any measure depriving the individual of his liberty must be compatible with the purpose of Art. 5, namely to protect the individual from arbitrariness (...). What is at stake here is not only the 'right to liberty', but also the 'right to security of person'."[2] The question arises, however, whether the purpose of the inclusion of the right to security of person is thus done justice. After all, the obligation to give legal protection to the right to liberty of person and the prohibition of arbitrariness in the jurisdiction of that right result from Article 5 and the system of the Convention even without the addition of 'and security',[3] while the term 'security' according to normal usage refers to more than mere protection against limitation of liberty. The Contracting States also have to give guarantees against other encroachments on the physical[4] security of persons and groups by the authorities as well as individuals, for instance, against unnecessary threats to the physical integrity of spectators during police action or against incitement to action against a particular group of persons.

1. Judgment of 25 May 1998, paras 124–129.
2. Judgment of 18 December 1986, para. 54.
3. See the judgment of 8 June 1976, *Engel*, para 58.
4. From its inclusion in Art. 5 it follows that, here, 'security' refers exclusively to physical security and not, e.g., to mental, economic, or social security. *Cf.*, for 'liberty', *ibidem*.

9.3 DEPRIVATION OF LIBERTY

9.3.1 THE DIFFERENCE BETWEEN DEPRIVATION AND RESTRICTION OF LIBERTY

With respect to the right to liberty of person, in the Court's opinion Article 5 offers protection exclusively against *deprivation* of liberty, not against other restrictions on the physical liberty of a person. The Court infers this from the further elaboration in Article 5, where the terms 'deprived of his liberty', 'arrest' and 'detention' are used, and also from the fact that Article 2 of Protocol No. 4 contains a separate provision concerning the restriction of freedom of movement.[5] The right to liberty refers to individual liberty in its classic sense, the physical liberty of the person.

In order to determine whether there has been *deprivation* of liberty the starting point is, in the opinion of the Court, the individual situation of the person concerned. Further, account must be taken of the special circumstances such as the type, duration, effects and manner of implementation of the measure in question. The degree of supervision and the effects on the possibilities of maintaining normal social contacts are also relevant.

Certain restrictions of the liberty of movement of soldiers – the obligation to be present in the barracks at particular times, also during leisure – which would constitute a deprivation of liberty for civilians, may be permitted if those restrictions do not go "beyond the exigencies of normal military service".[6] In the *Engel* Case the Court made the following distinction: it held the so-called 'light arrest' and 'aggravated arrest' to be in violation of Article 5, because the soldiers concerned were not confined or were able to perform their normal service; this in contrast with 'strict arrest' which did imply confinement and, therefore, had to be reviewed for its justification by reference to the exceptions of Article 5.[7] In the *Raimondo* Case the person concerned was placed under police supervision. He was also required to lodge a security deposit as a guarantee to ensure that he complied with the constraints attaching to the measure, *e.g.* an obligation to return to his house by 9 p.m. and not to leave before 7 a.m. unless he had valid reasons for doing so and had first informed the relevant authorities of his intention. This measure did not, according to the Court, exceed the boundaries of the mere *restriction* of liberty.[8] A different result was reached in the *Guzzardi* Case. In this case a measure of police supervision was combined with a stay on an island, where freedom of movement was limited at night to a few square kilometres and in the daytime to a small area of the island, while the possibilities of contact with other persons apart from the nearest relatives was very limited. The Court held that deprivation of liberty was involved.[9] In the *Lavents* Case a detainee suffered a heart attack and was sent to a hospital. The Court found that the stay in the hospital implied a deprivation of liberty. It took into consideration that the applicant could not leave the hospital and was under constant supervision, while the restrictions were comparable to those in prison.[10] In the *Amuur* Case asylum-seekers from Somalia were refused entry to France. They stayed in a transit zone of the airport. The Court held that the possibility to leave the transit zone of an airport is only theoretical if there is no other country that is prepared to grant entrance to the asylum-seeker and to offer him protection comparable to the protection that he expects to find in the country where he is seeking asylum.[11] The measures amounted to a deprivation of liberty. From the above case law it appears that the dividing line between deprivation of liberty and mere restrictions of liberty is by no means clear-cut; the distinction is one of degree or intensity rather than one of nature or substance.

The mere fact that a person has assented to his detention does not imply that the detention cannot be an unlawful deprivation of liberty. In the *'Vagrancy'* Cases the Court held that "the right to liberty is too important in a 'democratic society' within the meaning of the Convention for a person to lose the benefit of the protection of the Convention for the single reason that he gives himself up to be taken into detention".[12] In the Case of *H.M. v. Switzerland* the adult applicant complained that she had been placed in a nursing home against her will. The relevant statutory provisions under Swiss law expressly referred to the measure at issue as one of 'deprivation of liberty'. The Court came to an autonomous interpretation on the basis of the specific situation. Relevant factors were the degree of freedom of movement, the possibilities to maintain social contact with the outside world and the fact that she, after moving to the nursing home, agreed to stay there. The Court also took in account that the guardianship commission had ordered the placement in her own interest to provide her with the necessary medical care and satisfactory living conditions. Although it is not very clear in which manner this element may influence the assessment of whether the circumstances in the nursing home can be considered as a deprivation of liberty, all things considered the Court concluded that the applicant's placement in the nursing home did not amount to a deprivation of liberty within the meaning of Article 5(1).[13]

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5 *Ibidem*; judgment of 24 October 1979, *Winterwerp*, para. 37; judgment of 6 November 1980, *Guzzardi*, para. 92; judgment of 22 February 1994, *Raimondo*, para. 39. In its report in the *Bozano* case the Commission came to the conclusion that Art. 5 amounts to a *lex specialis* in relation to the freedom of movement; report of 7 December 1984, A.111, p. 35.

6 Report of 19 July 1974, *Engel and Others*, B.20 (1978), para. 69.

7 Judgment of 8 June 1976, paras 61-63.

8 Judgment of 22 February 1994, paras 13 and 39.

9 Judgment of 6 November 1980, para. 95.

10 Judgment of 28 November 2002, para. 63.

11 Judgment of 25 June 1996, para. 48. See also the judgment of 27 November 2003, *Shamsa*, paras 22-25.

12 Judgment of 18 June 1971, *De Wilde, Ooms and Versyp ('Vagrancy' Cases)*, para. 65.

13 Judgment of 26 February 2002, paras 44-48.

In some cases the (delay in the) transition from a stricter form of [illegible] more liberal one is at stake. In the *Ashingdane* Case there had been a [illegible] long failure to implement the applicant's transfer from a special psychiatric [illegible] to an ordinary psychiatric hospital with a more liberal regime. The Court [illegible] the place and conditions of detention had not ceased to be those capable [illegible] nying the lawful detention of a person of unsound mind. The delay [illegible] mischief against which Article 5(1) afforded protection. The Court [illegible] the transfer implies a change of the type of deprivation of liberty to which [illegible] is subjected. In the *Mancini* Case the District Court had replaced the pre-trial [illegible] of the applicants with the security measure of house arrest. However, [illegible] organisational shortcoming that was attributable to the State, the applicants [illegible] been able to leave the prison until six days later. Although the Court considered [illegible] imprisonment and house arrest deprivations of liberty, it concluded that the [illegible] complained of fell within the scope of Article 5(1) under (c) and found [illegible] violation. Decisive was that the replacement of detention in prison with [illegible] entails a change in the nature of the place of detention from a public institution [illegible] private home.[14] Besides the gradual difference between deprivation of liberty [illegible] restriction of liberty, the Court introduced change of the type of deprivation [illegible] as a possible criterion that may bring a delay of such change within the scope of [illegible] 5. This makes the case law rather casuistic. The place of the detention may [illegible] relevant in connection of Article 5 (1) under e.[15] In that context, its relevance [illegible] applicability of Article 5 is more easily understandable, because the basis [illegible] deprivation of liberty in those cases is often directly related with the place [illegible] detention, often a clinic, and the possibilities of treatment.

9.3.2 DEPRIVATION OF LIBERTY BY PRIVATE PERSONS

Under which circumstances are the Contracting States responsible for a deprivation of liberty that is primarily carried out by private persons? In the *Nielsen* Case the question arose whether a deprivation of liberty was at stake. The case concerned the hospitalisation for approximately six months of a 12-year-old boy in a psychiatric ward at a State hospital against his will, but with the consent of his mother as the holder of parental rights. The Government's primary contention was that Article 5 did not apply, because the deprivation of liberty resulted from the decision of the mother. The Court, although accepting that the powers of the holder of parental authority could be unlimited, was of the opinion that the applicant was still of an age at which it would be normal for a decision to be made by the parent even against the wishes of the [illegible]

[14] Judgment of 2 August 2001, paras 17-26.

[15] See, *e.g.*, the judgments of 11 May 2004, *Morsink* and *Brand*.

[illegible] opinion it must be possible for a child like the applicant to be admitted [illegible] the request of the holder of parental rights. Furthermore, the Court [illegible] the restrictions to which the applicant was subjected in the ward to be [illegible] ements for the care of a child of 12 years of age receiving treatment in [illegible] Therefore, the Court reached the opinion that Article 5 was not applicable [illegible] since the hospitalisation was a responsible exercise of custodial rights by [illegible] The situation is different when the containment of the juvenile applicant [illegible] by a court, as in *D.G. v. Ireland*. The Court held that the applicant was [illegible] of his liberty within the meaning of Article 5.[17]

[illegible] *Riera Blume* Case the applicants were members of a sect, who were arrested [illegible] After the decision to release them was taken, the applicants were taken [illegible] of the police in official vehicles to a hotel, where they were handed over [illegible] families with a view to their recovering their psychological balance. Once at [illegible] the applicants were subjected to a process of 'deprogramming'. They were [illegible] individual rooms under the supervision of private persons and they were not [illegible] to leave their rooms for the first three days. After ten days they were allowed [illegible] the hotel. On the last two days of their stay in the hotel they were questioned [illegible] public authorities. The Court considered the transferral to the hotel and the stay [illegible] hotel for ten days, on account of the restrictions placed on the applicants, as [illegible] deprivation of liberty. Since there was no legal basis for the deprivation of liberty, [illegible] relevant to assess whether the detention fell under the responsibility of the State. The Court answered that question in the affirmative. The contribution of the authorities had been so decisive that without it the deprivation of liberty would not have occurred.[18] This criterion implies a causal connection between the part played by the authorities and the deprivation of liberty.

In the *Riera Blume* Case the police had played an active role. The question arises whether Article 5 may also be violated if the authorities merely play a passive role and acquiesce in the loss of liberty. Depending on the circumstances of the case, it is desirable that the guarantees of Article 5 are also applicable in situations in which the authorities are fully aware of the deprivation of liberty and in the position to put it to an end but fail to do so. In the *Storck* Case the Court stressed that Article 5(1) creates a positive obligation for the State to protect its citizens. The lack of any effective State control over the lawfulness of the detention in a psychiatric clinic was held not to be in conformity with this positive obligation.[19] Article 5 also requires the authorities

[illegible] Judgment of 28 November 1988, paras 70-72. In the *Ashingdane* Case the Court held that the enforced stay in an ordinary psychiatric hospital amounted to a deprivation of liberty. See the judgment of 28 May 1985, para. 42.

[illegible] Judgment of 16 May 2002, paras 72-73. See also the admissibility decision of 12 October 2000, *Kuparska*.

[illegible] Judgment of 14 October 1999, paras 29-30. See also the judgment of 16 June 2005, *Storck*, paras 90-91.

[illegible] Judgment of 16 June 2005, paras 102-107.

to take effective measures to safeguard against the risk of disappearance [illegible] about the investigation after a disappearance in a case where it was [illegible] reasonable doubt that the authorities had taken away the persons [illegible] examined under Article 13.[21]

In cases where individuals are under control of the authorities, the [illegible] strict. In the *Bilgin* Case, the Court held as follows: "Bearing in mind the [illegible] of the authorities to account for individuals under their control, Article 5 [illegible] to take effective measures to safeguard against the risk of disappearance and [illegible] a prompt and effective investigation into an arguable claim that a person [illegible] taken into custody and has not been seen since."[22] In the *Kurt* Case, [illegible] considered an unacknowledged detention of an individual a complete negation [illegible] guarantees in the Convention and a most grave violation of Article 5. Having [illegible] control over that individual it is incumbent on the authorities to account [illegible] her whereabouts. For this reason Article 5 must be seen as requiring the [illegible] to take effective measures to safeguard against the risk of disappearance and [illegible] a prompt and effective investigation into an arguable claim that a person [illegible] taken into custody and has not been seen since.[23]

9.3.3 EXTRATERRITORIALITY

The applicability of Article 5 is not limited to actions of a State within the [illegible] its own territory. In the *Öcalan* Case the Court accepted that an arrest made [illegible] authorities of one State on the territory of another State, without the consent [illegible] latter, affects the person's individual rights to security under Article 5 [illegible] Convention does not prevent co-operation between States for the purpose of [illegible] fugitive offenders to justice, provided that it does not interfere with any of the [illegible] rights recognised in the Convention. In those cases the rules established by [illegible] dition treaty or, in the absence of any such treaty, the co-operation between the [illegible] concerned are also relevant factors to be taken into account for determining [illegible] the arrest that has led to the subsequent complaint to the Court was lawful. The [illegible] noted: "Independently of the question whether the arrest amounts to a violation [illegible] the law of the State in which the fugitive has taken refuge – a question which may [illegible] to be examined by the Court if the host State is a party to the Convention – it [illegible] be established to the Court 'beyond all reasonable doubt' that the authorities of [illegible] State to which the applicant has been transferred have acted extra-territorially [illegible]

20 Judgment of 25 May 1998, *Kurt*, para. 124; judgment of 13 June 2000, *Timurtas*, para. 103.
21 Judgment of 22 May 2001, *Sarli*, para. 69.
22 Judgment of 17 July 2001, para. 149. See also judgment of 18 June 2002, *Orhan*, para. 358.
23 Judgment of 25 May 1998, para. 124. In the same sense the judgment of 13 June 2000, *Timurtas*, para. 103.

[illegible] that is inconsistent with the sovereignty of the host State and therefore [illegible] international law".[24]

9.4 EXCEPTIONS TO THE PROHIBITION OF DEPRIVATION OF LIBERTY

9.4.1 GENERAL OBSERVATIONS

[illegible] contains an enumeration of the cases in which deprivation of liberty is [illegible]. This is an exhaustive enumeration,[25] that must be interpreted narrowly. [illegible] such an approach is consistent with the aim and purpose of Article 5 to ensure [illegible] no one is arbitrarily deprived of his liberty.[26]

[illegible] appears from the inclusion in the second sentence of the words 'in accordance with a procedure prescribed by law', it is required for all the cases mentioned that the procedure by means of which the deprivation of liberty has been imposed, be regulated in the law of the country in question. That law does not have to be written law. In the *Ireland-Janousek* Case there was no French statutory provision or any international treaty which permitted the enforcement on French territory of criminal convictions pronounced in the Principality of Andorra. Nevertheless, the Court held that Franco-Andorran customary law, dating back several centuries, had "sufficient stability and legal force to serve as a basis" for the detention of the applicants.[27] The words 'prescribed by law' do not imply that in all cases a judicial procedure must have been followed, as is evident in particular from the cases under (c) and (f).

The question of whether a detention complies with the requirement 'a procedure prescribed by law' is closely related to the question of whether the detention was lawful. These requirements, the latter of which is expressly mentioned in the individual exceptions under (a)-(f), and which are usually bracketed together by the Court, essentially refer back to national law. It means that the deprivation of liberty must be imposed in conformity with the substantive and procedural rules of the applicable national law. The Court is competent to review whether this requirement has been complied with, but is not called upon to give its own interpretation of national law.[28]

[illegible] judgment of 12 March 2003, paras 88-92. The judgment in this case was referred to the Grand Chamber, which came to the same conclusion in its judgment of 12 May 2005. See also the judgment of 12 October 1989, *Stocké*, paras 54 and 167. For transfer with a view to serving a sentence in another country, see the judgment of 15 March 2005, *Veermäe*.
[illegible] judgment of 18 January 1978, *Ireland v. the United Kingdom*, para. 194.
[illegible] judgment of 22 March 1995, *Quinn*, para. 24. See also the judgment of 24 October 1979, *Winterwerp*, para. 37.
[illegible] judgment of 26 June 1992, para. 107.
[illegible] See, e.g., the judgment of 24 October 1979, *Winterwerp*, para. 46; judgment of 18 December 1986, *Bozano*, para. 58; judgment of 10 June 1996, *Benham*, paras 39-47.

It is also not its role to assess the facts which have led a national court to ... position rather than another.[29] The interpretation and application of ... primarily left to the domestic authorities,[30] but in cases where a failure to ... domestic law entails a breach of the Convention, the Court exercises a ... to examine whether national law has been observed.

A period of detention is, in principle, 'lawful' within the meaning of ... if it is based on a court order. Even flaws in the detention order do not ... render the detention unlawful, since not every defect is of a nature that it ... detention of its legal basis under domestic law.[31] Relevant is whether the ... the court order may be considered to have been clear to the applicant and ... the domestic court acted in bad faith or failed to apply domestic law correctly. ... detention which extends over a period of several months and which has ... ordered by a court or by a judge or any other person 'authorised ... to exercise ... power' cannot be considered 'lawful' in the sense of Article 5(1). In the ... opinion, the protection afforded by Article 5(1) against arbitrary deprivations of ... would be seriously undermined if a person could be detained by executive ... following a mere appearance before the judicial authorities referred to in ... 3 of Article 5, as happened in the *Baranowski* Case.[33] A failure to comply ... procedural rule of national law,[34] but even the non-fulfilment of a procedural ... may lead to a violation of Article 5(1). The latter occurred in the *Wassink* Case, ... a judge failed to comply with national law inasmuch as he authorised the continued ... of the applicant after a hearing held without a registrar.[35]

Moreover, the Court must ascertain whether domestic law is in conformity ... the Convention. The answer to the questions of whether the court is competent (... a, c and d) and whether the arrest and detention are lawful, is determined essentially ... on the basis of national law. In that respect Article 5(1) lays down an obligation ... comply with the substantive and procedural provisions of national law. But it ... also requires that any measure depriving the individual of his liberty must be ... compatible with the purpose of Article 5, namely, to protect the individual from ... arbitrariness.[36]

The words 'prescribed by law' are not merely a reference to domestic law ... refer also to the 'quality of the law' and require that the law is 'sufficiently ...

29 Judgment of 24 November 1994, *Kemmache (No. 3)*, para. 44.

30 Judgment of 18 December 1986, *Bozano*, para. 58 and judgment of 20 March 1997, *Lukanov* ...

31 Judgment of 4 August 1999, *Douiyeb*, paras 44-45 and judgment of 30 January 2003, *Nikolova* ...

32 See, *e.g.*, the judgment of 31 July 2000, *Jecius*, para. 68.

33 Judgment of 28 March 2000, para. 57.

34 Judgment of 18 December 1986, *Bozano*, para. 54; judgment of 21 February 1990, *Van der* ... 22.

35 Judgment of 27 September 1990, paras. 23-27.

36 See, for example, the *Lukanov* judgment of 20 March 1997, para. 41; the *Giulia Manzoni* ... of 1 July 1997, para. 21, and *K.-F. v. Germany*, judgment of 27 November 1997, para. 47.

... In addition, as the Court held in the *Kemmache* Case, "The notion ... the term in question ['in accordance with a procedure prescribed by law'] ... fair and proper procedure, namely that any measure depriving a person of ... should issue from and be executed by an appropriate authority and should ... arbitrary".[38] The last mentioned requirement – the measure should not be taken ... – as inferred from the terms 'in accordance with a procedure prescribed ... and 'lawful',[39] can be regarded as the guiding principle for the interpretation ... 5. In view of that principle it must also be examined whether less severe ... than the deprivation of liberty could have sufficed. The detention of an ... is such a serious measure that it is only justified where other, less severe ... have been considered and found to be insufficient to safeguard the individual ... public interest.[40]

The notion 'lawful', which figures in the individual exceptions, may also imply ... requirements. These are discussed in the next section.

3.1.1 EXCEPTION UNDER (A)

The exception under (a) concerns the lawful detention of a person after conviction ... competent court. Three notions are to be discussed: 'competent court', 'lawful' ... after conviction'.

The word 'court' implies that the conviction must be imposed by a judicial organ. A decision of the police or a public prosecutor is not sufficient,[41] no more than a ... decision of a military commander[42] or of an administrative organ.[43] For an organ to ... be a judicial organ it must be 'independent both of the executive and of the parties

... judgment of 25 June 1996, *Amuur*, para. 50; judgment of 23 September 1998, *Steel and Others*, ... para. 54-55; judgment of 28 March 2000, *Baranowski*, paras 51-52.

... judgment of 24 November 1994, para. 34. See also the judgment of 24 October 1979, *Winterwerp*, ... para. 45.

... See, *e.g.*, the judgment of 29 February 1988, *Bouamar*, para. 47; judgment of 21 February 1990, *Wassink*, para. 24.

... judgment of 4 April 2000, *Witold Litwa*, para. 78.

... With respect to the Belgian Advocate-Fiscal, see the report of 4 March 1978, *Eggs*, D&R 15 (1979), ... p. 35 (62).

... Report of 19 July 1974, *Engel and Others*, B.20 (1978), par 84. A military commander can, however, ... order custody on remand, which is covered by paragraph 1(c): judgment of 22 May 1984, *De Jong, Baljet and Van den Brink*, paras 43-44.

... For the Austrian reservation with respect to this, see Council of Europe, *Collected Texts*, Strasbourg, ... 1994, p. 68. If the decision of the administrative organ is based on a judicial decision, the requirement ... under (a) has been complied with, provided that there is a sufficiently direct link between the two: ... report of 1 March 1979, *Christinet*, D&R 17 (1980), p. 35 (54); report of 9 July 1980, *Van Droogenbroeck*, B.44 (1985), p. 24.

to the case'.[44] It is not required that the members be jurists,[45] nor that [illegible] nominated for an indefinite period.[46] The question of whether the court [illegible] is to be answered on the basis of national law.

The requirement that the deprivation of liberty must be lawful means [illegible] this particular penalty must find a sufficient basis in the conviction by [illegible] concerned, but also – this in connection with Article 7 – that the facts [illegible] sentence relates constituted under municipal law, at the time the offence [illegible] mitted, a punishable act for which the imposition of imprisonment was [illegible] addition, the sentence on which the deprivation of liberty is based, must [illegible] provisions of the Convention. It must, for instance, have been pronounced [illegible] of a fair and public hearing in the sense of Article 6. In the *Drozd and Janousek* [illegible] the applicants were serving a term of 14 years imprisonment in France, follow[illegible] conviction by a court of the Principality of Andorra. They claimed a violation [illegible] Article 5(1) because the French courts had not carried out any review of the [illegible] of the foreign court, whose composition and procedure was, according to [illegible] applicants, not in conformity with the requirements of Article 6. Thus, the [illegible] arose whether the above-mentioned requirement also applies to sentences [illegible] been passed in another country. The Court expressed as its view that the Contracting States are obliged to refuse their co-operation if it emerges that the conviction is the result of a flagrant denial of justice. However, there is no obligation to verify whether the proceedings which resulted in the conviction were compatible with all the requirements of Article 6.[47] The application of this standard, which led to the conclusion, by 12 votes to 11(!), that Article 5(1) was not violated, is criticised by the minority of the Court because of the fact that the French representatives in Andorra had the power to ensure that the Convention was respected: they had legislative [illegible] and the competence to appoint judges in Andorra.[48]

The mere fact that a judicial sentence is annulled on appeal does not deprive imprisonment imposed in execution of that sentence of its lawful character.[49] [illegible] the matter may be different if the ground for annulment is precisely a manifest [illegible]

[illegible] to municipal law or a violation of one of the provisions of the Convention, [illegible] of Articles 6 and 7.

[illegible] word 'conviction' has to be understood as signifying both a finding of guilt [illegible] been established in accordance with the law that an offence has been [illegible] and the imposition of a penalty or other measure involving deprivation [illegible] the person is not convicted or sentenced in view of his lack of criminal responsibility, his detention comes under Article 5(1) under (e) instead of (a).[51] A person [illegible] remand is to be considered, from the moment of his conviction by a court [illegible] instance, as a detainee 'after conviction', so that from that moment and during [illegible] proceedings the lawfulness of that detention must be reviewed by reference to [illegible] under (a) and no longer by reference to that under (c).[52] This holds true [illegible] if under domestic law the person is still considered as a remand prisoner. The [illegible] after' in Article 5(1)(a) does not, according to the Court, simply mean that "the [illegible] must follow the 'conviction' in point of time", but also that "the detention [illegible] result from, follow, and depend or occur by virtue of, the conviction".[53]

In the *Van Droogenbroeck* Case the applicant was sentenced by a criminal court [illegible] ten years of imprisonment and was ordered to be 'placed at the Government's [illegible] disposal' for ten years. The Court had to decide whether there was sufficient connection for the purpose of Article 5, between the sentence and the order, and the subsequent deprivation of liberty on two occasions as a result of the decisions by the Minister of Justice, following applicant's disappearances. According to the Court, the sentence to imprisonment and the order to be placed at the Government's disposal constituted "an inseparable whole". The execution of the order could take several years, which was a matter of discretion of the Minister of Justice. In this case the way in which this discretion was exercised respected the requirements of the Convention.[54]

In the *Weeks* Case, again, the "sufficient causal connection between conviction and deprivation of liberty" was at issue. Here the applicant was sentenced to life imprisonment, but released on licence some ten years later. However, the licence was revoked after 15 months by the Home Secretary. The reason for the sentence to life imprisonment was to make the applicant "subject to a continuing security measure in the interests of public safety". Since there was no medical evidence justifying an order to send him to a mental institution, this "indeterminate sentence" would enable the Home Secretary to monitor his progress. The Court took the position that there were

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44 Judgment of 27 June 1968, *Neumeister*, para. 24. See also the judgment of 18 June 1971, *Ooms and Versyp ('Vagrancy' Cases)*, para. 77; judgment of 16 July 1971, *Ringeisen*, para. [illegible] judgment of 8 June 1976, *Engel*, para. 68.

45 Appl. 5258/71, *X v. Sweden*, Coll. 43 (1973), p. 71 (79).

46 The Dutch Supreme Military Court was recognised as a judicial organ in the *Engel* Case, [illegible] the four military members could be discharged from their function by the King. In the [illegible] the Commission and the Court the fact that these members had taken not only the judicial [illegible] the military oath also did not bar their independence: judgment of 8 June 1976, para. [illegible] 19 July 1974, B.20 (1978), para. 99.

47 Judgment of 26 June 1992, paras 108-110. See also the judgment of 24 October 1995, *Johnson*, paras 30-32.

48 *Ibidem*, pp. 40-43.

49 Appl. 3245/67, *X v. Austria*, Yearbook XII (1969), p. 206 (236); report of 9 March 1978, *Kroon*, [illegible] 13 (1979), p. 57 (61).

51 Judgment of 24 June 1982, *Van Droogenbroeck*, para. 35. See also the judgment of 6 November 1980, *Guzzardi*, para. 100 and the judgment of 28 March 1990, *B. v. Austria*, para. 38.

52 Judgment of 24 September 1992, *Herczegfalvy*, paras 62-64.

53 Judgment of 27 June 1968, *Wemhoff*, para. 9; judgment of 6 April 2000, *Labita*, paras 145 and 147; judgment of 30 November 2004, *Klyakhin*, para. 57.

54 Judgment of 5 November 1981, *I. v. the United Kingdom*, para. 39 and judgment of 28 March 1990, *B. v. Austria*, para. 38.

[illegible] Judgment of 24 June 1982, paras 39-40.

several similarities with an order to place someone at the disposal of the
However, the Court continued as follows: "Applying the principles state
Droogenbroeck judgment, the formal legal connection between Mr. Week
in 1966 and his recall to prison some ten years later is not on its own
justify the contested detention under Article 5, para. 1(a). The causal link
by subparagraph (a) (...) might eventually be broken if a position were
which a decision not to release or to re-detain was based on grounds that
sistent with the objectives of the sentencing court. In those circumstances,
that was lawful at the outset would be transformed into a deprivation of
was arbitrary and, hence, incompatible with Article 5."[55] The Court
conclusion that the sentencing judges must be taken to have known and
it was inherent in Mr Weeks' life sentence that his liberty was at the discre
executive for the rest of his life, and that it was not for the Court, within the
of Article 5, to review the appropriateness of the original sentence.[56] Thus, the
accepted a rather loose link between the original sentence and the renewed
However, the Court next examined whether the grounds on which the re
was based, were sufficient. Although, here again, the Court took as a starting
that a certain discretion has to be left to the national authorities in this matter
ducted its own examination of the grounds in a rather detailed manner
background of the original sentence.[57]

In the *Stafford* Case the Court noted that the finding in previous judgments
the mandatory life sentence according to English law constituted punishment
and had to be distinguished from the discretionary life sentence, could no
regarded as reflecting the real position in the domestic criminal justice system
mandatory life prisoner. That means that, once the punishment element
sentence (as reflected in the tariff) has been satisfied, continued detention,
tionary life and juvenile murderer cases, depends on considerations of risk and
erousness associated with the objectives of the original sentence. In the applicant's
the continued detention relied on the risk of non-violent offences, while the
sentence was based on murder. The Court found no sufficient causal connection

In the *Eriksen* Case, which seems to be rather exceptional, the authorisation
security measures was expired. The applicant, who had become aggressive
suffering brain damage as a result of a traffic accident, stayed in detention on remand
pending proceedings instituted in order to have the authorisation extended. The Court
stated that the detention in issue was directly linked to the applicant's initial conviction
and could thus be regarded as "lawful detention ... after conviction by a competent

55 Judgment of 2 March 1987, para. 49.
56 *Ibidem*, paras 50-51. See also the judgment of 16 December 1999, *Ireland v. the United Kingdom*, para. 118.
57 *Ibidem*, paras 50-51. See also the judgment of 10 December 2002, *Waite*, para. 68.
58 Judgment of 28 May 2002, paras 79-81.

the purposes of Article 5(1) under (a). It considered that the prolonged
if granted, would have been based on the offences which had grounded
applicant's initial conviction. Furthermore, the detention was consistent with
objectives of that authorisation, in particular the serious danger that the person
would commit further criminal offences.[59]

EXCEPTION UNDER (B)

most permissible form of deprivation of liberty mentioned under (b) – on account
non-compliance with a lawful order of a court – is clear. Here one may think, for
instance, of non-compliance with orders of the courts to pay a fine[60], of a refusal to
comply with a civil sentence[61] or to submit to a blood test,[62] or of a measure to enforce
information concerning a statutory declaration of assets which the applicant had
refused to make.[63]

In the *Steel* Case the Court examined whether the binding-over orders to keep the
peace and to be of good behaviour that had been applied to the applicants, were
specific enough properly to be described as 'lawful order[s] of a court'. In this respect
it noted that the orders were expressed in rather vague and general terms; the ex-
pression 'to be of good behaviour' was particularly imprecise and offered little
guidance to the person bound over as to the type of conduct which would amount
to a breach of the order. However, in each applicant's case the binding-over order was
imposed after a finding that she had committed a breach of the peace. Having con-
sidered all the circumstances, the Court was satisfied that it was sufficiently clear that
the applicants were being requested to agree to refrain from causing further, similar,
breaches of the peace during the ensuing twelve months.[64]

The duration of the detention must be assessed in connection with the specific aim
of the order. In the *Nowicka* Case the applicant's detention was carried out pursuant
to a court order to secure the fulfilment of her obligation to submit to a psychiatric
examination. The applicant was held in custody during several days before the (brief)
examination was conducted and she remained in detention after the examination
ended. Article 5(1) under (b) was violated.[65]

59 Judgment of 27 May 1997, paras 82-84.
60 Decision of 4 September 1996, *Tyrrell*.
61 In which case Article 1 of Protocol No. 4 must be observed by those countries which have ratified that Protocol.
62 Appl. 8278/78, *I. v. Austria*, D&R 18 (1980), p. 154 (156).
63 Appl. 9546/81, *X. v. Federal Republic of Germany* (not published).
64 Judgment of 23 September 1998, paras 75-76.
65 Judgment of 3 December 2002, para. 61.

The second exception mentioned under (b) – deprivation of liberty in order to secure the fulfilment of an obligation prescribed by law – is less clear. In fact, this wording of the exception would seem to pave the way for a great many forms of deprivation of liberty without any judicial intervention, simply by the invocation of a legal norm which provides an additional possibility of even taking preventive action before a norm has been violated. It is true that in those cases the fourth paragraph allows appeal to a court, but this does not alter the fact that such a wide interpretation of the second limb of paragraph (b) would erode many of the guarantees contained in the other provisions of Article 5. In the *Benham* Case the applicant claimed that his detention ordered by the magistrates because he had not paid the Poll Tax owed by him, did not fall under subparagraph (b) since he did not have any means to pay the debt and, therefore, the detention could not have been intended 'to secure the fulfilment' of this obligation. The Court rejected this argument by merely stating that subparagraph (b) did apply because the purpose of the detention was 'to secure the fulfilment' of the applicant's legal obligation.

In the *Engel* Case the Court held that 'any obligation' must relate to a "specific and concrete obligation which the applicant has until then failed to satisfy". In this case the Supreme Military Court had invoked Article 5(1)(b) in order to justify ordering 'strict arrest' as a provisional measure. The Court rejected this position, because it considered the general obligation to comply with military discipline not sufficiently specific.[67] In the above-mentioned *Steel* Case the applicants argued that Article 5, para. 1 (b) was violated since a requirement in general terms 'to keep the peace' was not sufficiently concrete and specific to amount to an 'obligation prescribed by law'. The Court did not agree. It observed that the elements of breach of the peace were adequately defined by English law. Furthermore, it was clear that where magistrates are satisfied, on the basis of admissible evidence, that an individual had committed a breach of the peace and that there was a real risk that he or she would do so again, the accused may be required to enter into recognizances to keep the peace or be of good behaviour. Finally, it was also clear that, if the accused refuses to comply with such an order, he or she may be committed to prison for up to six months.

A balance must be drawn between the importance in a democratic society of securing the immediate fulfilment of the obligation in question and the importance of the right to liberty. The duration of the detention is a relevant factor in drawing such a balance.[68] Other relevant factors are: the nature of the obligation arising from the relevant legislation, including its underlying object and purpose; the person being detained; and the particular circumstances leading to the detention.[69] In the *Vasileva* Case the applicant had been arrested because she refused to comply with the obligation

[illegible]

66 Judgment of 10 June 1996, para. 39.

67 Judgment of 8 June 1976, para. 69; report of 19 July 1974, B.20 (1978), p. 64. See also the judgment of 6 November 1980, *Guzzardi*, para. 101.

68 Judgment of 3 December 2002, *Nowicka*, para. 61; judgment of 24 March 2005, *Epple*, para. [illegible]

69 Judgment of 25 September 2003, *Vasileva*, para. 38.

[illegible] her identity to the police. Although the decision to arrest her was in conformity with Article 5(b), the duration of the detention was, in the context of the circumstances of the case, not proportionate to the cause of her detention.[70]

9.4 EXCEPTION UNDER (C)

The provision under (c) in Article 5(1) permits arrest or detention if there is a reasonable suspicion that an offence has been committed, or if this measure is reasonably considered necessary to prevent an offence or to prevent flight after an offence has been committed. First of all, the relation between these three situations will be discussed. Next the terms 'competent legal authority', 'lawful'[71] and 'reasonable suspicion' will be dealt with. The third paragraph of Article 5 requires that everyone who is arrested or detained under subparagraph (c), shall be brought *promptly* before a judicial authority and is entitled to trial *within a reasonable time* or to release pending trial. These requirements will be discussed in connection with that provision.

Since the three grounds mentioned in paragraph 1 under (c) have been placed side by side and have not been made cumulative, the provision would appear to justify detention as a measure against persons on suspicion that they will commit crimes without their having as yet committed them. This interpretation is also corroborated by the *travaux préparatoires*, *viz.* in the report of the Senior Officials, in which it is stated as follows: "it may (...) be necessary in certain circumstances to arrest an individual in order to prevent his committing a crime, even if the facts which show his intention to commit the crime do not of themselves constitute a criminal offence."[72] The same line of reasoning is expressed by the Commission in the *De Jong, Baljet and Van den Brink* Case. It assigned an independent meaning to each of the three grounds mentioned under (c): "The wording 'or' separating these three categories of persons clearly indicates that this enumeration is not cumulative and that it is sufficient if the arrested person falls under one of the above categories".[73]

One may wonder why the fear that the accused may flee after having committed an offence has been included as a separate ground, if the suspicion that such an offence has been committed or will be committed is in itself already a sufficient ground for arrest. A rational interpretation is reached if it is assumed that in this provision the

[illegible]

70 Ibidem.

71 The French version of Article 5(1) under (c) makes no express reference to '*regularity*'. This is without importance because the notion 'lawful' is a general one which applies to the whole of Article 5(1); judgment of 6 November 1980, *Guzzardi*, para. 102.

72 Council of Europe, *Collected Edition of the 'Travaux Préparatoires' of the European Convention on Human Rights*, Vol. IV, Strasbourg, 1977, p. 260.

73 Report of 11 October 1982, p. 34. In its judgment of 22 May 1984, para. 44, the Court did not dissociate itself from this interpretation.

[illegible]

grounds for arrest and those for continued detention have been joined. ... then produce the following picture: arrest is permitted in case of a reasonable ... that the accused has committed an offence or if the arrest may reasonably ... dered necessary to prevent his committing an offence that he is reasonably ... of planning to commit. For continuation of the detention it is additionally ... that it is likely that he will abscond or that there are reasonable grounds for ... that after his release the arrested person will again commit an offence.[74] ... however, the problem that it will then also have to be assumed that these lists ... of continuation do not constitute an exhaustive enumeration, since the ... organs have also recognised as such grounds the risk of suppression of evidence ... the danger of collusion.[76]

If a person is arrested on reasonable suspicion that he has committed an offence ... in order to prevent his committing an offence or to prevent his fleeing after ... done so, the conditions of the Convention are only met if the arrest or detention ... really aimed at bringing the accused before a competent judicial authority. The ... took this position as early as 1961 in the *Lawless* Case.[77] The same position was ... in *Ireland v. the United Kingdom* and the *Jecius* Case.[78] In the *Brogan* Case the ... cants alleged that their arrest and detention were not intended to bring them ... the competent legal authority; in fact they were neither charged nor brought ... a court. The Court held that the existence of such a purpose must be considered ... pendently of its achievement. There was no reason to believe that the applicants' ... detention was not intended to further police investigation by way of confirming ... dispelling concrete suspicions which grounded their arrest.[79] In this connection ... vague term 'legal authority' must, in conformity with the third paragraph of Art. 5, ... be deemed to mean: 'judge or other officer authorised by law to exercise judicial ... power'.[80] The provision under (c) does not require that the warrant of arrest must ... also originate from a judicial authority.[81]

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74 See Recommendation R(80)11 of the Committee of Ministers of 27 June 1980 on ... remand, where the grounds are indeed formulated cumulatively in Article 3, while Article ... that detention on remand without one of the grounds of the second category presupposes ... nevertheless exceptionally be justified in certain cases of particularly serious offences.

75 Judgment of 27 June 1968, *Wemhoff*, p. 25, paras 13-14.

76 Judgment of 28 March 1990, *B. v. Austria*, paras 42-43.

77 Judgment of 1 July 1961, para. 14.

78 Judgment of 18 January 1978, para. 196 and judgment of 31 July 2000, para. 50.

79 Judgment of 29 November 1988, paras 52-54. See also the judgment of 28 October 1994, ... paras 67-68, where the applicant was arrested for only three hours and released without being ... or being brought before the competent legal authority.

80 Judgment of 18 January 1978, *Ireland v. the United Kingdom*, para. 199. In its judgment of ... *Lawless*, para. 14, the Court speaks of 'judicial authority' and of 'judge'. *Cf.* also the judgment of ... 4 December 1979, *Schiesser*, para. 30.

81 Appl. 7755/77, *A. v. Austria*, D&R 9 (1978), p. 210 (211).

... fact that a person detained on remand is later released under a judicial ... does not render the arrest unlawful with retroactive effect.[82] Article 5(1)(c) ... imply that there be a 'reasonable suspicion'. At the moment the arrest is made ... not yet be firmly established that an offence has actually been committed or ... the precise nature of that offence is. The object of questioning during detention ... subparagraph (c) is to further the investigation by way of confirming or ... ing the reason for arrest. Whether the mere continuation of suspicion suffices ... the prolongation of the detention on remand is covered not by the first but ... third paragraph of Article 5.

... term 'reasonable suspicion' presupposes the existence of facts or information ... would satisfy an objective observer that the person concerned may have committed ... about to commit the offence. Thus, the reasonableness depends on all the ... circumstances of the case.[83] The Court must also assess whether the conduct of the ... can reasonably imply an offence.[84] In the *Fox, Campbell and Hartley* Case the ... special circumstances in Northern Ireland were at issue. The applicants complained ... their arrest under criminal legislation enacted to deal with acts of terrorism was ... based on a reasonable suspicion. The Court, although acknowledging that terrorist ... falls under a special category, stressed that this cannot justify stretching the ... notion of 'reasonableness' beyond the point where the essence of the safeguard secured ... at subparagraph (c) is impaired. Scrutiny lead the Court to the conclusion that ... previous convictions for acts of terrorism cannot constitute the sole basis of a suspicion ... justifying the arrest some seven years later.[85] In the *Murray* Case the Government of ... United Kingdom, without revealing its secret source that formed at least part of ... reason of suspicion, succeeded in convincing the Court that there was a 'plausible ... and objective basis' for the suspicion that the applicant might have committed the ... offence of involvement in the collection of funds for the IRA.[86]

... discussed above, the detention under Article 5(1) under (c) comes to an end when ... the person on remand is convicted by a court of first instance. His further detention ... must then be reviewed under subparagraph (a). If no conviction or sentencing ... takes place because of lack of criminal responsibility on the part of the person ... concerned in view of his mental capacity, the eventually ordered prolonged detention ... must under subparagraph (e).[87] In the *Quinn* Case the Paris Court of Appeal set aside ... a judicial order extending the detention on remand of the applicant. It directed that ... Mr Quinn should be "released forthwith if he [was] not detained on other grounds".

... Appl. 8083/77, *X. v. the United Kingdom*, D&R 19 (1980), p. 223 (225).

... Judgment of 30 August 1990, *Fox, Campbell and Hartley*, para. 32.

... Judgment of 20 March 1997, *Lukanov*, paras 42-45.

... Judgment of 30 August 1990, paras 16-18.

... Judgment of 28 October 1994, paras 50-63.

... Judgment of 24 September 1992, *Herczegfalvy*, paras 62-64.

This decision was not notified to the applicant nor was any step [illegible] commence its execution. On the same day, eleven hours after the [illegible] delivered its judgment, the applicant, who was still detained in prison, [illegible] with a view to extradition. The Strasbourg Court recognised that [illegible] execution of a decision ordering release of a detainee is understandable. [illegible] detention for 11 hours was nevertheless clearly not covered by subpara[illegible] did not fall under the other subparagraphs of Article 5(1).[88] In the *Giulia* [illegible] there was a period of 7 hours between the decision which implied release [illegible] moment the applicant left prison. The Courts concluded that Article 5 [illegible] violated. It took into account that some delay in carrying out a decision [illegible] detainee is often inevitable, although it must be kept to a minimum.[89]

The Court is stricter in cases where the period of detention does not result [illegible] order, but is laid down by law. In *K.-F. v. Germany* the maximum period [illegible] hours' detention for the purposes of checking identity was exceeded with a [illegible] Since the maximum period, which was laid down by law and was absolute, [illegible] in advance, the authorities responsible for the detention were under a duty [illegible] necessary precautions to ensure that the permitted duration was not exceed[illegible] Court concluded unanimously that Article 5 under (c) was violated.[90]

As a rule Article 5 under (c) does not provide a justification for the re-detention or continued detention of a person who has served a sentence after conviction [illegible] specific offence where there is a suspicion that he may commit a further [illegible] offence. However, in the Court's opinion the position is different when a person [illegible] detained with a view to determining whether he should be subjected, after expiry [illegible] the maximum period prescribed by a court, to a further period of security detention [illegible] imposed following conviction for a criminal offence. In the *Eriksen* Case the [illegible] rities were entitled, having regard to the applicant's impaired mental state and [illegible] sive history as well as to his established and foreseeable propensity for violence, [illegible] detain the applicant pending the determination by a court of the prosecutor's [illegible] for a prolongation of the authorisation to detain him. Relevant was that the 'bridging' detention was of a short duration, was imposed in order to bring the applicant before a judicial authority and was made necessary by the need to have updated medical reports.[91] The Court emphasised the exceptional character of the [illegible] so the implications of the Court's judgment should not be overrated.

Article 6(2) of the Convention provides that a person who is charged with an [illegible] must be presumed innocent until proved guilty. This presumption of innocence [illegible]

88 Judgment of 22 March 1995, para. 42.
89 Judgment of 1 July 1997, para. 25.
90 Judgment of 27 November 1997, *K.-F. v. Germany*, para. 72.
91 Judgment of 27 May 1997, *Eriksen*, para. 86.

[illegible] not only during the hearing in court; out of court, too, the accused – and [illegible] the person detained on remand – should not be treated as if his guilt were [illegible] established. The justification of the limitations to be imposed on the person [illegible] on remand should, therefore, be based on other criteria than the limitations [illegible] from a sentence of imprisonment.[92] This may also imply that persons [illegible] on remand should be segregated if possible from convicted persons, although, [illegible] the UN Covenant on Civil and Political Rights, this is not explicitly provided [illegible] the Convention.

EXCEPTION UNDER (D)

[illegible] first case mentioned under (d) one has to think of an order – judicial or not [illegible] place a minor under supervision, combined with a restriction of freedom, for [illegible] enforced stay in a reformatory institution or in a clinic. Most legal systems [illegible] such restrictions of freedom in the interest of the minor, even if the latter is [illegible] suspected of having committed any criminal offence. It is then required that it may [illegible] reasonably be assumed that the development or the health of the minor is seriously [illegible] endangered – for instance in the case of drug addiction and/or prostitution – or that [illegible] being ill-treated. The text speaks only of 'lawful order', so that it does not appear [illegible] required that the order emanates from a judicial organ. Under paragraph 4 of [illegible] Article 5, however, these minors too – or if the law so provides, their legal representatives – are entitled to institute court proceedings in order that the lawfulness of the [illegible] deprivation of their freedom may be reviewed.[93]

The far-reaching powers emanating from Article 5(1)(d) have led the Court to require rather strict guarantees that the educational purpose is indeed served by the detention. In the *Bouamar* Case a minor was repeatedly confined in a remand prison [illegible] for the purpose of educational supervision'. Although the confinements never [illegible] exceeded the statutory limit of 15 days, the detentions (nine in total) amounted to a deprivation of liberty for 119 days in less than one year. The Court held that, in order to consider the deprivation of liberty lawful for educational supervision, the Belgian Government was under an obligation to put in place appropriate institutional facilities which met the demands of security and educational objectives; the mere detention of a juvenile "in conditions of virtual isolation and without the assistance of staff with educational training cannot be regarded as furthering any educational aim".[94] In *D.G.*

92 See Rec. (65) 11 of the Committee of Ministers of the Council of Europe on detention on remand. In this Resolution it is emphasised that detention on remand should be an exceptional measure, which is applied only if 'strictly necessary'.
93 See, e.g., the judgment of 29 February 1988, *Bouamar*, paras 54-64, where a breach of this provision was established.
94 Judgment of 29 February 1988, para. 56.

v. Ireland the institution where the minor was placed was considered by the [illegible] a penal institution. The educational and other recreational services were voluntary, while the minor was unwilling to cooperate with the authorities. The detention could also not be considered as an interim measure for the purpose of educational supervisory regime which was followed speedily by the application of a regime.[95]

When the applicant has passed the school leaving age, but is still a minor, [illegible] 'for the purpose of educational supervision' may still fall within the scope of Article 5 (1) under (d).

According to the *travaux préparatoires* the second case mentioned under (d) is concerned with the detention of minors for the purpose of bringing them before a court to secure their removal from harmful surroundings, so that they are protected by Article 5(1)(c). This would, therefore, seem to be a measure by which the minor is protected against himself in order to prevent his sliding into criminality. It is not clear, however, what specific reason could bring the person concerned before a court if no crime has been committed. The only case known to the authors relating to such a measure concerned an enforced stay of eight months in an observation centre where the authorities examined whether theft and traffic offences had been committed. In any case, the measure of bringing a minor before a judicial authority who decides on the prolongation of the detention, must be the purpose of the initial deprivation of liberty; consequently, there must be a sufficient ground for that measure. Which body is competent to execute this deprivation of liberty is determined by national law ('lawful detention').

Since Article 5(1) under (d) confers such far-reaching powers on the [illegible] authorities with regard to minors, the age at which a person attains majority is of the greatest importance. This age is determined by domestic law. In Resolution [illegible] the Committee of Ministers of the Council of Europe has recommended the age at eighteen.[97] Domestic law also determines whether and in what cases a minor has the legal capacity to institute proceedings himself, so that a minor who has a right in the Strasbourg proceedings may be dependent on his parents or guardian for the exhaustion of the local remedies.

95 Judgment of 16 February 2002, paras 81-85.

96 Appl. 8500/79, *X. v. Switzerland*, D&R 18 (1980), p. 238.

97 Res. (72)29 'Lowering of the age of full legal capacity' and Explanatory Memorandum, Council of Europe, Strasbourg, 1972.

EXCEPTION UNDER (E)

[illegible] under (e) deals with widely divergent categories of persons. There is [illegible] all those persons in that they may be deprived of their liberty either in [illegible] medical treatment or because of considerations dictated by social [illegible] both medical and social grounds.[98] A predominant reason why the Convention allows the persons mentioned in paragraph 1(e) of Article 5 to be deprived of their liberty is not only that they may be dangerous for public safety but also that their own interests may necessitate their detention.[99]

[illegible] 'lawful' constitutes the general criterion, while under the fourth paragraph of Article 5 the categories here referred to are also entitled to have the lawfulness of their detention reviewed by a court in accordance with the legal rules applying in the country concerned. The latter is important in particular for those cases where the detention can be ordered under municipal law by an administrative organ. If and [illegible] in performing this review, the court determines a civil right in the sense of Article 6, the rules for a fair trial set forth therein have to be observed.[100]

The scope of application of subparagraph (e) is essentially determined by the terms 'infectious diseases', 'persons of unsound mind', 'alcoholics', 'drug addicts' and 'vagrants'. The Convention does not contain a definition of these concepts. In deciding [illegible] an individual should be detained for one of the reasons stated in subparagraph (e) the national authorities do have a certain discretion. However, in reviewing these national decisions the Court is prepared to carry out an independent examination of the question of whether the deprivation of liberty is in conformity with the Convention. In the case law the concepts 'infectious diseases', 'persons of unsound mind', 'alcoholics' and 'vagrants' have been clarified to some extent.

The essential criteria to assess the lawfulness of the detention of a person 'for the prevention of the spreading of infectious diseases' are whether this spreading is dangerous for public health or safety, and whether less severe measures than detention have been considered and found to be insufficient to safeguard the public interest.[101]

In the *Winterwerp* Case the Court emphasised that the term 'of unsound mind' entails that three minimum conditions have to be satisfied: (1) the person concerned must be "reliably shown" to be of unsound mind (which "calls for objective medical expertise"), (2) the nature or degree of the mental disorder must be such as to justify the deprivation of liberty, and (3) continued confinement is only valid as long as the disorder persists.[102] In the *Luberti* Case the question of whether the detention had

98 Judgment of 4 April 2000, *Witold Litwa*, para. 60.

99 Judgment of 6 November 1980, *Guzzardi*, para. 98. See also the judgment of 20 February 2003, *Hutchison Reid*, para. 51.

100 See the judgment of 24 October 1979, *Winterwerp*, para. 73.

101 Judgment of 25 January 2005, *Enhorn*, para. 44.

102 Judgment of 24 October 1979, para. 39.

continued beyond the period justified by applicant's mental disorder, was [illegible] by the Court in great detail.[103] In *R.L. and M.-J.D. v. France* there was [illegible] reason for the continued detention of the applicant, but the release was [illegible] because the physician in charge was not allowed to release the detainee. The Court judged that the applicant was held on administrative grounds that were [illegible] with Article 5(1) under (e).[104]

No deprivation of liberty of a person considered to be of unsound mind can be deemed in conformity with Article 5(1) under (e) of the Convention if it has been ordered without seeking the opinion of a medical expert. In urgent cases, for instance where a person is arrested because of his violent behaviour, it may be acceptable that such an opinion be obtained immediately after the arrest. In all other cases, however, consultation is necessary. Where no other possibility exists, for instance due to the refusal of the person concerned to appear for an examination, at least an assessment by a medical expert, based on the actual state of mental health, on the basis of the evidence available, must be sought.[105] In the Court's view, it does not automatically follow from a finding by an expert authority that the mental disorder which justified a patient's compulsory confinement no longer persists, that the latter must be immediately and unconditionally released into the community. The authorities should be able to impose some measure of supervision over the progress of the person once he is released into the community and to that end make his discharge subject to conditions. Appropriate safeguards are necessary to ensure that any deferral of discharge is consonant with the purpose of Article 5(1) and with the aim of the restriction in sub-paragraph (e), namely that discharge is not unreasonably delayed.[106]

In the *Witold Litwa* Case the Court interpreted the term 'alcoholics' (*alcoolique*) on the basis of the *ratio legis*. The Court considered that the objective purpose of the exception under (e) cannot be interpreted as only allowing the detention of 'alcoholics' in the limited sense of persons in a clinical state of alcoholism. Persons who are not medically diagnosed as 'alcoholics', but whose conduct and behaviour under the influence of alcohol pose a threat to public order or themselves can be taken into custody under Article 5(1) under (e) for the protection of their health or their own interests, such as their health or personal safety.[107] The mere fact that someone is under influence of alcohol, however, is not a sufficient basis for deprivation of liberty. The detention must be assessed in the light of the above mentioned *ratio legis* of the exception under (e). Decisive is whether the [illegible]

drunk in such a way as to pose a threat to public order.[108] The purpose measure must be to avert that threat. The same will apply to 'drug addicts'. *Wilde, Ooms and Versyp ('Vagrancy')* Cases the question arose whether persons could be considered as 'vagrants'. The Belgian Criminal Code defined persons who have no fixed abode, no means of subsistence and no regular profession'. According to the Court this definition did not appear to be in reconcilable with the usual meaning of the term 'vagrant'. A person falling the definition of the Belgian Criminal Code in principle comes under the ception of Article 5(1) under (e). In addition the Court held that the national courts educe from the information available that the persons concerned met the The Court, although confining itself to a marginal review of the national and its application, took a rather active position when it comes to a review of the nformity of that application with the wording and meaning of Article 5(1) under a guarantee has been created against too wide a national interpretation and ception of the categories mentioned under (e).[110] The necessity of a restrictive interpretation was equally emphasised by the Court in the *Guzzardi* Case, where it held that it may not be inferred from the exception permitted under Article 5(1) under (e) that the detention of persons who may constitute a greater danger than the categories mentioned in that article, is permitted equally and *a fortiori*.[111]

The involuntary commitment of an accused person in an observation clinic in most cases cannot be brought under paragraph 1 under (e), because as a rule it is not certain with sufficient assurance that he is of unsound mind. This deprivation of liberty may perhaps find its justification in paragraph 1 under (b), in case the measure is provided for in a judicial decision which may be enforced if it is not complied with voluntarily.

Since paragraph 1(e) does not contain any limitation as to the duration of the detention, this in contrast with the other categories of detention regulated in the same paragraph, the question is of great importance whether paragraph 4 confers on the person concerned only the right to have the lawfulness of the deprivation of his liberty as such reviewed by a court, or also the right to have recourse to a court periodically while the detention is prolonged. This question will be discussed under Article 5(4).

In the *Winterwerp* Case it had been argued on behalf of the applicant that Article 5(1)(e) entails for the person detained on one of the grounds mentioned there the right to appropriate treatment in order to ensure that he is not detained longer

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103 Judgment of 23 February 1984, para. 29. See also the report of 7 October 1981, *B. v. the United Kingdom*, D&R 32 (1983), p. 5 (37-38).

104 Judgment of 19 May 2004, paras 124-128.

105 Judgment of 5 October 2000, *Varbanov*, para. 47 and judgment of 19 May 2004, *R.L. and M.-J.D. v. France*, para. 117.

106 Judgment of 24 October 1997, *Johnson*, paras 61-63.

107 Judgment of 4 April 2000, *Witold Litwa*, paras 60-63.

108 Judgment of 8 June 2004, *Hilda Hafsteinsdottir*, para. 42.

109 Judgment of 18 June 1971, para. 68.

110 See also the judgment of 23 February 1984, *Luberti*, para. 27, and the judgment of 28 May 1985, *Ashingdane*, para. 37.

111 Judgment of 6 November 1980, para. 98.

than absolutely necessary. This submission, however, was rejected by the [illegible]. In the *Ashingdane* and *Aerts* Cases the Court further elaborated on this. According to the Court, the lawfulness of a deprivation of liberty concerns not only the [illegible] order of the liberty-depriving measures, but also its execution. In other [illegible] measure must not only be in conformity with domestic law, but also with the [illegible] of the restrictions laid down in Article 5(1). This also follows from Article [illegible] Convention. Therefore, there must be "some relationship between the [illegible] permitted deprivation of liberty relied on and the place and conditions of [illegible]. Except for this relationship, however, Article 5(1)(e) is not concerned with [illegible] treatment or conditions.[113]

In the *Morsink* and *Brand* Cases the relationship between the deprivation of [illegible] and the place of the detention was at stake. During the first period of the [illegible] of the non-punitive measure, the applicants were held in pre-placement [illegible] an ordinary remand centre until they could be placed in a custodial clinic. The [illegible] noted that, in principle, the 'detention' of a person as a mental health patient [illegible] be 'lawful' for the purposes of paragraph (1) under (e) if effected in a hospital [illegible] or other appropriate institution. In the circumstances of both cases the failure [illegible] the applicants to a custodial clinic did not result automatically in the conclusion [illegible] the detention was unlawful under Article 5 (1). The Court found it not to be [illegible] to this provision to commence the procedure for selecting the most appropriate custodial clinic after the order had taken effect. It would be unrealistic to expect a place be immediately available. The Court found a certain friction between [illegible] and required capacity in custodial clinics inevitable and acceptable. However, [illegible] of six months in the admission of a person to a custodial clinic is not acceptable the view of the Court.[114]

In the *Winterwerp* Case the Court considered the interval of two weeks between the expiry of the earlier order and the making of the succeeding renewal order unreasonable or excessive.[115] In the *Erkalo* Case the applicant was placed by [illegible] at the government's disposal. The request of the public prosecutor for the [illegible] of the placement order was not received by the competent court until two months the expiry of the statutory period, and, as a result, for eighty-two days the [illegible] of the applicant was not based on any judicial decision. The Court noticed that [illegible] was a lack of adequate safeguards to ensure that the applicant's release from [illegible] would not be unreasonably delayed. The 'bridging detention' was unlawful [illegible] constituted a breach of Article 5(1) of the Convention.[116]

112 Judgment of 24 October 1979, para. 51.
113 Judgment of 28 May 1985, para. 44; judgment of 30 July 1998, *Aerts*, para. 46.
114 Judgment of 11 May 2004, *Morsink*, paras 63-69 and judgment of 11 May 2004, *Brand*, para. [illegible]
115 Judgment of 24 October 1979, para. 49.
116 Judgment of 2 September 1998, paras 57-60. See for a justified 'bridging detention' judgment of 24 July 2001, *Rutten*, paras 39-46.

EXCEPTION UNDER (F)

[illegible] importance of the provision under (f) consists in that, although the Convention does not grant to aliens a right of admission to or residence in any of the Contracting States, Article 5 nevertheless contains certain guarantees in case the authorities proceed to the arrest or to detain an alien pending the decision on his admission, deportation or extradition. These consist first of all in the guarantee that such arrest or detention must be lawful and must, therefore, be in conformity with the applicable provisions of both domestic and international law and may not be imposed arbitrarily.[117] This right is complemented with the right of the person in question under paragraph 4 to have this lawfulness reviewed by a court. However, Article 5 does not merely refer back to domestic law but requires also that the applicable national law is 'sufficiently accessible and precise'. According to the Court this is especially required with regard to asylum-seekers.[118] In the *Amuur* Case French national law did not meet this requirement and moreover the Court held, *inter alia*, that the national courts lacked jurisdiction to review the conditions of detention.[119]

Article 5 paragraph 1 under (f) does not require that the detention of a person against whom action is being taken with a view to deportation or extradition must be reasonably considered necessary, for example to prevent his committing an offence or fleeing. In this respect Article 5 (1) under (f) provides a lower level of protection than Article 5 paragraph 1 under (c): all that is required under (f) is that action is being taken with a view to deportation or extradition. It is, therefore, immaterial whether the underlying decision can be justified under national or Convention law.[120] It is clear, however, that in reviewing the lawfulness of the detention, the lawfulness of the deportation or extradition will often also be at issue. This is especially the case when, according to national law, the lawfulness of the detention is made dependent on that of the deportation.[121]

In the *Conka* Case the applicants had received orders to leave the territory of Belgium. They did not obey these orders. The Belgian authorities tried to gain the trust of the applicants with an invitation to come to the Ghent police station. The authorities assured that their attendance was required "to enable the files concerning their applications for asylum to be completed". In fact the applicants were on their arrival in the police station arrested in view of their deportation to Slovakia. The Court expressed that acts whereby the authorities sought to gain the trust of asylum-seekers

[illegible] judgment of 18 December 1986, *Bozano*, para. 54.
[illegible] judgment of 25 June 1996, *Amuur*, para. 50.
[illegible] *Ibidem*, para. 53.
[illegible] judgment of 15 November 1996, *Chahal*, para. 112 and judgment of 5 February 2002, *Conka*, para. 38.
[illegible] report of 11 October 1983, *Zamir*, D&R 40 (1985), p. 42 (55). The fact that a domestic court has found the deportation procedure to be illegal does not deprive the applicant of his claim to be a victim of a violation of the Convention by reason of his arrest: report of 7 December 1984, *Bozano*, p. 32.

[illegible]

with a view to arresting and subsequently deporting them may be found to
the general principles stated or implicit in the Convention. The narrow
of the exceptions of Article 5(1) must also be reflected in the reliability of
tions. Misleading the individuals concerned about the purpose of a
make it easier to deprive them of their liberty is not compatible with

Article 5(1) under (f) implies the guarantee that the detention
purpose other than that of preventing the admission of the alien in
country or of making it possible to decide on his deportation or extradition
of the Convention, which prohibits restrictions of the rights and freedoms
purpose other than that for which they have been prescribed, applies here
the first place, this means that the deprivation of liberty is unlawful if the
order, and the way in which it is enforced, constitute a misuse of power
second place, it follows that the detention must not be attended with more
for the person concerned and must not last longer than is required for
conduct of the proceedings. In the *Quinn* Case the Court held: "It is clear
wording of both the French and the English versions of Article 5 § 1 (f) that
of liberty under this sub-paragraph is justified only for as long as
proceedings are actually taking place. It follows that if such proceedings
being conducted with due diligence, the detention ceases to be justified under
§ 1(f))".[124] Thus, although the duration of detention is only mentioned in
3 of Article 5 and this provision refers only to detentions under paragraph
Court stipulates that the period of detention may not exceed a reasonable time.
reasonableness of the length of detention has to be assessed in each individual
In this respect not only the length of the extradition or deportation
properly relevant, but also the length of connected procedures such as, for
summary proceedings which may result in a stay of execution of the
it has been decided to prolong the detention in the interest and at the request
person concerned, *e.g.* in order to find a suitable country which is prepared to
him, or in order to obtain certain guarantees from the extradition-requesting
with regard to his treatment,[126] he cannot claim afterwards that he is the victim
prolonged detention. Thus, in the *Kolompar* Case the Court found the period
in detention – it lasted for over two years – pending extradition to be unusually
Nevertheless, it held that it did not amount to a violation of Article 5(1)

[122] Judgment of 5 February 2002, *Conka*, paras 41-42.
[123] Report of 7 December 1984, *Bozano*, para. 69.
[124] Judgment of 22 March 1995, para. 48. See also the judgment of 15 November 1996,
112-113 and the judgment of 9 October 2003, *Slivenko*, para. 146.
[125] See also judgment of 25 June 1996, *Amuur*, para. 53.
[126] Appl. 9706/82, *X. v. Federal Republic of Germany* (not published).

the Belgian State could not be held responsible for the delays to which the
conduct gave rise.[127]

example of a violation of paragraph 1 under (f) is offered by the *Bozano*
Here the Court had to decide whether the deportation of Bozano from France
land was 'lawful' and 'in accordance with a procedure prescribed by law'.
according to the Court, also implies the absence of any arbitrariness. The
circumstances of the case, *inter alia* the fact that the authorities waited about a month
before executing the deportation order and prevented Bozano from making any effective
use of the theoretically existing judicial remedies, and the fact that the French
authorities contacted only the Swiss authorities, although the Spanish border was much
closer to the place where Bozano was arrested, led the Court to decide that the depri-
vation of liberty was neither lawful nor compatible with the right to security of person.
The French courts had reached the same conclusion. The way the deportation was
executed clearly indicated what the French authorities had in mind to get round the
prohibition of extradition to Italy ordered by the Limoges Court of Appeal. That was
the reason why Bozano had been delivered to the Swiss authorities: Switzerland
had an extradition treaty with Italy. The Court concluded, therefore, that the way
Bozano was deprived of his liberty amounted in fact to a disguised form of extra-
dition.[128]

5.4.8 INTERPLAY OF THE DIFFERENT EXCEPTIONS

A person may be detained under different subparagraphs of Article 5(1) successively.
If a person detained on remand is convicted by a court of first instance, his detention
is no longer under subparagraph (c) but under subparagraph (a). In the *Herczegfalvy*
case the decision by which the applicant was ordered to be placed in an institution
for mentally ill offenders, without convicting or sentencing him, was quashed on
appeal from that moment the deprivation of liberty once more came under paragraph
(e).[129] It is also possible that the detention falls under more than one subparagraph
at the same time. In the *Eriksen* Case the 'bridging detention' between the expiry of
an authorisation and the decision on a request for prolongation fell under the pro-
visions of Article 5 under (a) and (c) simultaneously.[130] In the *Kolompar* Case the
detention of the applicant came successively under Article 5(1)(c) only, under (c) and
(f) at the same time, under (f) only, under (f) and (a) at the same time, and finally once
more merely under (f).[131]

[127] Judgment of 24 September 1992, paras 40-42.
[128] Judgment of 18 December 1986, paras 59-60.
[129] Judgment of 24 September 1992, para. 22.
[130] Judgment of 27 May 1997, para. 86.
[131] Judgment of 24 September 1992, paras 35-36.

It appears sometimes to be difficult to determine whether the exception
or under (e) is applicable. In *X v. the United Kingdom* the applicant was
but this conviction contained solely the establishment that he co
criminal conduct concerned. No punishment was imposed on him. H
admission to and detention in a mental hospital for insane offenders was
assessing under which subparagraph the detention of the applicant had
with, the Court came to the conclusion that, although it recognised the
between the subparagraphs 5(1)(a) and 5(1)(e), both subparagraphs could be
applicable to the applicant's deprivation of liberty, at least initially. In the
the applicant was placed at the disposal of the government in a psychiatric
The Court considered that the applicant's detention fell within the ambit
5(1)(a) and (e) of the Convention.[132]

9.5 THE RIGHT TO BE INFORMED PROMPTLY OF THE REASONS FOR ARREST

9.5.1 GENERAL OBSERVATIONS

Article 5(2) grants to everyone who is arrested the right to be informed promp
a language which he understands, of the reasons for his arrest and of any charg
him. If the national authorities fail to do so, the arrest and detention are unlaw
if they can be brought under one of the cases mentioned in paragraph 1. The
of this second paragraph necessarily ensues from the idea underlying Article
liberty of person is the rule and is guaranteed, and an encroachment on this
only in the cases expressly provided for and in conformity with the law as it
In order for the person arrested to be able to judge, from the moment of
whether these two conditions have been met and to decide whether there are
for recourse to a court, adequate information must be available to him. Three
are to be discussed successively: the applicability of Article 5(2), the inform
should be given to the arrested person and, finally, the requirement of prom

A violation of paragraph 2 of Article 5 may also imply a violation of the
paragraph of this article. This question will be dealt with in the framework
discussion of the fourth paragraph.

[132] Judgment of 2 September 1998, para. 51. See also the judgment of 11 May 2004, *Morsink*, para. 57 and the judgment of 11 May 2004, *Brand*, para. 59.

APPLICABILITY

'arrest' and 'charge' used in paragraph 2 could create the impression that
is only relevant to cases arising under criminal law. However, the Court
view the second paragraph applies not only to the detentions referred
paragraph 1 under (c), but to any person arrested.[133] Therefore, paragraph 2
all cases mentioned in the first paragraph of Article 5(1). The Court clarified
by invoking the autonomous meaning of the terms of the Convention and
and purpose of Article 5. In addition, according to the Court, the use of the
charge' (*'toute accusation'*) showed that the intention of the drafters was
lay down a condition for the applicability of Article 5(2), but to indicate an
of which it takes account. Finally, the close link between the paragraphs
of Article 5 was considered to support this interpretation.[134]

RELEVANT INFORMATION

paragraph 2 of Article 5 requires that any arrested person shall be informed of the
reasons of his arrest and of any charge made against him. As the Court held in the *Fox, Campbell and Hartley* Case he must "be told, in simple, non-technical language that he can understand, the essential legal and factual grounds for his arrest, so as to be able, if he sees fit, to apply to a court to challenge its lawfulness in accordance with paragraph 4."[135] Thus, the Court took the position that the information required by Article 5(2) need not be worded in a particular form and need not even be given in writing. Consequently, as the Court held in the *Lamy* Case, there exists at this stage of the proceedings no obligation to make the file available to the defence of the accused person for inspection.[136] In assessing whether the applicant is adequately informed, the Court takes into consideration the special features of the case and the person of the detainee.[137] In the *Fox, Campbell and Hartley* Case and the *Murray* Case the persons concerned were questioned about their alleged activities for the IRA. The Court held that the bare indication of the legal basis for the arrest, taken on its own, was insufficient for the purposes of Article 5(2).[138] However, here the obligation of paragraph 2 had been complied with because the persons concerned had been able to infer the

[133] Judgment of 30 August 1990, *Fox, Campbell and Hartley*, para. 40; judgment of 28 October 1994, *Murray*, para. 72.

[134] Judgment of 21 February 1990, *Van der Leer*, paras 27–28.

[135] Judgment of 30 August 1990, para. 40; reiterated in the judgment of 28 October 1994, *Murray*, para. 72. See also the judgment of 5 April 2001, *H.B. v. Switzerland*, paras 48–49.

[136] Judgment of 30 March 1989, para. 31.

[137] See among others, the judgment of 30 August 1990, *Fox, Campbell and Hartley*, para. 40; judgment of 28 October 1994, *Murray*, para. 72 and judgment of 5 April 2001, *H.B. v. Switzerland*, para. 47. Ibidem, para. 41 and para. 76, respectively.

reasons for the arrest clearly enough from the content of the interrogation [illegible] place after the arrest.[139] In the *Dikme* Case the Court even took into account [illegible] sity and frequency of the interrogations, from which the applicant could [illegible] some idea of what he was suspected of.[140] The rationale of paragraph [illegible] question of whether the Court should not be a little stricter in these respects [illegible] rests of the arrested person which paragraph 2 is designed to protect, as [illegible] guaranteed only if the prescribed information is communicated to him [illegible] unambiguously.

9.5.4 PROMPTLY

Article 5(2) prescribes that the information about the reasons of arrest [illegible] charge must be given 'promptly' (*'dans le plus court delai'*). The Court has [illegible] that it need not be conveyed in its entirety by the arresting officer at the very [illegible] of the arrest. In the *Fox, Campbell and Hartley* Case the applicants were [illegible] sufficiently about the reasons for their arrest during the interrogations. The [illegible] views took place four and a half, six and a half and three hours, respectively, after [illegible] arrest. These intervals could not be regarded in the context of those cases as [illegible] outside the constraints of time imposed by the notion of promptness in Article [illegible] In its decision in the *Durgov* Case the Court concluded that, in the context of the [illegible] a delay of ten and a half hours did not fall outside the constraints of time imposed by the notion of promptness, while in the *Lowry* Case even an interval of [illegible] between the applicant's arrest and his questioning was considered compatible with Article 5(2).[142]

According to the Court, the arresting officer is not obliged to give the full information at the very moment of the arrest. This implies that at least some relevant information should be given at once.

[139] In the same sense: judgment of 11 July 2000, *Dikme*, para. 56.
[140] Judgment of 11 July 2000, paras 55-56.
[141] Judgment of 30 August 1990, para. 42. In the *Murray* Case, judgment of 28 October 1994, an interval of one hour and 20 minutes did not violate the provision of Article 5(2) [illegible]
[142] Decision of 2 September 2004, *Durgov*, and decision of 6 July 1999, *Lowry*.

9.6 THE RIGHT TO BE BROUGHT PROMPTLY BEFORE A JUDGE OR OTHER OFFICER

9.6.1 GENERAL OBSERVATIONS

[illegible] 5(3) relates exclusively to the category of detainees mentioned in the first [illegible] under (c): those detained on remand.[143] The main purpose of this paragraph, in relation to Article 5(1)(c), is to afford to individuals deprived of their liberty [illegible] guarantee: a procedure of a judicial nature designed to ensure that no one [illegible] be arbitrarily deprived of his liberty[144] and, furthermore, to ensure that any [illegible] detention will be kept as short as possible.

The judicial review of the detention must be an automatic one.[145] It cannot be made [illegible] on a preceding application by the detained person. Such a requirement would change the nature of the safeguard provided for under Article 5(3), a safeguard [illegible] from that in Article 5(4).[146] It might even defeat the purpose of the safeguard [illegible] Article 5(3), which is to protect the individual from arbitrary detention by [illegible] that the act of deprivation of liberty is subject to independent judicial [illegible] Prompt judicial review of detention is also an important safeguard against [illegible] treatment of the individual taken into custody.[148]

9.6.2 PROMPTLY

Paragraph 3 comprises, first of all, in addition to the right to prompt information [illegible] of trial in the second paragraph, the right to be brought 'promptly' before a judicial [illegible] liberty. It is obvious that a person cannot always be heard by a judge immediately [illegible] being arrested. Unlike in the case of the obligation to inform him of the reasons [illegible] arrest, there is a third person involved in his first contact with a judge. The word [illegible] promptly' – the French text speaks of *'aussitôt'* – therefore must not be interpreted [illegible] literally that the investigating judge must be virtually dragged out of bed to arraign [illegible] detainee or must interrupt urgent activities for this. However, adequate provisions [illegible] will indeed have to be made in order that the prisoner can be heard as soon as may [illegible] reasonably be required in view of his interests.

[143] See, e.g. the judgment of 28 March 1990, *B. v. Austria*, paras 33-36; judgment of 22 March 1995, *Quinn*, paras 51-53.
[144] Judgment of 4 December 1979, *Schiesser*, para. 30.
[145] Judgment of 22 May 1984, *De Jong, Baljet and Van den Brink*, para. 51.
[146] *Aksoy*, para. 57.
[147] Judgment of 25 May 1998, *Kurt*, para. 123.
[148] See the judgment of 18 December 1996, *Aksoy*, para. 76.

The Court gave its opinion about the interpretation of the word "promptly" in the *De Jong, Baljet and Van den Brink* Case. The Court had to answer the question whether the referral to a judicial authority seven, eleven and six days, respectively, after the arrest was in conformity with the requirement of promptness of Article 5(3). Although this question was answered in the negative, the Court refrained from developing a minimum standard. It only noted that "the issue of promptness must be assessed in each case according to its special features".[149] In other cases decided by the Court on the same day it also refrained from indicating a minimum time-limit.

In the *Brogan* Case the Court had to deal with the question of promptness in the case of arrest and detention, by virtue of powers granted under special legislation, of persons suspected of involvement in terrorism in Northern Ireland. The relevant provision under ordinary law in Northern Ireland for bringing an accused before a court was expressly made inapplicable to such arrest and detention. None of the applicants was in fact brought before a judge or judicial officer during his time in custody, which ranged from four days and six hours to six days and sixteen and a half hours. The Court noted that the investigation of terrorist offences presented the authorities with special problems and that, subject to the existence of adequate safeguards, the context of terrorism in Northern Ireland had the effect of prolonging the period during which the authorities may, without violating Article 5(3), keep a person suspected of terrorist offences in custody before bringing him before a judge or other judicial officer. However, it also stressed that the scope for flexibility in interpreting and applying the notion of 'promptness' is very limited.; even the shortest of the above periods of detention, namely the four days and six hours spent in police custody, fell outside the strict constraints as to time permitted by the first part of Article 5(3). The Court held as follows: "To attach such importance to the special features of terrorism as to justify so lengthy a period of detention without appearance before a judge or other judicial officer would be an unacceptably wide interpretation of the scope and meaning of the word 'promptly'. An interpretation to this effect would import into Article 5 § 3 a serious weakening of a procedural guarantee to the detriment of the individual and would entail consequences impairing the very essence of the right protected by this provision."[151] In the *O'Hara* Case the Court stated that detention periods exceeding 4 days for terrorist suspects are not compatible with Article 5(3).[152]

In the *Koster* Case the applicant was not brought before the Military Court until five days after his arrest. According to the Court this period was too long. The fact that the lapse of time had occurred because of the weekend, which fell in the interval period, and the two-yearly major manoeuvres, in which the members of the court

149 Judgment of 22 May 1984, para. 52. See also the judgment of 28 November 1991, *Koster*.

150 Judgments of 22 May 1984, *Van der Sluijs, Zuiderveld and Klappe*, para. 49, and *Duinhof and Duijf*, para. 41.

151 Judgment of 29 November 1988, para. 62.

152 Judgment of 16 October 2001, para. 46.

... 5, did not justify any delay in the proceedings. The demands of ... and justice could not alter this point of view.[153]

... JUDGE OR OTHER OFFICER

... 3 provides that the accused should be brought before a 'judge' or 'other ... authorised by law to exercise judicial power'. In the *Schiesser* Case the Court ... criteria for the determination of whether a person can be regarded as such ... it expressed that 'officer' is not identical with 'judge', but "nevertheless ... some of the latter's attributes". The first condition is independence of the ... and of the parties. This does not mean that the 'officer' may not be to some ... subordinate to other judges or officers provided that they themselves enjoy ... independence. Secondly, there is a procedural requirement: the 'officer' is ... himself hear the individual brought before him. Thirdly, there is a sub- ... requirement which places the 'officer' under the obligation to review "the ... circumstances militating for or against detention", and to decide "by reference to legal ... whether there are reasons to justify detention" and, if this is not the case, to ... the release of the person.[154] In this case the complaint concerned the fact that ... authority who was charged in certain cases with the prosecution also had ... on the lawfulness of the detention. The Court concluded that the provision ... 3 had not been violated. It held in particular that in the case under consi- ... there had been no blending of functions, that the functionary had been able ... and had proceeded, independently, and that the procedural and substantive ... had been observed.[155]

... cases against the Netherlands elements of the Dutch Military Code were ... to be in violation of Article 5(3). The first question raised was whether the ... could be considered as an 'officer authorised by law to exercise ... power'. Referring to its judgment in the *Schiesser* Case, the Court answered ... in the negative, since the *auditeur-militair* was only competent to make ... about the applicant's detention, but he had no power to order his ... The Government had submitted that, in practice, these recommendations were ... followed, pending a total revision of the Military Code in order to comply with ... Convention. However, in the opinion of the Court this practice was an insufficient

... judgment of 28 November 1991, para. 25.

... Judgment of 4 December 1979, para. 31. See also, *e.g.*, the judgment of 22 May 1984, *Van der Sluijs, Zuiderveld and Klappe*, para. 46; judgment of 22 May 1984, *Duinhof and Duijf*, para. 36; and judgment of 30 April 1999, *Aquilina*, paras 48-55.

... Judgment of 4 December 1979, paras 32-38. The presence of counsel was not included by the Court ... among the relevant guarantees; *ibidem*, para. 36.

guarantee.[156] Furthermore, as the *auditeur-militair* could also be in charge of
ting functions in the same case, he likewise could not be considered to be
from the parties.[157] The Court reached the same conclusion with regard to
commissaris, especially on the ground of the lack of power to decide on the
detention or release.[158] In the *Pauwels* Case the investigation and prosecution
were also performed by one and the same *auditeur-militair*. The Court
although the *auditeur-militair* is hierarchically subordinate to the
and the Minister of Justice, he is completely independent in the perfor
twin duties as a member of the public prosecutor's office and as chairman
of Inquiry. However, the fact that the legislation entitled the *auditeur-*
perform investigation and prosecution functions in the same case and
the same defendant, led the Court to the conclusion that the *auditeur*
impartiality could give rise to doubt.[159]

In two of the three cases against the Netherlands,[160] and to a lesser
the *Pauwels* Case, the impartiality[161] of the *auditeur-militair* was found
because he could also be in charge of prosecuting functions in the same
this reasoning, the Court implicitly deviated from its judgment in the
where it was held that only the effective concurrent exercise of such functions
Article 5(3). This development was clearly confirmed by the *Huber*
Brincat Case. In the *Brincat* Case, the Court held as follows: "only the
appearances at the time of the decision are material: if it then appears that
authorised by law to exercise judicial power' may later intervene, in the
proceedings, as a representative of the prosecuting authority, there is a risk
impartiality may arouse doubts which are to be held objectively justified".
Assenov Case the prisoner was brought before an investigator who questioned
formally charged him, and took the decision to detain him on remand.
Bulgarian law, investigators do not have the power to make legally binding
as to the detention or release of a suspect. Instead, any decision made by an
is capable of being overturned by the prosecutor. It followed that the

156 Judgments of 22 May 1984, *De Jong, Baljet and Van den Brink*, paras 46-50; *Van der Sluijs*
and Klappe, paras 42-44; and *Duinhof and Duijf*, paras 42-45.

157 *Ibidem*.

158 Judgments of 22 May 1984, *Van der Sluijs, Zuiderveld and Klappe*, paras 47-48 and
paras 39-40, respectively. See also the judgment of 26 May 1988, *Pauwels*, paras 37-38.

159 Judgment of 26 May 1988, para. 38. In the same sense: judgment of 18 February 1999,
57 and judgment of 14 March 2000, *Jordan*, para. 28.

160 Judgments of 22 May 1984, *De Jong, Baljet and Van den Brink*, para. 49 and *Van der Sluijs*
and Klappe, para. 44.

161 In the cases against the Netherlands the Court used the word 'independent' instead of

162 Judgment of 26 November 1992, para. 21. See also the judgment of 23 October 1990,
43. This case law is closely related to the case law concerning Art. 6(1).

independent properly to be described as an 'officer authorised by law
judicial power' within the meaning of Article 5 (3).[163]

TRIAL WITHIN A REASONABLE TIME

the third paragraph contains for the person detained on remand the right
within a reasonable time or otherwise to be released pending trial, if neces-
subject to certain guarantees for his appearance at the trial. The way this provision
is drafted seems at first sight to leave a free choice to the judicial authorities: either
bring the detention on remand, provided that it has been imposed in accordance
with paragraph 1(c), up to the moment of the judgment, which must then be given
within a reasonable time, or to provisionally release the detainee pending trial, which
would then no longer be subject to a given time-limit. Such an interpretation has
been definitely rejected by the Court. In the *Neumeister* Case the Court held with
regard to Article 5(3) "that this provision cannot be understood as giving the judicial
authorities a choice between either bringing the accused person to trial within a
reasonable time or granting him provisional release even subject to guarantees. The
reasonableness of the time spent by an accused person in detention up to the beginning
of the trial must be assessed in relation to the very fact of his detention. Until convic-
tion he must be presumed innocent, and the purpose of the provision under conside-
ration is essentially to require his provisional release once his continuing detention
ceases to be reasonable."[164] And in the *Wemhoff* Case the Court held as follows: "It
is inconceivable that they [the Contracting States] should have intended to permit their
judicial authorities, at the price of release of the accused, to protract proceedings
beyond a reasonable time. This would, moreover, be flatly contrary to the provision
of Article 6(1)."[165] The reference to Article 6(1) is indispensable for the Court's
interpretation of Article 5(3); the word 'moreover', therefore, might as well have been
omitted by the Court. In fact, as soon as the accused has been released, Article 5(3)
is no longer applicable.[166] The obligation that in these cases, too, the trial takes place
within a reasonable time, can be based only on Article 6(1). But precisely because
Article 6(1) applies to all criminal proceedings, it is evident that Article 5(3) does not
entail a choice between either release or trial within a reasonable time, but the
obligation to keep a prisoner no longer in detention on remand than is reasonable and
only for within a reasonable time.

Judgment of 28 October 1998, *Assenov and Others*, para. 148. See also the judgment of 25 March 1999,
Minelli, para. 51.
Judgment of 27 June 1968, para. 4.
Judgment of 27 June 1968, para. 5.
See, e.g., the judgment of 13 July 1995, *Van der Tang*, para. 58.

According to the quotation from the *Neumeister* Case, the Court [illegible] the word 'reasonable' with the processing of the prosecution and the [illegible] the length of the detention. The long delay of the trial may in itself be [illegible] view, for instance, of the complexity of the case or the number of witnesses [illegible] moned, but this does not mean that the continued detention is therefore [illegible] nable. The Court takes the view that Article 5(3) refers to the latter aspect [illegible] at the same time that the criteria for 'reasonable' in Article 5(3) are different [illegible] those for the same term in Article 6(1) or, at least, have to be applied [illegible] way.[167] Some delays may in fact violate Article 5(3) and still be compatible [illegible] Article 6(1).[168] This is also corroborated by the view of the Court in the *W.* [illegible] that "an accused person in detention is entitled to have his case given [illegible] conducted with particular expedition".[169]

With respect to the period that has to be taken into consideration for the [illegible] mination of whether the trial has taken place within a reasonable time, the [illegible] taken the position in the *Wemhoff* Case that this is the period between the [illegible] of arrest and that of the judgment at first instance.[170] If that judgment implies [illegible] or discharge from further prosecution, at all events it will have to be [illegible] release, while in the case of conviction henceforth it is a matter of 'detention [illegible] person after conviction' in the sense of Article 5(1)(a), to which the [illegible] concerning detention on remand no longer apply.[171] Later on the Court [illegible] its position adopted in the *Wemhoff* Case; it may now be taken as established [illegible] that the period to be taken into consideration ends with the pronouncement [illegible] first-instance judgment.[172] Two different periods of detention on remand for the [illegible] charge, interrupted by a release, may be taken into consideration together [illegible] determining the total period and its reasonable character,[173] but they may [illegible] assessed separately.[174] If a detention on remand has been preceded by a detention [illegible] another character or in relation to another criminal charge, the latter detention [illegible] taken into consideration when determining the period to be considered in [illegible] to the former one. The continuation of the detention pending appeal falls within the [illegible] scope of Article 5(1) under (a). This period may not be taken into consideration [illegible] assessing whether the period is reasonable within the meaning of Article 5(3). [illegible] first judgment is quashed, the period between the moment when the judgment [illegible]

167 The relation between the two provisions is dealt with explicitly in the judgment of [illegible] 1969 in the *Stögmüller* Case and in the *Matznetter* Case, para. 5 and para 12, respectively.
168 Judgment of 10 November 1969, *Matznetter*, para. 12.
169 Judgment of 27 June 1968, para. 17.
170 *Ibidem*, paras 6-8.
171 *Ibidem*, para 9.
172 See, *e.g.* judgment of 28 March 1990, *B. v. Austria*, paras 34-40; judgment of 6 April 200[illegible] para. 147; judgment of 15 July 2002, *Kalashnikov*, para. 110.
173 See, *e.g.*, the judgment of 26 June 1991, *Letellier*, para. 34.
174 Judgment of 27 November 1991, *Kemmache*, paras 46-48.

[illegible] the moment when the second judgment is delivered must be taken into [illegible] assess whether the length of the detention was reasonable.[175]

CONTINUED DETENTION

[illegible] of the 'reasonable suspicion', as mentioned in subparagraph 5(1)(c), [illegible] condition *sine qua non* for the lawfulness of the continued detention.[176] [illegible] reasonable suspicion' ceases to exist, the continued detention becomes [illegible] and accordingly the question as to its reasonableness does not arise at all. [illegible] continued detention on remand to be considered reasonable? This [illegible] cannot be answered *in abstracto*; the answer depends on the special features [illegible] for each individual case and at each moment the interests of the accused [illegible] have to be weighed against the public interest, with due regard to the [illegible] the presumption of innocence.[177] The national authorities have to establish [illegible] relevant facts. It is not possible to shift the burden of proof to the detained [illegible] That would be contrary to the principle that detention is an exceptional [illegible] from the right to liberty and one that is only permissible in exhaustively [illegible] and strictly defined cases.[178]

[illegible] first instance this weighing is in the hands of the national authorities. They [illegible] all the relevant arguments in their decisions on the applications for release.[179] [illegible] Court has clearly shown that it considers itself competent, on the basis of the [illegible] given in these decisions and the statements of the applicant, to review for their [illegible] with the Convention the grounds on which a request for release has been [illegible] by the national authorities.[180] The mere fact that the 'reasonable suspicion' [illegible] to exist is not sufficient, in the Court's opinion, to justify, after a certain [illegible] time, the prolongation of the detention. According to the Court's case law, [illegible] whether the period spent in detention on remand is reasonable, consists [illegible] two separate questions. The first question to be answered is whether the (other) [illegible] given by the national judicial authorities are 'relevant and sufficient' to justify [illegible] continued detention. If so, the second question to be answered is whether the [illegible] authorities displayed 'special diligence' in the conduct of the proceedings.

[illegible] among others, judgment of 6 June 2000, *Cesky*, para. 71.
[illegible] *e.g.*, the judgment of 10 November 1969, *Stögmüller*, para. 4; judgment of 27 August 1992, *Tomasi*, para. 84; judgment of 26 January 1993, *W. v. Switzerland*, para. 30; judgment of 6 April 2000, *Labita*, para. 152 and judgment of 9 January 2003, *Shishkov*, para. 58.
[illegible] judgment of 26 January 1993, *W v. Switzerland*, para. 30; judgment of 6 April 2000, *Labita*, para. 152.
[illegible] judgment of 26 July 2001, *Ilijkov*, para. 85.
[illegible] the judgment of 26 June 1991, *Letellier*, para. 35; judgment of 27 November 1991, *Kemmache*, [illegible] judgment of 27 August 1992, *Tomasi*, para. 84; and judgment of 8 June 1995, *Mansur*, [illegible]

If they did, the period spent in detention can be considered reasonable
in case the first or second question is to be answered in the negative
detention on remand did exceed a 'reasonable time'.

Various grounds have been adduced by the national authorities
continued detention. Thus, for example, in the *Neumeister* Case, the
and the *Matznetter* Case the Court held that the danger of flight, even if
constituted a sufficient ground for the detention on remand, after
to exist as a ground, specifically because of the possibility of bail
absconding cannot be gauged solely on the basis of the severity of the
it must be assessed with reference to a number of other relevant factors
character of the person involved, his morals, his assets and his contacts

The risk of a further offence is the other ground mentioned in para
the *Clooth* Case the danger of repetition was founded on the psychological
of the applicant. Nine months after the beginning of the detention an expert
described the applicant as dangerous and mentioned the need for him to
psychiatric care. In these circumstances the national courts should not
period of detention on remand without ordering an accompanying
measure. They did not order such a measure, consequently the risk of
not sufficient to justify the continued detention.[184] The Court considered that
reference to a person's antecedents cannot suffice to justify refusing
reviewing the lawfulness of the (prolongation of the) detention, the Court
consider itself confined to the grounds for detention on remand expressly
in paragraph 1(c), but has also accepted as such grounds the risk of
evidence,[185] the seriousness of the offence in connection with the public
safety of a person under investigation[188], (implicitly) the danger of subo

danger of collusion[190] and the risk of pressure being brought to a

Case the French Government relied among other arguments on the
public order to justify the continued detention. The Court held that,
grave offences may give rise to a 'social disturbance' capable of
pre-trial detention. However, it added that "this ground can be regarded
and sufficient only provided that it is based on facts capable of showing
accused's release would actually disturb public order. In addition detention
to be legitimate only if public order remains actually threatened."[192] This
that can be regarded as established case law,[193] places the national courts
obligation to state their reasons carefully when deciding to prolong the
remand. The mere use of stereotype criteria referring to the requirements
order will not suffice for the purpose of Article 5(3). This conclusion *mutatis*
seems to hold good for the other grounds capable of justifying the continued
on remand.[194] In the *Labita* Case the grounds of the continued detention
the risk of pressure being brought to bear on witnesses and of evidence being
with, the fact that the accused were dangerous, the complexity of the case
the requirements of the investigation. The Court considered the grounds very
, but reasonable, at least initially. The grounds were not considered sufficient,
however, to justify the applicant's being kept in detention for two years and seven
months. Some grounds, like the risk of tampering with evidence, can lose their strength
after a certain lapse of time.[195] In the *Labita* Case the allegations against the applicant
were from a single source, a *pentito*. The Court considered that a suspect may validly
be detained at the beginning of proceedings on the basis of statements by *pentiti*. Such
statements become, because of their ambiguous nature, necessarily less relevant with
the passage of time, especially where no further evidence is uncovered during the
course of the investigation. The same reservations must be made with respect to
[illegible] evidence.[196]

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181 See, *e.g.*, the judgment of 10 November 1969, *Matznetter*, para 12; judgment of 8 June 1976, *Letellier*, para. 35; judgment of 26 January 1993, *W. v. Switzerland*, para. 30; judgment of 26 June 1992, *Mansur*, para. 52; judgment of 17 March 1997, *Muller*, para. 35; judgment of 6 April 2000, *Labita*, paras 152-153 and judgment of 9 January 2003, *Shishkov*, para. 58.

182 Judgment of 27 June 1968, paras 7-14, and judgments of 10 November 1969, *Stögmüller* and *Matznetter*, para 11, respectively. In the *Wemhoff Case*, the Court involved in its [illegible] the fact that on the part of the detainee there was no evident willingness to give [illegible] 27 June 1968, para. 15.

183 See, *e.g.*, judgment of 26 June 1991, *Letellier*, para. 43; judgment 27 August 1992, *Tomasi*, para. 98; judgment of 26 January 1993, *W. v. Switzerland*, para. 33; judgment 17 March 1997, *Muller*, para. 43.

184 Judgment of 12 December 1991, para. 40.

185 See also the judgment of 17 March 1997, *Muller*, para. 44.

186 Judgment of 27 June 1968, *Wemhoff*, para. 14.

187 Judgment of 27 November 1991, *Kemmache*, para. 49; judgment of 27 August 1992, *Tomasi*, paras 86-91, judgment of 23 September 1998, *I.A. v. France*, para. 104; judgment of 13 February 2001, *Gombert and Gochgarian*, para. 46.

188 Judgment of 23 September 1998, *I.A. v. France*, para. 108.

189 See the judgment of 16 July 1971, *Ringeisen*, paras 105-106.

190 Judgment of 28 March 1990, *B. v. Austria*, paras 42-43; judgment of 12 December 1991, *Clooth*, para. 44; judgment of 26 January 1993, *W. v. Switzerland*, para. 35.

191 Judgment of 26 June 1991, *Letellier*, para. 39; judgment of 27 November 1991, *Kemmache*, para. 52; judgment of 27 August 1992, *Tomasi*, para. 95; judgment of 6 April 2000, *Labita*, paras 152-161.

192 Judgment of 26 June 1991, para. 51.

193 See the judgment of 27 November 1991, *Kemmache*, para. 52; judgment of 27 August 1992, *Tomasi*, para. 91; judgment of 23 September 1998, *I.A. v. France*, para. 104; judgment of 13 February 2001, *Gombert and Gochgarian*, para. 46.

194 See, e.g. the judgment of 11 December 2003, *Yankov*, para. 172.

195 See also the judgment of 26 June 1991, *Letellier*, para. 39; judgment of 12 December 1991, *Clooth*, para. 44; judgment of 27 August 1992, *Tomasi*, para. 95; judgment of 26 January 1993, *W. v. Switzerland*, para. 35; judgment of 16 November 2000, *Vaccaro*, para. 38.

196 Judgment of 6 April 2000, paras 156-161.

Generalizations and Article 5(3) appear not to fit very well together. [illegible] excludes any possibility of the release of a person against whom more than [illegible] gation is pending, is incompatible with Article 5(3).[197] However, the [illegible] in the *Pantano* Case in the specific circumstances of the crimes of the [illegible] sumption of dangerousness. It was relevant that this presumption was [illegible]

As has been observed above, if the prolongation of the detention on [illegible] on well-founded reasons, the question remains whether the authorities showed 'due diligence' in the conduct of the proceedings. Article 5(3) does not imply a [illegible] length of pre-trial detention; the reasonableness cannot be assessed in the [illegible] The case law shows that even a very long duration of the detention on remand – in *W v. Switzerland* this was slightly more than four years – may still be [illegible] table. On the other hand, in the *Shishkov* Case a period of approximately [illegible] and three weeks was considered to exceed the reasonable time, while in the [illegible] Case even a period of four months and fourteen days constituted a violation of Article 5(3). The Court motivated, against the background of the relatively short [illegible] that Article 5(3) does not authorise pre-trial detention that lasts no longer than a certain minimum period. Justification for any period of detention, no matter how short, must be convincingly demonstrated by the authorities.[200]

With regard to the criteria by which the reasonableness of the duration of the detention is to be assessed, three factors seem to be of crucial importance: the complexity of the case, the conduct of the detainee and the conduct of the authorities.[201] The length of a period spent in detention on remand does not appear to be reasonable if attributable either to the complexity of the case or to the applicant's conduct or if the authorities did not act with the necessary promptness. Article 5(3) is thus violated. If a detention on remand has been preceded by a detention of another character, for instance in relation to another criminal charge, the latter detention is not taken into consideration when determining *the period* to be considered in relation to the former. However, that preceding detention must be taken into account in assessing the *reasonable character* of the period spent in detention on remand.[203] The Court has

197 See the judgment of 11 December 2003, *Yankov*, para. 173.

198 Judgment of 6 November 2003, paras 69-70.

199 Judgment of 27 June 1968, *Wemhoff*, para 10, and judgment of 26 January 1993, *W.*, para. 30.

200 Judgment of 9 January 2003, *Shishkov*, para. 66; judgment of 8 April 2004, *Belchev*, para.

201 The right of a prisoner on remand "to have his case examined with particular expedience unduly hinder the efforts of the judicial authorities". See, *e.g.*, the judgment of 12 December *Toth*, para. 77.

202 See the judgment of 12 December 1991, *Toth*, para. 77 and the judgment of 27 August para. 102.

203 Judgment of 8 June 1995, *Mansur*, para. 51.

[illegible] have been periods of inactivity without a justification. In the *Kalashnikov* [illegible] had been significant delays in the proceedings. The hearing had to be [illegible] on account of the absence of the applicant's lawyer. The Court found that [illegible] did not substantially contribute to the length of the proceedings. The [illegible] exceeded a reasonable time.[204]

[illegible] expressly allows for making the release of the person detained on remand [illegible] on guarantees to appear for trial. The rationale of this is obvious: if and [illegible] prolongation of the detention would be allowed, certain guarantees may [illegible] for release. The provision is important in particular because of the obligation [illegible] limitations resulting from it for the national authorities.

[illegible] Article 5(3) does not guarantee an absolute right to release on bail, the [illegible] of demanding bail laid down there entails for the judicial authorities the [illegible] to ascertain whether by means of such a guarantee the same purpose can [illegible] as is aimed at by the detention on remand. In the *Jablonski* Case the [illegible] courts did not take into account any other guarantees that the applicant [illegible] appear for trial. The Court concluded that the prolonged detention could not [illegible] considered as necessary from the point of view of ensuring the due course of the [illegible] proceedings.[205]

In the case law four basic acceptable reasons for refusing bail can be distinguished: the risk that the accused will fail to appear for trial and the risk that the accused, if released, would take action to prejudice the administration of justice, commit further offences, or cause public disorder. If there are sufficient indications and guarantees for bail, but this possibility is not offered to the detainee, the detention loses its reasonable ground and as a consequence also its lawful character. This will be the case in particular if the only ground for the detention is the risk of flight.[206] If the detainee declines the offer without suggesting an acceptable alternative, he has only himself to blame for the continued detention.[207] On the other hand, the guarantee demanded for release must not impose heavier burdens on the person in question than are required for obtaining a reasonable degree of security. If, for instance, the detainee is required to give bail the amount of which he cannot possibly raise, while it may be assumed that a lower sum would also provide adequate security for his compliance with a summons to appear for trial, the prolongation of the detention is unreasonable.[208] This also means that the nature and the amount of the security demanded must be related to

[illegible] Judgment of 15 July 2002, para. 120.

[illegible] Judgment of 21 December 2000, para. 84.

[illegible] This also the Court in the *Wemhoff Case*, judgment of 27 June 1968, para. 15. See further the [illegible] judgment of 28 June 1991, *Letellier*, para. 64 and the report of 11 December 1980, *Schertenleib*, D&R [illegible] (1981), p. 137 (195).

[illegible] In the Court's opinion that was the situation in the *Wemhoff Case*, judgment of 27 June 1968.

[illegible] Judgment of 27 June 1968, *Neumeister*, paras 12-15.

[illegible] Ringeisen

the grounds on which the detention on remand is based; thus, in the [illegible] of the amount the damage caused by the accused may not be taken into [illegible] the other hand, the financial situation of the person concerned and/or [illegible] the person who stands bail for him must be taken into consideration [illegible] of the bail must be assessed principally in relation to the person concer[illegible] accused must provide the requisite information about this, but this does [illegible] the authorities from the duty of making an inquiry into it themselves, in [illegible] able to decide on the possibility of releasing him on bail.[210] In the *Iwanczuk* [illegible] inquiry about the sum and form of the bail lasted four months and fourteen [illegible] the competent judicial authority found prolonged detention on remand [illegible] The applicant had promptly provided the relevant information as to its [illegible] of these facts, the Court concluded that Article 5(3) was violated.

9.7 HABEAS CORPUS

9.7.1 GENERAL OBSERVATIONS

Article 5(4) grants to everyone who is deprived of his liberty by arrest or [illegible] the right to take proceedings by which the lawfulness of such deprivation [illegible] will be reviewed speedily by a court and his release ordered if the latter [illegible] the detention is unlawful. This resembles the remedy of *habeas corpus*, origin[illegible] English law.

The fourth paragraph constitutes an independent provision: even if the [illegible] found that the first paragraph has not been violated and that the detention [illegible] ingly, had a lawful character, an inquiry into the possible violation of the [illegible] paragraph may nevertheless be made.[211] This implies that even if the [illegible] Court leads to the conclusion that the detention was lawful, an assessment [illegible] made of whether the detained person at the time had the possibility to have the [illegible] ness reviewed by a domestic court. The procedure of paragraph 4 must, therefore, be considered as independent of the possibility of applying for release on bail.

The fourth paragraph of Article 5, like the second paragraph, requires [illegible] arrested person be informed of the reasons of his arrest in order to be in a [illegible] to take proceedings with a view to having the lawfulness of his detention [illegible] In *X. v. the United Kingdom* the Court considered that the issue under Article [illegible]

209 See, e.g., the judgment of 15 November 2001, *Iwanczuk*, para. 66.

210 Report of 11 December 1980, *Schertenleib*, D&R 23 (1981), p. 137 (197).

211 See, *inter alia*, the judgment of 24 October 1979, *Winterwerp*, para. 53 and the [illegible] 24 September 1992, *Kolompar*, para. 45.

212 Report of 11 October 1983, *Zamir*, D&R 40 (1985), p. 42 (59).

213 Judgment of 5 November 1981, *X. v. the United Kingdom*, para 66.

[illegible] by the fact that a violation was found of Article 5(4).[214] In the *Van der Leer* [illegible] stated, on the other hand, that it was not necessary to examine the question [illegible] of detention under paragraph 4 because it dealt with it under the second [illegible] paragraph.

9.7.2 APPLICABILITY

[illegible] *corpus* guarantees extend to all cases of deprivation of liberty provided for [illegible] first paragraph of Article 5. The content of the obligation is not necessarily the [illegible] in all circumstances and as regards every category of deprivation of liberty.[216] [illegible] a national court, after convicting a person of a criminal offence, imposes a fixed [illegible] sentence of imprisonment for the purposes of punishment, the supervision required [illegible] Article 5(4) is incorporated in that court decision. This view is based on the [illegible] assumption that in those cases the judicial review of the lawfulness of the detention, [illegible] is guaranteed by Article 5(4), has already taken place. This situation must be [illegible] distinguished from situations in which an indeterminate sanction is imposed. In *X. v. the United Kingdom* the applicant was convicted of causing bodily harm and was committed to a mental hospital for an indefinite period. According to the Court this deprivation of liberty fell, initially at least, within the ambit of both Article 5(1)(a) and Article 5(1)(e). The Court held that "By virtue of Article 5 § 4, a person of unsound mind compulsorily confined in a psychiatric institution for an indefinite or lengthy period is thus in principle entitled, at any rate where there is no automatic periodic review of a judicial character, to take proceedings at reasonable intervals before a court to put in issue the 'lawfulness' (...) of his detention, whether that detention was ordered by a civil or criminal court or by some other authority."[217]

The *Van Droogenbroeck* Case concerned the placing of a recidivist at the Government's disposal for ten years by court order. This order was given together with a sentence to two years imprisonment. On the completion of his principal sentence Van Droogenbroeck was placed in semi-custodial care, but he disappeared and, after his arrest, was sent to prison by a decision of the Minister of Justice. Although the Court held that the resulting deprivation of liberty occurred 'after conviction' in accordance with Article 5(1)(a), it considered the fourth paragraph of Article 5 to be applicable,

[illegible]

[illegible] Judgment of 21 February 1990, para. 34.

[illegible] Judgment of 5 November 1981, *X. v. the United Kingdom*, para. 52; judgment of 20 January 2004, [illegible], para. 19.

[illegible] Judgment of 5 November 1981, para. 52. The Court, moreover, emphasised that given the scheme of Article 5, read as a whole, the notion of 'lawfulness' implies that the same deprivation of liberty should have the same significance in paragraphs 1(e) and 4. See also the judgment of 28 May 1985, *Ashingdane*, paras 51-52.

[illegible]

which required in the instant case "an appropriate procedure allowing [...] determine 'speedily' (...) whether the Minister of Justice was entitled [...] detention was still consistent with the object and purpose of the 1964 [...]

The same line of reasoning was followed in the *Weeks* Case. The [...] age of 17, was convicted of armed robbery and sentenced to life imprison[ment]. sanction was not imposed because of the gravity of the offence. The sentence took account of the age and dangerous and unstable personality of the [...] decided that he should impose the sentence of life imprisonment to [...] Secretary of State to release him whenever he had become responsible with [...] of years. After nearly ten years the applicant was released on licence, but [...] this license was revoked. He complained that he had not been able, either [...] to prison or at reasonable intervals throughout his detention, to take proc[eedings] required by Article 5(4). The Court stated that the decisions of the executive [...] or to re-detain the applicant should be consistent with the objectives of the [...] court. If not, the detention would no longer be lawful for the purposes of sub[paragraph] (a). Because the grounds relied on by the sentencing judges for deciding that [...] of deprivation should be subject to the discretion of the executive were "by [their] susceptible of change", the Court concluded that Mr Weeks was entitled [...] proceedings as mentioned under paragraph 4.[219]

In the *Thynne, Wilson and Gunnel* Case each of the applicants had commit[ted] offences and had been sentenced to life imprisonment. The question of whether sentence should be imposed was at the discretion of the trial judge. In addition, need of punishment the applicants were considered to be suffering from [...] disturbance and to be dangerous and in need of treatment. The discretion[ary] sentence was imposed to enable the administration to assess their improvement to act accordingly. The Court decided, in line of the *Weeks* Case, that the [...] were entitled to take proceedings, but it had to establish from what point in [time] would be the case. To this end it distinguished between the punitive and [the] element of the sentence[220] and concluded that the punitive period of the life [sen]ment had expired.[221] According to the judgment in the *Stafford* Case, this [dis]is also applicable to mandatory life sentences.[222] To sum up, in fact the [...] distinguishes between 'the conviction by a competent court' in the [sense] Article 5(1)(a) as "the decision depriving a person of his liberty", on the [one] and the "ensuing period of detention in which new issues affecting the lawfulness the detention might subsequently arise", on the other hand. The 'conviction' [...]

218 Judgment of 24 June 1982, para. 49.
219 Judgment of 2 March 1987, para. 59.
220 This distinction was confirmed by English law, at least according to the Court. The Government [...] the opposite view.
221 Judgment of 25 October 1990, paras 71-78.
222 Judgment of 28 May 2002, paras 87-89.

[...] with the latter period. Thus, whenever the latter period starts, the [...] of the detention is no longer incorporated in the initial conviction.

[...] with the fourth paragraph, the Court takes account not only of the [...] existence of remedies in the legal system of the Contracting Party concerned, [...] the context in which they operate and the personal circumstances of the [...]. The domestic remedies have to be sufficiently certain, otherwise the require[ments] of accessibility and effectiveness are not fulfilled.[223] In *R.M.D. v. Switzerland* [...] was in a position of great legal uncertainty. He had to expect to be [...] from one canton to another at any moment, in which situation eventuality [...] of the transferring canton no longer had jurisdiction to decide the lawfulness [...] detention, that rendered any remedy ineffective, which led to a violation of [...] 5(4).[224]

[...] the fourth paragraph also apply to the detention on remand, now that the third [...] already prescribes that an accused person, after his arrest, shall be brought [...] before a judge or other officer authorised by law to exercise judicial power? [...] in the case that the person in question has thus been brought to trial it can hardly [...] that he has been able to exercise the right 'to take proceedings', while moreover [...] all cases there is a decision on the lawfulness of the detention by a 'court' in the [...] sense. The position would, therefore, appear justifiable that in certain cases [...] 5(4) grants to the person detained on remand a right of (periodic) recourse [...] court after the (judicial) decision to detain him or to prolong the detention has [been] taken.[225] In the *De Jong, Baljet and Van den Brink* Case the Court reached the [same] conclusion by holding that the procedure, prescribed in Article 5(3), "may admit[tedly] have a certain incidence on compliance with paragraph 4. For example, where [the] procedure culminates in a decision by a 'court' ordering or confirming deprivation [of] a person's liberty, the judicial control of lawfulness required by paragraph 4 is [incorporated] in this initial decision. (...) However, the guarantee assured by paragraph 4 [is] of a different order from, and additional to, that provided by paragraph 3."[226] In the *Toth* Case the Court held that Article 5(4) did not cover proceedings [initiated] by an investigating judge for the extension of the pre-trial period. The [judicial] court that had to decide on the request of the judge, had to confine itself to

[...] among others, judgment of 24 June 1982, *Van Droogenbroeck*, para. 54 and judgment of [...] November 1997, *Sakik*, para 53.
[...] judgment of 26 September 1997, *R.M.D. v. Switzerland*, para. 47.
[...] Recommendation R(80)11 of the Committee of Ministers of 27 June 1980 on detention on [remand], Article 14 of which provides: "Custody pending trial shall be reviewed at reasonably short [intervals] which the law or the judicial authority shall fix. In such a review, account shall be taken [...] all the changes in circumstances which have occurred since the person concerned was placed in [custody]".
[...] judgment of 22 May 1984, para. 57. See also the judgment of 25 October 1989, *Bezicheri*, para. 20.

'setting out a framework' within which the investigating judge [illegible] decisions. The national court itself did not review the 'lawfulness' of the [illegible] nor gave it a decision on the question of whether the applicant should be [illegible]

9.7.3 REVIEW OF LAWFULNESS AT REASONABLE INTERVALS

In the *Winterwerp* Case the Court took the view that a case of detention [illegible] of unsound mind "would appear to require a review of lawfulness to be [illegible] reasonable intervals".[228] This requirement was initially solely connected with [illegible] of unsound mind.[229] In the *Bezicheri* Case, however, the applicant was [illegible] remand. Subsequent to a first judicial review of the lawfulness of the detention [illegible] according to the Court, entitled "after a reasonable interval, to take proceed[illegible] which the lawfulness of his continued detention" was decided.[230]

According to established case law the right to take proceedings exists [illegible] where there is no "automatic periodic review of a judicial character".[231] It is [illegible] clear if this right also exists in case the national legislation does provide [illegible] system. Anyway, the wording of paragraph 4 suggests an answer in the affir[illegible] On the other hand, one might presume that the national authorities must be [illegible] possibility to reject an application for judicial review if no new facts are adduced [illegible] if shortly before an automatic periodic review of judicial character amounting [illegible] negative decision for the applicant.[232] In the *Bezicheri* Case, the person concerned [illegible] detained under Article 5(3), submitted his application for release one month after [illegible] first judicial review. The Italian Government argued that this period was too long [illegible] be reasonable, but the Court held that "detention on remand calls for short intervals". Consequently, in this case a period of one month was not unreasonable. In the *Baljet and Van den Brink* Case the applicants were in remand seven, eleven and [illegible] days respectively without any remedy against their deprivation of liberty. The Court held that this amounted to be a breach of Article 5(4).[233]

227 Judgment of 12 December 1991, para. 57.

228 Judgment of 24 October 1979, para 55. See also the judgment of 23 February 1984, *Luberti*, para. [illegible] and the judgment of 22 May 1984, *De Jong, Baljet and Van den Brink*, para. 57.

229 See, *e.g.*, the judgment of 23 February 1984, *Luberti*, p. 31.

230 Judgment of 25 October 1989, para. 20. The restriction to 'persons of unsound mind' was [illegible] in the judgment of 12 May 1992, *Megyeri*, para. 22, but, on the other hand, was [illegible] judgment of 23 November 1993, *Navarra*, para. 26 (concerning a prisoner on remand).

231 See, *e.g.*, the judgment of 5 November 1981, *X v. the United Kingdom*, para. 52; judgment of [illegible] 1992, *Megyeri*, para. 22.

232 Compare the report of the Commission of 15 December 1977, *Winterwerp*, B.31 (1983), [illegible] and para. 109.

233 Judgment of 22 May 1984, paras 58-59.

of detention of persons of unsound mind, the intervals can be longer than [illegible] detention under Article 5(3). In the *Herczegfalvy* Case concerning the [illegible] periodic review of the detention of a person of unsound mind, intervals [illegible] months and two years, respectively, between two judicial decisions were not [illegible] 'reasonable intervals'. However, a period of nine months was not criti[illegible] by the Court and, therefore, seemed to meet the requirements of the fourth [illegible]

sentences may be imposed on offenders due to considerations of mental insta[illegible] dangerousness. These circumstances may change over the passage of time. [illegible] Case the applicant, who was sentenced to life imprisonment, com[illegible] that a two-year delay between his Parole Board Reviews was unreasonable. [illegible] court shared this opinion. The Court was not satisfied that the period of two years [illegible] justified by considerations of rehabilitation and monitoring and took into [illegible] that the courses that the applicant underwent to address his problems [illegible] concluded within eight months of his recall.[235] The Court seems to require a [illegible] flexibility in determining the period, which must reflect the fact that there are [illegible] differences in the personal circumstances of the prisoners under review.

9.7.4 REVIEW BY A COURT

[illegible] paragraph 4 entitles the accused to a decision by a 'court'. In the *Neumeister* Case, the [illegible] Court indicated as the decisive criterion that the competent authority "must be [illegible] independent both of the executive and of the parties to the case".[236] Subsequently the [illegible] Court added that the right to judicial review is not of such a scope as to empower the [illegible] national courts to substitute their own discretion for that of the decision-making [illegible] authority on questions of pure expediency.[237] To satisfy the requirements of the [illegible] Convention the review of the national court should comply with both the substantial [illegible] and procedural rules of the national legislation and be conducted in conformity with [illegible] the aim of Article 5, the protection of the individual against arbitrariness.[238] What [illegible] guarantees must be attached to the procedure under the fourth paragraph of Article 5 [illegible] must be judged by the circumstances of each case, in which context in particular the [illegible] consequences resulting for the person concerned from the decision to be taken in that

[illegible] judgment of 24 September 1992, para. 77.

[illegible] judgment of 26 September 2000, *Oldham*, paras 34-35.

[illegible] judgment of 27 June 1968, para. 24. In this case the procedure itself was not yet considered decisive [illegible] by the Court. See also the judgment of 18 June 1971, *De Wilde, Ooms and Versyp ('Vagrancy' Cases)*, [illegible] para. 78; judgment of 25 October 1989, *Bezicheri*, para. 20.

[illegible] See, e.g., the judgment of 24 June 1982, *Van Droogenbroeck*, para. 49; judgment of 29 August 1990, *[illegible] v. Norway*, para. 50; judgment of 25 October 1990, *Thynne, Wilson and Gunnell*, para. 79.

[illegible] Judgments of 25 October 1990, *Koendjbiharie*, para. 27, and *Keus*, para. 66.

procedure must be considered.[239] Consequently, the guarantees which [illegible] of Article 5(4) must afford need not necessarily be the same as those [illegible] Article 6(1) for a 'fair trial'.[240] Nevertheless, because of the impact of [illegible] liberty on the fundamental rights of the person concerned, proceedings [illegible] under Article 5(4) should in principle also meet, to the largest extent [illegible] the circumstances of an ongoing investigation, the basic requirements [illegible] The proceeding must have a judicial character and provide guarantees [illegible] to the kind of deprivation of liberty in question. The practical realities and [illegible] circumstances of the detained person must be taken into consideration.[241]

The procedure must be adversarial and must always ensure 'equality [illegible] between the parties.[243] Equality of arms is not ensured if counsel is denied [illegible] those documents in the investigation file which are essential in order effectively [illegible] challenge the lawfulness of his client's detention.[244] The authorities should [illegible] both parties have the opportunity to be aware that observations have been [illegible] have a real opportunity to comment thereon.[245] Whether or not a submission [illegible] prosecution deserves a reaction is a matter for the defence to assess.[246] Article 5(4) [illegible] not impose an obligation on a court examining an appeal against detention to [illegible] every argument contained in the appellant's submissions. However, the court [illegible] treat as irrelevant, or disregard, concrete facts invoked by the detainee and [illegible] of putting into doubt the existence of the conditions essential for the 'lawful' [illegible] the sense of the Convention, of the deprivation of liberty.[247] In the *Lamy* Case [illegible] applicant's counsel did not have the opportunity to effectively challenge the [illegible] or views which the prosecution based on these documents, while it was [illegible] inspect the documents in question in order to challenge the lawfulness of the [illegible] warrant effectively. Article 5(4) was violated.[248]

The Court recognises that the use of confidential material may be [illegible] where national security is at stake. This does not mean, however, that the [illegible] authorities are released from effective control by the domestic courts whenever [illegible] choose to assert that national security and terrorism are involved. The Court [illegible] into account that techniques may be employed which both accommodate [illegible] security concerns about the nature and sources of intelligence information [illegible]

239 Judgment of 18 June 1971, *De Wilde, Ooms and Versyp* ('*Vagrancy*' Cases), para. 76.
240 Judgment of 24 October 1979, *Winterwerp*, para. 60; judgment of 12 May 1992, *Megyeri*, para. 22.
241 Judgment of 13 February 2001, *Schöps*, para. 44; judgment of 31 January 2002, *Lanz*, para. 43.
242 Judgment of 9 January 2003, *Shishkov*, para. 85.
243 See, e.g., judgment of 21 October 1986, *Sanchez-Reisse*, para. 51; judgment of 25 March 1999, *Nikolova*, paras 58-59; judgment of 31 January 2002, *Lanz*, para 44.
244 Judgment of 13 February 2001, *Garcia Alva*, para. 39.
245 Judgment of 13 February 2001, *Schöps*, para. 44.
246 Judgment of 31 January 2002, *Lanz*, para. 44.
247 Judgment of 25 March 1999, *Nikolova*, para. 61; judgment of 26 July 2001, *Ilijkov*, para. 94.
248 Judgment of 30 March 1989, para. 29.

[illegible] individual a substantial measure of procedural justice.[249] It is for the authorities to ensure that an individual satisfies the conditions for detention.[250]

[illegible] case of a person whose detention falls within the ambit of Article 5(1) under [illegible] hearing is required.[251] The detainee must have adequate time to prepare the [illegible] Article 5(4) does not as a general rule require such a hearing to be public.[253] [illegible] *Winterwerp* Case the detention of a person of 'unsound mind' under [illegible] was at stake. The Court considered it essential for the person concerned [illegible] access to court and to be enabled to be heard in person or, if necessary, through [illegible] representative. According to the Court it is possible that the mental condition of the [illegible] makes specific restrictions or derogations necessary as to the exercise of this [illegible] but this cannot in any case justify an encroachment on the right in its essence, [illegible] on the contrary calls for special procedural guarantees.[254] The Court concluded [illegible] in this case the initial decision of detention was not taken by a 'court' and that [illegible] applicant did not have access to a 'judicial procedure'.[255] In the *Megyeri* Case [illegible] national court had to assess whether the continued detention of the applicant was [illegible]. The applicant was heard in person but that did not meet the requirements [illegible] Article 5(4). The Court considered it doubtful whether the applicant was capable [illegible] adequately presenting the relevant points. It concluded, also taking into consideration the fact that the applicant had spent more than four years in a psychiatric hospital, that a counsel should have been appointed to assist the applicant in the proceedings.[256] The same point of view was adopted by the Court in the *Bouamar* Case, taking into consideration, *inter alia*, that the proceedings concerned a juvenile,[257] and in the *Magalhães Pereira* Case. In the last mentioned case the decision to continue the detention relied, *inter alia*, on a medical report that had been obtained a year and eight months beforehand and that did not necessarily reflect the applicant's condition at the time of the decision. The Court considered that a delay of that length between the preparation of a medical report and the decision whether or not the detention must be continued, in itself can run counter to the principle of protecting individuals from [illegible] arbitrariness.[258]

In the *Sanchez-Reisse* Case the applicant, against whom action had been taken with [illegible] to extradition, complained about the fact that he had not been able to apply

[illegible] judgment of 15 November 1996, *Chahal*, para. 131; judgment of 20 June 2002, *Al-Nashif*, para. 95.
[illegible] judgment of 20 February 2003, *Hutchison Reid*, para. 70.
[illegible] judgment of 4 December 1979, *Schiesser*, paras 30-31; judgment of 21 October 1986, *Sanchez-Reisse*, para. 51; judgment of 25 March 1999, *Nikolova*, para. 58.
[illegible] judgment of 24 June 2004, *Frommelt*, para. 33.
[illegible] judgment of 15 November 2005, *Reinprecht*, paras 38-41.
[illegible] judgment of 24 October 1979, para. 60.
[illegible] *idem*, para 67. See also the judgment of 21 February 1990, *Van der Leer*, paras 32-36.
[illegible] judgment of 12 May 1992, para. 25.
[illegible] judgment of 29 February 1988, paras 59-60.
[illegible] judgment of 26 February 2002, para. 49.

directly to a court. However, the Strasbourg Court had no objection to [illegible] ment of a previous administrative procedure, provided that this did [illegible] 'speed'-requirement.[259] In the *Singh* Case and the *Hussain* Case the Court [illegible] the lack of an oral and adversarial hearing in the proceedings before the [illegible] could not be compensated by the possibility of instituting proceedings [illegible] review. It was crucial for the Court that the applicants risked a considerable [illegible] imprisonment and that the decision which had to be taken by the Parole [illegible] the dangerousness of the applicants involved questions with regard to their [illegible] ity and level of maturity".[260] In the *Wassink* Case a failure to comply with [illegible] (according to the Court the requirement concerned was not an essential [illegible] lead to the conclusion that Article 5(4) was violated.[261]

Article 5(4) does not stipulate the requirement of the court's independence [illegible] impartiality and thus differs from Article 6(1). However, the Court has [illegible] independence is one of the most important constitutive elements of the [illegible] 'court' and that it would be inconceivable that Article 5(4) should not equally [illegible] the impartiality of that court. In *D.N. v.* Switzerland the Court assessed the [illegible] of a judge in conformity with the jurisprudence concerning Article 6(1). [illegible] judges – the only psychiatrist of the court – had previously given an expert [illegible] on the state of health of the detainee. The Court concluded that the circumstances [illegible] the case served objectively to justify the applicant's apprehension that the judge [illegible] the necessary impartiality.[262]

Article 5(4) does not require the institution of a second level of proceedings. [illegible] intervention of one organ satisfies Article 5(4), on condition that the proceedings [illegible] a judicial character and gives to the detainee guarantees appropriate to the [illegible] deprivation of liberty in question. However, in principle, if the question of [illegible] the detained person should be released will be heard on appeal, then the Contracting States must offer the persons concerned the same guarantees as at first instance.[263]

In the *Brannigan and McBride* Case the Court concluded that the right laid down in Article 5(4), is a *lex specialis* in relation to the right to an effective remedy laid down in Article 13.[265]

259 Judgment of 21 October 1986, paras 17 and 54.
260 Judgments of 21 February 1996, paras 68-69 and paras 60-61, respectively.
261 Judgment of 27 September 1990, paras 33-34.
262 Judgment of 29 March 2001, *D.N. v. Switzerland*, paras 44-56.
263 Judgment of 31 July 2000, *Jecius*, para. 100; judgment of 31 January 2002, *Lanz*, para. 39.
264 Judgment of 12 December 1991, *Toth*, para. 84, and judgment of 23 November 1993, para. 28.
265 Judgment of 26 May 1993, para. 76.

SPEEDY DECISION

[illegible] explicitly requires that the judicial review shall take place 'speedily'. Compliance [illegible] must be assessed in the light of the specific circumstances of the case.[266] The [illegible] of medical issues involved in a determination of whether a person can be [illegible] may be taken into account.[267] With regard to the period that has to be taken [illegible] consideration the Court has taken as a starting point the day the application for [illegible] has been made. The relevant period comes to an end on the day the court has [illegible] judgment.[268] If the proceedings have been conducted at two levels of jurisdiction [illegible] overall assessment must be made in order to determine whether the requirement [illegible] has been complied with.[269]

[illegible] assessing the speedy character required by paragraph 4 comparable factors may [illegible] into consideration as those which play a role with respect to the requirement [illegible] within a reasonable time under Article 5(3) and under Article 6(1), such as, [illegible] the conduct of the applicant and the way the authorities have handled [illegible].[270] Neither an excessive workload,[271] nor a vacation period[272] can justify a [illegible] inactivity on the part of the judicial authorities.

The notion of 'speedily' *('à bref délai')* indicates a lesser urgency than that of promptly *('aussitôt')* in Article 5(3).[273] In the *Sanchez-Reisse* Case the time which [illegible] between the lodging of two requests and the decisions thereon, 31 days and [illegible] respectively, did not satisfy the 'speed'-requirement of Article 5(4). In the [illegible] Case a period of 23 days on remand was not considered 'speedily'.[274] In the [illegible] Case the same conclusion was reached with respect to extradition proceedings [illegible] a period of 17 days.[275] With respect to a period of nearly one year and five months [illegible] the judicial decisions were given[276], the Court expressed certain doubts about [illegible] overall length of the period. Nevertheless, it took into consideration the fact that [illegible] applicant had retained the right to submit further applications for release, which

[illegible] See, e.g., the judgment of 21 October 1986, *Sanchez-Reisse*, para. 55, and the judgment of 29 August [illegible] *E. v. Norway*, para. 64.
[illegible] Judgment of 21 December 2000, *Jablonski*, para. 92.
[illegible] See, e.g., the judgment of 21 October 1986, *Sanchez-Reiss*, para. 54, and the judgment of 29 August [illegible] *E. v. Norway*, para. 64.
[illegible] See, e.g., the judgment of 23 February 1984, *Luberti*, para. 33, and the judgment of 23 November [illegible] *Navarra*, para. 28.
[illegible] See, e.g., the judgment of 23 February 1984, *Luberti*, paras 30–37, and the judgment of 21 February [illegible] *Van der Leer*, para. 36.
[illegible] See, e.g., the judgment of 25 October 1990, *Bezicheri*, para. 25.
[illegible] Judgment of 29 August 1990, *E. v. Norway*, para. 66.
[illegible] para. 64.
[illegible] Judgment of 28 November 2000, paras 85–86.
[illegible] Judgment of 9 January 2003, paras 44–45.
[illegible] With respect to one application for release the applicant appealed three times to the Court of [illegible].

were all dealt with in short periods,[277] and reached the conclusion that [illegible] was not violated.[278] In the *Fox, Campbell and Hartley* Case two applicants [illegible] proceedings for *habeas corpus*. They were released 44 hours after their [illegible] judicial control on the lawfulness of their detention had taken place. The [illegible] that they were released speedily and did not find it necessary to examine [illegible] complaint under Article 5(4).[279]

9.8 RIGHT TO COMPENSATION

Article 5(5) grants a right to compensation if an arrest or detention is found [illegible] contravention of the preceding provisions of Article 5. At first sight this [illegible] appears superfluous by the side of the general provision concerning just [illegible] in Article 41 of the Convention. The difference, however, is that Article 41 [illegible] competence on the Court, while Article 5(5) grants an independent right [illegible] national authorities, the violation of which right may constitute the object of [illegible] complaint and may subsequently lead to the Court's application of Article [illegible] difference may be illustrated by the following example. If an arrest has been [illegible] unlawful by the national court and the prisoner has subsequently been released [illegible] Article 5(4), he can still complain about a violation of Article 5 if his claim for [illegible] sation has not been received or has been rejected. If, on the other hand, a [illegible] ment of a detainee has been stopped after having been found by the national [illegible] to conflict with Article 3, but no damages are awarded to the injured person, [illegible] no ground for a separate complaint, since Article 3 itself does not grant a right [illegible] compensation and Article 41 applies only after the Court has established violation [illegible] – in this case – Article 3.

In the *Brogan* Case the Government argued that the aim of paragraph 5 is [illegible] that the victim of an 'unlawful' arrest or detention should have an enforceable [illegible] to compensation. In this regard the Government also contended that 'lawful [illegible] construed as essentially referring back to domestic law and in addition as [illegible] any element of arbitrariness. The Government concluded that even in the [illegible] violation being found of any of the first four paragraphs, there had been no [illegible] of paragraph 5 because the applicants' deprivation was lawful under Northern [illegible] law and was not arbitrary. The Court held that such a restrictive interpretation [illegible] incompatible with the terms of paragraph 5, which refers to arrest or detention [illegible] contravention of the provisions of this Article'.[280]

277 Periods from eight to twenty days.

278 Judgment of 26 June 1991, *Letellier*, paras 56-57. See also the judgment of 23 November [illegible] *Navarra*, paras. 29-30.

279 Judgment of 30 August 1990, paras 45-46.

280 Judgment of 29 November 1988, para. 67. See also the judgment of 10 June 1996, *Brogan* [illegible]

[illegible] pointed out by the Court in the *Ciulla* Case, the effective enjoyment of the [illegible] protected in paragraph 5 must be ensured in the Contracting States with "a [illegible] degree of certainty".[281] In the *Sakik* Case the Court assessed the effectiveness [illegible] application of Article 5(5) by the national authorities. In all the cases in which [illegible] was payable under the domestic legal provision concerned, it was [illegible] that the deprivation of liberty was unlawful. However, the domestic courts [illegible] the detention in accordance with domestic law and the right to compensa- [illegible] decided on the unlawfulness under domestic law. Under these circumstances [illegible] effective enjoyment of the right guaranteed by Article 5(5) of the Convention is [illegible] with a sufficient degree of certainty.[282]

The damage to be compensated may be material as well as non-material.[283] [illegible] In the *Wassink* Case the Court took the view that the Contracting States are [illegible] to make the award of compensation dependent of the real existence of any [illegible] damage resulting from the violation of Article 5.[284] In this case the detention under [illegible] Article 5(1) was unlawful because there was no registrar present at the hearing, as was required by national law. For this reason it was hard for the applicant to prove any damage. It was uncertain if proceedings conducted in conformity with Article 5 would [illegible] led to the release of the applicant. The question of whether damage is involved, [illegible] raises the merits and will ultimately have to be decided by the Strasbourg Court.

9.9 DEROGATION

[illegible] Article 5 is not included in the enumeration of Article 15(2). Under the conditions [illegible] mentioned in the first paragraph of that article, the Contracting States may, therefore, derogate from the provision of Article 5 if, insofar as, and as long as this is necessary. In the *Brannigan and McBride* Case the derogation made by the United Kingdom Government was upheld by the Court. Surprisingly, the Court held, before examining the derogation, that Article 5(3) and (5) had not been complied with.[285] It is submitted that this consideration should not have been made if indeed the derogation met the requirements of the Convention.[286]

[illegible] Judgment of 22 February 1989, para 44. See further the judgment of 30 August 1990, *Fox, Campbell and Hartley*, para. 76, and the judgment of 25 October 1990, *Thynne, Wilson and Gunnel*, para. 82. [illegible] Judgment of 26 November 1997, para. 60 and judgment of 11 December 2003, *Yankov*, para. 194. [illegible] Judgment of 22 June 1972, *Ringeisen*, paras 23-26. See also the judgment of 2 December 1987, *Bozano*, [illegible] para 6-9.

[illegible] Judgment of 27 September 1990, para 38. See also the judgment of 10 March 1972, *'Vagrancy'* Cases, [illegible] para 24.

[illegible] Judgment of 26 May 1993, para. 37.

[illegible] See the declaration of judge Thor Vilhjálmsson, attached to the judgment.

CHAPTER 10
RIGHT TO A FAIR AND PUBLIC HEARING (Article 6)

REVISED BY PIETER VAN DIJK (SECTIONS 1-4)
AND BY MARC VIERING (SECTIONS 5-10)

CONTENTS

10.1 TEXT OF ARTICLE 6

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 but 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 to 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 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 the language used in court.

10.2 SCOPE OF ARTICLE 6

For the interpretation of Article 6 the Court, in its *Delcourt* judgment, has given the following guideline: "In a democratic society within the meaning of the Convention, the right to a fair administration of justice holds such a prominent place ... that a restrictive interpretation of Article 6(1) would not correspond to the aim and purpose of that provision."[1]

In thus rejecting a restrictive interpretation, the Court has given guidance not only for its own case law, but also to the national authorities, especially the domestic courts. The Court's case law shows that it considers itself competent to examine in detail the way in which Article 6 has been interpreted and applied at the national level.

The first issue to be discussed is the scope of Article 6. Thereafter, the various express and implied requirements embodied in the three paragraphs of this provision will be outlined.

10.2.1 DETERMINATION OF CIVIL RIGHTS AND OBLIGATIONS

Unlike the second and the third paragraph of Article 6, which apply exclusively to proceedings concerning criminal charges, the first paragraph also applies to proceedings in which the determination of civil rights and obligations is (also) at issue.

10.2.2 DRAFTING HISTORY

The meaning of the words 'determination of his civil rights and obligations' (*contestations sur ses droits et obligations de caractère civil*) is rather vague and leaves ample scope for 'creative' interpretation and even 'judicial policy'.[2] If, as is the case here, the ordinary meaning to be given to treaty provisions does not provide a suffi-

1 Judgment of 17 January 1970, para. 25.

2 Thus the representative of the Commission, Fawcett, before the Court in the *König* Case, B.25(1976), p. 179.

clear interpretation, recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion.[1] To date the Court has not expressly referred to the preparatory work of the Convention for the interpretation of 'civil rights and obligations'.[3]

The drafting history of the words 'civil rights and obligations' was studied in depth at an early stage by several authors.[5] These studies indicate that the drafting history of Article 14 of the International Covenant on Civil and Political Rights, which was used as a model by the drafters of Article 6 of the Convention, offers a rather strong indication that it was not the drafters' intention to restrict the scope of the right of access to court, apart from determinations of criminal charges, to determinations of rights and obligations of a private-law character. On the contrary, one is struck by the fact that proposals which might imply the risk of such a restriction, were criticised for that reason and rejected or amended.[6]

The *travaux préparatoires* of the European Convention do not contain an indication of a discussion of the formula here at issue in any of the bodies involved in the drafting. In the French text of Article 6 the formula of Article 14 of the Covenant was adopted without any change. In the English text 'rights and obligations in a suit at law' was altered, at the very last stage of the drafting process, to 'civil rights and obligations'. The reason for this is not traceable, but apparently it was not considered to have any implications for the scope of Article 6. One may assume that the only reason for it was that, in the eyes of continental lawyers (and of the linguists involved), 'suit at law' was

1 Articles 31, para. 1, and 32 of the Vienna Convention on the Law of Treaties; 8 *International Legal Materials* (1969), p. 679.

3 With respect to these *travaux préparatoires*, the position was taken in Strasbourg, on the one hand, that they provide no clarity as to the meaning of 'civil rights and obligations' (separate opinion of judge Matscher attached to the judgment of 28 June 1978, *König*), and on the other hand, that they point in the direction of a restrictive interpretation (report of the Commission of 19 March 1970, *Ringeisen*, B.11 (1972), pp. 70-71; joint dissenting opinion attached to the judgments of 29 May 1986, *Feldbrugge* and *Deumeland*), while an extensive interpretation was also considered by some as being in conformity therewith (minority view of the Commission in the *Benthem* Case).

5 See, especially, in chronological order: Jacques Velu, 'Le problème de l'application aux juridictions administratives, des règles de la Convention européenne des droits de l'homme relatives à la publicité des audiences et des jugements', *Revue de Droit International et de Droit Comparé* (1961), pp. 129-171; Karl Josef Partsch, *Die Rechte und Freiheiten der europäischen Menschenrechtskonvention*, Berlin (1966), pp. 143-150; Thomas Buergenthal and Wilhelm Kewenig, 'Zum Begriff der Civil Rights in Artikel 6 Absatz 1 der europäischen Menschenrechtskonvention', *Archiv des Völkerrechts* (1966/67), pp. 393-411; Frank C. Newman, 'Natural Justice, Due Process and the New International Covenants on Human Rights: Prospectus', *Public Law* (Winter 1967), pp. 274-313.

6 See Velu, *ibidem*, pp. 145-154. See especially his reference, at p. 150, to a statement by the delegate of the USSR, Mr Pavlov. At p. 154 Velu says: "Au fond, toutes les délégations étaient d'accord pour que les garanties de procédures prévues s'appliquent à toutes les juridictions". See also P. Lemmens, *Geschillen over burgerlijke rechten en verplichtingen* [Disputes concerning Civil Rights and Obligations], Antwerp, 1989, pp. 218-220, and M.L.W.M. Viering, *Het toepassingsgebied van artikel 6 EVRM* [The Scope of Article 6 ECHR], Zwolle, 1994, pp. 33-49. Both authors also discuss the intervention by the Danish delegate, Mr Sørensen, who proposed to exclude disputes between a private party and a public authority but did not have a decisive impact on the outcome of the debates on that point.

not the obvious equivalent for '*de caractère civil*'.[7] In conclusion, there is no [illegible] that a restrictive interpretation of 'civil rights and obligations' can be based [illegible] drafting history of either Article 14 of the Covenant or Article 6 of the [illegible] The Committee of Experts on Human Rights of the Council of Europe, [illegible] a comparison between the two provisions, also reached the conclusion [illegible] to the words here under discussion that 'in view of the fact that the French [illegible] identical terms (...) the intention was the same'.[8]

It may be true that the original intention of the drafters of a treaty may [illegible] less relevant as time lapses, especially after States have become parties whose [illegible] sentatives did not participate in the drafting, but this argument is less convincing [illegible] long as there is no common and unambiguous legal opinion and/or uniform [illegible] which deviates from that original intention.

10.2.3 AUTONOMOUS MEANING OF RIGHTS AND OBLIGATIONS

In the *Benthem* Case the Court expressly declined to give an abstract definition of [illegible] rights and obligations',[9] notwithstanding the Commission's invitation to do so.[10] [illegible] is not to say, however, that the Court has given no guidance as to the interpretation [illegible] of these words. In its case law the Court has drawn the following main lines.

Although for the determination of whether a right or obligation is at stake [illegible] domestic legal system concerned has to be taken as a starting point, the Court has [illegible] made it clear that, as part of a provision of the Convention, the words 'right' and [illegible] obligations' have an autonomous meaning. Thus it held in the *König* Case: "The [illegible] principle of autonomy applies to the concept in question; any other solution would [illegible] lead to results incompatible with the object and purpose of the Convention (...)."[11] The Court thus concludes that the concept of 'civil rights and obligations' is autonomous, it nevertheless does not consider that, in this context, the legislation of the State concerned is without importance. Whether or not a right is to be regarded as civil within the meaning of this expression in the Convention must be determined by reference to the substantive content and effects of the right – and not its [illegible] classification – under the domestic law of the State concerned. In the exercise of its supervisory functions, the Court must also take account of the object and purpose of the Convention and of the national legal systems of the other Contracting States (...)."[11]

"The first question to be answered is whether a certain claim constitutes a 'right' – or 'legitimate interest?'[12] – under the domestic law of the State concerned for the application of Article 6. The Court requires that the determination concerns a right that 'can be said, at least on arguable grounds, to be recognised under domestic law'.[13] The words 'on arguable grounds' leave the Court sufficient room to make an assessment independently of the arguments advanced by the defendant State on the issue.[14] In particular, the Court does not have to be convinced that the legal claim is well-founded under domestic law; it is enough for it to determine that the claim is sufficiently tenable.[15] The fact that the claim concerned was addressed as an issue in national proceedings constitutes sufficient ground for the 'arguability' of the existence of a right.[16]

The viewpoint that Article 6 implies a right of access to court[17] has as a consequence that the fact that a certain claim is not actionable under domestic law, is not decisive for the applicability of Article 6. As the Court stated in the *Al-Adsani*, *McElhinney* and *Fogarty* Cases: "Whether a person has an actionable domestic claim may depend not only on the substantive content, properly speaking, of the relevant civil right as defined under national law but also on the existence of procedural bars preventing or limiting the possibilities of bringing potential claims to court. In the latter kind of case Article 6 para. 1 may be applicable."[18]

Consequently, the doctrine of State immunity does not lead to the conclusion that the person concerned has no right vis-à-vis that State; indeed, the State may waive immunity. The grant of immunity does not qualify a substantive right, but constitutes a procedural bar to have the right determined.[19]

In the *Baraona* Case the Court rejected the Government's submission that the impugned measure had no basis in national law at that time and accordingly could not give rise to liability on the part of the State and could not be the subject of a 'dispute'. The Court adopted the position that it was not for the Court to assess either

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7 See Velu, *ibidem*, p. 159.

8 Council of Europe, *Problems arising from the co-existence of the United Nations Covenants on Human Rights and the European Convention on Human Rights; Differences as regards the Rights Guaranteed*, Report of the Committee of Experts on Human Rights to the Committee of Ministers, Doc. H(70)7, Strasbourg, September 1970, p. 37.

9 Judgment of 23 October 1985, para. 35.

10 Report of 8 October 1983, *Benthem*, para. 91. More expressly Mr Danelius and Mr Melchior, delegates of the Commission, in the hearing before the Court; Cour/Misc (85)30, 26 February 1985, pp. 3 and 8 respectively.

11 Judgment of 28 June 1978, *König*, paras 88-89.

12 Judgment of 5 October 2000, *Mennitto*, para. 27.

13 Judgment of 21 February 1986, *James and Others*, para. 81; judgment of 12 October 1992, *Salerno*, para. 14; judgment of 10 May 2001, *Z and Others v. the United Kingdom*, para. 87; decision of 14 November 2002, *Berkmann*, para. 2.

14 Judgment of 8 July 1987, *O. v. the United Kingdom*, para. 54.

15 Judgment of 26 March 1992, *Editions Périscope*, para. 38; judgment of 29 July 1998, *Le Calvez*, para. 56; judgment of 7 November 2000, *Jori*, para. 47.

16 Judgment of 26 March 1992, *Editions Périscope*, para. 38; judgment of 5 October 2000, *Mennitto*, para. 27: it was deemed sufficient that the issue 'had given rise to jurisdictional dispute'.

17 *Infra*, 4.1.

18 Judgments of 21 November 2001, paras 47, 24 and 25, respectively.

19 *Ibidem*, paras 48, 25 and 26, respectively.

the merits of the applicant's claim under domestic law or the influence of [illegible] tionary situation in Portugal on the application of domestic law; this belongs exclusive jurisdiction of the national courts. The applicant, however, could arguable grounds to have a right that was recognised under national law [illegible] stood it.[20] And in the *Voggenreiter* Case the Court held that, although according constant case law of the German Constitutional Court the State cannot be held sible for legislative acts, the applicant, who complained about the fact that of the adoption of a certain law he had to give up his professional activity, was theless claiming a civil right, since the German Constitution guaranteed the the free exercise of one's profession and the right to respect of one's property.

On the other hand, if domestic law expressly excludes the claim, the Court the position that 'to this extent' there can be no arguable right which would Article 6 applicable.[22] The Court may not, by interpreting Article 6 para. 1, cre right that has no basis in the domestic legal system concerned.[23] However, the fact that a right has been restricted by the legislator has no effect on the applica of Article 6.[24] And a court decision to the effect that a certain claim does not cannot remove, retrospectively, the arguability of the claim.[25] However, if the court reaches the conclusion that the claimed right does not exist (any more) domestic law, Article 6 is no longer applicable and does not guarantee any access.[26] This may amount to a lack of an effective remedy, but that issue falls Article 13 and not under Article 6.[27]

The fact that the applicant had also instituted the national proceedings to which the public interest does not stand in the way of the applicability of Article 6, provi that at the same time an individual right was at stake.[28]

The mere fact that the authorities enjoy discretion in their decision-making that, therefore, the person concerned cannot claim a specific outcome, does not mean that no right of the applicant is involved. He is entitled to the authorities respect the limits of their discretion. That discretion is not unfettered and has to be exercised within the framework of the applicable law and in conformity with general principles

20 Judgment of 8 July 1987, paras 40-41.

21 Judgment of 8 January 2004, para. 35

22 Judgment of 21 February 1990, *Powell and Rayner*, para. 36; judgment of 27 August 1997, *Andersson*, paras 35-36; decision of 14 November 2002, *Berkmann*, para. 2; judgment of 19 October 2005 (Grand Chamber), *Roche*, paras 119-124.

23 Judgment of 10 May 2001, *Z and Others v. the United Kingdom*, para. 98; judgment of 21 November 2001, *Al-Adsani*, para. 47.

24 Judgment of 28 June 1990, *Mats Jacobsson*, para. 31; judgment of 28 May 1997, *Pauger*, para. 41.

25 Judgments of 10 May 2001, *Z and Others v. the United Kingdom* and *T.P. and K.M. v. the United Kingdom*, paras 89 and 94, respectively.

26 Judgment of 10 May 2001, *Z and Others v. the United Kingdom*, para. 97; judgment of 28 June 2001, *Truhli*, para. 27.

27 Judgment of 10 May 2001, *Z and Others v. the United kingdom*, paras 102-103.

28 Judgment of 27 April 2004, *Lizarraya and Others*, paras 45-48.

and good administration.[29] However, if the award of a claimed entitlement is left to the court and the case law has not established an obligation on the part of the authorities in situations like the one at issue, no 'actual' right exists.[30]

The determination of the existence of an 'obligation' will be less problematic; that issue has not played an important role in the case law so far.

2.1.1 LEGAL DISPUTE ('CONTESTATION')

From the use of the word '*contestations*' in the French text of Article 6 para. 1, which has no equivalent in the English text, it has been inferred that for Article 6 to be applicable the settlement of a dispute concerning a right or obligation must be at issue.[31] The concept of 'dispute' should not be construed too technically and should be given a substantive rather than a formal meaning: a difference of opinion between two or more (legal) persons who have a certain relation to the right or obligation at issue is sufficient, provided that it is 'genuine and of a serious nature'.[32] One of the (legal) persons may be a public authority whose act or decision affects the other (legal) person.[33] If the act or decision is a favourable one and is not contested by the addressee, but is challenged by another public authority or another (legal) person, the latter has raised a '*contestation*', also in the relation between the former and the competent authority.[34] For the '*contestation*' is not required that damages are claimed.[35]

The '*contestation*' must be of a legal character: it must concern the alleged violation of a right.[36] This does not exclude cases in which the administrative authority has discretionary powers,[37] provided that the way in which these powers have been exercised is challenged on legal and not only on policy grounds.[38] These legal grounds

Judgment of 27 October 1987, *Pudas*, paras 36-37; judgment of 7 July 1989, *Tre Taktörer AB*, paras 39-40; judgment of 25 October 1989, *Allan Jacobsson*, para. 69.

Judgment of 28 September 1995, *Masson and Van Zon*, para. 51; judgment of 26 March 1996, *Leutscher*, para. 24.

Judgment of 23 June 1981, *Le Compte, Van Leuven and De Meyere*, para. 45. The Court said, however, "Even if ...". See also the judgment of 23 October 1990, *Moreira De Azevedo*, para. 66: "In so far as the French word '*contestation*' would appear to require the existence of a dispute, if indeed it does so at all ...".

Judgment of 23 June 1981, *Le Compte, Van Leuven and De Meyere*, para. 45; judgment of 10 May 2001, *Z and Others v. the United Kingdom*, para. 92; judgment of 23 January 2003, *Kienast*, para. 39.

Judgment of 16 July 1971, *Ringeisen*, para. 94.

Judgment of 23 October 1985, *Benthem*, para. 33.

Judgment of 28 September 2004, *Pieniążek*, para. 20.

Judgment of 23 June 1981, *Le Compte, Van Leuven and De Meyere*, para. 46; judgment of 23 January 2003, *Kienast*, para. 43.

Judgment of 2 August 2000, *Lambourdiere*, para. 24.

Judgment of 26 June 1986, *Van Marle and Others*, para. 35; judgment of 27 October 1987, *Pudas*, para. 34.

may relate to the way in which the limits of the discretion set by law [illegible] respected,[39] or to the issue of whether the challenged act is in conformity with [illegible] recognised principles of law and good administration.[40]

The legal-character requirement does not mean that the difference of [illegible] not relate to facts, provided that they have some implications for the [illegible] of (the scope of) rights or obligations.[41] In this respect, in our opinion, the [illegible] judgment of the Court was not well reasoned.[42] In the national proceedings [illegible] had taken place before a judicial body, the dispute concerned mainly factual [illegible] but some of them, such as the calculation of the period of self-employment [illegible] direct bearing on the entitlement to be registered as an accountant. That concerned about the latter aspects were not pursued in the Strasbourg procedure would [illegible] to be not relevant for the applicability of Article 6, since the issue was rather [illegible] there had been a *contestation* in the domestic proceedings. Indeed, the mere fact [illegible] a judicial authority had considered itself competent to deal with the dispute gives [illegible] latter a legal character.

The fact that the dispute has been 'settled' by a non-judicial procedure does [illegible] mean that the party who is not satisfied with the settlement no has longer a [illegible] of a serious and genuine nature.[43]

In the *Moreira de Azevedo* Case the Court held that, although the applicant [illegible] only *assistente* in criminal proceedings and had not filed a formal claim for damages, [illegible] there was a *contestation* concerning his civil rights.[44] It seems to have been decisive [illegible] crucial that the implications of intervening as an *assistente* were not clear under Portuguese law, because in the subsequent *Hamer* Case the Court reached the conclusion that there had been no 'dispute' over a civil right because of the failure of the applicant to lodge a formal claim for damages.[45]

In most cases, however, where the applicability of Article 6 is at issue the existence of a '*contestation*' is not in dispute.

39 Judgment of 25 October 1989, *Allan Jacobsson*, para. 69.

40 Judgment of 28 June 1990, *Skärby*, para. 28.

41 Judgment of 26 June 1986, *Van Marle and Others*, para. 31; judgment of 27 October 1987, [illegible] para. 31.

42 Judgment of 26 June 1986, paras 31-37. See the concurring opinion of Judges Ryssdal, [illegible] and Bernhardt, and the dissenting opinion of Judge Cremona.

43 Judgment of 21 September 2004, *Zwiazek Nauczycielstwa Polskiego*, paras 30-34.

44 Judgment of 23 October 1990, para. 67.

45 Judgment of 7 August 1996, paras 74-79. See also the decision of 10 June 2004, *Garimpo*, which concerned the position of *assistente* under Portuguese law.

DETERMINATION

[illegible] judicial proceedings must lead to a 'determination' of civil rights or [illegible]. The mere communication or warning by a public authority that a certain [illegible] has lapsed *de lege*, is not a 'determination'.[47] However, the mere fact that, at [illegible] the applicant withdrew his action which resulted in the discontinuance [illegible] proceedings, does not affect the applicability of Article 6.[48]

[illegible] request for a provisional measure does not result in a (final) determination and, [illegible] consequently, Article 6 is not applicable.[49] On the other hand, if the determination [illegible] court has taken place but the court decision is not (fully) executed, the claim for [illegible] remainder of the) execution and damages still forms part of the determination [illegible] is covered by Article 6.[50]

There must be a connection between the dispute to be solved and a civil right or [illegible]. A tenuous connection or remote consequence does not suffice.[51] Thus, the [illegible] held that proceedings concerning the licencing of a nuclear power plant did not [illegible] a sufficiently direct link with the applicants' rights to adequate protection of their [illegible], physical integrity and property to bring Article 6 para. 1 into play.[52] And proceedings concerning the annulment of a Presidential decree by virtue of an agreement between France and Switzerland, which made enlargement of an airport near the border possible, were deemed not to be sufficiently directly linked to the applicants' [illegible] and economic interest to construct an industrial area near the airport.[53] This also means that Article 6 para. 1 does not apply to proceedings instituted by way of *actio popularis*.[54] However, the mere fact that the applicant shares the legal connection with several others does not make that connection remote or tenuous.[55]

On the other hand, the 'determination' need not form the main point or even the purpose of the proceedings. It is sufficient that the outcome of the (claimed) judicial

* As will be discussed under 'access to court', hereafter under 4.1., according to the Court, Art. 6 para. 1 not only contains procedural guarantees in relation to judicial proceedings, but also grants a right of access to judicial proceedings for the cases mentioned in this article.

46 Judgment of 27 March 2001, *Kervoëlen*, paras 28-30.

47 Judgment of 14 October 2003, *Ciz*, para. 61.

48 Decision of 14 January 2003, *Seija and Vidar Hagman*, para. 1.

49 Judgment of 14 October 2003, *Dybo*, paras 20-22.

50 Judgment of 23 June 1981, *Le Compte, Van Leuven and De Meyere*, para. 47; judgment of 26 August 1997, *Balmer-Schafroth and Others*, para. 32; judgment of 13 February 2003, *Chevrol*, para. 44.

51 Judgment of 26 August 1997, *Balmer-Schafroth and Others*, para. 40; judgment of 6 April 2000, *Athanassoglou and Others*, para. 51.

52 Decision of 18 March 2003, *S.A.R.L. du Parc d'Activités de Blotzheim et la S.C.I. Haselaecker*, para. 9.

53 Judgment of 6 April 2000, *Athanassoglou and Others*, paras 53-54. See, however, the joint dissenting opinion of Judges Costa, Tulkens, Fischbach, Casadevall and Maruste, who stressed that the decision whether the action had the character of an *actio popularis* required access to a domestic court.

54 Judgment of 25 October 1989, *Allan Jacobsson*, para. 70.

proceedings may be 'decisive for',[56] or may 'affect',[57] or may 'relate to'[58] the
tion and/or the exercise of the right, or the determination and/or the fulfil
obligation, as the case may be. The effects need not be legal; they may also
factual.[59] And if the proceedings concern the determination of a civil right
gation, the same applies to subsequent proceedings concerning legal costs

The civil right or obligation does not have to constitute the object of the
ings.[61] If, for instance, the object of the proceedings is the annulment of an
tive decision or sanction, the right or obligation may be the object or one of
of that decision or may be implied in the sanction. The civil right may also
claimed by a third party who intervenes in criminal proceedings to obtain
In the same way, if an administrative decision does (also) affect civil right
parties, *e.g.* the neighbours of a piece of land for which a building permit
granted or the neighbours of a licensed plant, they also have the right of acce
to challenge the decision.[63] Moreover, the determination need not necessarily
the actual existence of a right or obligation, but may also relate to its scope or
lities,[64] or to the unlawfulness of interferences with the exercise of a right.[65] The
line is reached, however, if the right claimed is not at issue at all in the proce
concerned. Thus, the Court held Article 6 to be not applicable with regard to
the applicants in the *McMichael* Case. Mr McMichael had failed to take the req
prior steps to obtain legal recognition of his parental rights. Therefore, the case
ceedings, instituted by Mr and Mrs McMichael, could not have a connection wit
determination of Mr McMichael's rights as a father.[66]

[56] Judgment of 16 July 1971, *Ringeisen*, para. 94. See also, *i.a.*, the judgment of 17 March 1997,
para. 38.

[57] Judgment of 24 October 1979, *Winterwerp*, para. 73. See also, *i.a.*, the judgments of 23 April
Ettl and Others; *Erkner and Hofauer*; and *Poiss*, paras 32, 62 and 48, respectively.

[58] Judgment of 28 June 1990, *Skärby*, para. 27; judgment of 4 March 2003, *A.B. v. Slovakia*, para.

[59] Judgment of 23 September 1982, *Sporrong and Lönnroth*, para. 80 in conjuction with para.

[60] Judgment of 23 September 1997, *Robins*, para. 29. See also, *i.a.*, the judgment of 21 Februar
Ziegler, paras 24-25.

[61] See the *Winterwerp* Case, where the object was the deprivation of liberty, which had, however,
consequences for Mr Winterwerp's legal capacity to perform private-law acts; judgment of 24 O
1979, *Winterwerp*, paras 73-74.

[62] Judgment of 23 October 1990, *Moreira De Azevedo*, paras 66-67.

[63] Judgment of 6 April 2000, *Athanassoglou and Others*, para. 45.

[64] Judgment of 23 June 1981, *Le Compte, Van Leuven and De Meyere*, para. 49; judgment of 23 O
1985, *Benthem*, para. 32; judgment of 26 June 1986, *Van Marle and Others*, para. 32.

[65] Judgment of 23 September 1982, *Sporrong and Lönnroth*, para. 80.

[66] Judgment of 24 February 1995, para. 77. Decision of 24 June 2004, *Mandela*: the proceedings
concerned a procedural issue and not a determination of the right at issue.

under domestic law a person may bring a claim for damages incurred by a criminal
in the criminal proceedings, these proceedings are decisive for his 'civil' rights.[67]
that means that the impossibility of taking certain actions to safeguard these rights
could amount to lack of access to court.[68] However, if the applicant has failed to lodge
claim in the appropriate proceedings, the proceedings in which he brings the claim
cannot be considered to be decisive for the right concerned for the purpose of Article
para. 1 consequently, if the latter proceedings are discontinued, the applicant cannot
be said to have been denied access to court.[69] Both in the *Hamer* Case and in the
Assenov Case the applicants had claimed damages as a civil party in criminal
proceedings. In the *Hamer* Case the applicant had failed to claim damages at the right
stage of the proceedings, which would than have been dealt with by the court in its
penal composition. In the *Assenov* Case the applicant could have brought civil
proceedings for damages, the outcome of which was, in the opinion of the Court, not
determined by that of the criminal proceedings. However, in the *Calvelli and Ciglio*
case the Court decided in respect of Italy that the criminal proceedings were apt to
have repercussions on the claims made by the applicants as civil parties.[70] It appears
from the facts of the case that there the applicants had also brought a claim in civil
proceedings, but the case was struck out of the civil court's list. In any case, if the civil
court stays the proceedings to wait for the outcome of the criminal proceedings concerning the criminal issues involved, the Court takes this into account in assessing the reasonableness of the duration of the trial.[71]

In its judgment of 12 Februari 2004 in the *Perez* Case the Grand Chamber considered that the Court's case law concerning civil claims in criminal proceedings might present a number of drawbacks, particularly in terms of legal certainty for the parties, and tended to over-complicate any analysis of the applicability of Article 6 to civil-party proceedings in French law and similar systems. It indicated that it wished to end this uncertainty and held that there can be no doubt that civil-party proceedings constitute (in French law) a civil action for reparation of damages caused by an offence. If the civil component remains closely connected with the criminal component to the extent that the criminal proceedings affect the civil component, Article 6 applies to both components of the proceedings. The damages sought may relate to pecuniary damages, even of a symbolic nature, but also, *e.g.*, to the protection of one's reputation. If, however, the civil action is brought for punitive purposes, Article 6 is not applicable

[67] Judgment of 28 October 1998, *Aït-Mouhoub*, para. 44; judgment of 26 October 1999, *Maini*, paras 28-29; judgment of 3 April 2003, *Anagnostopoulos*, para. 32.

[68] Decision of 24 February 2005, *Sottani*, para. 2.

[69] Judgment of 7 August 1996, *Hamer*, paras 74-78; judgment of 28 October 1998, *Assenov and Others*, para. 117.

[70] Judgment of 17 January 2002, para. 62.

[71] Judgment of 8 July 2004, *Djangozov*, para. 38.

to the private component of the proceedings, since the Convention does not guarantee any right to 'private revenge' or to an *actio popularis*.[72]

If a remedy is not provided for under national law, it is not possible to determine ... effect the outcome of the proceedings have had or might have had. In those ... Court investigates whether the challenged decision or refusal to decide was ... for a civil right or obligation and whether the administrative procedure ... *contestation* concerning such a right or obligation.[73]

If the outcome of proceedings concerning procedural requirements ... the merits of the case, these proceedings are decisive for a civil right or ... the merits concern such a right or obligation.[74] The same holds good for ... proceedings which take place in the framework of judicial proceedings ... civil rights and are closely linked to the latter.[75]

10.2.6 AUTONOMOUS MEANING OF 'CIVIL'

The words 'civil rights and obligations' have an autonomous meaning in Art... To determine whether a certain right or obligation is a 'civil' right or obligation ... must first examine what the nature of the right or obligation at issue is according ... the law of the respondent State.[77] If the right or obligation forms part of private ... it is evident that the first paragraph of Article 6 applies.[78] To this extent the autono... of the interpretation is a one-way autonomy. The same holds good if the feature... private law are 'predominant'.[79] In contrast, the mere fact that the right or obliga... at issue is governed by public law does not exclude the applicability of the first ... graph of Article 6; what matters are the contents and effect of that right or obli... rather than its legal classification.[80] In that context the Court also pays attention ... the capacity in which a person claims a right and the conditions under which he ... to exercise it or exercises it.[81] In doing so, it also takes into account the legal ...

72 Judgment of 12 February 2004, paras 54-71. See also the judgment of 3 April 2003, *Anagnostopoulos*, para. 32.
73 Judgment of 27 October 1987, *Bodén*, para. 32; judgment of 28 June 1990, *Skärby*, para. 3...
74 Judgment of 19 March 1997, *Paskhalidis*, para. 30.
75 Judgment of 28 November 2000, *Siegel*, paras 37-38.
76 Judgment of 28 June 1978, *König*, paras 88-89. See also the judgment of 29 September 199... para. 34; judgment of 5 October 2000, *Maaouia*, para. 34.
77 Judgment of 28 June 1978, *König*, para. 89; judgment of 29 May 1986, *Feldbrugge*, para. 2...
78 Judgment of 28 November 1984, *Rasmussen*, para. 32.
79 Judgment of 29 May 1986, *Feldbrugge*, paras 30-40.
80 Judgment of 28 June 1978, *König*, para. 89.
81 Judgment of 30 November 1987, *H v. Belgium*, paras 46- 47.

... other Contracting States.[82] This approach makes the scope of Article 6 para. 1 ... dependent on the national legal system concerned.
... is also not decisive for the 'civil' nature of a right or obligation whether the ... ering dispute is one between individuals or one between an individual and a ... public authority. Even if in the latter case that public authority is involved in the pro... ings in a sovereign capacity, those proceedings can relate to the determination ... civil rights and obligations'.[83] It is equally not decisive whether the proceedings take ... before a civil court or before another body vested with jurisdiction.[84] And, finally, ... fact that in legal relations between individuals great public interests may also be ... olved, does not bar the applicability of Article 6 para. 1.[85]

... to the present the Court has held the first paragraph of Article 6 applicable, in ... addition to proceedings with a private-law character, *inter alia*[86] to the following ... proceedings as determining civil rights or obligations:
- proceedings concerning a permit, licence or other act of a public authority which constitutes a condition for the legality of a contract between private parties;[87]
- proceedings which may lead to the cancellation or suspension by the public authorities of the qualification required for practising a particular profession;[88]
- proceedings concerning the refusal by the authorities to appoint the applicant to a post that belongs to the liberal professions, or concerning dismissal from such a post,[89] and concerning a decision which prevents the applicant from taking up a certain position;[90]
- proceedings concerning certain financial aspects of public service,[91] and concerning labour contracts for positions in state-owned enterprises;[92]

82 Judgment of 28 June 1978, *König*, para. 89; judgment of 29 May 1986, *Feldbrugge*, para. 29.
83 Judgment of 28 June 1978, *König*, para. 90; judgment of 23 October 1985, *Benthem*, para. 34.
84 Judgment of 16 July 1971, *Ringeisen*, para. 94. See also, *i.a.*, the judgment of 8 July 1987, *Baraona*, paras 42-43.
85 Judgment of 28 November 1984, *Rasmussen*, para. 32.
86 See also under 2.8.
87 Judgment of 16 July 1971, *Ringeisen*, para. 94; judgment of 22 October 1984, *Sramek*, para. 34.
88 Judgment of 28 June 1978, *König*, paras 91-95; judgment of 23 June 1981, *Le Compte, Van Leuven and De Meyere*, paras 46-48; judgment of 10 February 1983, *Albert and Le Compte*, para. 28; judgment of 30 November 1987, *H v. Belgium*, paras 45-47; judgment of 19 April 1993, *Kraska*, para. 25; judgment of 26 September 1995, *Diennet*, para. 27; judgment of 29 September 1999, *Serre*, para. 20; judgment of 10 April 2003, *Bakker*, para. 26; decision of 28 September 2004, *Krokstäde*, para. 1.
89 Judgment of 6 April 2000, *Thlimmenos*, para. 58; judgment of 15 November 2001, *Werner*, para. 32.
90 Judgment of 7 November 2000, *Kingsley*, paras 43-45
91 Judgment of 28 March 2000, *Dimitrios Georgiadis*, para. 21; judgment of 18 July 2000, *S.M. v. France*, para. 19.
92 Judgment of 30 September 2003, *Sienkiewicz*, impliedly.

- proceedings concerning the grant or revocation of a licence by the authorities which is required for setting up a certain business or carrying on economic activities;[93]
- expropriation, consolidation, designation and planning proceedings,[94] proceedings concerning building permits and other real-estate permits,[95] proceedings concerning orders specifying the use of land,[96], proceedings concerning restoration of ownership as a rehabilitation measure[97] and concerning compensation for confeited property,[98] and more in general proceedings the outcome of which has consequences for the right of ownership or has an impact on the use or the enjoyment of property;[99]
- proceedings concerning discrimination when bidding for a public works contract and in access to the civil service;[101]
- proceedings in which a decision is taken on entitlement, under a social security scheme, to health insurance benefits,[102] to industrial-accident insurance benefits,[103] to welfare (disability) allowances,[104] to State pensions,[105] to invalidity pensions,[106] to surviver pensions,[107] and to old-age pensions;[108]

93 Judgment of 23 October 1985, *Benthem*, para. 36; judgment of 27 October 1987, *Pudas*, para. 35; judgment of 17 July 1989, *Tre Traktörer Aktiebolag*, para. 43; judgment of 18 February 1991, *Fredin*, para. 63; judgment of 21 December 1999, *G.S. v. Austria*, para. 27; judgment of 7 November 2000, *Kingsley*, paras 43-45; judgment of 13 February 2003, *Chevrol*, para. 49.

94 Judgment of 23 September 1982, *Sporrong and Lönnroth*, para. 80; judgments of 23 April 1987, *Erkner and Hofauer*, and *Poiss*, paras 32, 62 and 48, respectively; judgment of 29 October 1987, *Bodén*, para. 32; judgment of 27 November 1991, *Oerlemans*, para. 48; judgment of 16 December 1992, *De Geouffre de la Pradelle*, para. 28 (impliedly); judgment of 26 October 2000, *Varipati*, para. 21; judgment of 28 March 2000, *Aldo and Jean-Baptiste Zanatta*, para. 24; decision of 11 May 2004, *Hutten*.

95 Judgment of 25 October 1989, *Allan Jacobsson*, para. 73; judgment of 21 February 1990, *Håkansson and Sturesson*, para. 60; judgment of 28 June 1990, *Mats Jacobsson*, para. 34; judgment of 21 June 1990, *Skärby*, para. 29; judgment of 19 February 1998, *Allan Jacobsson* (No. 2), para. 42.

96 Judgment of 18 February 1991, *Fredin*, para. 63; judgment of 22 January 2004, *Alge*, para. 8.

97 Judgment of 9 November 2000, *Jori*, paras 48-49.

98 Judgment of 21 October 2003, *Cegielski*, para. 24.

99 Judgment of 23 June 1993, *Ruiz-Mateos*, paras 51-52; judgment of 25 November 1993, *Zanghì*, para. 27; judgment of 19 June 2001, *Mathieu*, para. 18.; judgment of 20 December 2001, *Jacobs*, para. 16; judgment of 23 October 2003, *Achleitner*, impliedly.

100 Judgment of 10 July 1998, *Tinnelly & Sons Ltd and Others and McElduff and Others*, para. 61.

101 Judgment of 30 October 2001, *Devlin*, para. 23.

102 Judgment of 29 May 1986, *Feldbrugge*, paras 26-40; judgment of 26 August 1997, *De Haan*, para. 37.

103 Judgment of 29 May 1986, *Deumeland*, paras 62-74.

104 Judgment of 26 February 1993, *Salesi*, para. 19; judgment of 26 November 1997, *Sienkiewicz*, para. 31; decision of 5 February 2004, *Bogonos*, para 1.

105 Judgments of 26 November 1992, *Francesco Lombardo and Giancarlo Lombardo*, paras 17 and 18, respectively; judgment of 24 August 1993, *Massa*, para. 26.

106 Judgment of 24 June 1993, *Schuler-Zgraggen*, para. 46; judgment of 19 March 1997, *Hornsby*, para. 30.

107 Judgment of 28 May 1997, *Pauger*, para. 45.

108 Judgment of 19 March 1997, *Paskhalidis and Others*, para. 30.

- proceedings to obtain allowances under a national health service programme;[109]
- proceedings against public authorities in which rights and obligations concerning family law are at issue;[110]
- proceedings concerning the change of a surname;[111]
- proceedings against the public administration concerning contracts,[112] concerning damages in administrative proceedings[113] or in criminal proceedings,[114] concerning negligence on the part of the authorities[115] and concerncing any (other) tort committed by a person or institution for which the State is responsible;[116]
- proceedings concerning damages as a result of the effects of a land consolidation project;[117]
- proceedings concerning damage caused to one's reputation;[118]
- proceedings relating to compensation for unjustified conviction or detention;[119]
- proceedings concerning public assistance in evicting tenants from a house;[120]
- proceedings concerning the obligation to pay contributions under a social security scheme;[121]
- proceedings concerning the payment of levies for public services;[122]
- patent application proceedings;[123]

109 Judgment of 5 October 2000, *Mennitto*, para. 27.

110 Judgment of 28 November 1984, *Rasmussen*, para. 32; judgments of 8 July 1987, *O. and H. v. the United Kingdom*, paras 54-60 and 69, respectively; judgments of 8 July 1987, *W., B. and R. v. the United Kingdom*, paras 73-79, 73-79 and 78-84, respectively; judgment of 22 June 1989, *Eriksson*, para. 73; judgment of 27 November 1992, *Olsson* (No. 2), para. 97; judgment of 26 May 1994, *Keegan*, para. 57; judgment of 19 February 1998, *Paulsen-Medalen and Svensson*, paras 38-42; judgment of 19 September 2000, *Glaser*, para. 91.

111 Decision of 6 December 2001, *Petersen*, para. 4: 'the Court starts with the assumption that Article 6 para. 1 in principle appplies'.

112 Judgment of 27 August 1991, *Philis*, para. 65 (impliedly).

113 Judgment of 8 July 1987, *Baraona*, para. 44; judgment of 27 April 1989, *Neves e Silva*, para. 37; judgment of 24 October 1989, *H v. France*, para. 47; judgment of 26 March 1992, *Editions Periscope*, para. 40; judgment of 31 March 1992, *X v. France*, para. 30; judgment of 23 September 2003, *Racinet*, impliedly.

114 Judgment of 23 October 1990, *Moreira De Azevedo*, para. 66; judgment of 27 February 1992, *Cascaroli*, para. 19 (impliedly); judgment of 24 November 1997, *Werner*, para. 39; judgment of 10 July 2001, *Lamanna*, para. 29.

115 Judgment of 19 February 1998, *Kaya*, para. 104; judgment of 28 October 1998, *Osman*, paras 136-139; judgment of 10 May 2001, *Z and Others* v. the United Kingdom, para. 89.

116 Judgment of 14 October 2003, *Chaineux*, para. 12; judgment of 21 October 2003, *Broca and Texier-Micault*, para. 26; judgment of 16 December 2003, *Mianowski* (impliedly).

117 Judgment of 26 September 2000, *Van Vlimmeren and Van Ilverenbeek*, para. 37 (impliedly).

118 Judgment of 15 November 2001, *Werner*, para 33.

119 Judgment of 29 May 1997, *Georgiadis*, para. 34; judgment of 24 November 1997, *Szücs*, paras 36-37; judgment of 15 October 1999, *Humen*, para. 57; judgment of 17 November 2000, *Karakasis*, para. 25.

120 Judgment of 28 July 1999, *Immobiliare Saffi*, paras 62-63; judgment of 3 August 2000, *G.L. v. Italy*, para. 30.

121 Judgment of 9 December 1994, *Schouten and Meldrum*, paras 49-60.

122 Judgment of 27 July 2000, *Klein*, para. 29.

123 Judgment of 20 November 1995, *British-American Tobacco Company Ltd*, para. 67.

- proceedings concerning the right to register as an association;[124]
- proceedings to have one's legal capacity restored.[125]

10.2.7 PUBLIC LAW PROCEEDINGS WHICH DO NOT FALL WITHIN THE SCOPE OF CIVIL RIGHTS AND OBLIGATIONS

There are still certain administrative proceedings where individual rights or [illegible] are at stake, with respect to which the Court so far has held that Article 6 para. 1 [illegible] applicable.

10.2.7.1 Proceedings concerning tax duties

In the *Schouten and Meldrum* Case the Court held in an *obiter dictum* that obligations which derive from tax legislation or are otherwise part of normal civic duties in a democratic society, do not fall under the notion of 'civil obligations'.[126] Almost two years before, in the *Editions Périscope* Case, the Court had attributed a decisive importance to the pecuniary character of the rights and obligations involved rather than to the fact that the dispute concerned damage resulting from the allegedly discriminatory application of tax regulations.[127] And in its judgment in the *National & Provincial Building Society* Case the Court held, referring to its judgment in the *Editions Périscope* Case, that the restitution proceedings were decisive for the determination of pecuniary law rights and that the applicability of Article 6 para. 1 was not affected by the fact that these rights had their background in tax legislation and the obligation of the applicants to account for tax under that legislation.[128] The latter judgment, in particular, left doubt on the precise direction of the case law.

The *Schouten and Meldrum* line of reasoning was confirmed in the *Ferrazzini* [illegible] by the Grand Chamber, albeit by eleven votes to six. There the Court started its considerations by observing that pecuniary interests are clearly at stake in tax proceedings. However, merely showing that a dispute is pecuniary in nature is not in itself sufficient to attract the applicability of the first paragraph of Article 6 under its 'civil' head. After examining whether interpreting the Convention as a living instrument should lead to the conclusion that developments have occurred in democratic societies that have affected the fundamental nature of the obligation to pay tax, the Court reached the conclusion that "tax matters still form part of the hard core of public-authority

124 Judgment of 5 October 2000, *APEH Üldözötteinek Szövetsége and Others*, para. 36.
125 Judgment of 5 July 1999, *Matter*, para. 51.
126 Judgment of 9 December 1994, para. 50.
127 Judgment of 26 March 1992, para. 40.
128 Judgment of 23 October 1997, para. 97.

prerogatives, with the public nature of the relationship between the taxpayer and the tax authority remaining predominant. (...). It considers that tax disputes fall outside the scope of civil rights and obligations, despite the necessary pecuniary effects which they necessarily produce for the taxpayer."[129]

It is hard to understand why tax procedures, which in all member States of the Council of Europe are governed by rather strict legal rules, do not have to meet the minimum standards of fair trial of Article 6. As judge Lorenzen observed in his dissenting opinion, 'it is now recognised at least in the vast majority of the Contracting Parties that disputes in fiscal matters can be decided in ordinary proceedings by a court or tribunal. It is therefore difficult to see why it is still necessary to grant to the States a special prerogative under the Convention in this field and thus deny litigents in tax proceedings the elementary procedural guarantee of Article 6 para. 1'.[130] In the same dissenting opinion it is stated that the criterion 'normal civic duties in a democratic society' used by the Court, is not suitable to form the basis for a general distinction between 'civil' and 'non-civil' rights and obligations. 'Thus it is difficult to see why, for example, the obligation to hand over property for public use in return for compensation is not a 'normal civic duty' whereas the obligation to tolerate tax-based reductions of the compensation is? (...) Or how can it be explained that an obligation to pay contributions under a social-security scheme is 'civil', but an obligation to pay wage-taxes is not?'[131]

The fact that disputes concerning the obligation to pay taxes are not considered to be 'civil' for the purpose of Article 6 leaves, of course, open the question of the applicability of Article 6 to administrative fines, including fines imposed on taxpayers, under the 'criminal' head.[132] That issue will be discussed at a later stage. It is pointed out in the present context, however, that this applicability under the criminal head has as a result that the protection under Article 6 depends on how the legal framework for tax proceedings is organised in the different legal systems, while even within one and the same legal system it may be coincidental whether penalty proceedings and tax assessment proceedings are joined or not.[133] And why should a person who is charged

129 Judgment of 12 July 2001, para. 29. See the dissenting opinion of Judge Lorenzen, joined by Judges Rozakis, Bonello, Strážnická, Birsan and Fischbach, where it is stated: "It is not open to doubt that the obligation to pay taxes directly and substantially affects the pecuniary interest of citizens and that in a democratic society taxation (...) is based on the application of legal rules and not on the authorities' discretion. Accordingly (...) Article 6 should apply to such disputes (...)".
130 Dissenting opinion of Judge Lorenzen, joined by Judges Rozakis, Bonello, Strážnická, Birsen and Fischbach, para. 8.
131 *Ibidem*, para 6.
132 Judgment of 24 February 1994, *Bendenoun*, para. 52; judgment of 16 December 2003, *Faivre*, para. 21. See, however, the decision of 3 June 2003, *Morel*.
133 Thus also the dissenting opinion, para. 8.

with a fine for not complying with his tax duties, enjoy more legal pro... those who appeal against a tax duty imposed upon them?

10.2.7.2 Proceedings concerning admission and expulsion of aliens

The Commission had adopted the view that the first paragraph of Article ... apply to proceedings concerning admission and expulsion of aliens.[134] The C... sion seemed to indicate that this would be different if the right to respect ... life as a 'civil right' was at issue[135] or if expulsion constituted a violation of ... to education,[136] but in a later decision it held that the expulsion decision ... not determine the right to respect of family life.[137] Since the applications were ... inadmissible by the Commission, the Court could not pronounce on the ... first opportunity presented itself when a case was directly referred to the ... virtue of Protocol No. 11.

While the Court left the issue open initially,[138] in the *Maaouia* Case the ... Chamber took a principled position in the matter. There the Court concluded ... Article 1 of Protocol No. 7, which contains procedural guarantees for the ... of aliens, that "the States were aware that Article 6 para. 1 did not apply to pro... for the expulsion of aliens and wished to take special measures in that sphere." ... led the Court to hold that "the proceedings for the rescission of the exclusion ... which form the subject-matter of the present case, do not concern the determ... of a 'civil right' for the purposes of Article 6 para. 1. The fact that the exclusi... incidentally had major repercussions on the applicant's private and family li... his prospects of employment cannot suffice to bring those proceedings within ... scope of civil rights protected by Article 6 para. 1 of the Convention."[140]

To indicate that the case was meant to be a 'pilot case' the Court reached the ... wing general conclusion, which extended beyond the facts of the case bef... "Decisions regarding the entry, stay and deportation of aliens do not concern the ... mination of an applicant's civil rights or obligations or of a criminal charge ... him, within the meaning of Article 6 para. 1 of the Convention."[141]

134 Appl. 3225/67, *X, Y, Z, V and W v. the United Kingdom*, Coll. 25 (1968), p. 117 (122-123) (admi... and Appl. 9285/81, *X, Y and Z v. the United Kingdom*, D&R 29 (1982), p. 205 (212) (expul...

135 Appl. 3225/67, *X, Y, Z, V and W v. the United Kingdom*, Coll. 25 (1968), p. 122. See also Appl. ... and 2992/66, *Alam, Kahn and Singh v. the United Kingdom*, Yearbook X (1967), p. 478 (50...

136 Appl. 7841/77, *X v. the United Kingdom* (not published).

137 Appl. 8244/78, *Singh Uppal and Others*, D&R 17 (1980), p. 149 (157).

138 Decision of 4 May 1999, *S.N. v. The Netherlands*, para. 3: "even supposing that the proce... concerning the grant of residence permits and the expulsion of aliens were to come within the ... of Article 6".

139 Judgment of 5 October 2000, para. 36.

140 *Ibidem*, para. 38.

141 *Ibidem, para. 40.* The position adopted is still standing case law: decision of 29 June 2004 ... *Kandomabadi.*

...ot self-evident, to put it mildly, that for the interpretation of a provision of the ...vention conclusions may be drawn from an instrument which was adopted more ...enty years later and has not yet been ratified by all the States parties to the ...ention. It is even less evident, from the text of Article 1 of Protocol No. 7 and ...Explanatory Note, that Protocol No. 7 may be considered a *lex specialis* with respect ...the procedural guarantees of the first paragraph of Article 6.[142] Indeed, "Proto... ...add to the rights of the individual; they do not restrict or abolish them".[143] The ...Explanatory Note states that Article 1 of the Protocol 'does not affect' the position ...upted by the Commission that Article 6 does not apply to deportation procedures,[144] ...does not imply that, according to the drafters of the Protocol, the said position ...the only correct interpretation of Article 6. Moreover, the statement in the Expla... ...Note only refers to deportations and, thus, does not give ground for any con... ...as to alien procedures in general.[145]

Moreover, in the light of the observation by the Court that the exclusion order ...initially had major repercussions on the applicant's private and family life or on ...prospects of employment, it is difficult to understand how the Court's conclusion ...to be reconciled with its case law that for the applicability of the first paragraph of ...Article 6 it is sufficient that the dispute concerned 'relates' to the scope of a civil right ...and the manner of its exercise.[146]

In *F. v. the United Kingdom* the Court observed that an issue may exceptionally ...be raised under Article 6 by an expulsion order in circumstances where the person ...being expelled has suffered or risks suffering a flagrant denial of fair trial in the re... ...ceiving country.[147] This, of course, is a different issue than that here under discussion.

10.2.7.3 Proceedings concerning civil servants' employment rights

In the *Pellegrin* Case the Court very extensively dealt with the much debated issue of ...whether and to what extent disputes relating to the recruitment, career and termina... ...tion of service of civil servants fall within the scope of Article 6 para. 1. Standing case ...law it held that this was not the case.[148] However, the three categories of disputes were ...restrictively defined. Disputes that exclusively related to pecuniary rights – or rights ...of a purely or essentially economic character – did not fall under these categories and

142 See the concurring opinion of Judge Costa and the dissenting opinion of Judge Loucaides joined by Judge Traja.

143 Dissenting opinion of Judge Loucaides joined by Judge Traja.

144 Explanatory Note, para. 16.

145 Thus also Judge Costa in his concurring opinion.

146 Judgment of 28 June 1990, *Skärby*, para. 27.

147 Judgment of 22 June 2004, para. 2.

148 Judgment of 24 August 1993, *Massa*, para. 26. See also, *i.a.*, the judgment of 24 August 1998, *Boulesnouer*, para. 30.

were considered to concern civil rights in the sense of Article 6.[149] The [illegible] was supposed to be whether the claim by the civil servant mainly called [illegible] the authorities' discretionary power in the recruitment, career or termination [illegible] of civil servants.[150] If, however, the pecuniary right claimed directly depended [illegible] decision concerning recruitment, career or termination of service – or [illegible] instatement – the main rule of inapplicability was held to apply.

In the *Pellegrin* Case the Court admitted that this case law contained [illegible] of uncertainty for Contracting States as to the scope of their obligations under [illegible] 6 para. 1 in disputes raised by employees in the public sector over their conditions [illegible] service." It continued its considerations as follows: "The criterion relating to [illegible] nomic nature of a dispute, for its part, leaves scope for a degree of arbitrariness [illegible] a decision concerning the 'recruitment', 'career' or 'termination of service' of [illegible] servant nearly always has pecuniary consequences. (...) The Court therefore [illegible] to put an end to the uncertainty which surrounds application of the guarantees [illegible] Article 6 para. 1 to disputes between States and their civil servants. (...) The Court accordingly considers that it is important, with a view to applying Article 6 para. [illegible] to establish an autonomous interpretation of the term 'civil service' which would make it possible to afford equal treatment to public servants performing equivalent or similar duties in the States party to the Convention, irrespective of the domestic system, employment and, in particular, whatever the nature of the legal relation between official and the administrative authority (whether stipulated in a contract or governed by statutory and regulatory conditions of service). To that end, in order to determine the applicability of Article 6 para. 1 to public servants, whether established or employed under contract, the Court considers that it should adopt a functional criterion based on the nature of the employee's duties and responsibilities. In so doing, it must apply a restrictive interpretation, in accordance with the object and purpose of the Convention, of the exceptions to the safeguards afforded by Article 6 para. 1. [illegible] Court therefore rules that the only disputes excluded from the scope of Article 6 para. 1 of the Convention are those which are raised by public servants whose duties typify the specific activities of the public service in so far as the latter is acting as a depository of public authority responsible for protecting the general interests of the State or other public authorities. A manifest example of such activities is provided by the armed forces and the police. (...) Accordingly, no disputes between administrative authorities and employees who occupy posts involving participation in the exercise of powers conferred by public law attract the application of Article 6 para. 1 since the Court intends to establish a functional criterion (...). Disputes concerning persons [illegible]

149 Judgment of 26 November 1992, *Giancarlo Lombardo*, para. 16. See also, *i.a.*, the judgment of 24 August 1998, *Benkessiouer*, para. 30.

150 Judgment of 17 March 1997, *Neigel*, para. 44. See, however, the dissenting opinion of Judge [illegible]. See also, *i.a.*, the judgment of 24 August 1998, *Benkessiouer*, paras 29-30.

[illegible] within the ambit of Article 6 para. 1 because on retirement employees break [illegible] special bond between themselves and the authorities; they, and *a fortiori* those [illegible] through them, then find themselves in a situation exactly comparable to that [illegible] under private law in that the special relationship of trust and loyalty [illegible] them to the State has ceased to exist and the employee can no longer wield [illegible] of the State's sovereign power (...)."[151]

The judgment is quoted extensively because it reflects the clear – and not very commendable – intention of the Court to not only judge on the case before it but draw the lines [illegible] future cases. The great advantage of the Court's reasoning is undoubtedly that it [illegible] an end to the many uncertainties which its previous case law and that of the Commission on the matter had created, especially concerning the criterion of the measure of discretion on the part of the authority which took the challenged decision.[152] It is also to be welcomed that the Court dissociates itself from the view that a distinction should be made between civil servants and those in public service who are employeed under a contract.[153]

However, by introducing the 'functional criterion' the Court gave rise to a new set of uncertainties and of possible unequal treatment. Indeed, it will be difficult to determine – and even more difficult to predict – in each individual case whether the civil servants concerned "occupy posts involving participation in the exercise of powers conferred by public law".[154] And, indeed, shortly afterwards, in the *Frydlender* Case, where the position of the applicant civil servant would seem very similar to that of Mr Pellegrin, the Court did hold Article 6 to be applicable.[155] The Court itself seems to struggle with the distinction at times, apparently prefering to leave the issue open.[156]

The criterion of 'exercise' is not clear and the separation between administrative acts of a public law and those of a private law character is not drawn in the same way in the different legal systems. The criterion is also problematic, as becomes strikingly clear when it is applied in such a way that the legal position of judges falls outside the guarantees of Article 6, which weakens their independence vis-à-vis the executive.[157]

The – rather remarkable – reference by the Court to a list of posts and activities within the European Commission, that was drafted for quite a different purpose and could only take into account the situation in the member States of the European Union, will provide some but not sufficient guidance as to the 'functional criterion'. Moreover, it has to be pointed out that Article 6 classifies rights and obligations and

151 Judgment of 8 December 1999, paras 60-66.

152 On that criterion, see the previous edition of the present book, pp. 405-406. In his separate opinion in the *Pellegrin* Case Judge Traja calls the previous use of that criterion 'a cautious approach'. See also the judgment of 27 June 2000, *Frydlender*, paras 29-32.

153 See, e.g. the judgment of 30 October 2001, *Devlin*, para. 26.

154 Judgment of 27 June 2000, Frydlender, paras 34-41

155 Judgment of 21 November 2001, *Fogarty*, para. 28.

156 Decision of 8 February 2001, *Pitkevich*, para. 1.

not the subjects or objects thereof; civil rights claims do not depend on a
tion of public employees.[158] And "the criterion used will create a new
mination between public sector workers, depending on whether or not
powers conferred by public law."[159] Moreover, the Court maintains a diff
protection between employees in the public sector and those in the
without an express justification as to the difference on the basis of a
and proportionality between the impact of the difference and that aim
Court had found reason in the requirement of equal treatment between
and employees in the private sector to extend the applicability of Artic
dissenting judges put it: "First of all, we do not see how the existence of
[of trust and loyalty] can be a sufficiently weighty argument for the purpo
mining the scope of Article 6 since there may be a similar bond in other
relationships. Why, for example, would it be right for a policeman not to be
by Article 6 when an employee of a private security service, with the same
maintaining order, would be protected? Secondly, we do not understand why
who participates in the exercise of powers conferred by public law, and
domestic law, has access to an independent tribunal in connection with dis
cerning employment, is not entitled to a judicial decision within a reasonable
Lastly, although loyalty is relevant above all where it is a matter of appointment
dismissal from the most sensitive public duties, we fail to see why loyalty
a difference where it is a matter of disputes over salary or other payments."

In the *Frydlender* Case the Court indicated that it will apply the criterion of
as a depository of public authority', as an exception to the entitlement of civil
to the protection of Article 6, in a restrictive way in accordance with the object
purpose of the Convention.[161] Indeed, later on several functions were consid
to be covered by the *Pellegrin* criterion.[162] And, as was indicated in the
judgment, claims of civil servants relating to their retirement, such as pensio
not come under the exception, as retirement breaks the special bond.[163] On the

158 Judge Traja in his separate opinion, and Judges Tulkens, Fischbach, Casadevall and Thomassen in their joint dissenting opinion.

159 Joint dissenting opinion of Judges Tulkens, Fischbach, Casadevall and Thomassen.

160 Judgment of 26 November 1992, *Francesco Lombardo*, para. 17; judgment of 24 August 1993, para. 26.

161 Judgment of 27 June 2000, para. 40.

162 See, *e.g.*, the judgment of 30 March 2000, *Procaccini*, para. 13; judgment of 18 July 2000, *France*, para. 19; judgment of 2 August 2000, *Lambourdiere*, para. 23; judgment of 26 October 2000, *Castanheira Barros*, para. 32; judgment of 30 October 2001, *Devlin*, para. 26; judgment of 15 November 2001, *Werner*, para. 34.

163 See also the judgment of 14 December 1999, *Antonakopoulos, Vortsela and Antonakopoulos*, para. 21; judgment of 28 March 2000, *Dimitrios Georgiadis*, para. 21; judgment of 18 July 2000, *France*, para. 19. However, Article 6 was held not to apply to the pension rights of a former decision of 11 October 2005, *Papon*.

Court seems inclined to apply the criterion in a strictly formal way: a civil
who belonged to the National Fire Service but occupied the position of teacher
National Fire Academy, was deemed to carry 'considerable responsibilities in
of national defence' with a reference to his research work.[164]

far as military personnel and the police are concerned, in the *Kerojärvi* Case
Court held that a dispute concerning the entitlement to compensation under the
Military Injuries Act came within the 'civil right' scope of Article 6. The Court
on reason "to distinguish this case from previous cases in which it has found that
over benefits under a social-security scheme concern 'civil rights'."[165] In the
case the Court treated the right to a military pension as a 'civil' right.[166] It was
expected, however, that the *Pellegrin* line would bring personnel cases concerning
military and the police under the exception of 'depositary of public authority
responsible for protecting the general interests of the State'.[167] The cases mentioned
go into that line "because on retirement employees break the special bond
between themselves and the authorities".[168] A reserve officer, who will be called on
only at intervals, is treated in this respect as still being on duty.[169]

In the present situation, where civil servants as a rule have access to a court for the
settlement of disputes with their public employer, it is difficult to understand why the
Court excludes them from the right to such access. Most applications filed with the
Court in this area concern the reasonable time requirement. As the dissenting judges
stated, this raises the question why domestic courts with jurisdiction in civil servant
disputes, which in all other respects fulfil the requirements of Article 6, should not
be placed under the obligation to give judgment within a reasonable time.

10.2.8 ARE ALL CONVENTION RIGHTS AND FREEDOMS 'CIVIL'?

Unlike Article 13, Article 6 does not refer to the 'rights and freedoms as set forth in the Convention' but to 'civil rights and obligations'. The two concepts are not co-extensive, although there may be some overlapping.[170]

It is self-evident that the rights laid down in the Convention are 'rights' in the sense of Article 6. But are they also 'civil' rights in that sense? They certainly do have that character to the extent that they have a 'horizontal effect' within the domestic legal

Decision of 11 July 2000, *Kepka*, para. 2.

Judgment of 19 July 1995, para. 36; judgment of 12 June 2001, *Trickovic*, para. 40.

Judgment of 28 June 2001, para. 26.

The Court made the express observation (para. 65) that "A manifest example of such activities is provided by the armed forces and the police".

Ibidem, para. 66. See also the judgment of 13 November 2003, *Papazoglou and Others*, impliedly.

Judgment of 27 February 2001, *R. v. Belgium*, para. 44.

Judgment of 21 February 1975, *Golder*, para. 33; judgment of 8 January 2004, *Voggenreiter*, para 35.

order, since rights and obligations between private parties are 'civil' in character, an individual's right to respect for his reputation by a private person was held to be a 'civil right'.[171]

However, the civil rights protected in the Convention may also come under Article 6 if they are vindicated *vis-à-vis* a public authority. Thus, in the *Werner* Case the right of protection of one's good reputation against the public authorities, including the courts, was recognized as a 'civil right' in the sense of Article 6.[172] The same was true in the *Ciz* Case with respect to an alleged defamation by a member of Parliament.[173]

In the *Balmer-Schafroth* Case and the *Athanassoglou* Case the right to have physical integrity adequately protected from the risks entailed by the use of nuclear energy was recognized as a right in the sense of Article 6, since it was regulated in the Swiss Nuclear Energy Act and emerged from the constitutional right to life.[174] However, the link between the proceedings concerned and that right was considered to be insufficiently direct to make Article 6 applicable.[174] The right to life also generates a civil right for the relatives of the deceased in combination with a claim for damages.[175]

In the *Aerts* Case the Court adopted the position that the right to liberty is a civil right.[176] In the *Paulsen-Medalen and Svensson* Case the right to respect of family life was dealt with as a 'civil' right,[177] as was in the *Petersen* Case (on assumption) the right relating to a change of a child's surname, as being an element of family life.[178] In the *Ganci* Case the Court held that complaint procedures against a special detention regime with severe restrictions as to visits by relatives, use of telephone and transfer of financial transactions, concerned the detainee's civil rights.[179] In the *Magyar Üldözötteinek Szövetsége* Case the right to register as an association, as part of the right to freedom of association, was held to be a 'civil' right, since "it was (...) the right to an association's very capacity to become a subject of civil rights and obligations that was at stake in the registration proceedings".[180] In the *Tinnelly & Sons Ltd and McElduff*

171 Judgment of 29 October 1991, *Helmers*, para. 29; judgment of 13 July 1995, *Tolstoy Miloslavsky*, para. 58; judgment of 15 November 2001, *Werner*, para. 33; judgment of 3 June 2004, *De Jorio*, para. 41; judgment of 8 July 2004, *Djangozov*, para. 41.; judgment of 28 September 2004, *Pienava*, para. 41. If statements made in Parliament are involved, Article 6 is also applicable but access to court may be blocked by the principle of 'parliamentary immunity', see *infra*, 10.4.6.2.

172 Judgment of 15 November 2001, para. 33. See also the judgment of 12 November 2002, *Saccoccia*, impliedly.

173 Judgment of 14 October 2003, *Ciz*, para. 61.

174 Judgment of 26 August 1997, paras 33-34; judgment of 6 April 2000, para. 44.

175 Judgment of 22 January 2004, *Sekin and Others*, (impliedly).

176 Judgment of 30 July 1998, para. 59. See also the decision of 18 March 2003, *Fabre* (implicitly).

177 Judgment of 19 February 1998, paras 38-42.

178 Judgment of 6 December 2001, para. 4: "the Court starts with the assumption that Article 6 is in principle appplies".

179 Judgment of 30 October 2003, paras 23-26; judgment of 11 January 2005, *Musumeci*, para. 9.

180 Judgment of 5 October 2000, para. 36.

right not to be discriminated against on grounds of religious belief or political opinion when bidding for a public works contract was held to be a 'civil' right.[181] The same question was taken with respect to discrimination in the area of recruitment for the civil service.[182]

As far as the right to the peaceful enjoyment of possessions is concerned, in the case of expropriation and consolidation decisions and in the case of forfeiture of property, the proceedings in which the legitimacy and/or the damages are determined, are considered to be a 'determination of a civil right'.[183] Equally, the decision to place a bank in compulsory administration, which has a decisive impact on the right of the bank to administer its own property and assets, concerns a civil right of the bank.[184] And if a certain claim is combined with a claim for damages, the Court is inclined to consider the proceedings as being closely connected to a claim of a pecuniary nature and as decisive for the determination of civil rights.[185]

For the rights and freedoms laid down in the Convention that are of a political character the situation is less clear. In the *Pierre-Bloch* Case the Court held that the right to stand for elections is a 'political' and not a 'civil' one and that, therefore, disputes concerning the exercise of that right lie outside the scope of Article 6, even if economic interests are involved.[186] The mere fact that in the dispute concerned the applicant's pecuniary interests were also at stake, did not make Article 6 applicable, because these interests were closely connected with the exercise of the political right.[187]

A claim which has a certain connection with the Convention but is not guaranteed as a right there, does not, on that sole basis, come under the protection of Article 6. If the claim concerned is also not recognized as a right under the applicable domestic law, Article 6 is not applicable. Thus, in the *Gutfreund* Case the Court held Article 6 to be not applicable to proceedings concerning legal aid in a civil case, because the right to legal aid in civil cases is not recognized in Franch law nor, in the circumstances of the case, in Article 6 of the Convention.[188] It reached the same conclusion with respect to proceedings relating to the decision to subject a detainee to a high-security regime.[189]

Thus, it may be concluded that most of the rights and freedoms laid down in the Convention, also in relation to the public authorities, have been recognized by the

181 Judgment of 10 July 1998, paras 61-62.

182 Judgment of 30 October 2001, *Devlin*, paras 25-26.

183 Judgments of 2 April 1987, *Ettl and Others*, *Erkner and Hofauer*, and *Poiss*, paras 32, 62 and 48, respectively; judgment of 27 October 1987, *Bodén*, para. 32; judgment of 23 June 1993, *Ruiz-Mateos*, paras 58-59; judgment of 21 October 2003, *Cegielski*, para. 24; judgment of 13 July 2004, *Beneficio Cappella Paolini*, para. 28.

184 Judgment of 21 Ocotber 2003, *Credit and Industrial Bank*, para. 64-67.

185 Judgment of 13 November 2003, *Napijalo*, paras 47-50.

186 Judgment of 21 October 1997, paras 50-51; decision of 27 May 2004, *Guliyev*, para. 3; decision of 14 December 2004, *Krasnov and Skuratov*, para. 1.

187 *Ibidem*, para. 51.

188 Judgment of 12 June 2003, paras 31-43.

189 Decision of 28 August 2001, *Lorsé and Others*, para. 3. See, however, note 179.

Court as 'civil' rights unless their political character prevails. To the [illegible] applicability of Article 6 is (still) not recognized, Article 13 of the [illegible] of course, apply.[190]

10.2.9 CONCLUDING OBSERVATIONS

The Strasbourg case law concerning 'civil rights and obligations' still lacks [illegible] certainty in certain respects in spite of several praiseworthy efforts of the [illegible] to draw some general lines. It lacks clarity because no general definition of [illegible] and obligations' can still be inferred from it, while the criteria developed by [illegible] such as that of the effect which the outcome of the proceedings may have for [illegible] or obligation of a civil character, are not very specific and sometimes difficult [illegible] It lacks certainty because the lines drawn in the case law curve rather frequently [illegible] appear still to lead within the Court to different views in concrete cases. In our [illegible] this lack of clarity and certainty, which constitutes an undesirable situation not [illegible] for the individual seeking justice, but also for the public authorities and the [illegible] the Contracting States, which are called upon to apply Article 6, can only be eliminated [illegible] if the Court departs from its present casuistic approach and develops a general [illegible] readily applicable definition of 'civil rights and obligations', thus fulfilling its [illegible] to give direction to the interpretation and application of the Convention. [illegible] judgments in the *Ferrazzini*, *Maaouia* and *Pellegrin* Cases, although one may not [illegible] with the line of reasoning adopted, are a step in the right direction from this [illegible] spective, but even these judgments do not yet offer the clarity and certainty required. Precisely at a moment when several States which have recently acceded to the [illegible] vention are in the process of adapting their legislation and reforming their [illegible] system, more clarity about the scope of Article 6 is urgently needed.

It is submitted that the most satisfactory way to end legal uncertainty and make effective legal protection is to recognize – as an example of 'evolutive interpretation' – that the first paragraph of Article 6 is applicable to all cases in which a determination by a public authority of the legal position of a private party is at stake, regardless whether the rights and obligations involved are of a private character and regardless of whether the claim concerns a public law relationship. The basic principle of the Rule of Law would seem to require that in all cases of government interference with the legal position of a private party the latter has a right of access to court and to a [illegible]

190 See for a case of privacy affected by aircraft noise, which was not protected under domestic [illegible] judgment of 7 August 2003, *Hatton and Others*, paras 137-142.

191 For this 'constitutional' function, see the judgment of 18 January 1978, *Ireland v. the United* [illegible] para. 154.

[illegible] the Court held in the *Klass* Case, "The rule of law implies, *inter alia*, that [illegible] interference by the executive authorities with an individual's rights should be [illegible] an effective control which should normally be assured by the judiciary, at [illegible] the last resort, judicial control offering the best guarantees of independence, [illegible] and a proper procedure."[193]

10.3 CRIMINAL CHARGE

10.3.1 DETERMINATION OF A CRIMINAL CHARGE

[illegible] words 'determination of (...) any criminal charge' (*'décidera (...) du bien-fondé* [illegible] *accusation en matière pénale'*) also raise problems of interpretation. [illegible] From the term 'determination' it follows that the 'criminal' limb of Article 6 is not [illegible] applicable to every procedure in which an accused or detained person is involved, but [illegible] to those proceedings in which the well-foundedness of a charge is at stake. Thus, [illegible] the *Ganci* Case the Court held that complaint procedures against restrictions imposed upon a detainee did not concern the determination of a criminal charge, but [illegible] indeed concern the determination of the detainee's civil rights.[194]

More problematic is the term 'criminal charge'. On this point the legal systems [illegible] the Contracting States show many variations. To avoid differences in the scope of [illegible] application of Article 6 in the different national legal orders, and also the risk of this [illegible] application being eroded by the introduction of legal norms and procedures outside [illegible] the sphere of criminal law, the adoption of an autonomous meaning, independent [illegible] the national legal systems, was necessary here as well. In the *Adolf* Case the Court [illegible] said with respect to 'criminal charge' in so many words: "These expressions are to be interpreted as having an 'autonomous' meaning in the context of the Convention and not on the basis of their meaning in domestic law."[195]

In many cases the criminal character of the proceedings involved is clear, either because of their characterisation under the applicable domestic law or in view of their nature and purpose, and the terminology used for their regulation.[196] However,

193 Thus also the joint dissenting opinion of Judges Tulkens, Fischbach, Casadevall and Thomassen in the *Pellegrin* Case and the dissenting opinion of Judge Loucaides joined by Judge Traja in the *Maaouia* Case. For a proposal to use as a general criterion that the pecuniary interests of an individual are directly affected and the interference is not based on the exercise of discretionary powers, see the dissenting opinion of Judge Lorenzen, joined by Judges Rozakis, Bonello, Stráznická, Bîrsan and Fischbach in the *Ferrazzini* Case.

194 Judgment of 6 September 1978, para. 55.

195 Judgment of 30 October 2003, para. 22.

196 Judgment of 26 March 1982, para. 30.

[illegible] Judgment of 23 October 1995, *Gradinger*, para. 36; judgment of 10 June 1996, *Pullar*, para. 29.

[illegible] essentia

there are several cases in which the Court had to draw lines on the basis of autonomous interpretation.

10.3.2 AUTONOMOUS CONCEPT OF 'CHARGE'

The general point of departure defined in the *Delcourt* Case "that a restrictive interpretation of Article 6 para. 1 would not correspond to the aim and purpose of the provision",[197] also applies here. In addition, in the *Deweer* Case the Court established guideline for the autonomous interpretation of 'charge'. It held that "the prominent place held in a democratic society by the right to a fair trial (...) prompts the Court to prefer a 'substantive', rather than a 'formal', conception of the 'charge' contemplated by Article 6 para. 1."[198] Consequently, the concept is to be understood "within the meaning of the Convention and not solely within the meaning under national law".[199]

In the *Deweer* Case the Court gave the following description of the concept 'charge' in the sense of Article 6: 'the official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence'. The 'notification' marks the beginning of the 'charge' and, consequently, is also relevant with respect to the period of the procedure to which Article 6 applies, for instance in determining whether the reasonable-time requirement has been met. The relevant period starts with the notification, even if it is formulated in a language which the person concerned does not understand[201] or if it did not reach him.[202]

However, a formal notification is not always required. Examples of possible measures other than an official notification are the search of the person's home, the seizure of certain goods,[203] the request that a person's immunity be lifted,[204] or the confirmation by the court of the sealing of a building.[205] In the *Corigliano* Case the Court summarised its case law as follows: "In criminal matters, in order to assess whether the 'reasonable time' requirement contained in Article 6 para. 1 has been complied with, one must begin by ascertaining from which moment the person is 'charged'; this may have occurred on a date prior to the case coming before the

197 Judgment of 17 January 1970, para. 25.
198 Judgment of 27 February 1980, para. 44.
199 Judgment of 16 December 1997, *Tejedor García*, para. 27.
200 Judgment of 27 February 1980, para. 46.
201 Judgment of 19 December 1989, *Brozicek*, paras 41-42.
202 Judgment of 19 February 1991, *Pugliese*, para. 14 in conjunction with para. 10. For consequences of notification not in person, see the judgment of 12 February 1985, paras 26-28.
203 Judgment of 15 July 1982, *Eckle*, para. 74 in conjunction with para. 12.
204 Judgment of 19 February 1991, *Frau*, para. 14.
205 Judgment of 18 July 1994, *Venditelli*, para. 21.

such as the date of the arrest, the date when the person concerned was officially notified that he would be prosecuted or the date when the preliminary investigations were opened (...). Whilst 'charge', for the purpose of Article 6 para. 1, may in general be defined as 'the official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence', it may in some cases take the form of other measures which carry the implication of such an allegation and which likewise substantially affect the situation of the suspect (...)."[206]

From this 'definition' it follows that Article 6 also applies to the pre-trial phase,[207] but only from the moment a charge has been brought. The mere fact that the police are carrying out an investigation or witnesses are being heard, or that a judicial organ is making a preliminary inquiry, does not necessarily mean that a 'criminal charge' exists. In the *Deweer* Case the Court held that a 'charge' may exist at the stage in which the prosecuting authorities make a proposal for settlement, even if that proposal is made in the framework of an inspection that is not performed within the context of the repression of crime and even if there is no notification of impending prosecution, while the settlement will prevent such prosecution.[208] And even a summon to appear as a witness may mark a criminal charge, if the person concerned may deduce from the circumstances that there is incriminating evidence also against him.[209]

In the *Escoubet* Case the Court adopted the opinion that Article 6 does not apply to the various preliminary measures which may be taken as part of a criminal investigation before bringing a 'criminal charge', such as the arrest or interviewing of a suspect (...), measures which may, however, be governed by other provisions of the Convention, in particular Articles 3 and 5.[210] This reasoning makes the criteria of 'charge' rather difficult to apply. Indeed, in case of the arrest or interviewing of a suspect, the latter may very well experience this as implying an allegation which substantially affects his situation and may be in need of the guarantees of Article 6 from that moment on in order to make these guarantees effective.[211]

Article 6 is also applicable to proceedings by which a detention on remand is reviewed or prolonged on the ground of an existing suspicion, although these proceedings themselves are not directed at the determination of the charge,[212] as well as to proceedings which ended with the conclusion that the offence was not punishable.[213]

206 Judgment of 10 December 1982, para. 34.
207 Judgment of 16 December 1997, *Tejedor García*, para. 27.
208 Judgment of 27 February 1980, paras 42-45.
209 Judgment of 20 October 1997, *Serves*, para. 42.
210 Judgment of 28 October 1999, para. 34.
211 See the joint dissenting opinion of Judges Tulkens, Fischbach and Casadevall, attached to the *Escoubet* judgment.
212 Judgment of 28 November 1978, *Luedicke, Balkacem and Koç*, para. 49. See also the judgment of 31 March 1998, *Reinhardt & Slimane-Kaid*, para. 93; judgment of 13 February 2001, *Lietzow*, para. 44.
213 Judgment of 26 March 1982, *Adolf*, paras 31-33.

On the other hand, the refusal to pay compensation for damages caused by a [illegible] authority in the course of criminal proceedings which are subsequently discontinued does not amount to a penalty,[214] but may involve a 'civil' right. The mere fact that criminal prosecution is terminated or results in dismissal of the case does not mean that, in retrospect, Article 6 was not applicable, particularly when the person originally accused the prosecution may have left with certain prejudicial consequences.[215]

Whether the criminal proceedings were instituted by a private party or by a public authority is irrelevant to the question of whether a 'charge' was brought, and thus to the applicability of Article 6.[216] However, the private party who takes the initiative to start criminal proceedings is not himself entitled to a determination of the charge by a court; he may be entitled to the determination of his civil rights if a civil claim is, or can be, and actually has been submitted in the criminal proceedings.[217] On the other hand, if a third person's rights are affected adversely by measures consequential upon the prosecution of others, no criminal charge can be said to have been brought against the former, who therefore cannot invoke the guarantees of Article 6 concerning the determination of a criminal charge. This approach, adopted in the *Agosi* Case,[218] is similar to the conclusion in the *Air Canada* Case that the seizure of an aircraft in which drugs had been brought into the United Kingdom, could not be considered as a 'criminal charge' brought against the airline company. The fact that the company regained the aeroplane only after it had paid an amount of $50,000, did not alter this conclusion.[219] Article 6 may, of course, be applicable under its civil limb.

A tariff-fixing decision by a public authority that determines the period of detention is itself a sentencing exercise and must comply with the guarantees of Article 6.[220]

214 Decision of 25 January 2000, *Van Leeuwen BV*, para. 1.

215 Appl. 8269/78, *X v. Austria*, Yearbook XXII (1979), p. 324 (340-342). See also the judgment of 26 March 1982, *Adolf*, para. 33, concerning a decision that an offence was not punishable.

216 Judgment of 25 March 1983, *Minelli*, para. 28.

217 Judgment of 23 October 1990, *Moreira De Azevedo*, para. 67; judgment of 17 January 2002, *Calvelli and Coglio*, para. 62. See also *supra*, under 10.2.5.

218 Judgment of 24 October 1986, para. 65.

219 Judgment of 5 May 1995, paras 52-53.

220 Judgment of 16 December 1999, *T. v. the United Kingdom*, paras 106-110; judgment of 12 June 2002, *Easterbrook*, para. 26.

10.3 AUTONOMOUS CONCEPT OF 'CRIMINAL'

10.3.1 *Applicability to Disciplinary Procedures and Administrative Sanctions*

The question of whether Article 6 is applicable to disciplinary procedures was answered in the negative by the Commission for a long time.[221] In the *Engel* Case, however, both the Commission and the Court took the position that the character of a procedure under domestic law cannot be decisive for the question of whether Article 6 is applicable, otherwise the national authorities would be able to evade the guarantees of that provision by introducing disciplinary procedures with respect to offences which, by reason of their nature or the character of the sanction imposed, are very similar to criminal offences.[222] As the Court stated in its judgment: "The Convention without any doubt allows the States (...) to maintain or establish a distinction between criminal law and disciplinary law, and to draw the dividing line, but only subject to certain conditions. (...) If the Contracting States were able at their discretion to classify an offence as disciplinary instead of criminal or to prosecute an author of a mixed offence on the disciplinary rather than on the criminal plane, the operation of the fundamental clauses of Articles 6 and 7 would be subordinated to their sovereign will. (...) The Court therefore has jurisdiction, under Article 6 (...), to satisfy itself that the disciplinary does not improperly encroach upon the criminal."[223] The same reasoning was followed in respect of administrative procedures which lead to the imposition of a sanction.[224]

For an answer to the question of whether disciplinary and administrative proceedings imply a 'criminal charge' in the sense of Article 6, the Court developed the following criteria in its *Engel* judgment.[225]

10.3.1.1 *Classification under Domestic Law*

The first criterion to be applied is the classification of the allegedly violated norm under the applicable domestic legal system. Does it belong to criminal law or to disciplinary or administrative law? If the former is the case, the matter is settled, since the autonomy of the interpretation of 'criminal charge' is a one-way autonomy. Domestic

221 See the case law mentioned in the report of 19 July 1974, *Engel and Others*, B.20 (1978), pp. 68-69.

222 *Ibidem*, p. 70 and the judgment of 8 June 1976, para. 81.

223 *Ibidem*.

224 Judgment of 21 February 1984, *Öztürk*, paras 47-49.

225 *Ibidem*, para. 82. In its report of 14 December 1981, *Albert and Le Compte*, B.50 (1986), p. 36, the Commission proposed yet a fourth criterion: the applicable rules concerning evidence. In general, in disciplinary procedures the person concerned has no right to remain silent and no right to invoke professional secrecy. This does not, however, appear to be a correct independent criterion, since it forms a consequence of the choice made by the national legislature between criminal and disciplinary procedures, and moreover a consequence that, if applied as a criterion, would be detrimental to the legal protection of the person concerned.

law is decisive to the extent that, if an act or omission *is* designated as an offence by domestic law, Article 6 is applicable to the proceedings in which [illegible] related to such act or omission is determined.[226] Criminalisation of certain [illegible] may be reviewed for its conformity with other provisions of the Convention; its justification is not an issue under Article 6.

Only if an offence is not classified as criminal by the relevant legal system, i.e. decriminalised, is there the danger of evasion of the guarantees of Article 6. This makes a further examination of the applicability of that provision necessary. This may require some investigation and interpretation by the Court of the relevant domestic law,[228] its legal history or the case law in relation thereto.[229] Even if Article 6 is found to be applicable, that does not mean that the disciplinary or administrative procedures have to be changed into criminal procedures; the only requirement is that they respect the guarantees of Article 6.

In view of the danger of evasion by defining an offence as 'disciplinary' or 'administrative' under national law, the criterion of the classification serves only as a preliminary point of departure for the ultimate assessment of the applicability of Article 6. This assessment has to be made on the basis of objective principles. For this purpose the Court has developed the following two additional criteria.

10.3.3.3 Scope of the Norm and Purpose of the Penalty

The scope of the norm concerns the circle of its addressees: is the norm only addressed to a specific group or is it a norm of a generally binding character? A provision of disciplinary law only addresses persons belonging to the disciplinary system. Therefore, as a starting point the circle of addressees offers a useful indication, but the same conduct that constitutes an offence under disciplinary law may also amount to an offence under criminal law.[230] On the other hand, there are several criminal law prohibitions which can only apply to certain persons: minors or adults, parents and guardians, spouses, captains, civil servants, *et cetera*. Therefore, the distinguishing feature implied in this criterion is not the number of addressees, but their quality as members of a particular group, combined with the interests protected by the rule.

The indeterminate character of the criterion came clearly to the fore in the *Ravnsborg* Case. The applicant had filed a criminal complaint of defamation against the [illegible] 'reader's letter' in a newspaper. Pending the proceedings he held a press conference to inform the public about his complaint. In summary proceedings he was fined for breaching the secrecy of the investigation. Since his appeal against the conviction was dismissed without public hearing, he claimed that Article 6 had been violated. The Commission had adopted the view that the violated rules were disciplinary rules and that neither the penalty imposed nor the maximum penalty could by their nature make the offence a criminal one.[231] The Court, however, made the following distinction: "disciplinary sanctions are generally designed to ensure that the members of particular groups comply with the specific rules governing their conduct. Furthermore, in a great majority of the Contracting States disclosure of information about an investigation still pending constitutes an act incompatible with such rules and punishable under a variety of provisions. As persons who above all others are bound by the confidentiality of an investigation, judges, lawyers and all those closely associated with the functioning of the courts are liable in such an event, independently of any criminal sanction, to disciplinary measures on account of their profession. The parties, on the other hand, only take part in the proceedings as people subject to the jurisdiction of the courts, and they therefore do not come within the disciplinary sphere of the judicial system. As Article 185 [of the relevant Swiss Code], however, potentially affects the whole population, the offence it defines, and to which it attaches a punitive sanction, is a 'criminal' one for the purposes of the second criterion."[232]

That this aspect of the second criterion is not an easy one to apply became even clearer when the Court, in the not so dissimilar *Ravnsborg* Case[233] and *Putz* Case,[234] reached the opposite conclusion.

In the *Campbell and Fell* Case the Court, morover, indicated that the distinction between disciplinary and criminal offences is also a relative one. Thus, misconduct by a prisoner is usually no more than a question of internal discipline, but violations of the prison rules may also amount to criminal offences. Relevant indicators are the seriousness of the matter and whether the illegality of the act concerned turns on the fact that it is committed in prison.[235]

The fact that the nature of the offence is only of a minor character is of no relevance under the second criterion. According to the Court, the criminal nature of an offence does not require a certain degree of seriousness.[236]

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226 Judgment of 8 June 1976, *Engel and Others*, para. 81; judgment of 21 October 1997, *Pierr[illegible]* para. 60.

227 See the judgment of 22 October 1981, *Dudgeon*, paras 60-61, where the legislation in Northern Ireland, prohibiting homosexual intercourse between consenting male persons over 21 years of age, was held to violate Article 8.

228 Judgment of 25 March 1983, *Minelli*, para. 28; judgment of 28 June 1984, *Campbell and Fell*, para. 69.

229 Judgment of 21 February 1984, *Öztürk*, para. 51; judgment of 27 August 1991, *Demicoli*, para. 31.

230 Judgment of 28 June 1984, *Campbell and Fell*, para. 71.

231 Report of 16 March 1989, paras 100-111.

232 Judgment of 22 May 1990, para. 33. See also the judgment of 27 August 1991, *Demicoli*, para. 33.

233 Judgment of 23 March 1994, para. 34.

234 Judgment of 22 February 1996, paras 34-38.

235 Judgment of 28 June 1984, para. 71; judgment of 9 October 2003 (Grand Chamber), *Ezeh and Connors*, para. 101.

236 Judgment of 21 February 1984, *Öztürk*, para. 53; judgment of 9 October 2003 (Grand Chamber) *Ezeh and Connors*, para. 104.

The purpose of the penalty, as the other aspect of the second criterion, is to distinguish criminal sanctions from purely reparatory or compensatory ones. This sub-criterion was introduced in the *Öztürk* Case to determine whether the decriminalisation of certain offences under domestic law had as a consequence that Article 6 would no longer be applicable. The Court held this not to be the case as the sanction that could be applied had kept its 'deterrent' and 'punitive' character. In the case of fines a clear criterion is whether the fine is merely intended as pecuniary compensation for damage caused or is punitive or deterrent in nature. Even if an administrative sanction is imposed on a person who has no personal fault to his matter does not exclude the sanction from having a punitive character. The of guilt plays a role only in determining the classification of the proceedings under domestic law.[240]

Whereas the three criteria developed by the Court are not cumulative, the aspects of the second criterion are. This means that an offence which is not under national law, may only be considered criminal in the sense of Article nature, if both the scope of the violated norm is of a general character and the of the sanction is deterrent and punitive.[241]

The violation of one and the same legal provision may lead to the imposition measures which are partly compensatory and partly punitive. Only the latter of the measure brings the proceedings under the category of 'criminal charge'. under taxation law, if a person has failed to pay the taxes imposed upon him dings instituted against him may result in the decision that he still has to pay amount as compensation for his failure, and a surcharge as a sanction on the The latter part is of a punitive character.[242]

The mere fact that a sanction or other measure imposed by the administrative court is of a severe character with far-reaching consequences for the person does not mean that the sanction or measure is of a punitive character. If the or measure is only meant to restore, or compensate for, the failure on the person concerned, its character is reparatory rather than punitive,[243] and

237 Judgment of 21 February 1984, para. 53. See also the judgment of 2 September 1998, para. 58.

238 Judgments of 29 August 1997, *E.L., R.L. and J.O.-L. v. Switzerland* and *A.P., M.P. and T.P. v. Switzerland*, paras 46 and 42, respectively.

239 Judgment of 29 August 1997, *E.L., R.L. and J.O.-L. v. Switzerland*, paras 42 and 46.

240 Judgment of 29 August 1997, *A.P., M.P. and T.P. v. Switzerland*, para. 42.

241 Judgment of 21 February 1984, *Öztürk*, para. 53; judgment of 24 February 1994, *Bendenoun*

242 Judgment of 24 February 1994, *Bendenoun*, para. 47; judgment of 14 March 1998, *Netherlands*, para. 37; judgment of 29 August 1997, *E.L., R.L. and J.O.-L. v. Switzerland*; judgment of 3 May 2001, *J.B. v. Switserland*, paras 47-49.

243 Judgment of 7 July 1989, *Tre Traktörer AB*, para. 46.

is not brought about and is not possible.[244] However, if the sanction or such a character and severity that it is covered by the third criterion, to hereafter, Article 6 may still be applicable. This will very rarely be the case, the person concerned can hardly complain about a measure the only purpose to bring about or promote as closely as possible the situation which he was to create or maintain himself. Possible examples of such severity would be to induce the person concerned to fulfil his obligations ('civil detention') measures of a repetitive character or of such a long duration that the reparatory character will be overshadowed by the punitive side-effects.[245]

The lack of clarity of the (application of the) second criterion and its relation to third criterion may be illustrated by the *Pierre-Bloch* Case. There the Court examined three kinds of possible sanctions as to their purpose, which surprisingly the Court did under the heading 'nature and degree of severity of the penalty' and not under that of 'nature of the offence'. First, the candidate who violated the Elections Code might be disqualified from standing for election for one year. That sanction was considered not to be 'criminal' since its purpose was to compel candidates to respect the maximum limit of election expenditure and was thus "designed to ensure the proper conduct of parliamentary elections". The severity of the sanction did not make it criminal either, because it was limited to a period of one year.[246] Secondly, the penalty to pay an amount equal to the amount by which the candidate had exceeded the ceiling of election expenditure was considered not to be 'criminal', because it was also "designed to ensure the proper conduct of parliamentary elections".[247] As to its severity the Court observed, *inter alia*, that the penalty was not entered into the criminal record and that in case of failure to pay no imprisonment could be imposed. A fine of FRF 25,000 could be imposed with as an alternative a year's imprisonment, but that eventuality was not considered relevant as no proceedings were brought against the applicant in connection with that possibility.[248] In particular the criterion used by the Court that the penalty concerned had as its purpose to compel the person concerned to respect the law and was therefore not 'criminal', is convincing only if meant in a reparatory or corrective sense. The punitive elements of a penalty also have the aim of compelling respect for the law, but in a preventive way in respect of the future. Indeed, in the *Lauko* Case the Court held the sanction imposed to be punitive, because 'it was intended as a punishment to deter reoffending'.[249]

244 Judgment of 21 October 1997, *Pierre-Bloch*, para. 58.

245 Judgment of 21 October 1997, *Pierre-Bloch*, para. 57.

246 *Ibidem*, para. 56.

247 *Ibidem*, para. 58.

248 *Ibidem*, para. 60.

249 Judgment of 2 September 1998, para. 58. See also the judgment of 24 February 1994, *Bendenoun*, para. 47: 'the tax surcharges are intended not as pecuniary compensation for damage but essentially as a punishment to deter reoffending'.

10.3.3.4 Nature and Severity of the Penalty

The third, and in certain cases ultimately decisive criterion is that of the severity of the penalty with which the violator of the norm is threatened.

The element of the 'nature' of the penalty should not be confused with the 'purpose' of the penalty, discussed under the second criterion.[250] If the purpose of the sanction (i.e. deterrence and punishment) does not make the second criterion applicable, the nature and severity of the penalty may still bring the proceedings under Article 6.[251] On the other hand, if on the basis of the second criterion the proceedings must be deemed to clearly be of a criminal character, the nature and severity of the penalty are not relevant anymore. The second and third criterions are alternative, not cumulative.[252] On strict logical grounds one might deduct from the *Bendenoun* judgment that the Court changed its position on this point.[253] However, this does not seem to have been the intention. The case was not referred to the Grand Chamber, which indicates that the Chamber did not think its judgment to be inconsistent with previous case law (see Rule 51 of the then applicable Rules of the Court). And, indeed, in the *Ravnsborg* Case the Court took into account 'the three alternative criteria'.[254]

The Court explained its *Bendenoun* judgment in the *Garyfallou AEBE* Case: the second and the third criterion were not cumulative, although they could be taken into consideration together in case a separate analysis of each criterion did not make it possible to reach a clear conclusion as to the existence of a criminal charge.[255] However, the judgment in the *Morel* Case has again contributed to confusion on the matter. In that case a tax penalty of 10% with interest had been imposed. In accordance with the *Bendenoun* judgment the Court concluded that the applicable legislation was of a general character and that the penalty was intended to prevent future violations. Then again in accordance with its *Bendenoun* judgment, although the first two *Engel* criteria were met, the Court examined the severity of the penalty. Here it reached the conclusion that the penalty was not sufficiently severe to make Article 6 applicable. In our opinion, and in view of, among others, the *Öztürk* judgment, the Court could have followed that reasoning only, if the first two criteria did not allow for a clear conclusion about the existence of a criminal charge, which was not the case here.

The element is considered to be the criminal penalty *par excellence*. Unless it is, by its nature, duration or manner of execution 'not appreciably detrimental', it gives an otherwise disciplinary or administrative procedure a criminal character to such an extent that Article 6 must be held applicable.[257] Thus, in the *Engel* Case, although the Court reached the conclusion that the offences at issue were against norms regulating the functioning of the Dutch armed forces, and therefore they could justly form the object of disciplinary procedures, it held that, since for some of these offences an imprisonment of considerable duration could be imposed, the conditions of Article 6 para. 1 ought to have been observed in the disciplinary procedures in question.[258]

This judgment makes it clear, first of all, that in the opinion of the Court not every restriction of liberty is a deprivation of liberty. This depends on the factual consequences.[259] Moreover, the deprivation of liberty must be 'liable to be imposed as a punishment',[260] which excludes deprivations of liberty such as the detention of mentally ill people or the detention of aliens with a view to deportation or expulsion. The detention to induce the person concerned to fulfil his obligations ('civil detention') would seem to meet the elements of the third criterion, if of a sufficiently long duration.

In the *Kiss* Case, which concerned disciplinary measures against a prisoner, the Commission concluded that Article 6 was not applicable, because it did not consider the possible penalty, loss of the prospect of reduction of the penalty, a deprivation of liberty.[261] However, in the *Campbell and Fell* Case, where the procedure could have resulted in refusal of remission of part of the imprisonment, the Court held that the practice of remission of the penalty creates for the detainee the justifiable expectation that he will be released before the end of the detention period. The procedure might therefore, in the Court's opinion, have such serious consequences for the person concerned as to the duration of his detention that it was to be considered of a criminal

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250 That the Court brings the element of the purpose of the sanction under the second rather than third criterion is clear from the judgment of 22 May 1990, *Weber*, para. 33: 'As article 185 bis potentially affects the whole population, the offence it defines, and to which it attaches a sanction, is a 'criminal' one for the purposes of the second criterion.'

251 Judgment of 8 June 1976, *Engel and Others*, para. 85.

252 Judgment of 21 February 1984, *Öztürk*, para. 54; judgment of 25 August 1987, *Lutz*, para. 54.

253 Judgment of 24 February 1994, *Bendenoun*, para. 47.

254 Judgment of 23 March 1994, para. 30.

255 Judgment of 24 September 1997, para. 33. See also the judgment of 23 July 2002, *Västberga Taxi Aktiebolag and Vulic*, para. 78; judgment of 9 October 2003 (Grand Chamber), *Ezeh and Connors*, para. 86.

256 Decision of 3 June 2003.

Judgment of 8 June 1976, *Engel and Others*, para 82; judgment of 9 October 2003 (Grand Chamber), *Ezeh and Connors*, para. 126. The same would hold good, *a fortiori*, for capital and corporal punishment, if such punishment would still be allowed under Articles 2 and 3, respectively, in conjunction with Protocols Nos 6 and 13. However, such punishment could hardly be considered of a disciplinary character.

Judgment of 8 June 1976, para. 85.

In the *Engel* Case the Commission and the Court differed of opinion as far as the penalty of 'aggravated arrest' was concerned. In the cause of its opinion that no deprivation of liberty was at issue, the Court held it to be decisive that, although under that regime the soldiers, in off-duty hours, had to serve their arrest in a specially designated place which they were not allowed to leave for recreation purposes, they were not 'kept under lock and key'; judgment of 8 June 1976, para. 62.

Ibidem, para. 82. This would seem to indicate that a certain link may exist between the nature and the purpose of the sanction.

Appl. 6224/73, Yearbook XX (1977), p. 156.

character.[262] It reached the same conclusion in the *Ezeh and Connors* Case, also held that the question whether the resulting longer duration of loss of 'appreciably detrimental' should not be determined by reference to the length sentence already being served.[263] In its decision in *X v. Switzerland* the Commission came to the conclusion that isolated confinement of a person who is already as a penalty for late return from leave of absence, is a purely disciplinary which the procedural guarantees of Article 6 para. 1 need not be complied with. Commission here took into consideration that for a person already deprived liberty such a confinement is not of a 'severity' as envisaged in the Court's case

The *Engel* judgment also makes it clear that not every deprivation of liberty Article 6 applicable. Its effects on the person concerned must be of a certain *inter alia*, due to its duration. Thus, although the 'strict arrest' was held a vation,[265] in this case the maximum duration of two days was considered insufficient by the Court for it to be regarded as a criminal penalty,[266] whereas the Court different position with regard to the detention of some months to which the applicants De Wit, Dona and Schul could have been sentenced.[267]

The relevant duration is the maximum penalty that *may* be imposed authority which is called upon to determine the charge; that is to say that penalty actually imposed but the maximum that the person concerned risked committing the offence is decisive in this respect, even if practice shows that maximum is seldom, if ever, imposed.[268] This principle of perspective also applies proceedings where only a financial penalty has been imposed, but failure to pay lead to alternative imprisonment, may come under Article 6. In the case of a company the latter factor may consist of the possibility of detention of its directors in case non-payment.[269] However, the judgments in, on the one hand, the *Ravnsborg* and the *Putz* Case and, on the other hand, the *Demicoli* Case, the *Schmautzer* Case, *T. v. Austria*, make it difficult to draw a clear line and seem to suggest that factors than (the duration of) possible (alternative) detention also play a role, especially

262 Judgment of 28 June 1984, para. 72.
263 Judgment of 9 October 2003 (Grand Chamber), paras 121-124.
264 Appl. 7754/77, D&R 11 (1978), p. 216 (218).
265 Judgment of 8 June 1976, para. 63.
266 *Ibidem*, para. 85.
267 *Ibidem*. See also the judgments of 29 September 1999, *Smith and Ford* and *Moore and Gordon* 19 and 18, respectively; judgment of 6 February 2001, *Wilkinson and Allen*, para. 19; judgment 5 June 2001, *Mills*, para. 20.
268 Judgment of 22 May 1990, *Weber*, para. 34: "that the fine could amount to ..."; judgment of 27 1991, *Demicoli*, para 34; judgment of 9 October 2003 (Grand Chamber), *Ezeh and Connors*
269 Judgment of 24 September 1997, *Caryfallou*, para. 34.

character of the penalty and whether an appeal lies against the decision to a fine into a prison sentence.[270]

the ground of the duration criterion the Commission held in the *Eggs* Case, also concerned a case of military discipline and in which the penalty imposed five days of strict arrest in a civil prison: "Although relatively harsh, this freedom-restricting penalty could not, either by its duration or by the conditions of its enforcement in Basle prison, have caused serious detriment to the applicant. It could not, therefore, in this case be classified as criminal."[271]

In the *McFeeley* Case, which concerned IRA prisoners, the Commission took the position that for the determination of the severity of the penalty the cumulative effect of repeatedly imposed penalties should not be taken into account, because for the applicability of Article 6 each sentence must be considered by itself.[272] This position seems to have been confirmed by the Court in the *Ravnsborg* Case[273] and the *Putz* case.[274] Although the view of the Strasbourg organs is formally correct, it may have the consequence that without any intervention of a court a person may be subjected to restrictions which in combination amount to a much heavier burden for him than the sanction which in a separate case would be of sufficient duration to confer a criminal-law character on the procedure. The question arises whether, if the duration criterion is appropriate at all in cases of deprivation of liberty, one ought not to seek a certain analogy here with the Court's case law concerning Article 5 para. 3 where, for the determination of the reasonableness of the period, successive periods of detention for various charges are also taken into account together,[275] so that the total situation in which the person finds himself is taken as the frame of reference and not the separate measures imposed upon him.

In the *Oliveira* Case and the *Landvreugd* Case the order imposed by the *Burgomaster* to the effect that the applicant was not allowed to enter parts of the city center for fourteen days, was considered to be of a preventive character and not of such a severity to give it a 'criminal' character.[276]

All these elements and conditions as indications of the seriousness of the consequences of the penalty, make the third criterion a rather unpredictable one as long as fixed standards are lacking. It is submitted that it would be desirable and create the required clarity if the third criterion were applied in such a way that in any case where the

Judgment of 23 March 1994, *Ravnsborg*, para. 35; judgment of 22 February 1996, *Putz*, para. 37; judgment of 27 August 1991, *Demicoli*, para. 34; judgment of 23 October 1995, *Schmautzer*, para. 28; judgment of 14 November 2000, *T. v. Austria*, para. 67.
Report of 4 March 1978, para. 79.
Appl. 8317/78, D&R 20 (1980), p. 44 (94).
Judgment of 23 March 1994, para. 35.
Judgment of 22 February 1996, para. 37.
Judgment of 27 June 1968, *Neumeister*, para. 6; judgment of 16 July 1971, *Ringeisen*, para. 101.
Judgments of 6 June 2000, paras 3 and 2, respectively.

penalty may consist of a deprivation of liberty in the sense assigned there[...] law concerning Article 5, the guarantees of Article 6 should be observed [...] dure that may result in such a deprivation.[277]

The fact that Article 6 also applies to legal persons raises the issue wh[...] vation of liberty' of a legal person may also make Article 6 applicable. In [...] the *Kaplan* Case the Commission held that the restrictions imposed by [...] measures on the activities of the company did not concern a 'criminal charge' [...] these restrictions could not be regarded as equivalent to a penalty.[278]

It is not yet very clear to what extent disciplinary penalties other than [...] of liberty may be considered severe enough to make Article 6 applicable. In the [...] Case, which concerned proceedings where the fine could amount to 500 Swed[...] and could be converted into a term of imprisonment in certain circumstances [...] Court held, with a general reference to its third criterion and without further [...] ning, that what was at stake was "sufficiently important to warrant classifying [...] offence as a criminal one under the Convention",[279] leaving it unclear to what [...] the fact that the fine could be converted into imprisonment was decisive. The [...] lack of clarity was left in the *Demicoli* judgment.[280] The more recent *Ravnsborg* [...] *Schmautzer* Case and *Putz* Case seem to make it even more difficult to follow [...] Court's case law on this point. In the *Ravnsborg* Case, the imposed maximum [...] 1000 Swedish crowns did not make the sanction a 'criminal' one. In addition [...] amount, the Court took into account that the fine was not registered in the [...] records and that conversion into a term of imprisonment could take place [...] special procedure, including an oral hearing, was followed.[281] This term of imp[...] ment amounted to at least two weeks. In the subsequent *Schmautzer* Case the C[...] held that driving without wearing a seat-belt, an administrative offence under [...] law, was criminal in nature. It used as an additional argument that the [...] fine (of 200 Austrian schillings) had been accompanied by an order for conv[...] to prison in case of non-payment. The maximum term of imprisonment was [...]

277 Thus judge Cremona in his separate opinion in the *Engel* Case, A.22, pp. 52-53. In its report in the *Albert and Le Compte* Case the Commission indeed observed quite generally with regard to [...] disciplinary measure: "it cannot be treated as being equivalent to a penal sanction, such as [...] deprivation of liberty"; report of 14 December 1981, *Albert and Le Compte*, B.50 (1986), [...] In its decision on Appl. 8209/78, *Sutter v. Switzerland*, para. 2, the Commission also argued [...] generally: "The applicant was charged with an offence under the Military Penal Code, punishable by imprisonment, and therefore he was undoubtedly accused of a criminal offence". Also in a [...] sense: report of 6 May 1981, *Minelli*, B.52 (1986), p. 21.

278 Report of 17 July 1980, para. 170. See, however, the judgment of 24 September 1997, *Garyfallou AEBE*, para. 34.

279 Judgment of 22 May 1990, para. 34.

280 Judgment of 27 August 1991, para. 34.

281 Judgment of 23 March 1994, para. 35.

In the *Putz* Case, however, the Court held with reference to its reasoning in [...] *Ravnsborg* Case that a possible maximum penalty of 20,000 Austrian schillings, [...] could have been converted into a term of imprisonment of ten days, did not come [...] the ambit of Article 6.[283]

The Court went rather far in attributing a decisive character to the severity of a [...] that did not consist in deprivation of liberty in the *Garyfallou AEBE* Case. [...] However, even there the Court took into consideration, in addition to the maximum [...] the fine and the risk of the company's assets being seized, as "more importantly, [...] the purposes of the Court's examination" that, in the event of non-payment of the [...] the directors risked detention of up to one year.[284]

The *Malige* Case concerned the measure of docking of points from driving licenses [...] a conviction for a traffic offence. No possible detention as an alternative was [...] provided. The Court found the measure to be of a severity to make it a criminal [...] sanction. However, in its reasoning the Court seems to have mixed the purpose of the [...] sanction with its severity: "the deduction of points may in time entail invalidation of [...] the licence. It is indisputable that the right to drive a motor vehicle is very useful in [...] everyday life and for carrying on an occupation. The Court, like the Commission, [...] accordingly infers that, although the deduction of points has a preventive character, [...] it also has a punitive and deterrent character and is accordingly similar to a secondary [...] penalty."[285]

The judgment in the *Escoubet* Case suggests that, in the case of two different measures of comparable impact, the connection which a certain measure has with the outcome of criminal proceedings may be decisive for the applicability of Article 6. The Court held with respect to the measure of withdrawal of a driving licence after a road accident: "The immediate withdrawal of a driving licence is a precautionary measure; the fact that it is an emergency measure justifies its being applied immediately and there is nothing to indicate that its purpose is punitive. Withdrawal of a driving licence is distinguishable from disqualification from driving, a measure ordered by the criminal court at the end of criminal proceedings. In such a case, the criminal court assesses and classifies the facts constituting the offence which may give rise to disqualification."[286]

283 Judgment of 23 October 1995, para. 28. See also, of the same date, five other cases against Austria: *Umlauft*, para. 31; *Gradinger*, para. 36; *Pramstaller*, para. 33; *Palaoro*, para. 35, *Pfarrmeier*, para. 32. In these cases the imposed fines varied from 5,000 Austrian schillings (in the event of default of payment 200 hours of imprisonment) in the *Pfarrmeier* Case to 50,000 schillings (fifty days of imprisonment) in the *Pramstaller* Case. The maximum penalties that could have been imposed varied from 300 schillings (24 hours of imprisonment) in the *Pfarrmeier* Case to 100,000 schillings (three months of imprisonment) in the *Pramstaller* Case.

284 Judgment of 22 February 1996, para. 37.

285 Judgment of 24 September 1997, para. 34.

286 Judgment of 23 September 1998, para. 39.

287 Judgment of 28 October 1999, para. 37.

The same kind of reasoning was followed in the *Blokker* Case. The applicant had been stopped by the police driving a car with too high an alcohol level and had been ordered, *inter alia*, to subject to an Educational Measure Alcohol, the costs of which he had to pay himself. The Court found the measure not to be of a severity and character to make it a criminal sanction. In the Court's opinion it could be compared with the procedure of issuing a driving licence, aimed at ensuring that the driver possesses the required skills and knowledge of the relevant traffic rules. The costs and time which the applicant had to spend for the Measure were to be compared with the time and costs spent for obtaining a driving licence. The fact that in case of failure to comply with the Measure the driving licence could be declared invalid did not change the character, since that was to be compared with the consequences of failing to pay for or take an examination for a driving licence, and not with the application for driving as a measure in the context of criminal proceedings.[287]

10.3.4 FISCAL PENALTIES

With respect to 'fiscal penalties' the Court has adopted the position that those fiscal penalties which are not compensatory in nature, but are of a punitive character such as fines, disqualifications and settlements of penalties, give the proceedings a criminal character for the purposes of Article 6.[288]

This was further elaborated upon in the *Bendenoun* Case. Although the surcharges imposed upon the applicant were, in the Government's submission, to be considered 'administrative' and not 'criminal' penalties under the applicable French law, the Court did not consider this to be decisive. On the basis of the other criteria of its *Engel* judgment it reached the conclusion that the criminal connotation was predominant, since the surcharges were "intended not as pecuniary compensation for damages but essentially as a punishment to deter reoffending, they were imposed under a general rule, the purpose of which was both deterrent and punitive, and they were very substantial".[289]

10.3.5 DECRIMINALISATION AND 'PETTY OFFENCES'

For a long time there has been a lack of clarity as to whether Article 6 applies to criminal proceedings, even when offences of a less serious nature are concerned.

287 Judgment of 7 November 2000, para. 1.

288 Judgment of 7 October 1988, *Salabiaku*, para. 24; judgment of 3 May 2001, *J.B. v. Switzerland*, para. 47-49.

289 Judgment of 24 February 1994, para. 47; judgment of 3 May 2001, *J.B. v. Switzerland*, para. 47; judgments of 23 July 2002 *Västberga Taxi Aktiebolag and Others*, paras 78-82.

290 See Appl. 8537/79, *X v. Federal Republic of Germany* (not published).

Article 6 does not distinguish between criminal charges of a serious and those of a less serious nature and the determination of a criminal charge concerning a petty offence may be of great importance for the person in question, all proceedings in which the question of a determination of a criminal charge should fall under the guarantees of Article 6.

This is the view adopted by the Court. In the *Adolf* Case, in which a petty offence was involved, which on that ground was declared non-punishable, the Court held: "non-punishable or unpunished criminal offences do exist and Article 6 of the Convention does not distinguish between them and other criminal offences; it applies whenever a person is 'charged' with any criminal offence."[291] And in the *Öztürk* Case the Court held: "There is in fact nothing to suggest that the criminal offence referred to in the Convention necessarily implies a certain degree of seriousness (...). Furthermore, it would be contrary to the object and purpose of Article 6, which guarantees to everyone charged with a criminal offence' the right to a court and to a fair trial, if the State were allowed to remove from the scope of this Article a whole category of offences merely on the ground of regarding them as petty."[292]

The Court indicated in the *Öztürk* Case that it does not conflict with the Convention to distinguish between different categories of offences, but that such a classification is not decisive for the question whether Article 6 is applicable.[293] In this case an offence was involved which was not qualified under German law as a criminal but as a 'regulatory' offence: an *Ordnungswidrigkeit*. Quite in line with its previous case law concerning Article 6 the Court, here again, was on its guard against erosion of the guarantees aimed at in that article: "if the Contracting States were able at their discretion, by classifying an offence as 'regulatory' instead of criminal, to exclude the operation of the fundamental clauses of Articles 6 and 7, the application of these provisions would be subordinated to their sovereign will. A latitude extending thus far might lead to results incompatible with the object and purpose of the Convention."[294]

Consequently, it remains decisive whether the nature of the offence, and that of the sanction that may be imposed, confer a criminal character on the proceedings, irrespective of whether formally they still have that character under domestic law.

10.3.6 ADMISSION, EXPULSION AND EXTRADITION PROCEDURES

The prohibition to enter a country does not amount to a criminal penalty. The same holds good for the removal or expulsion of aliens from the territory, although such

291 Judgment of 26 March 1982, para. 33.

292 Judgment of 21 February 1984, para. 53.

293 *Ibidem*, para. 49.

294 *Ibidem*, para. 49.

measure may be experienced by the person concerned as a penalty. In [illegible] Case the Court recognised that such measures may be characterized [illegible] different domestic legal orders and that their characterization as a [illegible] decisive for determining whether or not the penalty is criminal in [illegible] respect the Court noted that, in general, the measure is not characterized [illegible] within the member States of the Council of Europe. "Such orders, which in [illegible] may also be made by the administrative authorities, constitute a special [illegible] measure for the purpose of immigration control and do not concern the determination of a criminal charge against the applicant for the purposes of Article 6 para. 1 [illegible] fact that they are imposed in the context of criminal proceedings cannot alter their essentially preventive nature."[295]

The *Maaouia* Case concerned an exclusion order imposed on the applicant by a criminal court in addition to the imprisonment conviction. The Court does not [illegible] to distinguish this order from expulsion orders. However, Judge Costa, in his concurring opinion, defined the order as an 'ancillary penalty' which comes within the criminal law. He nevertheless agreed with the majority that Article 6 was not applicable, but for the reason that the charge forming the basis of the order was not charged by the applicant in the proceedings for the rescission of the order.

Extradition proceedings are also held not to be covered by Article 6, on the ground that a 'determination' involves the full process of the examination of an individual's guilt or innocence, and not the process of determining whether a person can be extradited to another country.[296]

10.3.7 CONCLUDING OBSERVATIONS

As in the case of 'civil rights and obligations', the Court should make further efforts to lift the uncertainty and ambiguity with respect to 'criminal charge' which case-law still leaves, especially concerning the criterion of the nature and severity of the penalty.

As to the nature of the penalty, Article 6 should be held applicable to all [illegible] proceedings which may result in the imposition of a punitive sanction that is by its nature and/or its consequences is so similar to criminal sanctions that there is no justification for excluding judicial review, except by free and unambiguous waiver. This includes in particular deprivation of liberty and the imposition of fines but also concern restrictions of economic or professional freedom of a punitive character (which, moreover, could affect civil rights and obligations). Since the Court has rejected the position that Article 6 makes no distinction between serious and less [illegible]

295 Judgment of 5 October 2000, para. 39.

296 Appl. 10227/82, *H v. Spain*, D&R 37 (1984), p. 93 (94).

[illegible] that it may even apply to proceedings which lead to no penalty at all, the [illegible] penalty cannot be a decisive element for its 'punitive' character. [illegible] the severity of a non-criminal sanction is concerned, there would seem [illegible] convincing reason to distinguish between detentions of short and of longer [illegible] since deprivation of liberty has by definition severe consequences. As to fines, [illegible] to distinguish between small and large amounts. However, the financial [illegible] of the person concerned should then be relevant and, in connection therewith, the possibility that, if the fine is not paid, an alternative detention may be imposed.

10.4 ACCESS TO COURT

10.4.1 INTRODUCTION

Article 6 para. 1 not only contains procedural guarantees in relation to judicial proceedings, but also grants *a right to* judicial proceedings for the cases mentioned there: the right of access to court. This right has not been laid down in express terms in Article 6. The first paragraph only refers to entitlement to a fair and public hearing by a court, leaving it unclear whether this entitlement only exists in cases where judicial proceedings have been provided for under domestic law, or that provision implies – or rather presupposes – a right to such judicial proceedings.

This unclarity was lifted by the Court in its *Golder* judgment. The Court referred to the reference in the Preamble of the Convention to the rule of law "as one of the features of the common spiritual heritage of the member States of the Council of Europe". According to the Court that reference had to be taken into account when interpreting the terms of Article 6 para. 1 according to their context and in the light of the object and purpose of the Convention. In doing so the Court made the observation that "in civil matters one can scarcely conceive of the rule of law without there being a possibility of having access to the courts". The Court further reasoned that Article 6 must be read in the light of the following two legal principles: (1) the principle whereby a civil claim must be capable of being submitted to a judge, as one of the universally recognised fundamental principles of law; and (2) the principle of international law which forbids the denial of justice.[297] "Taking all the preceding considerations together, it follows that the right of access constitutes an element which is inherent in the right stated by Article 6 para. 1. This is not an extensive interpretation adding new obligations on the Contracting States: it is based on the very terms of the first sentence of Article 6 para. 1 read in its context and having regard to the object and purpose of the Convention, a lawmaking treaty (...), and to general principles of

297 Judgment of 21 February 1975, paras 34-35.

law. The Court thus reaches the conclusion (...) that Article 6 para. 1 [illegible] everyone the right to have any claim relating to his civil rights and obligations [illegible] before a court or tribunal."[298]

In conclusion, Article 6 para. 1 also applies to determinations of civil [illegible] obligations, and of criminal charges, for which domestic law does not [illegible] judicial proceedings.[299] It does not, however, imply a guarantee against [illegible] out of a case by the court if there is no sustainable cause of action.[300]

With this extensive, teleological interpretation the Court intended to prevent [illegible] from eroding the guarantees of Article 6 by restricting, or even abolishing, [illegible] proceedings in some areas and omitting its introduction in others.[301] For the [illegible] reason the Court adopted the view that Article 6 also applies to the (non-) [illegible] tation of a judicial decision: "to construe Article 6 as being concerned exclusively [illegible] access to a court and the conduct of proceedings would be likely to lead to [illegible] incompatible with the principle of the rule of law".[302] Where the competent [illegible] refuse or fail to comply, or even delay doing so,[303] the guarantees under [illegible] enjoyed by a litigant during the judicial phase of the proceedings, are rendered [illegible] of purpose. Consequently, the power of the Procurator-General to apply for [illegible] judgment to be quashed infringes the principle of legal certainty and the right [illegible] to court.[304] And the same holds good if private parties refuse to execute a judg[illegible] and the judgment is not enforced against them.[305] Execution of a judgment [illegible] a court must, therefore, be regarded as an integral part of the 'trial' for the [illegible] of Article 6.[306] A stay of execution must itself be subject to effective judicial [illegible]

298 *Ibidem*, para. 36. See, however, the dissenting opinion of judge Fitzmaurice, para. 40.

299 This was the case, *e.g.*, with the Crown appeal procedure in the Netherlands: judgment of [illegible] 1985, *Benthem*, paras 41-44. For a specific administrative review procedure in Sweden [illegible] meet the requirements, see the judgment of 23 September 1982, *Sporrong and Lönnroth*, [illegible] judgment of 28 June 1990, *Mats Jacobsson*, para. 36.

300 Judgment of 10 May 2001, *Z and Others v. the United Kingdom*, para. 97.

301 Judgment of 21 February 1975, *Golder*, para. 35.

302 Judgment of 19 March 1997, *Hornsby*, para. 40; judgment of 28 July 1999, *Immobilier Saf[illegible]* 63; judgment of 14 December 1999, *Antonakopoulos, Vortsela and Antonakopoulos*, [illegible] judgment of 28 March 2000, *Dimitrios Georgiadis*, para. 25; judgment of 20 July 2000, *[illegible]* para. 27; judgment of 3 August 2000, *G.L. v. Italy*, para. 33; judgment of 30 November 2000, *[illegible] Palumbo*, para. 42; judgment of 11 January 2001, *P.M. v. Italy*, paras 48-49; judgment of [illegible] 2001, *Pialopoulos*, para. 68; judgment of 12 April 2001, *Logothetis*, paras 14-16; judgment of [illegible] 2002, *Adamogiannis*, para. 20; judgment of 6 March 2003, *Jasiūnienė*, paras 27-31; judgment of 22 May 2003, *Kyrtatos*, para. 32; judgment of 12 July 2005, *Okyay and Others*, para. 72.

303 Here, the Court judges on the reasonableness of the delay: decision of 11 January 2005, *[illegible]*

304 Judgment of 30 September 1999, *Brumărescu*, para. 62.

305 Judgment of 22 June 2004, *Pini and Others*, paras 174-189.

306 Judgment of 22 May 2003, *Kyrtatos*, para. 30; judgment of 23 October 2003, *Timofeyev*, [illegible]

307 Judgment of 3 August 2000, *G.L. v. Italy*, para. 40; judgment of 30 November 2000, *Edwards*, [illegible] para. 45.

[illegible] judicial means is no justification for non-execution,[308] and even if there are [illegible] reasons for a stay of execution, the authorities must take speedy and ade[illegible] measures to create a situation that allows for execution.[309] Consequently, [illegible] a final judgment to be quashed at the Procurator-General's application [illegible] time-limit, was considered by the Court to violate the principle of legal [illegible] and, consequently, the right to a fair hearing.[310] Access to court is also made [illegible] if the applicant has the possibility of bringing legal proceedings, but is pre[illegible] by operation of the law from pursuing his claim.[311]

[illegible] interpreted in this way paragraph 1 of Article 6 takes over to a considerable extent [illegible] function of Article 13, which guarantees a right to an effective remedy. Article 6 [illegible] goes further. Firstly, because it implies a right of recourse to a *court or tribunal* [illegible] characterized in the substantive sense of the term by its judicial function, that is to [illegible] determining matters within its competence on the basis of rules of law and after [illegible] proceedings conducted in a prescribed manner".[312] And secondly, because it applies [illegible] determinations of civil rights and obligations and not only to those which are [illegible] to one of the rights and freedoms laid down in the Convention. However, [illegible] Article 13 remains important for cases of violation of rights which according to the [illegible] Strasbourg case law are not 'civil rights' in the sense of Article 6 para. 1[313] and, indeed, [illegible] cases of violation of (the reasonable-time requirement of) Article 6 itself.[314]

[illegible] access guarantee of Article 6 covers all the issues related to the dispute concerning [illegible] rights or obligations, including issues concerning the costs involved in having [illegible] rights and obligations determined.[315] Domestic law or case law may not exclude [illegible] issues from appeal to a court, not even if, in an indirect way, they depend on [illegible] which themselves may be subjected to judicial examination.[316] For the same [illegible] the possibility of instituting judicial proceedings for damages does not [illegible] for the right to refer the underlying dispute to a court.[317]

308 Judgment of 29 June 2004, *Piven*, para. 40; judgment of 27 September 2005, *Amat-G*, para. 48.

309 Judgment of 11 January 2001, *Lunari*, para. 45.

310 Judgment of 28 October 1999, *Brumarescu*, para. 62. See the concurring opinion of Judge Bratza joined by Judge Zupancic, where it is said that it was rather the right of access to court that was at stake and had been violated. See also the judgment of 24 July 2003, *Ryabykh*, para. 55.

311 Judgment of 1 March 2002, *Kutic*, paras 25-33.

312 Judgment of 16 December 1992, *Geouffre de la Pradelle*, paras 36-37; judgment of 10 May 2001, *Cyprus v. Turkey*, para. 233; judgment of 22 May 2001, *Baumann*, para. 39.

313 See the Court in its judgment of 21 February 1975, *Golder*, para. 33.

314 Judgment of 26 October 2000, *Kudla*, paras 147-149.

315 Judgment of 23 September 1997, *Robins*, para. 28; judgment of 6 February 2001, *Beer*, paras 12-13.

316 Judgment of 22 June 1989, *Eriksson*, paras 80-81; judgment of 26 May 1994, *Keegan*, para. 59.

317 Judgment of 7 July 1989, *Tre Traktörer AB*, para. 49.

10.4.2 REQUIREMENT OF EFFECTIVENESS

10.4.2.1 General observations

As holds good for all rights laid down in the Convention, the right of access [illegible] must not be theoretical or illusory, but practical and effective.[318] This requires that the person concerned not only has a right to apply to a court for the determination of his rights or obligations, but must also be enabled to present his case properly and effectively,[319] which also requires that the proceedings are organized and conducted in a way that takes into account the intellectual abilities of the parties.[320] It further follows that the right of access includes the right to obtain a 'determination' of the matter by the competent court.[321] It also means that there has to be an independent and impartial court with the required jurisdiction to make this determination, otherwise the right of access is not secured.[322] Thus, in its judgments in *W., B.* and *R. v. the United Kingdom* the Court held that, although the parents could apply for judicial review to institute wardship proceedings, and thereby have certain aspects of the authority's access decisions examined by an English court, during the currency of the parents' resolutions the court's powers were not of sufficient scope to fully satisfy the requirements of Article 6, as they did not extend to the merits of the matter.[323]

In the *Obermeier* Case the Court held that there had been a violation of the right of access to court, since the court in question could only determine whether the administrative authorities had exercised their discretionary power in a way compatible with the object and purpose of the applicable law.[324] And in the *Tinnelly* Case and the *Devlin* Case the Court adopted the position that the fact that, for national security reasons, the court could not determine the merits of the applicant's complaint concerning discrimination, made the remedy ineffective to an extent that was not justified by the security considerations; it took into consideration that in other contexts it had been found possible to modify judicial proceedings in such a way as to safeguard national security concerns and yet accord the individual a substantial degree of procedural justice.[325]

Consequently, there is a close link between the requirement of effective access to court and the requirement of exhaustion of local remedies, laid down in Article

318 Judgment of 9 October 1979, *Airey*, para. 24; judgment of 1 March 2002, *Kutic*, para. 25; judgment of 10 July 2003, *Multiplex*, para. 44.

319 *Ibidem.*

320 Judgment of 15 June 2004, *S.C. v. the United Kingdom*, para. 36.

321 Judgment of 10 July 2003, *Multiplex*, para. 45.

322 Judgment of 23 June 1981, *Le Compte, Van Leuven and De Meyere*, para. 44; judgment of 28 September 1982, *Sporrong and Lönroth*, para. 80; judgment of 28 May 1985, *Ashingdane*, para.

323 Judgments of 8 July 1987, paras 81-82, 81-82 and 86-87, respectively.

324 Judgment of 28 June 1990, paras 69-70.

325 Judgment of 10 July 1998, paras 77-78; judgment of 30 October 2001, para. 31.

[illegible] the Court concludes that the local remedies available were not effective it [illegible] at the same time, in cases to which Article 6 para. 1 applies, that the applicant [illegible] have effective access to a court.[326]

10.4.2.2 Full jurisdiction

For the right of access to be effective it is not sufficient that the court has jurisdiction [illegible] on the merits of the case. The court must have full jurisdiction. This means that the court must have competence to judge both on the facts and on the law as a [illegible] the 'determination'.[327]

However, the Court recognises that especially in procedures of judicial review of administrative decisions it is a common feature that the courts take a somewhat reserved position in reviewing the establishment of the facts by the administration. In judging on whether that approach is sufficient from the perspective of effective access to court, the Court has regard to such aspects as the subject-matter of the decision appealed against, the manner in which and the procedure according to which the decision was arrived at, and the contents of the dispute. Especially if the subject-matter concerns a specialised area of the law and the facts have been established in the course of a quasi-judicial procedure governed by several of the safeguards required by Article 6, a restricted jurisdiction to re-examine the facts will be acceptable.[328] Thus, on the one hand, in the *Schmautzer* Case the Court held that the appeal from the administrative authorities to the administrative court did not satisfy the requirements of Article 6, since the latter did not have full jurisdiction to review and quash the decision of the administrative body both on questions of fact and of law.[329] There the Court took into consideration that the administrative court was sitting in proceedings that were of a criminal nature for the purposes of the Convention. On the other hand, the judgments in the *Bryan* Case, the *Chapman* Case and the *Jane Smith* Case suggest that in more typically administrative proceedings, if a full review of the facts has been performed by the administrative body, a more restricted jurisdiction may suffice.[330]

326 Judgment of 22 May 2001, *Baumann*, para. 48.

327 Judgment of 23 June 1981, *Le Compte, Van Leuven and De Meyere*, para. 51; judgment of 21 September 1993, *Zumtobel*, para. 29; judgment of 26 April 1995, *Fisher*, para. 28; judgment of 23 October 1995, *Umlauft*, para. 37; judgment of 12 June 2003, *Kück*, para. 48 and judgment of 13 July 2004, *Beneficio Cappella Paolini*, paras 28-29. See, however, the judgment of 22 November 1995, *Bryan*, paras 44-47, and the judgment of 4 October 2001, *Potocka and Others*, paras 52-59, where the Court held that a somewhat restricted jurisdiction could also meet the requirements of Article 6 para. 1 in specific circumstances.

328 Judgment of 22 November 1995, *Bryan*, paras 45-47; judgment of 4 October 2001, *Potocka and Others*, para. 53.

329 Judgment of 23 October 1995, para. 36; judgment of 20 June 2000, *Mauer*, para. 16.

330 Judgment of 22 November 1995, *Bryan*, paras 34-47; judgments of 18 January 2001, *Chapman* and *Jane Smith*, paras 124 and 133, respectively.

Effective access to a court for a determination also means that the [illegible] concerning legal issues relevant for the determination rests with the [illegible] quently, the practice of the French *Conseil d'Etat* to ask the minister of [illegible] for a preliminary opinion about the reciprocal character of a treaty [illegible] is then followed by the *Conseil d'Etat* without any possibility for the parties [illegible] that opinion, is in violation of the right of access to court.[331]

10.4.2.3 Legal Aid

In the *Airey* Case it was held that, although the right of access to court does [illegible] an automatic right to free legal aid in civil proceedings, it may imply the [illegible] on the part of the State to provide for the assistance of a lawyer to persons [illegible] need. This is the case when legal aid proves indispensable for an effective [illegible] court, either because legal representation is rendered compulsory or by reason of [illegible] procedural complexity of the case. The State may also, if appropriate and possible, [illegible] for abolition of compulsory representation and simplification of procedure to [illegible] that effective access to the court no longer requires a lawyer's assistance.[332] Moreover, a certain financial threshold for the legal costs to be incurred may be acceptable.

In the *Aerts* Case the Court adopted the opinion that legal aid may not be refused by the competent authority on the sole basis of the latter's assessment of the prospects of success of the review, unless the assessment is made by a court.[333] In the *Gnahoré* Case the Court specified this by stating that the fact that representation by a lawyer was obligatory, had been decisive. It accepted the refusal of legal aid for reasons [illegible] of any serious cassation ground in a case where legal representation was not required and the procedure of selection offered several guarantees.[335] The same position was adopted in the *Essaadi* and *Del Sol* Cases.[336] If an *ex gratia* offer has been made [illegible] is refused by the applicant, the latter cannot complain about lack of effective access.

10.4.2.4 Other Aspects of Effectiveness

In the *De Geouffre de la Pradelle* Case the Court held that if the law regulating [illegible] access to court is so complex and unclear that it creates legal uncertainty, [illegible] court cannot be said to be effective.[338]

331 Judgment of 13 February 2003, *Chevrol*, paras 83-84.
332 Judgment of 9 October 1979, paras 24-26.
333 Judgment of 19 September 2000, *Glaser*, para. 99.
334 Judgment of 30 July 1998, para. 60.
335 Judgment of 19 September 2000, paras 40-41.
336 Judgments of 26 February 2002, paras 33-36 and 23-26, respectively.
337 Judgment of 9 October 1997, *Andronicou and Constantinou*, para. 200.
338 Judgment of 16 December 1992, paras 33-34.

[illegible] *Golder* Case the Court attached to its view that Article 6 implies a right of [illegible] court and that "hindering the effective exercise of a right may amount to a [illegible] of that right, even if the hindrance is of a temporary character", the consequence [illegible] a refusal to permit detainees to correspond with persons providing legal [illegible] counsel is contrary to this provision.[339] Moreover, the detainee has a right [illegible] contact with counsel or a person providing legal aid without the presence of [illegible] authority.[340]

[illegible] access to a court also requires that the applicant has access to the [illegible]. However, if a copy of the judgment is sent to the applicant in a normal way, [illegible] that he lives far away and has not indicated his intention to receive the copy [illegible] certain address is at his own risk.[341]

10.4.3 ACCESS TO COURT IN CRIMINAL CASES

[illegible] criminal cases and for cases with criminal features which make Article 6 applicable, [illegible] right of access to court implies that the person who is 'charged', has the right that [illegible] ultimate determination of that charge is made by a court which fulfils the requirements of Article 6 para. 1. It does not imply that the person 'charged' may demand [illegible] continuation of the prosecution and an ultimate trial by a court, but only that, [illegible] a determination is made, this is done by a court.[342] However, if the charge is [illegible] on the basis of a financial transaction between the accused and the prosecuting authority, without a free choice on the part of the accused, he is actually denied [illegible] to court contrary to Article 6.[343] In other situations, too, a waiver of the right [illegible] access by an accused should not be assumed lightly and may be overruled by an [illegible] important public interest.[344] And if the case is dropped under circumstances in which [illegible] odium of guilt would continue to cling to the person in question, Article 6 has nevertheless been violated; this also in the light of the presumption of innocence of [illegible] second paragraph.[345]

[illegible] Judgment of 21 February 1975, para. 40. See also the judgment of 25 March 1983, *Silver and Others*, para. 82; judgment of 28 June 1984, *Campbell and Fell*, paras 106-107.
[illegible] Judgment of 28 June 1984, *Campbell and Fell*, paras 111-113.
[illegible] Decision of 5 February 2004, *Bogonos*, para. 1.
[illegible] Report of 18 October 1985, *Lutz*, para. 48.
[illegible] Judgment of 27 February 1980, *Deweer*, paras 49-54. In this case the person in question was subject to the threat that his shop would be closed if he did not agree to the transaction.
[illegible] Judgment of 15 June 2004, *Thompsom*, para. 43.
[illegible] Judgment of 25 March 1983, *Minelli*, paras 34-41. See, however, the judgment of 26 March 1996, *Lutcher*, paras 30-32: The applicant had been tried at first instance *in absentia*. He instituted an appeal, but the appeal proceedings ended in the court of appeal declaring the prosecution time-barred. The applicant's request for reimbursement of legal costs was refused on the ground that suspicion still weighed against the applicant. In the opinion of the Court the result was not a violation

The right of access to court does not imply the right for the victim of a criminal offence to institute criminal proceedings himself or to claim prosecution by the prosecutor.[346] However, if the criminal proceedings are the only possibility to vindicate his civil right to damages as a civil party, this may be different.[347]

Against the background of the Court's judgment in the *Airey* Case concerning 'effective' access[348] the Commission's view that the fact that excessive costs are claimed for the accused in taking evidence does not imply a violation of Article 6 has been modified.[349] It did so in an unpublished decision of 1984, where the Commission concluded that in certain circumstances the high costs could raise a problem under Article 6 para. 1.[350]

The decision in the *Golder* judgment, referred to under 10.4.2.4, that the right of access to court implies the right of free correspondence and consultations in private with a lawyer,[351] also holds good for criminal cases, to the extent that this guarantee does not already follow from the third paragraph under (b). Moreover, the right of (effective) access to court may also play a role in assessing whether free legal aid should have been granted under paragraph 3(c)[352] and whether the State should be held responsible for a manifest failure by a legal aid counsel to provide effective representation.[353]

10.4.4 ACCESS TO JUDICIAL APPEAL PROCEEDINGS

The possibility of appeal to a higher court constitutes a domestic remedy that has to be previously exhausted according to Article 35. In fact, an appeal court may remedy the fact that the proceedings in the first instance were not in conformity with Article 6 in all respects.[354]

The right of appeal to a higher court is not laid down, and is also not implied, in Article 6 para. 1.[355] However, if appeal *is* provided for and has been lodged, and the court in that instance is called upon to make a 'determination', Article 6 para. 1 also means that, if domestic law provides for the remedy of appeal, access to that remedy may not be limited in its essence or in a disproportionate way.[357] If its application has a discriminatory effect, this also amounts to a violation of Article 6 in relation to Article 14.[358]

The same holds good for appeal to a constitutional court,[359] unless its review concerns exclusively the constitutionality of the previous judicial decision and not a 'new determination'.[360] It is not easy to understand how and in what situations such a distinction may be made. In fact, the decisive criterion is whether there is a close link between the subject-matter of the proceedings before the constitutional court and that of the proceedings which led to the referral of the matter to the constitutional court.[361]

Article 6 may also be applicable to proceedings concerning a so-called 'special remedy'. Thus the Court held Article 6 applicable to the proceedings concerning a request for revision and retrial.[362] However, the Court took into consideration that the request for revision could also relate to the way the domestic court had applied national law, and in fact replaced the appeal for cassation. As a rule Article 6 does not apply to requests for revision or reopening.[363]

Article 6 does not debar States from laying down regulations governing the access to an appellate or cassation court, provided that their purpose is to ensure the proper administration of justice. Consequently, there is no violation of Article 6 where an applicant is refused access to such a court due to his own procedural mistake. If the rejection of a petition for review or cassation is, however, the result of an omission on the part of the court, the right of access is violated by that rejection.[364]

The decision of the appellate court declaring the appeal inadmissible on the ground that the appellant no longer had a legal interest, does not limit the right of access in

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of Article 6 para. 2, since the applicant had been able to exercise the rights of the defence and a decision on reimbursement did not involve a reassessment of the applicant's guilt.

346 Judgment of 29 October 1991, *Helmers*, para. 29.

347 *A contrario*, see the judgment of 28 October 1998, *Assenov and Others*, paras 111-117.

348 Judgment of 9 October 1979, *Airey*, para. 24.

349 Appl. 1982/63, *X v. Austria* (not published).

350 Appl. 9379/81, *X v. Switzerland* (not published).

351 Judgment of 21 February 1975, para. 40.

352 Judgment of 28 March 1990, *Granger*, paras 44-48.

353 Judgment of 19 December 1989, *Kamasinski*, para. 65.

354 Judgment of 16 December 1992, *Edwards*, paras 38-39; judgment of 26 August 1997, *De Haan*, para. 54.

355 Judgment of 23 July 1968, *Belgian Linguistic Case*, para. 9; judgment of 17 January 1970, *Delcourt*, para. 25; judgments of 11 October 2001, *Hoffmann* and *Sommerfeld*, paras 65 and 64, respectively.

356 Judgment of 17 January 1970, *Delcourt*, para. 25; judgment of 22 February 1984, *Sutter*, paras 26-28; judgment of 29 May 1986, *Deumeland*, para. 77; judgment of 2 March 1987, *Monnell and Morris*, para. 54; judgment of 26 May 1988, *Ekbatani*, para. 26; judgment of 19 December 1989, *Kamasinki*, para. 106; judgment of 28 August 1991, *F.C.B. v. Italy*, paras 29-33; judgment of 22 April 1992, *Vidal*, paras 30-35; judgment of 12 October 1992, *T. v. Italy*, paras 24-25; judgment of 16 December 1992, *Hadjianastassiou*, paras 29-31; judgment of 23 November 1993, *Poitrimol*, paras 28-29; judgment of 25 March 1998, *Belziuk*, para. 37.

357 Judgment of 23 November 1993, *Poitrimol*, paras 35-38; judgments of 29 July 1998, *Omar* and *Guérin*, para. 41-42 and para. 43, respectively; judgment of 14 December 1999, *Khalfaoui*, paras 42-54; judgment of 15 February 2000, *Garcia Manibardo*, paras 44-45.

358 Judgment of 11 October 2001, *Hoffmann*, para. 66.

359 Judgment of 16 September 1996, *Süszmann*, para. 41; judgment of 1 July 1997, *Pammel*, para. 53; judgment of 21 October 1997, *Pierre-Bloch*, para. 48; judgment of 12 June 2001, *Trickovic*, para. 39; judgment of 18 October 2001, *Mianowicz*, para. 45; judgment of 20 February 2003, *Kind*, para. 43.

360 Judgment of 22 October 1984, *Sramek*, para. 35.

361 Judgment of 23 June 1993, *Ruiz-Mateos*, para. 59.

362 Judgment of 29 July 2004, *S.L. Band Club*, paras 40-48. See, however, the judgment of 8 April 2003, *Ruiz*, para. 18.

363 Decision of 9 December 2004, *"Energia" Producers' Cooperation*.

364 Report of the Commission of 21 October 1998, *Bogdanska Dimova*, paras 52-59.

its essence, especially not if he has had the full benefit of a first (and possibly [illegible]) instance that was in conformity with Article 6 para. 1.[365]

If Article 6 is applicable, the specific characteristics of the appeal proceedings in question must be taken into account with regard to the question of whether [illegible] 6 has been complied with.[366] Thus, for instance, it must be examined whether the requirement of publicity of the trial in appeal proceedings[367] and in cassation proceedings[368] has the same fundamental importance as is the case for first instance proceedings. The same even applies to the strict requirement of publicity of the judgment,[369] and the requirement of the presence in person of the person charged. However, the principle of equality of arms has to be respected at every instance.

The Commission has held a few times that Article 6 was not applicable to proceedings in which a decision is taken about leave of appeal, for instance the procedure by which three judges of the *Bundesverfassungsgericht* take a decision about the admission of a *Verfassungsbeschwerde*.[372] It is disputable, however, whether this view is correct in its generality, since in these proceedings a negative decision may also be based on the manifestly ill-founded nature of the appeal, which in fact implies a 'determination'. A more correct view was adopted by the Commission in the *Monnell and Morris* Case, in which Article 6 was deemed to be applicable on account of the close connection of the decision about admission of the appeal with the merits of the appeal proceedings themselves, and because these preliminary proceedings may already lead to an extension of the detention.[374]

In some legal systems the person who has been convicted at first instance but to whom some remedies against this sentence are still available, is no longer regarded as one against whom a charge is pending, but as a convicted person, so that in such a case, strictly speaking, Article 6 would not be applicable. However, in the *Delcourt* Case, in which the Court stressed the desirability of an extensive interpretation

365 Decision of 29 January 2002, *Venema and Others*, para. 3.

366 Judgment of 17 January 1970, *Delcourt*, para. 26; judgment of 25 April 1983, *Pataki*, para. 9; judgment of 8 December 1983, *Pretto and Others*, para. 23; judgment of 28 March 1990, *Grob*, para. 44; judgment of 19 December 1997, *Brualla Gómes de la Torre*, para. 37.

367 Judgment of 26 May 1988, *Ekbatani*, paras 27-28; judgments of 29 October 1991, *Helmers*, and *Fejde*, paras 36, 27 and 31, respectively.

368 Judgment of 22 February 1984, *Sutter*, para. 30.

369 Judgment of 10 July 2001, *Lamanna*, para. 32.

370 Judgment of 21 September 1993, *Kremzow*, para. 58; judgment of 25 March 1998, *Belziuk*, para. 37; judgment of 6 July 2004, *Dondarini*, para. 27.

371 Judgment of 20 February 1996, *Lobo Machado*, para. 31; judgment of 25 March 1998, *Belziuk*, para. 37; judgment of 6 February 2001, *Beer*, paras 17-18.

372 Appl. 9508/81, *X v. Federal Republic of Germany* (not published); Appl. 6916/75, *X, Y and Z*, D&R 6 (1977), p. 101 (107); Appl. 10663/83, *X v. Denmark* (not published).

373 Cf. the report of 15 March 1985, *Adler*, paras 48-50.

374 Report of 11 March 1986, paras 125-127, followed by the Court in its judgment of 2 March 1987, para. 54.

[illegible] it held that the charge has not yet been determined in the sense of Article [illegible] as the verdict of acquittal or conviction has not become final.[375] On the one [illegible] means that, although Article 6 does not grant a right of appeal for criminal [illegible] Protocol No. 7 contains such a right in Article 2 with regard to those States [illegible] have ratified that Protocol), the proceedings in appeal and in cassation do form [illegible] 'determination', and, therefore, must equally satisfy the minimum standard [illegible] in Article 6.[377] The fact that in its examination the court of cassation is [illegible] to the legal grounds on which the lower court has based its sentence, does [illegible] in the way of applicability of Article 6,[378] nor does the circumstance that in [illegible] cases appeal and cassation no longer relate to the validity of the criminal [illegible] as such, but exclusively to the penalty imposed.[379] On the other hand, [illegible] in which a decision is taken on requests for conditional release, revision, [illegible] or mitigation of penalty are not covered by Article 6, since in those cases there [illegible] been a determination which has acquired the force of *res judicata*.[380] However, in the case of a revocation of a conditional release there is the question of [illegible] of a criminal charge' in the sense of Article 6, because such a procedure [illegible] result in a renewed imposition of a penalty.[381] And in the above-mentioned cases [illegible] 6 is of course applicable if the proceedings also involve civil rights or obligations.

10.4.5 NO RIGHT OF ACCESS TO COURT IN EACH STAGE OF THE PROCEDURE

In its judgment in the *Le Compte, Van Leuven and De Meyere* Case the Court held that Article 6 para. 1 does not prescribe the Contracting States "to submit '*contestations*' (disputes) over 'civil rights and obligations' to a procedure conducted at each of its stages before 'tribunals' meeting the Article's various requirements. Demands of flexibility and efficiency, which are fully compatible with the protection of human rights, may justify the prior intervention of administrative or professional bodies and,

375 Judgment of 17 January 1970, paras 25-26.

376 *Ibidem*.

377 *Ibidem*.

378 *Ibidem*, paras 24-25; judgment of 22 February 1984, *Sutter*, para. 30.

379 Appl. 4623/70, *X v. the United Kingdom*, Yearbook XV (1972), p. 376 (394-396).

380 Appl. 1760/63, *X v. Austria*, Yearbook IX (1966), p. 166 (174) and the case law mentioned there. See also Appl. 9813/82, *X v. the United Kingdom* (not published), concerning a change of prison location, and Appl. 10733/84, *Asociación De Aviadores de La República, Mata and Others*, D&R 41 (1985), p. 211 (224): a decision concerning an amnesty after conviction does not determine a criminal charge'.

381 Appl. 4036/69, *X v. the United Kingdom*, Coll. 32 (1970), p. 73 (75). Thus implicitly also the Commission: Appl. 1760/63, *X v. Austria*, Yearbook IX (1966), p. 166 (174).

a fortiori, of judicial bodies which do not satisfy the said requirements [illegible] respect."[383]

In the *Albert and Le Compte* Case the Court elucidated this as follows: "[illegible] cumstances the Convention calls at least for one of the two following [illegible] the jurisdictional organs themselves comply with the requirements of Article [illegible] graph 1, or they do not so comply but are subject to subsequent control by [illegible] body that has full jurisdiction and does provide the guarantees of Article [illegible] graph 1."[384]

This means that, for instance, the situation where objection or appeal [illegible] administrative action lies with an administrative body does not conflict with [illegible] also not if this objection or appeal procedure amounts to a determination of [illegible] and obligations or a criminal charge, provided that there is in the last resort [illegible] review by a court with full jurisdiction. It was precisely that last requirement [illegible] in the opinion of the Court,[385] had not been fulfilled in the Dutch procedure of [illegible] appeal.[386] It also means that in the case of a criminal charge the penalty may be [illegible] mined by an administrative body, *e.g.*, the Revenue,[387] the public prosecutor,[388] or regional authorities,[389] or the Minister of the Interior,[390] provided that from [illegible] decision appeal lies to a court with full jurisdiction. In those cases it has to be [illegible] whether appeal is effectively open in all cases to the appellate body that is [illegible] by the respondent Government as satisfying Article 6 and whether this is [illegible] appeal.[391]

In the *De Cubber* Case the Court qualified its viewpoint that only the last stage of proceedings has to fulfil all the requirements of Article 6. It adopted the position that this holds good only for those cases in which under domestic law the proceedings [illegible] not of a civil or criminal but, *e.g.*, of a disciplinary or administrative character, [illegible] moreover the decision is not in the hands of what within the domestic system are [illegible]

383 Judgment of 23 June 1981, para. 51.

384 Judgment of 10 February 1983, para. 29. See also the reports of 8 July 1986, *Van Lierde* (hitherto unpublished), para. 44 and *Houart*, paras 36-38; judgment of 22 June 1989, *Langborger*, para. 34; judgment of 27 May 2003, *Crisan*, para. 25.

385 The Dutch government had argued that, if one looked 'beyond the appearances', the Administrative Litigation Division of the Council of State in fact acted as a court.

386 Judgment of 23 October 1985, *Benthem*, paras 38-43. See, however, the judgment of 27 November 1991, *Oerlemans*, paras 53-57, where the Court accepted the argument of the Dutch Government that, since the *Benthem* judgment, the procedure of Crown appeal left open access to review by a civil court on the basis of the latter's supplementary jurisdiction.

387 Judgment of 24 February 1994, *Bendenoun*, para. 46.

388 Judgment of 16 December 1992, *Hennings*, para. 26 in conjunction with para. 10.

389 Judgment of 2 September 1998, *Lauko*, para. 64.

390 Judgment of 23 September 1998, *Malige*, para. 45.

391 See in particular the report of 3 July 1985, *Ettl and Others*, paras 76-90. In its judgment of 23 April 1987 in that case, paras 42-43, the Court held that there was no question of violation of Article 6 since Austria had made a reservation in this respect upon ratification of the Convention.

courts of the classic kind'. If, on the contrary, proceedings are concerned [illegible] as to be classified as 'civil' or 'criminal', both in virtue of the Convention and [illegible] domestic law, and if the 'detetermination' is made by a body that is a 'proper [illegible] both the formal and the substantive meaning of the term', Article 6 applies [illegible] body irrespective of whether its decision is open to appeal. The flexible standard [illegible] with regard to disciplinary and administrative proceedings, according to the [illegible] "cannot justify reducing the requirements of Article 6, paragraph 1 in its [illegible] and natural sphere of application. A restrictive interpretation of this kind [illegible] not be consonant with the object and purpose of Article 6, paragraph 1."[392] [illegible] position, which did not receive sufficient attention in legal practice and [illegible], was reconfirmed in the *Findlay* Case with respect to the requirement of [illegible] and impartiality,[393] and in the *Riepan* Case with respect to the requirement of publicity.[394] In proceedings before courts 'of the classic kind' the parties are [illegible] to a first instance tribunal that fully meets the requirements of Article 6 para. 1.

10.4.6 LIMITATIONS OF THE RIGHT OF ACCESS TO COURT

10.4.6.1 *General observations*

The right of access to court laid down in Article 6 is not an absolute right. First of all, it may be waived, provided that this has been done unambiguously.[395] That waiver may concern the right of access as such or certain of its elements, *e.g.*, the publicity of the proceedings[396] – provided that the public interest of publicity does not overrule the interests of the parties in this respect – or the applicant may have limited the judicial review as *dominus litis*.[397] There are also certain implicit restrictions, for instance in the sense that a criminal prosecution may also be terminated without intervention of the court, provided that this does not lead to a formal or factual 'determination'. Moreover, there may be procedural limitations such as time limits,[398] provided that they are not unreasonably short,[399] the requirement of an interest to

392 Judgment of 26 October 1984, para. 32.

393 Judgment of 25 February 1997, *Findlay*, para. 79.

394 Judgment of 14 November 2000, *Riepan*, para. 18.

395 Judgment of 7 May 1974, *Neumeister*, paras 33-36.

396 Judgment of 23 June 1981, *Le Compte, Van Leuven and De Meyere*, para. 59; judgment of 10 February 1983, *Albert and Le Compte*, para. 35; judgment of 12 February 1985, *Colozza*, para. 28.

397 Judgment of 5 May 1995, *Air Canada*, paras 61-62.

398 Including civil limitation periods: judgment of 22 October 1996, *Stubbings and Others*, paras 51-57. A time-limit of one week was not considered by the Court to amount to a denial of access; judgment of 16 December 1992, *Hennings*, paras 26-27. See also the judgment of 11 October 2001, *Rodriguez Valin*, para. 28. See, however, the judgment of 28 October 1998, *Pérez de Rada Cavanilles*, paras 46-49

sue,[400] court fees that are not excessive,[401] security for costs to be incurred by the party,[402] the obligatory assistance of a lawyer[403] and other admissibility and even prior authorization to proceed with the claim.[404] As the Court held *Ashingdane* Case: "Certainly, the right of access to the courts is not absolute be subject to limitations; these are permitted by implication since the right 'by its very nature calls for regulation by the State, regulation which may and in place according to the needs and resources of the community and of als'. (...) In laying down such regulation, the Contracting States enjoy a certain of appreciation. Whilst the final decision as to the observance of the Co requirements rests with the Court, it is no part of the Court's function to for the assessment of the national authorities any other assessment of what the best policy in this field. (...)."[405]

10.4.6.2 Limitation must not impair the essence of access

The limitations prescribed by law or applied by the courts must not restrict or the access in such a way or to such an extent that the very essence of the impaired.[406] They must also be sufficiently clear or the provisions concerned contain safeguards against misunderstanding.[407] In that context, too, the Court scrutiny is based on the principle that the Convention is intended to guarantee rights that are theoretical or illusory but rights that are practical and effective.[408]

and the judgment of 10 July 2001, *Tricard*, paras 30-33, where a time limit of three and two respectively, was found to be too short.

400 Judgment of 28 June 1990, *Obermeier*, para. 68; decision of 29 January 2002, *Venema and Ge* para. 3.

401 Judgment of 19 June 2001, *Kreuz*, paras 58-66.

402 *Ibidem*, para. 54.

403 Judgment of 24 November 1986, *Gillow*, para. 69.

404 Judgment of 28 May 1985, *Ashingdane*, para. 59; judgment of 19 June 2001, *Kreuz*, para. 58.

405 Judgment of 28 May 1985, para. 57. See also *i.a.* the judgment of 14 December 1999, *Khalfaoui*, paras 35-36; judgment of 10 May 2001, *Z and Others v. the United Kingdom*, para. 93; judgment of 25 September 2003, *Pages*, para. 30; judgment of 28 October 2003, *Stone Court Shipping Company S.A.*, para 34; judgment of 21 September 2004, *Zwiazek Nauczycielstwa Polskiego*, para. 28.

406 Judgment of 28 May 1985, *Ashingdane*, para. 57; judgment of 9 December 1994, *Holy Monasteries*, para. 83; judgment of 22 October 1996, *Stubbings and Others*, para. 52; judgment of 16 December 1997, *Canea Catholic Church*, para. 41; judgments of 6 December 2001, *Yagtzilar and Others* and *Tsironis*, paras 23 and 26, respectively; judgment of 28 October 2003, *Stone Court Shipping Company S.A.*, para. 35.

407 Judgment of 4 December 1995, *Bellet*, paras 36-37; judgment of 16 December 1992, *Geouffre de Pradelle*, paras 31-35; judgment of 30 October 1998, *F.E. v. France*, para. 47; judgment of 11 July 2000, *Lagrange*, paras 40-42.

408 Judgment of 9 October 1979, *Airey*, para. 24. See also *i.a.* the judgment of 19 June 2001, *Kreuz*, para. 57; judgment of 12 July 2001, *Prince Hans-Adam II of Liechtenstein*, para. 45.

...the *Canea Catholic Church* Case the Court held that an unforeseeable ...question of the legal personality of the applicant church imposed a limi... on the latter that impaired the very substance of its right to a court.[409]

...category of restrictions is that of immunities. Although immunity does not ...the applicability of Article 6, it may block access to court to a very large extent. ...consideration the Court emphasizes that the States must observe restraint in granting ...immunity. In the first place, the persons and organs who enjoy im... must be narrowly defined. In the *Al-Adsani* Case the Court made it clear that ...without restraint or control, immunity on large groups or categories of ...would be inconsistent with the basic principle underlying Article 6.[410] ...the second place, the acts in respect of which immunity is claimed must directly ...the function for which immunity is granted. Thus, a member of Parliament ...immunity in direct relation to his parliamentary work,[411] but not for acts ...outside that specific context.[412] In the third place, the Court examines ...a fair balance has been struck between the public interests which the grant ...serves and the interest of unrestricted access to court. Thus, in the *Osman* ...Court reached the conclusion that the automatic application of a rule which ...to the grant of immunity to the police, without having regard to competing ...considerations, amounted to an unjustifiable restriction.[413]

...parliamentary immunity as such is considered not to constitute a disproportional ...of access to court, since it reflects a principle that has been generally ...in the member States of the Council of Europe.[414] The same holds good ...restrictions to bring a civil action against judges, since these serve the proper ...ning of the judiciary and are common in domestic and international legal ...[415] Recognition of immunity to States and State organs in accordance with ...national treaty law and customary law, even when the civil action concerns *ius ...*, was deemed proportional by the Court on the ground that the State concerned ...in compliance with the international requirement of good inter-state relations.[416] ...ever, the Court indicates in its case law that in assessing the proportionality of

...judgment of 16 December 1997, para. 41.

...judgment of 21 November 2001, para. 47.

...judgment of 17 December 2002, *A. v. the United Kingdom*, paras 66-89.

...judgment of 19 June 2001, *Kreuz*, para. 56; judgment of 30 January 2003, *Cordova (No. 1)*, paras ...-43; judgment of 3 June 2004, *De Jorio*, paras 29-30. In the *Ciz* Case the issue of immunity of a ...member of Parliament against an accusation of defamation was not even raised; judgment of ...4 October 2003, *Ciz*, para. 61.

...judgment of 28 October 1998, paras 151-153.

...judgment of 17 December 2002, *A. v. the United Kingdom*, paras 78-83.

...judgment of 15 July 2003, *Ernst and Others*, para. 50.

...judgments of 21 November 2001, *Al-Adsani, Fogarty and McElhinney*, paras 54-56, 35-39 and 36-40, ...respectively.

restrictions resulting from immunity, it takes into consideration whether [illegible] extent reasonable alternatives were available to the applicant to have his [illegible] mined.[417]

The availability (at a later moment) of alternatives also played an important [illegible] assessing the proportionality of the restriction in the *Klass* Case. There the Court [illegible] the following observation in respect of the complete exclusion of judicial [illegible] long as it [i.e. the security control] remains validly secret, the decision placing [illegible] under surveillance is thereby incapable of judicial control on the initiative of the [illegible] concerned, within the meaning of Article 6; as a consequence, it of necessity [illegible] the requirements of that Article."[418] However, the Court added the following observation: "According to the information supplied by the Government, [illegible] individual concerned, once he has been notified of such discontinuance [of the [illegible] control], has at his disposal serveral legal remedies against the possible infringement of his rights; these remedies would satisfy the requirements of Article 6."[419]

Access to court may also be unduly restricted or taken away by the court itself or a higher court. In the *Todorescu* Case the courts of first and second instance had examined the applicants' claim for restitution of confiscated property. The court of second instance had decided in favour of the applicants, which decision was upheld by the court of appeal. However, the Supreme Court, at the request of the Procurator-General, annulled the second instance judgment and decided that the courts did not have jurisdiction to review the constitutionality of the decree by which the confiscation was ordered. This judgment amounted to barring access to court for the applicants to have their civil right determined. The Court held that the annulment by the Supreme Court of a final judgment was in contravention of the principle of legal certainty and violated the right of access to court.[420]

These cases indicate that the Court is not inclined to leave a very broad margin of appreciation to the national authorities and courts in restricting access to court. In addition, although the Court has repeatedly stated that "its task is not to substitute itself for the competent domestic authorities in determining the most appropriate means of regulating access to justice, nor to assess the facts which led those courts to adopt one decision rather than another,"[421] it does consider it to be its task to examine errors of fact or law allegedly committed by a national court, if these may have resulted

417 Judgment of 18 February 1999, *Waite and Kennedy*, para. 68; judgment of 15 July 2003, *Ernst and Others*, para. 54; judgment of 3 June 2004, *De Jorio*, para. 32.

418 Judgment of 6 September 1978, para. 75.

419 *Ibidem*.

420 Judgment of 30 September 2003, paras 37-40. The line for this case law was set by the Grand Chamber in its judgment of 30 September 1999, *Brumarescu*, paras 61-62.

421 Judgment of 19 June 2001, *Kreuz*, para. 56.

[illegible] of access to court.[422] This may be the case, for instance, if the applicable time [illegible] for instituting proceedings has not been correctly applied by the court.[423] The [illegible] does very far in examining whether the procedural rule concerned is reasonable in itself and has been applied in a reasonable way, taking into account such [illegible] as the strictness of the rule, whether or not the applicant had the assistance of [illegible] and whether the applicant has taken the necessary precautions.[424] The Court, although recognising the appropriateness of the rule concerned, is even prepared to substitute its own assessment for that of the domestic court and conclude that the rule has been applied in such a strict way that the applicant was in fact deprived of his access to court.[425] In this way the Court approaches the role of a fourth instance.

16.3 Legitimate aim and proportionality

[illegible] limitation is not compatible with Article 6 para. 1 if it does not pursue a legitimate [illegible] and if there is no reasonable relationship of proportionality between the means employed and the aim sought to be achieved.[426]

Examples of a legitimate aim are the good or fair administration of justice,[427] limitations aimed at preventing the courts from becoming overloaded,[428] proper functioning of the judiciary,[429] legal certainty,[430] good international relations which may require the grant of State immunity,[431] and the public interest in regaining sovereignty.[432] Even if the limitation serves a legitimate aim, its application must not be arbitrary[433] nor be disproportional.[434]

422 Judgment of 12 July 2001, *Prince Hans-Adam II of Liechtenstein*, para. 49; decision of 2 December 2004, *Falcon Rivera*, para. 1.

423 Judgment of 26 October 2000, *Leoni*, paras 25-27.

424 Judgment of 11 October 2001, *Rodriguez Valin*, paras 23-28.

425 Judgment of 25 January 2000, *Miragall Escolano and Others*, para. 38 (see also the critical dissenting opinion of judge Pellonpää); judgment of 16 November 2000, *Société Anonyme 'Sotiris and Nikos Koutras Attee'*, paras 21-23; judgment of 11 January 2001, *Platakou*, paras 32-49; judgment of 6 December 2001, *Tsironis*, paras 27-30.

426 Judgment of 28 May 1985, *Ashingdane*, para. 57. For a comprehensive review of these criteria, see the judgment of 21 September 1994, *Fayed*, paras 68-83.

427 Judgment of 13 July 1995, *Tolstoy Miloslavsky*, para. 61; judgment of 14 November 2000, *Annoni di Gussola and Others*, para. 51; judgment of 11 October 2001, *Rodriguez Valin*, para. 22; judgment of 28 October 2003, *Stone Court Shipping Company S.A.*, para. 34.

428 Judgment of 19 December 1997, *Brualla Gómez de la Torre*, para. 36.

429 Judgment of 15 July 2003, *Ernst and Others*, para. 50.

430 Judgment of 10 July 2001, *Tricard*, para. 29; judgment of 11 October 2001, *Rodriguez Valin*, para. 22.

431 Judgments of 21 November 2001, *Al-Adsani*, *Fogarty* and *McElhinney*, paras 54, 34 and 35, respectively.

432 Judgment of 12 July 2001, *Prince Hans-Adam II of Lichtenstein*, para. 69.

433 Judgment of 13 July 1995, *Tolstoy Miloslavsky*, para. 65.

434 Judgment of 21 September 2004, *Zwiazek Nauczycielstwa Polskiego*, para. 38. For an example of clear disproportionality, see the judgment of 31 July 2001, *Mortier*, paras 36-39.

The proportionality of a limitation depends on many aspects. [illegible] recognised that limitations on access to court may be more extensive [illegible] of activities in the public sphere is at stake than in relation to litigation [illegible] duct of persons acting in their private capacity.[435] It has also held that [illegible] reflect generally recognised rules of public international law on State immunity [illegible] in principle be regarded as imposing a disproportionate restriction [illegible] access to court.[436] International standards may also be a yardstick for the [illegible] nality of statutes of limitation.[437]

In the *Al-Adsani* Case the argument put forward by a minority of the [illegible] rules concerning State immunity must yield for provisions of the Convention [illegible] reflect *jus cogens* on the basis of the 'normative hierarchy theory', and, consequently, in such cases do not serve a legitimate aim, was not followed by the majority.[438] However, the Court *did* stress that because immunity rules result in removing [illegible] jurisdiction of the courts of a group of civil claims, the States must exercise [illegible] in claiming immunity, and such claims must be subject to control by the Court.[439]

Although Article 6 does not guarantee a right of appeal, if a limitation rule [illegible] to taking away the right of appeal, that effect may well be disproportionate. This is the case, for instance, if appeal is not open to an accused who has failed to surrender to custody, notwithstanding the existence of a warrant for his arrest,[440] or who has failed to pay a bail instead.[441] It may also be the case if the appeal is only admissible if the appellant has deposited the amount for which he was convicted at first instance and the court has not taken into consideration the actual financial situation of the appellant.[442] However, in the *Eliazer* Case the limitation that no appeal in cassation lies against judgments pronounced following proceedings *in absentia* was not considered to be disproportionate.[443] The reasoning followed by the Court to [illegible]

435 Judgment of 21 September 1994, *Fayed*, para. 75.

436 Judgments of 21 November 2001, *Al-Adsani*, *Fogarty* and *McElhinney*, paras 54, 35-39 and [illegible] respectively; judgment of 12 December 2002, *Kalogeropoulou*, para. 1.

437 Judgment of 22 October 1996, *Stubbings and Others*, para. 53.

438 Dissenting opinion of Judges Rozakis, Caflisch, Wildhaber, Costa, Cabral Barreto and Vajić.

439 Judment of 21 November 2001, *Al-Adsani*, para. 47.

440 Judgment of 23 November 1993, *Poitrimol*, paras 35-38; judgments of 29 July 1998, *Omar*, [illegible] paras 41-42 and para. 43, respectively; judgment of 14 December 1999, *Khalfaoui*, [illegible] judgments of 20 March 2001, *Goedhart* and *Stroek*, paras 31-32 and 29-30, respectively; [illegible] of 18 December 2003, *Skondrianos*, para. 27.

441 Judgment of 1 July 2004, *Walser*, para. 29.

442 Judgment of 15 February 2000, *Garcia Manibardo*, paras 44-45; judgment of 14 November [illegible] *Annoni di Gussola and Others*, paras 49-59; judgment of 31 July 2001, *Mortier*, paras 34-[illegible] judgment of 25 September 2003, *Pages*, paras 32-36, the Court seems to have reversed the [illegible] of proof: the applicant had not shown that his financial situation was such that removal of [illegible] form the role because of lack of execution was disproportional. See, however, the judgments [illegible] same date, *Bayle*, para. 43, where the Court held the financial position of the applicant to [illegible]

443 Judgment of 16 October 2001, para. 33-36.

[illegible] in that case from its *Poitrimol* judgment is not very convincing.[444] It may [illegible] that Eliazer was not obliged to surrender to custody as a precondition, but that [illegible] the fact that the reason for his absence was specifically fear of arrest. The [illegible] also held that the applicant could still open the path to the court of cassation [illegible] at the objection proceedings, but that would seem to lead to a circular [illegible] since the very issue was the legitimacy of the requirement of his appearing. The Court also took into consideration the fact that it is of capital importance that [illegible] should appear at his trial and the legitimate aim to discourage unjustified [illegible] which outweighs the accused's concern to avoid the risk of being arrested [illegible] his trial,[445] but these considerations would seem to have also been valid [illegible] *Poitrimol* Case.

In the *Sejdovic* Case, where the complaint concerned the refusal of a new trial after conviction *in absentia*, the Court held that a person convicted *in absentia* who could [illegible] considered to have unequivocally waived the right to appear, should in all cases [illegible] to obtain a new ruling by a court.[446]

[illegible] short time limit for bringing an action may be proportionate under normal [illegible] circumstances, but disproportionate in cases where there are special complications[447] [illegible] the applicant lives far away.[448] If in setting the amount of security for the payment [illegible] possible fine the court has not taken into account that the person concerned had [illegible] financial resources, this may in practice amount to depriving him of his recourse [illegible] before that court.[449] And if, in connection with the amount of court fees to be paid, [illegible] domestic court relied on the fact that the applicant was a businessman and should [illegible] taken into account the need to secure in advance sufficient funds for court fees, [illegible] without taking into account the link of the proceedings to the business activity and [illegible] actual financial situation of the applicant, the fees may be disproportionate.[450]

If the domestic court applies a certain admissibility requirement in too formalistic [illegible] way, this may amount to a disproportional restriction, especially if the applicant is [illegible] given the opportunity to correct his mistake.[451]

444 See the dissenting opinion of Judges Türmen and Maruste.

445 Judgment of 16 October 2001, *Eliazer*, paras 32.

446 Judgment of 10 November 2004, para. 30.

447 Judgment of 28 October 1998, *Pérez de Rada Cavanilles*, paras 45-49.

448 Judgment of 10 July 2001, *Tricard*, paras 30-34.

449 Judgment of 28 October 1998, *Aït-Mouhoub*, paras 57-61. See also the judgment of 13 July 1995, *Tolstoy Miloslavsky*, paras 59-67: in the circumstances of the case, even the obligation to pay an amount of 124,900 English pounds as security for costs to pursue an appeal did meet the requirement of proportionality.

450 Judgment of 19 June 2001, *Kreuz*, paras 62-63. See also the decision of 9 December 2004, *V.M. v. Bulgaria*.

451 Judgment of 28 October 2003, *Stone Court Shipping Company S.A.*, paras 36-43; judgment of 20 April 2004, *Bulena*, para. 35; judgment of 25 May 2004, *Kadlec and Others*, paras 26-30; judgment of 27 May 2004, *Boulougouras*, paras 26-27.

10.4.6.4 Retrospective legislation with effect on access

In the case of retrospective legislation which has the effect of influencing the determination of a dispute to which a State is a party, respect for the [illegible] requires that any reason adduced to justify such measure be treated with the [illegible] possible degree of circumspection.[452] Even the fact that access to court is restored by subsequent legislation does not put an end to the violation of the right of access to court if that access was stayed for a considerable period of time.[453] Exceptionally, however, a retrospective limitation may be justified if the legislative action is intended to put an end to the efforts of the applicants to frustrate the clear intention of the legislature,[454] or serves other 'compelling grounds of the general interest'.[455] However, mere financial risk on the part of the government cannot warrant such legislative interference.[456] Even though a situation where a significant number of legal suits against large sums of money are lodged against the State may call for some further legislation, the measures taken must be compatible with Article 6 para. 1.[457]

Procedural law amendments which limit the right of appeal may have a retroactive effect for pending cases. According to the Court this is in conformity with a generally recognised principle that, save where expressly provided to the contrary, procedural rules apply immediately to proceedings that are under way. Here the same test applies that such a limitation must serve a legitimate aim, may not impair the very essence of the right of access and must be proportionate; and here again [illegible] criteria apply if the limitation concerns access to a court of appeal or a court of cassation.[458]

10.4.6.5 Limitations with respect to specific groups

The authorities may lay down specific restrictive rules for access to court with regard to, for instance, minors, prisoners or persons of unsound mind,[459] but in those cases

[452] Judgment of 9 December 1994, *Stran Greek Refineries and Stratis Andreadis*, para. 49; judgment of 28 October 1999, *Zielinski and Pradal & Gonzalez and Others*, paras 57-61; judgment of 7 November 2000, *Anagnostopoulos and Others*, paras 20-21; judgment of 28 June 2001, *Agoudimos and Cefalonian Sky Shipping Co.*, para. 30.

[453] Judgment of 1 March 2002, *Kutić*, paras 30-33; judgment of 10 July 2003, *Multiplex*, para. 47; judgment of 9 October 2003, *Acimovic*, para. 42.

[454] Judgment of 23 October 1997, *The National & Provincial Building Society and Others*, para. 112.

[455] Judgments of 28 October 1999, *Zielinsky and Pradel & Gonzalez*, para. 57; judgment of 28 June 2001, *Agoudimos and Cefallonian Sky Shipping Co.*, para. 30; judgment of 10 July 2003, *Multiplex*, para. 51.

[456] Judgments of 28 October 1999, *Zielinsky and Pradel & Gonzalez*, paras 58-59.

[457] Judgment of 10 July 2003, *Multiplex*, para. 52.

[458] Judgment of 19 December 1997, *Brualla Gómes de la Torre*, paras 35-39.

[459] Judgment of 21 February 1975, *Golder*, paras 37-40; judgment of 10 May 2001, *Z and Others v. United Kingdom*, para. 93.

[illegible] 'special status' of the individual concerned cannot warrant the total absence [illegible]

Limitations warranted by security reasons

[illegible] Case a drastic restriction was imposed on the right of access to court. [illegible] was invoked by the applicants because the challenged legislation, which permitted interference with correspondence and wire-tapping for security reasons without knowledge of the person concerned, excluded the normal recourse to a court and replaced it by supervision by a parliamentary committee. Leaving open the question whether this case concerned civil rights or a criminal charge, the Court held that a distinction should be made between two stages. In the first stage the measures are ordered and applied without the person's knowledge and as a consequence are incapable of judicial control on the initiative of the person concerned and, thus, of necessity escape the requirements of Article 6. In the stage in which the measures have been terminated and in which, consequently, there is no longer any ground for secrecy, they come within the ambit of Article 6.[461]

The Court was faced here with the dilemma between, on the one hand, the guarantee of effective access to court and, on the other hand, the necessity for the national authorities to be able to carry out an effective security control for the protection of the democratic values underlying the Convention. The Court observed with respect to the alleged violation of Article 8: "The rule of law implies, *inter alia*, that an interference by the executive authorities with an individual's rights should be subject to effective control which should normally be assured by the judiciary, at least in the last resort, judicial control offering the best guarantees of independence, impartiality and proper procedure."[462] Nevertheless, the Court opted for the security interest, imposing restrictions on the effective access to court via what might be called a systematic interpretation of the first paragraph of Article 6 in connection with the second paragraph of Article 8. But the Court also emphasized – as had been done by the German *Bundesverfassungsgericht* – that the secrecy vis-à-vis the person concerned must not last any longer than is required for the protection of the interest envisaged by the measures, after which period access to court must be fully open again for the person in question.[463] The said parliamentary committee will then have to take particular care that the person in question is indeed informed as soon as the situation permits, since otherwise national judicial review as well as the Strasbourg review might be rendered completely illusory.

[460] Judgment of 24 October 1979, *Winterwerp*, para. 75.

[461] Judgment of 6 September 1978, para. 75.

[462] *Ibidem*, para. 55.

[463] *Ibidem*, para. 75 in conjunction with para. 71.

In the *Leander* Case, which also concerned secret surveillance, the C... had declared the complaint concerning Article 6 incompatible with the C... *ratione materiae* on the basis of its case law that litigation concerning ... dismissal from the civil service falls outside the scope of Article 6,[464] C... the Court could not pronounce on the issue. However, it nevertheless gave ... cation of its point of view by following, with respect to Article 13, its *Klass* ... in holding that "an effective remedy under Article 13 must mean a remedy ... effective as can be, having regard to the restricted scope for recourse inher... system of secret surveillance for the protection of national security."[465]

In its report in *R.V. v. the Netherlands*, which concerned a request of ... information held by the Dutch Military Intelligence Services (MIS), alth... complaint under Article 6 had been lodged but only under Article 8, the C... based its conclusion that the interference was not 'in accordance with the law' ... *alia*, on the fact that the Royal Decree governing the activities of the MIS ... contain any safeguard mechanism, thus leaving it open whether the safeguards ... to in the Government's observations, which were provided for in a broader fram... (investigation by a parliamentary committee and by the National Ombudsman) ... sufficiently effective.[466]

10.5 THE RIGHT TO A FAIR TRIAL

10.5.1 INTRODUCTION

Article 6 requires a 'fair hearing'. The notion of 'hearing' may be equated with ... of 'trial' or 'trial proceedings'. This follows firstly from the French wording of the ... vision: *'toute personne a droit à ce que sa cause*(!) *soit entendue'*. Secondly, the ... be heard within a reasonable time, embodied in the first paragraph, refers ... proceedings as a whole[467] and, thirdly, the second sentence of the first paragraph ... the exclusion of the public and the press from all or part of the *trial*. Thus, the ... of 'hearing' should not be seen as equivalent to 'hearing in person' or 'oral hear... although these two aspects may be elements of the notion of 'fair and public hear... as contained in Article 6.[468]

When is a hearing 'fair'? In the *Kraska* Case the Court took as a starting-point ... the purpose of Article 6 is, *inter alia*, "to place the 'tribunal' under a duty to ...

464 Appl. 9248/81, D&R 34 (1983), p. 78 (83).
465 Judgment of 26 March 1987, para. 84.
466 Report of 3 December 1991, paras 45-46.
467 See *infra* 10.7.2.
468 See *infra* 10.5.4.

... examination of the submissions, arguments and evidence adduced by the ... without prejudice to its assessments of whether they are relevant to its ...

... However, the Court has avoided giving an enumeration of criteria in the abstract. ... each individual case the course of the proceedings has to be assessed to decide ... whether the hearing concerned has been a fair one. What counts is the picture which ... proceedings as a whole present,[470] although certain aspects *per se* may already con... ... with the principle of a fair hearing in such a way that an opinion can be given ... on the fairness of the trial irrespective of the further course of the proceedings, *e.g.*, ... the way in which the evidence is collected during a preliminary hearing. Depending ... on the stage of the proceedings and its special features, the manner of application of ... Article 6 may differ.[471] The publicity requirement, for example, may be less strict as ... as cassation proceedings are concerned.[472]

... certain aspects of a 'fair hearing' are expressly outlined for criminal cases in ... paragraphs 2 and 3 of Article 6. These aspects in principle also apply to civil cases (and ... administrative cases if covered by Article 6). However, from the lack of such an ... enumeration with regard to civil cases, the Court has concluded that the requirements ... inherent in the notion of a 'fair hearing' in civil cases are not necessarily identical to ... the requirements in criminal cases and that there exists a 'greater latitude' for the ... national authorities when dealing with civil cases than when dealing with criminal ... procedures.[473]

Although the enumeration in the third paragraph might create a different im... pression, the content of the term 'fair hearing' in 'criminal' cases is not confined to ... the provisions of paragraph 3 of Article 6.[474] The guarantees implied in the requirement ... of 'fair hearing' in paragraph 1 fully apply to criminal proceedings as well. Conse... quently, the finding that the proceedings are in conformity with the requirements of ... the third paragraph does not make a review for their conformity with the 'fair-hearing' ... principle superfluous in all cases. The proceedings as a whole may, for instance, create ... the picture that the accused has had insufficient opportunity to conduct an optimal ... defence, although none of the explicitly granted minimum guarantees has been ...

... judgment of 19 April 1993, para. 30. See also, *e.g.*, the judgment of 6 December 1988, *Barberà, Messegué and Jabardo*, para. 68.
... See, *e.g.*, the judgment of 6 December 1988, *Barberà, Messegué and Jabardo*, para. 68; judgment of ... November 1989, *Kostovski*, para. 39.
... See, *e.g.*, the judgment of 26 May 1988, *Ekbatani*, para. 27; judgment of 29 October 1991, *Helmers*, ... para. 36.
... See *infra* 10.6.
... judgment of 27 October 1993, *Dombo Beheer B.V.*, paras 32-33; judgment of 9 March 2004, *Pitkänen*, para. 59.
... See, *e.g.*, the judgment of 25 February 1993, *Funke*, para. 44; judgment of 7 December 2000, *Zoon*, ... paras 32-50.

violated. As the Commission observed in the *Adolf* Case: "Article 6(3) [...] plifies the minimum guarantees which must be accorded to the accused in [...] of the 'fair trial' referred to in Article 6(1)."[475] This implies, on the one [...] negative answer to the question of whether the first paragraph has been [...] renders an investigation of an alleged infringement of the third paragraph [...] fluous,[476] while, on the other hand, the investigation of a possible violation [...] trial principle laid down in the first paragraph must not be confined to an exam[...] of the third paragraph. As a result of an extensive and functional interpretation [...] third paragraph in the Strasbourg case law, however, examination for compli[...] with the third and with the first paragraph is in fact likely to more or less [...]

Various aspects of the right of a 'fair trial' are discussed in the following [...] Sometimes it is very difficult to distinguish those aspects, since they are often [...] connected. In criminal cases the Court regularly uses the rather vague notion of [...] of the defence'. This wording seems equal to the concept of a 'fair trial'.[477]

10.5.2 EQUALITY OF ARMS

An important element of the fair hearing requirement is the principle of equality [...] arms. This principle implies, as the Court held in the *Dombo Beheer B.V.* Case [...] regard to civil proceedings "that each party must be afforded a reasonable opportu[...] to present his case – including his evidence – under conditions that do not place [...] at a substantial disadvantage *vis-à-vis* his opponent."[478]

For criminal cases, where the very character of the proceedings involves a fund[...]mental inequality of the parties, this principle of 'equality of arms' is even more [...]tant, and the same applies, though to a lesser degree, to administrative proceedi[...] The principle can play a role in every stage of the proceedings and with regard to [...] issues.

The principle of 'equality of arms', that is closely connected to the right to an [...]sarial proceedings, entails that the parties must have the same access to the [...] and other documents pertaining to the case, at least insofar as these may play a [...] in the formation of the court's opinion.[480] However, the access to the file [...]

475 Report of 8 October 1980, B.43 (1985), p. 29.

476 *Ibidem*. See also the judgment of 27 February 1980, *Deweer*, para. 56.

477 See, *e.g.*, the judgment of 24 February 1994, *Bendenoun*, para. 52.

478 Judgment of 27 October 1993, para. 33. See also the judgment of 22 September 1994, [...] para. 56, and the judgment of 9 December 1994, *Stran Greek Refineries and Stran Andr[...]* para. 46.

479 Judgment of 29 May 1986, *Feldbrugge*, para. 44.

480 Judgment of 15 July 2003, *Ernst and Others*, paras 60-61.

[...] to an accused's lawyer.[481] A particular way in which the information from [...] must be given or be available does not follow from this principle, provided that [...] insurmountable obstacles are created which in fact amount to withholding infor[...] The parties should in principle have the opportunity to make copies of the [...] documents belonging to the case-file. The case law on this point is not clear, [...] the Court in the *Schuler-Zgraggen* Case, when deciding the question of [...] the access of the applicant to the case-file did meet the requirements of Article [...] expressly mentioned the ability of the applicant to make copies.[483] A lack of access [...] case-file may be remedied by an appeal court.[484]

Each party must be given the opportunity to oppose the arguments advanced by [...] other party.[485] In the *Feldbrugge* Case, for example, the Court came to the con[...] that Article 6(1) had been violated, since the applicant had not been given the [...] portunity to comment upon the report of a medical expert, which was of decisive [...] portance for the outcome of the proceedings.[486] In the *Hentrich* Case the Revenue [...] ercised the right of pre-emption because it held the sale price of a piece of land con[...] ed in the contract of sale to be too low. The applicant did not get a real opportunity [...] challenge the decision of the Revenue, because the tribunals, on the one hand, [...] ied her the possibility to prove that the sale price corresponded to the real market [...] e of the land and, on the other hand, allowed the Revenue to give a meaningless [...] otivation for its decision to exercise the right of pre-emption.[487] These facts amoun[...] to a breach of Article 6(1).[488] In the *Yvon* Case the applicant claimed that the [...] ciple of equality of arms had been breached in the proceedings to determine com[...] pensation before the expropriation judge. In the proceedings, the expropriated party [...] as not only faced by the expropriating authority but also by the Government Com[...] missioner, who was competent to present oral observations and file submissions, that [...] ould include a reasoned valuation of the compensation. The Court took into account [...] at the Government Commissioner and the expropriating authority had full access [...] the land charges register, which listed all property transfers, where the expropriated [...] arties had only limited access. Moreover, the Government Commissioner's submis[...] ns seemed to be of particular significance where they tended towards a lower valua-

481 Judgment of 19 December 1989, *Kamasinski*, para. 88; judgment of 21 September 1993, *Kremzow*, para. 52.

482 Appl. 8289/78, *X v. Austria*, D&R 18 (1980), p. 160 (167-168).

483 Judgment of 24 June 1993, paras 50-52.

484 *Ibidem*. Cf. also the judgment of 21 September 1993, *Zumtobel*, para. 35.

485 See, *e.g.*, the judgment of 23 June 1993, *Ruiz-Mateos*, para. 63; judgment of 24 November 1997, *Werner*, para. 65; judgment of 6 February 2001, *Beer*, para.17; judgment of 20 December 2001, *Aschberger*, para. 50.

486 Judgment of 29 May 1986, para. 44. See also, *e.g.*, the judgment of 23 June 1993, *Ruiz Mateos*, paras 61-68; judgment of 19 April 1994, *Van de Hurk*, paras 56-57.

487 The Revenue confined its motivation to stating that the price was too low.

488 Judgment of 22 September 1994, para. 56.

tion than proposed by the expropriating authority. If that was the case, the [illegible] rejected the Government Commissioner's submissions must specifically [illegible] reasons for such a rejection. Therefore, the principle of equality of arms [illegible] breached.[489]

In many cases the Court had to deal with the question whether the participation of the advocate-general or a similar officer in the deliberations of the Court of Cassation or Supreme Court had constituted a violation of the principle of equality of arms. Initially, in the *Delcourt* Case, the Court answered the question in the negative because of the independent position of the *Procureur général* in relation to the Ministry of Justice and the fact that the latter cannot give orders or instructions to the Procureur *général* in concrete cases.[490] The Court changed its view in the *Borgers* Case, where it emphasised the correctness of the *Delcourt* judgment in as far as the independence and impartiality of the Court of Cassation and its *Procureur général* are concerned, but nevertheless concluded that the *Procureur général*, in recommending that an appeal on points of law should be allowed or dismissed, appeared to be an ally or opponent to one of the parties. Therefore, his participation in the deliberations had constituted a violation of the principle of equality of arms.[491] This point of view may be regarded as settled case law in criminal[492] as well as in civil cases.[493]

A different, although connected issue, namely the impossibility for the parties to reply to the advocate-general's submissions, is discussed regularly under the label of the adversarial principle. However, in the *Apeh Üldözötteinek Szövetsége* (Alliance of APEH's persecutees) Case that impossibility amounted to a breach of the equality of arms requirement. The case concerned non-contentious proceedings with a view to registering the applicants' association. The Hungarian Tax Authority (APEH), which learnt about the founding of the association from the press, complained that the name of the association was defamatory for APEH. The public prosecutor's office intervened in the registration proceedings and proposed that the request for registration be rejected because there was no approval of APEH for the use of its name. The Court held that the failure of the national courts to notify the applicants of this intervention and likewise of the submissions of the Attorney General's Office to the Supreme Court had violated the principle of equality of arms.[494]

489 Judgment of 24 April 2003, paras 29-37.
490 Judgment of 17 January 1970, para. 32.
491 Judgment of 30 October 1991, para. 26.
492 See, *e.g.*, the judgment of 22 February 1996, *Bulut*, para. 48.
493 See, *e.g.*, the judgments of 20 February 1996, *Vermeulen*, para. 34 and *Lobo Machado*, para. 31; judgment of 7 June 2001, *Kress*, paras 82-87; judgment of 21 March 2002, *Immeubles Groupe Kosser*, para. 27.
494 Judgment of 5 October 2000, paras 39-44. See also, with regard to criminal proceedings, the judgment of 22 February 1996, *Bulut*, para. 49; judgment of 31 January 2002, *Lanz*, paras 55-60; judgment of 17 January 2002, *Josef Fischer*, paras 16-22.

Another inequality occurred in the *Platakou* Case. The Greek code of civil procedure provided that all statutory time-limits were suspended in favour of the State during the holiday season from the first of July until September the fifteenth. The Court held that this provision placed the applicant, whose claim for indemnification after expropriation proceedings had been belated and, therefore, declared inadmissible, at a substantial disadvantage to the opposing party.[495]

The principle further entails that the parties are afforded the same opportunity to summon witnesses. In the *Dombo Beheer B.V.* Case the central question in the national proceedings was whether a certain agreement had been concluded between the applicant company and its bank. The person who represented the bank at the meeting before the alleged agreement was concluded, was allowed to testify before the court. The person who represented the applicant company, however, could not give evidence, because the national court identified him with the company itself. Thus, there was 'a substantial disadvantage' for the company vis-à-vis the bank in breach of Article 6.[496] In many legal systems, persons closely related to parties in civil proceedings cannot be heard as witnesses under oath. In the *Ankerl* Case the inability of Mrs Ankerl to give evidence under oath on the allegedly agreed lease between her husband and another party did not amount to a breach of Article 6. The Court held that under national law the court could freely assess the results of the "measures taken to obtain evidence". Furthermore, the national court did not attach any particular weight to the testimony of the other party on account of his having given evidence on oath and the court had relied on evidence other than just the statements in issue.[497] Therefore, the giving of evidence on oath by Mrs Ankerl could not have influenced the outcome of the proceedings.

In the *Pisano* Case the applicant claimed that the refusal of the national courts to summon a witness had violated the applicants' right to a fair trial. Italian law legally restricted the possibility to summon witnesses *à décharge* who had not been listed seven days before the first court hearing, to cases in which the judge considered their citation absolutely necessary. The same limitation did not apply to witnesses *à charge*. Due to the fact that the applicant did not contest the legitimacy of the refusal, but its correctness, it appeared to the Court not to be necessary to give its express view about this difference. It limited itself to the assessment that the applicant had the opportunity to present his arguments before the courts and that the reasoning in the judgments made clear why the witness had not been summoned. Therefore, Article 6 had not been violated.[498] In the *Vidal* Case the request of the applicant to hear four persons as

495 Judgment of 11 January 2001, paras 45-48.
496 Judgment of 27 October 1993, paras 33-35.
497 Judgment of 23 October 1996, para. 38.
498 Judgment of 27 July 2000, paras 22-29.

defense witnesses had been rejected implicitly. The complete silence of [illegible] on the request did violate Article 6.[499]

In addition, the parties must have the same possibility to call experts [illegible] should in turn receive the same treatment. In the *Bönisch* Case the Court [illegible] the expert involved in the proceedings and the powers given to him insofar [illegible] ranteed the latter's neutrality, so that he had to be considered as a witness [illegible] secution rather than as an expert. Since the accused had not been given the [illegible] portunity to call such an 'expert', the principle of 'equality of arms' [illegible] violated.[500]

Phases in the examination during which neither of the parties was present [illegible] the principle of 'equality of arms'. In the *Nideröst-Huber* Case the Court [illegible] that the observations of the cantonal court had not been communicated to [illegible] the parties to the dispute before the Federal Court. As the cantonal court could [illegible] be regarded as the opponent of either of the parties, the requirement of equality of arms had not been infringed.[501] However, a problem did arise with regard to the right to adversarial proceedings, which is discussed further in the following section.

10.5.3 THE RIGHT TO ADVERSARIAL PROCEEDINGS; EVIDENCE

The right to adversarial proceedings entails in principle the opportunity for the parties to have knowledge of and comment on all evidence adduced or observations filed, even those coming from an independent member of the national legal service.[502] It may be deduced from the extensive case law that it is immaterial whether a person has chosen not to be legally represented,[503] whether the documents or observations in issue are important for the outcome of the proceedings,[504] whether the omission to communicate the document in issue has caused any prejudice,[505] or whether the observations [illegible]

499 Judgment of 22 April 1992, para. 34.

500 Judgment of 6 May 1985, paras 33-35. The mere fact that an expert is a member of the [illegible] institute which reported the initial suspicions, does not suffice to regard the expert as a 'witness for the prosecution': judgment of 28 August 1991, *Brandstetter*, para. 45.

501 Judgment of 18 February 1997, *Nideröst-Huber*, para. 23. See also the judgment of 7 June [illegible] *Kress*, para. 73; judgment of 21 March 2002, *Immeubles Groupe Kosser*, para. 23.

502 See, *e.g.*, the judgment of 20 February 1996, *Vermeulen*, para. 33; judgment of 25 June [illegible] Orshoven, para. 41; judgments of 27 March 1998, *K.D.B. v. the Netherlands*, and *J.J. v. the Netherlands*, para. 44 and para. 43, respectively; judgment of 18 February 1997, *Nideröst-Huber*, para. 24; judgment of 9 November 2000, *Göç*, paras 31-37; judgment of 7 June 2001, *Kress*, para. 65. See for a rare exception the judgment of 15 June 2004, *Stepinska*, paras 17-19.

503 See, *e.g.*, the judgment of 8 February 2000, *Voisine*, para. 33; judgment of 27 February 2001, *Lanz et* Bosoni, para. 20; judgment of 26 April 2001, *Meftah and Others*, para. 42.

504 See, *e.g.*, the judgment of 19 July 1995, *Kerojärvi*, paras 39-42; judgment of 28 June 2001, *Ziegler v. Switzerland*, para. 37; judgment of 21 February 2002, *Ziegler*, para. 38.

505 Judgment of 3 June 2003, *Walston (No. 1)*, para. 58.

[illegible] any fact or argument which already appeared in the impugned decision. It is [illegible] for the parties to assess whether a submission deserves a reaction.[506] In the *Slimane-Kaïd* Case concerning French cassation proceedings, the Court found a twofold breach of the adversarial requirement: neither the reporting judge's report, which had been disclosed to the advocate-general, nor the submissions of the latter had been communicated to the parties.[507] However, the Court also held that the subsequent changed French practice did meet the requirements of Article 6.[508] This practice implies that the parties and the advocate-general receive only the first section of the reporting judge's report, which includes an analysis of the case, while on the day preceding the hearing the advocate-general informs the parties' lawyers of the gist of his submissions.[509] They are entitled to reply by means of a memorandum on the deliberations and in cases where there is an oral hearing they may reply to the submissions orally. In the *Kress* Case, with regard to a similar practice before the French *Conseil d'Etat*, the Court reached the same conclusion.[510] In the *Immeubles Groupe Kosser* Case the Court held that the fact that the memorandum was received the day after the public hearing, whilst the deliberations of the *Conseil d'État* took place directly after the hearing, did not constitute a breach of the adversarial principle.[511]

Evidence obtained contrary to the norms laid down in the Convention itself, such as statements extracted via torture or other inhuman treatment contrary to Article 3, or evidence collected by means of encroachment on privacy contrary to Article 8, conflicts on that ground alone with the Convention. However, the Convention does not lay down rules on evidence as such. The Court, therefore, does not exclude as a matter of principle and in the abstract that evidence obtained in breach of provisions of domestic law may be admitted. It is a matter for the national courts to assess the obtained evidence and its relevance.[512] Nevertheless, the Court has adopted the view

506 See, *e.g.*, the judgment of 18 February 1997, *Nideröst-Huber*, para. 29, and *mutatis mutandis* the judgment of 22 February 1996, *Bulut*, para. 49; judgment of 31 January 2001, *Lanz*, para. 58; judgment of 15 July 2003, *Fortum Corporation*, para. 42.

507 Judgment of 31 March 1998, paras 105-106; see also, *e.g.*, the judgments of 27 March 1998, *K.D.B. v. the Netherlands*, and *J.J. v. the Netherlands*, para. 44 and para. 43, respectively; the judgment of 11 December 2002, *Berger*, paras 42-43. In the judgment of 27 November 2003, *Slimane-Kaïd (No. 2)*, para. 17, the omission to communicate the draft judgment, which had been communicated to the advocate-general, to the party also amounted to a breach of Article 6.

508 Judgment of 31 March 1998, para. 106; judgment of 2 November 2004, *Fabre*, paras 31-32.

509 In the judgment of 26 July 2002, *Meftah and Others*, paras 49-52, the Court reached the conclusion that a person who has chosen to defend himself without representation should benefit from the same practice. [illegible]

510 Judgment of 7 June 2001, para. 76; see also the judgment of 21 March 2002, *APBP*, paras 23-27; judgment of 10 October 2002, *Theraube*, paras 31-32.

511 Judgment of 21 March 2002, para. 26.

512 See, *e.g.*, the judgment of 12 July 1988, *Schenk*, para. 46; judgment of 26 September 1996, *Miailhe (No. 2)*, para. 43; judgment of 18 March 1997, *Mantovanelli*, para. 34.

that the principle of 'fair hearing' may entail specific requirements [illegible] evidence.

The notion of a fair criminal trial implies that the public interest in the [illegible] crime cannot justify the use of evidence obtained as a result of police [illegible]. From the fact that an accused person is entitled in principle to "take part in the [illegible] and to have his case heard", the Court has deduced that "all the evidence [illegible] principle be produced in the presence of the accused (...) with a view to [illegible] argument."[514] The principle of immediacy is a guarantee of fairness as the [illegible] made by the court about the credibility of a witness may have important [illegible] for an accused. A change in the composition of the trial court after the [illegible] an important witness should, therefore, normally lead to a rehearing of the [illegible] ness.[515] The evidence produced must be sufficiently 'direct' to actually make [illegible] possible during the public hearing.[516] In the *Bricmont* Case the lack of confrontation between the accused persons and a member of the Belgian royal family, as the [illegible] seeking damages, amounted to a breach of paragraphs 1 and 3 of Article 6 [illegible] together.[517]

The case law with regard to the opportunity of the accused to challenge and [illegible] a witness is further discussed in subsection 10.10.5. As will be seen, it may be concluded from this case law that a court decision which is exclusively or almost exclusively based upon indirect evidence of witnesses, has not been taken in accordance with the fair trial requirement, unless in some way or another an adequate possibility to contradiction and counter-evidence has been afforded. The same holds good with respect to other evidence, such as tape recordings; defence against its contents must be allowed and still be practicable. According to the Court Article 6(1) does not [illegible] access to the tape itself. Its relevance for the fairness of the trial depends, [illegible] on the vital character of the contents of the tape for the evidence, while it is relevant whether the transcript of the tape has been verified by an independent person.[518] Although the national authorities have greater latitude when dealing [illegible]

513 Judgment of 9 June 1998, *Teixeira de Castro*, paras 34-36; judgment of 22 July 2003, *Edwards and Lewis*, para. 49 and judgment of 27 October 2004, *Edwards and Lewis* (Grand Chamber).

514 Judgment of 6 December 1988, *Barberà, Messegué and Jabardo*, para. 78. See also the judgment of 20 November 1989, *Kostovski*, para. 41; judgment of 27 September 1990, *Windisch*, para. 2[illegible].

515 Judgment of 9 March 2004, *Pitkänen*, para. 58. The same rule seems to hold good in other [illegible] *ibidem*, para. 62.

516 In the *Kamasinski* Case, the Commission held it to be in violation of Article 6(1) that no [illegible] been given to the applicant or his representative of the contents of the information which the [illegible] acting as rapporteur, had obtained by telephone from the judge of the regional court who presided over the trial; report of 5 May 1988, paras 188-195.

517 Judgment of 7 July 1989, paras 78-85.

518 Judgment of 24 November 1986, *Gillow*, para. 71. See also the judgment of 12 July 1988, [illegible] paras 39-49, and the judgment of 2 July 2002, *S.N. v. Sweden*, paras 46-52, with regard to the interview of a minor who was the perceived victim of a sexual offence.

[illegible] than they have when dealing with criminal cases, as a rule the principle of [illegible] also seems to apply to civil cases.[519]

[illegible] *Mantovanelli* Case the applicants applied to the administrative courts for [illegible] that the hospital where their daughter had received medical treatment, was [illegible] her death. In Strasbourg they complained that the procedure followed in pre- [illegible] the expert medical opinion ordered by the national administrative court had [illegible] in conformity with the adversarial principle. The Court firstly concluded that [illegible] disputed that the 'purely judicial' proceedings had complied with the adver- [illegible] principle. The applicants could have made submissions to the national court [illegible] the content and findings of the report of the expert. Nevertheless, the Court [illegible] whether they had had a real opportunity to comment effectively on it. The [illegible] that had to be answered by the expert concerned a technical field that was [illegible] within the judge's knowledge and, therefore, the report was likely to have a pre- [illegible] influence on the assessments of the facts by that court. The Court further [illegible] into account that no practical difficulties stood in the way of the applicants being [illegible] in the process of producing the rapport, and the fact that the people to be [illegible] by the expert were employed by the hospital, the opposing party in the [illegible] proceedings. Finally the Court concluded that the applicants had not been able to com- [illegible] effectively on the main piece of evidence and therefore Article 6 had been [illegible].[520]

[illegible] prosecuting authorities are obliged 'to disclose to the defence all material evidence [illegible] for or against the accused',[521] but the right to disclosure is not an absolute one. In cri- [illegible] proceedings there may be competing interests, such as national security, the [illegible] to protect witnesses or keep secret police methods of investigation of crime.[522] However, only such restrictions as are strictly necessary, are permissible and any difficulties caused to the defence by a limitation of its right must be sufficiently counterbalanced.[523] In principle it is a matter for the national courts to decide whether [illegible] non-disclosure of evidence was strictly necessary.[524] The Court scrutinizes whether [illegible] decision-making procedure applied in each case complied, as far as possible, with [illegible] adversarial principle and the principle of equality of arms, and incorporated ade- [illegible] safeguards to protect the rights of the accused. In this regard it seems crucial [illegible] the defence is informed, can make submissions and can participate in the

[illegible] judgment of 9 March 2004, *Pitkänen*, paras 59-65.

[illegible] judgment of 18 March 1997, paras 35-36.

[illegible] judgment of 16 December 1992, *Edwards*, para. 36.

[illegible] See, e.g., the judgment of 26 March 1996, *Doorson*, para. 70; judgment of 16 February 2000, *Rowe and Davis*, para. 61.

[illegible] judgment of 23 April 1997, *Van Mechelen and Others*, para. 58; judgment of 16 February 2000, *Rowe and Davis*, para. 61.

[illegible] judgment of 16 February 2000, *Rowe and Davis*, para. 61.

decision-making process. The Court futher attaches great importance to [illegible] the need for disclosure is under constant assessment of the judge, who must [illegible] throughout the trial the fairness or otherwise of the disclosed evidence.[525]

In the *Fitt* Case the Court concluded, by nine votes to eight, that there [illegible] a violation of Article 6. In the national proceedings the prosecution had made an *ex parte* application to the trial judge for an order authorising non-disclosure. The defence were told that the material in question related to sources of information [illegible] were able to make submissions to the judge outlining the defence case. The Court based its conclusion *inter alia* on the facts that the material formed no part of the prosecution case and was never put to the jury and that the need for disclosure was at all times under the assessment of a judge. The minority, however, took the view that the surveillance of the judge could not remedy the unfairness created by the defence absence from the *ex parte* proceedings.[526] In the *Jasper* Case the defence were not told of the category of material that the prosecution sought to withhold, but here too by nine votes to eight, the Court held that Article 6 had not been violated.[527] A different conclusion was reached in the *Rowe* and *Davis* Case. During the applicant's trial in first instance the prosecution withheld, without notifying the judge, certain relevant evidence on grounds of public interest. The absence of any scrutiny of the undisclosed evidence by the trial judge could not be remedied in the appeal proceedings. The Court held that the trial judge was fully versed in all the evidence, saw witnesses give their testimony and would have been in a position to monitor the need of disclosure throughout the trial. The judges in the Court of Appeal however, were dependent on their understanding of the relevance of the undisclosed evidence on the transcripts of the hearing of the court in first instance and on the information of the prosecution counsel. Therefore, the lack of scrutiny of the withheld material deprived the applicants of a fair trial.[528] In the *Edwards* and *Lewis* Case the applicants complained that the undisclosed evidence substantiated their claim that they had been the victims of entrapment. Since they were denied access to the evidence, they were not able to put the case in full before the judge. According to the Court the matters raised by the applicants were of determinative importance to the applicants' trials. The Court reached the conclusion that the trial had not been fair, taking into account that the judge who subsequently rejected the defence submissions on entrapment, had already acquired

525 See, *e.g.*, the judgment of 16 February 2000, *Rowe and Davis*, para. 62-67; judgment of 23 September 2001, *P.G. and J.H. v. the United Kingdom*, paras 69-71.

526 Judgment of 16 February 2000, paras 47-50; see also the judgment of 23 September 2001, *P.G. and J.H. v. the United Kingdom*, paras 70-73.

527 Judgment of 16 February 2000, paras 54-58.

528 Judgment of 16 February 2000, paras 65-69. See also the judgment of 16 December 1992, *Edwards*, paras 35-39; judgment of 19 September 2000, *I.J.L., G.M.R. and A.K.P. v. the United Kingdom*, para. 118; judgment of 19 June 2001, *Atlan*, paras 41-46.

[illegible] evidence which may have been relevant to the issue, and also the lack of adequate safeguards to protect the interests of the accused.[529]

3 THE RIGHT TO BE PRESENT AT THE TRIAL AND THE RIGHT TO AN ORAL HEARING

The concept of a 'fair hearing' in principle entails the right of the parties to be present at the trial. This right is closely connected to the right to defend oneself in person as stipulated in Article 6(3) subparagraph (c),[530] the right to an oral hearing[531] and the right to be able to follow the proceedings.[532] In the *Colozza* Case the Court held that, 'although this is not expressly mentioned in para. 1 of Article 6, the object and the purpose of the Article as a whole show that a person 'charged with a criminal offence' is entitled to take part in the hearing.'[533]

There may be exceptions to this principle as far as trials at second or third instance are concerned. However, an exception is not allowed where an appellate court has to examine a case both as to the facts and the law and make a full assessment of the issue of guilt or innocence. In that case the direct assessment of the evidence given in person by the accused for the purpose of proving that he did not commit the alleged offence, is required.[534] Moreover, in principle an exception is permissible only if the accused was entitled to be present at the hearing at first instance.[535] In addition, the Court takes

529 Judgment of 22 July 2003, paras 50-59, confirmed by the Court in its judgment of 27 October 2004 (Grand Chamber), para. 47. See also the judgment of 9 May 2003, *Papageorgiou*, paras 30-40, where essential items of evidence had not been produced or adequately examined at the trial.

530 See, *e.g.*, the judgment of 25 November 1997, *Zana*, para. 68. See on the right to defend oneself in person *infra* 10.10.4.

531 See the judgment of 23 February 1994, *Fredin (No.2)*, para. 21, and the judgment of 26 April 1995, *Fischer*, para. 44.

532 Judgment of 23 February 1994, *Stanford*, para. 26. In this case the applicant complained about the poor acoustics of the courtroom.

533 Judgment of 12 February 1985, para. 27. See also, *e.g.*, the judgment of 2 March 1987, *Monnell and Morris*, para. 58; judgment of 19 December 1989, *Brozicek*, para. 45.

534 Judgment of 25 July 2000, *Tierce and Others*, para. 95; judgment of 6 July 2004, *Dondarini*, para. 21. However, in the judgment of 19 February 1996, *Botten*, para. 39 and paras 48-53, and the judgment of 15 July 2003, *Sigurthor Arnarsson*, para. 30-38, the Court chose a different approach, where it stated that 'even if the court of appeal has full jurisdiction to examine both points of law and of fact, Article 6 para. 1 does not always require a right to a public hearing or, if a hearing takes place, a right to be present in person'.

535 In many judgments the Court stated that the notion of a 'fair trial' implies that persons charged with a criminal offence, *as a principle*, are entitled to be present at the first instance trial. See, *e.g.*, the judgment of 26 May 1988, *Ekbatani*, para. 25; judgment of 25 March 1998, *Belziuk*, para. 37; judgment of 3 October 2000, *Pobornikoff*, para. 24. However, there does not seem to be much room for an exception to this principle. In cases where the Court accepted the non-entitlement for the accused to be present at the second or third instance trial, the accused had in fact been present at first instance.

into account the nature of the national (appeal) system,[536] the scope of [illegible] the national (appeal) court[537] and the "manner in which the applicant's [illegible] actually presented and protected" before the national (appeal) court.[538] In the proceedings in the *Kremzow* Case the accused risked a serious increase [illegible] Therefore, the Court held that the gravity of what was at stake implied [illegible] applicant ought to have been able to defend himself in person.[539] A different [illegible] was reached in the *Jan Åke Andersson* and *Fejde* Cases. The Court attached [illegible] to the fact that the appeal raised questions which could be decided on the [illegible] case-file, to the minor character of the offence and to the prohibition [illegible] increase of the sentence on appeal.[540]

The rule that the person concerned is entitled to be present at the hearing [illegible] instance seems less strict in civil proceedings.[541] However, in the *Helmers* Case [illegible] cerning the 'civil' right to enjoy a good reputation, the Court developed with [illegible] to the entitlement of the applicant to be present at the appeal hearing the [illegible] of reasoning as in criminal cases.[542] The seriousness of what was at stake – the [illegible] sional career of the applicant – did not justify an encroachment on the right [illegible] present.[543]

In civil proceedings the right to be present at the trial may be waived, [illegible] the waiver must be made in an unequivocal manner.[544] The same holds good [illegible]

536 See, *e.g.*, the judgment of 2 March 1987, *Monnell and Morris*, paras 56-70; judgment of 21 Sept[illegible] 1993, *Kremzow*, para. 63; judgment of 8 February 2000, *Josef Prinz*, paras 36-37.

537 See, *e.g.*, the judgment of 8 February 2000, *Josef Prinz*, para. 43; judgment of 3 October [illegible] *Pobornikoff*, paras 29-33; judgment of 23 January 2003, *Richen and Gaucher*, paras 35-36.

538 See, *e.g.*, the judgment of 29 October 1991, *Helmers*, paras 36-39; judgments of 8 Febru[illegible] *Michael Edward Cooke* and *Josef Prinz*, para. 38 and paras 37 and 44, respectively.

539 Judgment of 21 September 1993, *Kremzow*, para. 67. See also the judgment of 19 Febru[illegible] *Botten*, paras 48-53, concerning a judgment of the Norwegian Supreme Court in which it [illegible] its own assessment of the facts without hearing the applicant and the judgment of 8 Febru[illegible] *Michael Edward Cooke*, para. 42.

540 Judgments of 29 October 1991, *Jan-Åke Andersson*, paras 29-30; *Fejde*, para. 33. The [illegible] the impossibility of increasing the sentence, is not – at least not in itself – decisive. See the [illegible] of 3 October 2000, *Pobornikoff*, para. 31, where the imposed sentence could not be increa[illegible] appeal proceedings, but nevertheless the applicant had the right to be present at the trial. S[illegible] the judgment of 8 February 2000, *Josef Prinz*, paras 40-44, in which the absence of the appe[illegible] the proceedings before the Austrian Supreme Court with regard to the question whe[illegible] conditions for the applicant's placement in an institution for mentally ill offenders were [illegible] not violated Article 6 and the judgment of 3 October 2002, *Kucera*, para. 29.

541 See the judgment of 23 February 1994, *Fredin (No. 2)*, para. 22; judgment of 19 February 19[illegible] *Jacobsson (No. 2)*, para. 49. Compare also the judgment of 1 June 2004, *Valová, Slezák and [illegible]* paras 63-69.

542 In particular, its *Jan Åke Andersson* and *Fejde* judgments of 29 October 1991.

543 Judgment of 29 October 1991, paras 36-39. See also, *e.g.*, the judgment of 23 February 199[illegible] *(No. 2)*, para. 22; judgment of 12 July 2001, *Malhous*, para. 60.

544 See, *e.g.*, the judgment of 24 June 1993, *Schuler-Zgraggen*, para. 58; judgment of 21 Septe[illegible] *Zumtobel*, para. 34.

[illegible] cases.[545] In case the accused has not been notified in person of a hearing, [illegible] due diligence is required in assessing whether the accused has waived his right [illegible] be present.[546] In the *Sejdovic* Case the Italian authorities took the view that the [illegible] had waived his right to appear at his trial because he had become untraceable [illegible] the allegedly committed crime. However, according to the Court there was [illegible] to prove that the applicant knew of the proceedings against him and even [illegible] that he knew, it could not be concluded that he had unequivocally waived [illegible] to appear at his trial. In these circumstances the applicant should have been [illegible] obtain a new ruling by a court on the charges brought against him. Since Italian [illegible] did not guarantee with sufficient certainty that the applicant would have the [illegible] to appear at a new trial to present his defence, Article 6 had been [illegible].[547] Moreover, the Court held that the violation of the Convention was the [illegible] of the shortcoming in the Italian legal system, which meant that every person [illegible] in absentia could be deprived of a retrial.[548] National legislation may [illegible] the unjustified absence of an accused at the trial, although there are [illegible] restrictions. The right of counsel who attends the trial to conduct the [illegible] in absence of the accused[549] may not be impaired[550] and the measures taken [illegible] be disproportionate otherwise.[551] In the *Medenica* Case, where the absence [illegible] accused, who had received the summons to appear, without a valid excuse [illegible] the rehearing of the case, this requirement of proportionality had been met.[552] The foregoing, of course, does not bar judgment by default, provided that the [illegible] in question has been summoned by the prescribed procedure and sufficient [illegible] are attached to this procedure. If it is not certain whether the accused was [illegible] aware that proceedings against him were taking place and that he had been sum[illegible] for a hearing, the Court examines the carefulness of the procedure by means [illegible] which contact was sought with him.[553] In any case, the fact that the accused is [illegible], is no reason for his not being heard, at least not at a first instance trial.[554]

[illegible] judgment of 12 February 1985, *Colozza*, para. 29; judgment of 21 September 1993, *Kremzow*, [illegible] 66 and 68; judgment of 8 February 2000, *Josef Prinz*, para. 33 in conjunction with para. 44; [illegible] judgment of 13 February 2001, *Krombach*, para. 85; judgment of 14 June 2001, *Medenica*, para. 54. [illegible] judgment of 27 May 2004, *Yavuz*, paras 49-51, where the accused had been summoned via counsel.

[illegible] judgment of 10 November 2004, paras 34-42.

[illegible] *Sidoti*, para. 44.

[illegible] See *infra* 10.10.4.3.

[illegible] judgment of 21 January 1999, *Van Geyseghem*, para. 34; judgment of 23 May 2000, *Van Pelt*, para. [illegible]; judgment of 13 February 2001, *Krombach*, para. 89.

[illegible] judgment of 23 November 1993, *Poitrimol*, para. 35.

[illegible] judgment of 14 June 2001, para 57. See also the judgment of 16 October 2001, *Eliazer*, paras 30-36. [illegible] judgment of 12 February 1985, *Colozza*, paras 27-28; judgment of 28 August 1991, *F.C.B. v. Italy*, [illegible] paras 33-36; judgment of 12 October 1992, *T v. Italy*, paras 27-30; judgment of 18 May 2004, *Somogyi*, [illegible] para. 66-76.

[illegible] The judgment of 19 December 1989, *Kamasinski*, paras 104-108, seems to indicate a different point [illegible] of view with regard to appeal proceedings.

[illegible] media

10.5.5 VARIOUS OTHER REQUIREMENTS

While in criminal matters the *nulla poena sine lege*-rule applies, in civil matters, in principle, the legislature is not precluded from adopting new retrospective legislation to regulate rights arising under existing laws. However, the principle of the rule of law and the notion of fair trial embodied in Article 6 preclude any interference by the legislature with the administration of justice designed to influence the determination of the dispute. For this reason the Court held in the *Stran Greek Refineries and Stratis Andreadis* Case that Greece had violated the applicants' rights under Article 6 by enacting a law that influenced the proceedings which were pending before the courts, between the applicants and the Greek State, in a way favourable to the State.[555] Such interference by the legislature can only be justified on overriding grounds of interest.[556] In many cases this requirement had not been met. The case turned out differently in the case of *The National & Provincial Building Society* effect of the British Finance Act 1992 was to deprive building societies of the chance of winning already pending proceedings against the Inland Revenue. According to arguments, the Court took into account the fact that the interference caused by the Act was of a much less drastic nature than the interference in the Stran Greek Refineries Case, in which the applicants and the State had been engaged in litigation for years and the applicants had an enforceable judgment against the State. In the proceedings by the building societies had just been started. Furthermore, the intervention of the legislature had been foreseeable and the Finance Act 1991 concerned the tax sector, an area where recourse to retrospective legislation was not unusual in the United Kingdom. The Court concluded that there had been no violation of Article 6.[558]

The 'fair hearing' requirement implies the right of the accused "not to contribute to incriminating himself".[559] This right is focused on respecting the will of the accused to remain silent. It does not extend to the use in criminal proceedings of material which may be obtained from the accused through the use of compulsory powers but which has existence independent of the will of the suspect.[560] It applies in criminal proceedings in respect of all types of criminal offences without distinction, from the most simple to the most complex.[561] Although the right not to incriminate oneself and to remain silent lie at the heart of the notion of a fair hearing,[562] these are not absolute rights.[563] However, the very essence of these rights may not be violated. Therefore, the threat and imposition of a criminal sanction on the accused, such as accumulating fines[564] or a prison sentence,[565] because he fails to supply information to the authorities investigating the alleged commission of crimes, violates the fair hearing requirement.[566]

In the *Saunders* Case the applicant, who had not been charged (yet), had been obliged under the Companies Act to give evidence to the inspectors appointed by the Secretary of State for Trade and Industry. The function of the inspectors was investigational and not a judicial function. It was their task "to conduct an investigation ... required to discover whether there are facts which may result in others taking action". The applicant, who risked the imposition of a fine or a prison sentence in case of non-compliance with the obligation, did give evidence. In the subsequent criminal proceedings the transcripts of the interviews which he gave to the inspectors were read out in part by the prosecution over a three day period. In these circumstances the Court held that the subsequent use of the statements was intended to incriminate the applicant and constituted an infringement of the right not to incriminate oneself.[567]

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555 Judgment of 9 December 1994, paras 42-50. See also *supra* 10.4.6.4.

556 See, *e.g.*, the judgment of 28 October 1999, *Zielinski and Pradal and Gonzalez* para. 57; of 28 June 2001, *Agoudimos and Cefallonian Sky Shipping Co*, para. 30; judgment of 8 July *Smokovitis*, para. 23.

557 See, *e.g.*, the judgment of 22 October 1997, *Papageorgiou*, paras 37-40, where the Court took the position that the dispute in issue, whose outcome had been influenced by the Act, was not a dispute between the applicants and the State, because the party to the was a private-law, not a public-law, entity. However, the Court rejected this In this respect, see also the judgment of 28 October 1999, *Zielinski and* para. 60; judgment of 28 June 2001, *Agoudimos and Cefallonian Sky Shipping Co* par

558 Judgment of 23 October 1997, paras 105-113. See also the judgment of 27 May *Stanislas, OGEC St. Pie X and Blanche de Castille and Others*, paras 61-72, and the 24 April 2004, *Gorraiz Lizzaragga and Others*, paras 64-73, where the Court held that enactment of the law in issue had indisputably been unsupportive of the applicants' it could not be said to have been intended to circumvent the principle of the rule of

559 Judgment of 25 February 1993, *Funke*, para. 44.

Judgment of 17 December 1996, *Saunders*, para. 69. See also the judgment of 22 June 2000, *Coëme* and others, para. 128.

Judgment of 17 December 1996, *Saunders*, para. 74. See also the judgments of 21 December 2000, *Heaney and McGuinnes* and *Quinn*, para. 57 and para. 58 respectively.

Judgment of 25 February 1993, *Funke*, para. 44.

Judgments of 21 December 2000, *Heaney and McGuines* and *Quinn*, para. 47 and para. 47, respectively. In these judgments the Court has referred to the judgment of 8 February 1996, *John Murray*, para. 47, in which case the Court held explicitly that the right to remain silent is not absolute, and would seem to imply that the right not to incriminate oneself is also not absolute. In its judgment of 17 December 1996, *Saunders*, para. 74, the Court explicitly refused to answer the question whether the right not to incriminate oneself is absolute or not.

Judgment of 25 February 1993, *Funke*, para. 44.

Judgments of 21 December 2000, *Heaney and McGuines* and *Quinn*, paras 47-56 and paras 47-56, respectively.

Although not clear, this might be different if statements made by the accused will not be admissible evidence against him. See the judgments of 21 December 2000, *Heaney and McGuines* and *Quinn*, paras 47-55 and paras 52-54, respectively.

Judgment of 19 December 1996, paras 67-75. See also the judgment 19 September 2000, *I.J.L., G.M.R. and A.F. v. the United Kingdom*, paras 79-83, concerning three persons who were tried together with the applicant in the *Saunders* Case and the judgment of 27 April 2004, *Kansal*, para. 29.

However, the use of compulsory powers to obtain information against the person concerned outside the context of criminal proceedings is in itself not prohibited.[568]

In the *John Murray* Case the Court sought to strike the balance between the right to remain silent and the circumstances in which an adverse inference, prejudicial to the law, may be drawn from silence. In its lengthly reasoning the Court took account of several safeguards designed to respect the rights of the defence. For instance, the fact that the applicant had been warned that adverse inferences might be drawn from his silence, and the fact that the adverse inferences could only be drawn if a failure to express oneself might "as a matter of common sense" lead to the conclusion that the accused had been guilty and if there existed very strong other evidence against the accused.[569] The Court concluded that there had been no violation of Article 6. The facts were different in the *Condron* Case, in which the Court held that the trial judge's omission to direct the jury that it could only draw an adverse inference if satisfied that the applicants' silence at the police interview could only sensibly be attributed to the fact of having no answer or none that would stand up to cross-examination, was incompatible with the exercise of their right to remain silent.[571]

A fair trial may imply the right to have the assistance of a lawyer, including during the phase preceding the trial. This aspect will be discussed under paragraph 3(c) of Article 6. Is it also possible to infer a right to free legal aid from the principle of fair hearing? From paragraph 3(c) it might be concluded *a contrario* that this is not the case. In fact, paragraph 3(c) only guarantees this right for criminal proceedings, and even there only 'when the interests of justice so require'. However, if one party does have the means to secure legal aid and the other does not, there is no 'equality of arms' if the latter does not obtain the assistance of a lawyer as well.[573] Above, in section 10.3.1, the view of the Court was mentioned that the mere right of 'access to court' which is implied in Article 6(1), entails the obligation for the Contracting States to make legal aid available, or at least financially possible, if the person in question would otherwise be faced with an insuperable barrier to defend himself adequately. In that context the Court will make an independent examination of the complexity of the case and other

568 Decision of 10 September 2002, *Allen*, 76574/01, with regard to the requirement to make a declaration of assets to the tax authorities; judgment of 8 July 2004, *Weh*, paras 47-57, where the Court by six votes to three held that the obligation of the registered car owner to provide information about who had driven a motor vehicle identified by the number plate at a certain time, did not violate Article 6. It appeared crucial that the link between the applicant's obligation to disclose the driver of his car and possible criminal proceedings for speeding against him was remote and hypothetical.

569 Judgment of 8 February 1996, paras 44-58. In the judgment of 20 March 2001, *Telfner*, para. 15, the drawing of adverse inferences was not allowed under Article 6(2) because there was no very strong evidence.

570 The same conclusion was reached in the judgment of 6 June 2000, *Averill*, paras 38-52.

571 Judgment of 2 May 2000, paras 55-62.

572 See, *e.g.*, Appl. 6202/73, *X and Y v. the Netherlands*, D&R 1 (1975), p. 66 (71).

573 See, *mutatis mutandis*, the judgment of 4 March 2003, *A.B. v. Slovakia*, para. 61.

factors such as the applicable rules of evidence and the emotional involvement of the applicant in the outcome of the proceedings.[574] Other expenses, too, for instance for a translator or an interpreter, may be so onerous that the principle of 'fair hearing' is at stake.[575]

The same applies to the question of whether under Article 6(1) the parties are entitled to have witnesses and experts summoned and examined. From the fact that Article 6(3)(d) contains explicit provisions about this for criminal cases, it might be inferred *a contrario* that such a right does not hold good for the parties in civil proceedings. However, here again, the case law recognises the possibility that the court's refusal to have a particular witness summoned by a party to a dispute, or to hear him, constitutes an encroachment on the right to a fair hearing.[576] That right does not require, however, that a national court appoints, at the request of the defence, another expert when the opinion of the court-appointed expert supports the prosecution [illegible]

Usually an additional element of 'fair hearing' is the requirement that the judicial decision must state the reasons on which it is based. The extent to which the requirement applies depends on 'the nature of the decision' and can only be assessed in the circumstances of each individual case.[578] According to the Court it is, moreover, necessary to take into account the differences existing in the Contracting States with regard to, *inter alia* the presentation and drafting of judgments.[579] It is clear that the court is not obliged to give a detailed answer to every argument.[580] When a motivation is lacking altogether, the remedies provided for are likely to become illusory.[581] The detail with which the statement of the reasons must go is, therefore, determined by what an effective remedy against the decision requires in each particular case.[582]

From this point of departure the practice existing in some countries to provide certain judgments in criminal cases with a motivation only after an appeal has been lodged, seems questionable. However, in the *Zoon* Case the Court held that it cannot

Appl. 9353/81, *Webb v. the United Kingdom*, D&R 33 (1983), p. 133 (138-141).

Report of 18 May 1977, *Luedicke, Belkacem and Koç*, B.27 (1982), p. 26.

Judgment of 15 July 2003, *Sigurthor Arnarsson*, paras 31-38.

Judgment of 28 August 1991, *Brandstetter*, para. 46. The judgment of 2 October 2001, *G.B. v. France*, paras 64-70, constitutes an exception, where the court-appointed expert at the trial, to the detriment of the accused, changed his point of view radically after a brief examination of a prior psychiatric report written by another expert.

See, e.g., the judgments of 9 December 1994, *Ruiz Torija*, and *Hiro Balani*, para. 29 and para. 27, respectively; judgment of 19 February 1998, *Higgins and Others*, para. 42.

Judgment of 21 May 2002, *Jokela*, para. 72.

See, e.g., the judgment of 19 April 1994, *Van de Hurk*, para. 61; judgments of 9 December 1994, *Ruiz Torija*, and *Hiro Balani*, para. 29 and para. 27, respectively; judgment of 21 January 1999, *Garcia Ruiz*, para. 26.

See the judgment of 16 December 1992, *Hadjianastassiou*, paras 34-36 and *infra* 10.10.3.

See the judgment of 1 July 2003, *Suominen*, paras 37-38.

be said that the applicant's rights were unduly affected by the absence
judgment or by the absence from the judgment in abridged form
enumeration of the items of evidence relied on to ground his convic
a judgment only refers to the wording of the law without any detailed
6 may be violated.[584] In dismissing an appeal an appellate court may
simply endorse the reasons of the lower court's decision. However,
Article 6 requires that the court "did in fact address the essential issues
submitted to its jurisdiction and did not merely endorse without
findings reached by the lower court".[585] In the *Hirvisaari* Case the endorse
national court of the reasoning of the Pension Board, which had found the
partly capable of working, violated Article 6. Since the applicant's main
his appeal had been the inadequacy of the Pension Board's reasoning, the
have given proper reasons of its own.[586]

A remarkable situation occurred in the *Schuler-Zgraggen* Case. The nati
based its decision with regard to the alleged entitlement of the female appl
invalidity pension on the mere assumption that "women give up work when
birth to a child". This reasoning amounted to a breach of Article 6 in conjunc
Article 14.[587] In the *Van Kück* Case the applicant claimed that the Ger
proceedings concerning her claims for reimbursement of medical expenses
of gender re-assignment measures had been unfair. In the special circumst
the case the Court held that the interpretation by the national court of
"medical necessity" and evaluation of evidence in this respect had not been
and that the approach in examining the question of whether the applicant
berately caused her transsexuality, had not been appropriate. Therefore, the
ings in question did not satisfy the requirements of a fair hearing.[588]

10.6 PUBLIC TRIAL AND THE PUBLIC PRONOUNCEMENT OF THE JUDGMENT

Article 6(1) requires that the hearing shall be public. In the *Pretto* Case the Court set forth the rationale of this requirement as follows: "The public character of proceedings

583 Judgment of 7 December 2000, paras 32-50 and *infra* 10.10.3.

584 Judgment of 29 May 1997, *Georgiadis*, paras 41-43; judgment of 15 January 2004, *Saloa*, paras 50-52; judgment of 19 February 2004, *Yiarenios*, paras 21-23.

585 Judgment of 19 December 1997, *Helle*, para. 60; judgment of 27 September 2001, *P*, para. 30.

586 Judgment of 27 September 2001, paras 31-32. See also the judgment of 7 July 2004, *H.A.L.*, paras 49-52.

587 Judgment of 24 June 1993, paras 66-67.

588 Judgment of 12 June 2003, paras 46-64.

judicial bodies referred to in Article 6 para. 1 (...) protects litigants against administration of justice in secret with no public scrutiny; it is also one of the means whereby confidence in the courts, superior and inferior, can be maintained. By rendering the administration of justice visible, publicity contributes to the achievement of the aim of Article 6 para. 1 (...) namely a fair trial, the guarantee of which is one of the fundamental principles of any democratic society, within the meaning of the Convention."[589]

In addition to the interest which the parties to the dispute may have in a public hearing, it serves a public interest as well: verifiability of and information about, and public confidence in the administration of justice. Consequently, the question arises whether the parties can waive their right to a public hearing to an unlimited degree or not. On the contrary, the court may only comply with a request to that effect if one of the grounds explicitly mentioned for this in Article 6 presents itself. In *Le Compte, Van Leuven and De Meyere*[590] and in *H v. Belgium*[591] the Court seemed to have taken the same position. This was confirmed by the *Håkansson and Sturesson* judgment, where the Court held that "neither the letter, nor the spirit" of the provision oppose an express or tacit waiver of the right to a public hearing, although the waiver must be made in an unequivocal manner and "must not run counter to any important public interest".[592] In this case the Court concluded that a tacit waiver had occurred. The proceedings concerning the lawfulness of an auction sale usually took place *in camera*. For this reason, in the Court's view, the omission of the applicants to ask the competent authorities for a public hearing could be regarded as a waiver of their entitlement to have their case heard in public.[593] The Court has elucidated its point of view in its subsequent case law. A failure to request a hearing is not to be considered a waiver, where the law explicitly excludes a hearing,[594] or where, though the law does not contain a special rule, the court's practice is never to hold one.[595] In case the court's practice is not to hold one of their own motion, but where the law explicitly provides for the possibility to request one,[596] or where it is at least the practice to hold one upon a party's request,[597] a failure to request a hearing is considered an unequivocal waiver.

589 Judgment of 8 December 1983, para. 21. See also, *e.g.*, the judgment of 22 February 1984, *Axen*, para. 25; judgment of 26 September 1995, *Diennet*, para. 33; judgment of 24 November 1997, *Werner*, para. 45; judgment of 12 July 2001, *Malhous*, para. 55.

590 Judgment of 23 June 1981, para. 59.

591 Judgment of 30 November 1987, para. 54.

592 Judgment of 21 February 1990, para. 66.

593 *Ibidem.*

594 Judgment of 26 September 1995, *Diennet*, para. 34; judgment of 21 march 2002, *A.T. v. Austria*, para. 37.

595 Judgment of 24 November 1997, *Werner*, para. 48; judgment of 20 May 1998, *Gautrin*, paras 38 and 42; judgment of 21 March 2000, *Rushiti*, para. 22.

596 Judgment of 21 September 1993, *Zumtobel*, para. 34; judgment of 24 June 1993, *Schuler-Zgraggen*, para. 58; judgment of 1 July 1997, *Rolf Gustafson*, para. 47.

597 Judgment of 28 May 1997, *Pauger*, paras 60-61.

With a view to the public interest which is served by publicity, in [illegible] criminal cases, it will, however, have to be assumed that there is merely a [illegible] of waiving the right to a public hearing, not a right to a hearing *in camera*. [illegible] if a request for a hearing *in camera* is made, the court may refuse this on the [illegible] of the weighing of the interest of the party concerned against the public interest [illegible] court then will, of course, also have to take into account the protection of the [illegible] life of the party concerned, as one of the explicitly mentioned grounds of [illegible] and also the danger which publicity may constitute for the presumption of [illegible] protected in the second paragraph.

The text of Article 6 does not contain any qualification of the right to a [illegible] hearing as far as the phase of the proceedings is concerned. However, the Court [illegible] a distinction between a trial before a court at first instance and a trial before an appeal court, also with respect to the public interests involved: "The Court fully [illegible] the value attaching to the publicity of the proceedings such as those indicated by the Commission (...). However, even where a court of appeal has jurisdiction to review the case both as to facts and as to law, the Court cannot find that Article 6 [illegible] requires a right to a public hearing irrespective of the nature of the issues to be decided. The publicity requirement is certainly one of the means whereby confidence in the courts is maintained. However, there are other considerations, including the right to a trial within a reasonable time and the related need for expeditious handling of the court's case-load, which must be taken into account in determining the necessity of a public hearing at stages in the proceedings subsequent to the trial at first instance. Provided a public hearing has been held at first instance, the absence of such a hearing before a second or third instance may accordingly be justified by the special features of the proceedings at issue. Thus, leave to appeal proceedings and proceedings involving only questions of law, as opposed to questions of fact, may comply with the requirements of Article 6, although the appellant was not given an opportunity of being heard in person by the appeal or cassation court."[599]

In the *Tierce and Others* Case the Court added: "However, where an appellate court has to examine a case to the facts and the law and make a full assessment of the issue of guilt or innocence, it cannot determine the issue without the direct assessment of the evidence given in person by the accused for the purpose of proving that he did not commit the act allegedly constituting a criminal offence. The principle that hearings should be held in public entails the right for the accused to give evidence in person to an appellate court."[600]

598 Judgment of 21 February 1990, *Håkansson and Sturesson*, para. 67.

599 Judgments of 29 October 1991, *Helmers*, para. 36; *Jan-Åke Andersson*, para. 27 and *Fejde*, para. [illegible]. See further, *e.g.*, the judgment of 22 February 1996, *Bulut*, para. 41-42.

600 Judgment of 25 July 2000, para. 95.

[illegible] as far as the publicity requirement is concerned, these quotations do *per se* not [illegible] any difficulty. However, the last clause in the Swedish cases, "although the appellant was not given an opportunity of being heard in person by the appeal or cassation court", and the statement in the *Tierce and Others* Case that the right to a public hearing entails the right to give evidence in person to an appellate court, may cause confusion. The question whether a person should be heard in person has strictly speaking nothing to do with the publicity requirement. In fact, the Court confuses the right to a public hearing – that means a public *trial* – with the right to be heard in person. In fact, in these cases the crucial question did not concern the publicity requirement but appeared to be whether the court of appeal could properly decide to examine the case without the applicants having a right to present their arguments at a hearing.[601]

The form of publicity to be given to the judgment under domestic law must be assessed in the light of the special features of the proceedings.[602] For pragmatic reasons the opinion would seem to be justified that the requirement of a public judgment has been complied with if during a public session the reading is confined to that of the operational part of the judgment,[603] and that even this may be omitted if the operational part contains no more than the determination that the appeal has been rejected or the case is referred back.[604] In that case the parties must receive a copy of the text of the judgment as soon as possible, while the publication of those judgments in which legal questions of a more public interest are at issue, is also of special importance for the accessibility.[605] In case proceedings have been conducted in chambers in order to protect the privacy of children and parties, the pronouncement of the judgment in public may to a large extent frustrate these aims. Despite the fact that Article 6 permits restrictions exclusively with respect to the public nature of the proceedings, not with respect to the public nature of the judgment, the Court has held that in such a case it suffices that anyone who can establish an interest may consult or obtain a copy of the judgment, as long as cases of special interest are routinely published, to enable the

601 Judgments of 29 October 1991, *Helmers*, para. 38; *Jan-Åke Andersson*, para. 29; and *Fejde*, para. 33; judgment of 25 July 2000, *Tierce and Others*, paras 99-102; the question whether a person has the right to be present at the trial is discussed *supra* 10.5.4.

602 See, *e.g.*, with regard to cassation proceedings and proceedings before the supreme court the judgments of 8 December 1983, *Pretto and Others* and *Axen*, para. 27 and para. 31, respectively; judgment of 22 February 1984, *Sutter*, para. 34 (proceedings before the Swiss Military Court of Cassation).

603 Judgment of 8 December 1983, *Pretto*, paras 25-28.

604 Report of 14 December 1979, *Le Compte, Van Leuven and De Meyere*, B.38, p. 24; report of 15 March 1985, *Adler*, D&R 46 (1986), p. 36 (45).

605 *See ibidem*, p. 24 and p. 45, respectively.

public to study the judgments.[606] A failure to deliver the judgment publicly may be remedied on appeal.[607]

With respect to the possibilities of restricting publicity the following observations may be made. Although in some cases the Court examined *ex officio* whether one of the exceptions had been applicable,[608] it may be presumed that it is for the national authorities to invoke explicitly the exceptions of Article 6.[609] On the one hand, the Court has shown to be willing to leave the national authorities, and specifically the national courts, a certain 'margin of appreciation' in the assessment of the question whether there is any reason for application of one of the restrictions, as is the case with respect to the grounds of restriction included in other provisions of the Convention.[610] On the other hand, the Court has also itself shown to be prepared to make an independent examination of the reasons for the restriction,[611] in which context the Court is not prepared to accept simply a developed practice, but requires that it be established specifically for each case which ground of restriction is invoked.[612] However, in principle, it is not inconsistent with Article 6 for a State to designate an entire class of cases, *e.g.*, proceedings concerning minors, as an exception to the general rule.[613] In fact the opposite problem occurred in *T.* and *V. v. the United Kingdom*, concerning two eleven-year-old boys who had been accused of abduction and murder. The applicants complained that they had been deprived of the opportunity to participate effectively in the criminal proceedings because of the massive press attention to the case outside court and the fact that the trial had been conducted with the formality of an adult criminal trial, albeit modified to a certain extent in view of the defendants' age. The Government disputed that the public nature of the trial breached the applicants' rights and stressed that the publicity of the trial ensured the fairness of the proceedings. The Court took into account that, according to psychiatric evidence, the ability of the applicants to understand the proceedings in court and to instruct their lawyers was limited and held it "highly unlikely that the applicants would have felt sufficiently uninhibited in the tense courtroom and under public scrutiny" to consult with their lawyers during the trial or that they would have been capable outside the courtroom

606 Judgment of 24 April 2001, *B. and P. v. the United Kingdom*, paras 45-49.

607 Judgment of 10 July 2001, *Lamanna*, para. 30-34, and implicitly the judgments of 24 November 1993, *Werner* and *Scücs*, paras 54-60 and 43-48, respectively.

608 See the judgment of 29 September 1999, *Serre*, para. 22; judgment of 8 February 2000, *Sutter*, para. 21.

609 This point of view seems to be confirmed by the judgment of 23 April 1997, *Stallinger and Kuso*, para. 51; judgment of 20 May 1998, *Gautrin*, para. 42.

610 See also *supra* 10.4.6.3.

611 See, *e.g.*, the judgment of 23 June 1981, *Le Compte, Van Leuven and De Meyere*, paras 59-61; judgment of 10 February 1983, *Albert and Le Compte*, paras 34-37.

612 Judgment of 8 June 1976, *Engel*, para. 89. See also the judgment of 3 October 2000, *Ekbatani*, para. 34-35.

613 Judgment of 24 April 2001, *B. and P. v. the United Kingdom*, para. 39.

communicate with them and give them relevant information for the defence. Thus, the applicants' rights to participate effectively in the proceedings had been violated.[614]

In relation to the restriction ground of the protection of public order one is inclined to think of the prevention of disorder. When Article 14 of the International Covenant on Civil and Political Rights was drafted, this interpretation was indeed advocated, also on behalf of Great Britain, and on that ground objections were raised – in vain – to the translation of the French term *ordre public* in the English text.[615] Now that the text of Article 6 in its present form has been adopted in terms equal to those of Article 14 of the Covenant, a comparison with Articles 10(2) and 11(2), where for the protection of public order the English text has 'the prevention of disorder' and the French text 'la défense de l'ordre', renders it difficult to maintain the British interpretation, although, on the other hand, the English and the French text of Article 9(2) show that the authors have not been very consistent in this matter. However this may be, the prevention of disorder in the courtroom may in any case be brought under the ground 'the interests of justice'.[616] What then does 'public order' mean in this context? In the case of *Compte, Van Leuven and De Meyere* Case, the Belgian Government invoked this ground, alleging that publicity of the medical disciplinary cases might lead to violation of medical professional secrecy. The Commission indeed examined this aspect under the common denominator.[617] This seems to point in the direction of public order in the sense of *ordre public*. Medical professional secrecy was also invoked in the *Diennet* Case, where the French Government tried to justify the fact that disciplinary proceedings against a medical practitioner had been held *in camera*. However, according to the Court the proceedings in question concerned only 'the method of consultation by correspondence' adopted by the applicant and thus, in principle, not the private life elements of the applicant.[618]

So far the interest of national security has hardly played a part, if at all, in the Strasbourg case law with respect to the public nature of the trial, but it is easy to conceive of situations in which proceedings deal with State secrets or other information that is security-sensitive. The court will then have to form an independent opinion about

614 Judgments of 16 December 1999, paras. 80-89 and paras 81-91, respectively. See also the judgment of 15 June 2004, *S.C. v. the United Kingdom*, paras 27-37, concerning an eleven- year-old boy with limited intellectual capacity, where the Court held that he should have been tried in a specialist tribunal which was able to give full consideration to and make proper allowance for the handicaps under which he laboured and to adopt its procedure accordingly.

615 See E/CN.4/SR.318, p. 10: "the proper conception was that closed hearings could be held with a view to preventing disorder".

616 See the judgment of 14 November 2000, *Riepan*, para. 34, where the Court held that in exceptional cases the public may be excluded from the trial for security concerns.

617 See the report of 14 December 1979, B.38 (1984), pp. 43-44. See also the report of 14 December 1981, *Albert and Le Compte*, B.50 (1986), pp. 40-41.

618 Judgment of 26 September 1995, para. 34.

this. Everything that the authorities prefer to be kept secret does not fall within [illegible] alone concern national security.

Cases involving the protection of the private life of the parties, except for [illegible] which the interests of minors are involved,[619] require proceedings in camera [illegible] the parties appear to appreciate such protection.[620]

The last ground of restriction – the interests of justice – is explicitly [illegible] opinion of the domestic court concerned. On occasion it may be necessary [illegible] the public nature of the proceedings to protect, for instance, the safety and [illegible] of witnesses; they, too, can claim a 'fair trial'.[621] Here again, however, an [illegible] supervision by the Strasbourg Court is fitting. The interests of justice may also [illegible] that the space available for the public does not become overcrowded and that [illegible] are excluded. But, on the other hand, the interest of publicity requires that the [illegible] stration of justice takes place at locations where reasonable accommodation [illegible] public is available. If the trial takes place outside a regular courtroom, to which [illegible] general public in principle has no access (*e.g.* a prison), the national authorities [illegible] to take compensatory measures in order to ensure that the public and the media [illegible] duly informed about the place of the hearing and are granted effective access [illegible]

10.7 THE REASONABLE-TIME REQUIREMENT

10.7.1 INTRODUCTION

Article 6 stipulates in its first paragraph that the hearing of the case by the court must take place 'within a reasonable time' (*dans un délai raisonnable*). Just as with regard to these same words in Article 5(3) this raises the difficult question as to what criteria have to be applied for the assessment of what is reasonable and also what period is to be taken into account in this respect.

In the case of Article 5(3) it is in any event clear what is to be considered as the beginning of the relevant period: this is the moment of the arrest. The rationale of the provision is that the detention on remand does not last longer than is strictly necessary. The purpose of the reasonable-time requirement of Article 6(1), however, is to guarantee that within a reasonable time, and by means of a judicial decision, an end is put to the insecurity into which a person finds himself as to his civil-law position or on account of a criminal charge against him; in the interest of the person in question [illegible]

619 Judgment of 24 April 2001, *B. and P. v. the United Kingdom*, paras 35-41.

620 Thus apparently also the Commission in its report in the *Albert and Le Compte* Case, p. 50, para. [illegible]

621 See on this *infra* 10.10.5.

622 Judgment of 14 November 2000, *Riepan*, paras 28-31.

[illegible] of legal certainty. This rationale entails that the provision also applies in cases [illegible] there is no question of detention on remand.[622]

[illegible] judgments with regard to the reasonable-time requirement are quite numerous. However, around the middle of the eighties of the twentieth century the main [illegible] seem to have been charted.

10.7.2 THE RELEVANT PERIOD

10.7.2.1 *Dies a Quo*

[illegible] determination of the relevant period the jurisdiction *ratione temporis* must be taken into account. Thus, in the case of an individual complaint concerning proceedings which were already in progress at the moment the State concerned became a party to the Convention – or recognised the individual's right of complaint under former Article 25 – only the length of the period from that moment can be taken into account. However, for the assessment of the reasonableness of that period the stage at which the proceedings were at that moment is also taken into consideration.[624]

With respect to the determination of civil rights and obligations, the beginning of the period is in general taken to be the moment at which the proceedings concerned are instituted[625] or at which, within the framework of other proceedings, such a right or obligation is put forward in a defence. If prior to the judicial proceedings another action, such as an administrative objection[626] or a request for formal confirmation,[627] must have been brought, the beginning is shifted to the moment of that action.[628] A negotiation phase preceding the proceedings, however, is not counted as part of the relevant period.[629]

622 For the relationship between the two provisions, see the judgment of 10 November 1969, *Stögmüller*, paras 4-5.

623 See, e.g., the judgment of 10 December 1982, *Foti*, para. 53; judgment of 26 October 1988, *Martins Moreira*, para. 43; judgment of 25 March 1996, *Mitap and Müftüoglo*, para. 31; judgment of 15 July 2002, *Kalashnikov*, para. 124.

624 See, e.g., the judgment of 23 November 1993, *Scopelliti*, para. 18; judgment of 23 March 1994, *Muti*, para. 12; judgment of 27 October 1994, *Katte Klitsche de la Grange*, para. 50.

625 Judgment of 28 June 1978, *König*, paras 28 and 101.

626 Judgment of 9 December 1994, *Schouten and Meldrum*, paras 61-62.

627 Compare the *Vallee* Case, judgment of 26 April 1994, para. 133, where the submission of the preliminary claim for compensation to the administrative authority, required under national law, constituted the starting-point of the relevant period. See also the judgment of 9 June 1998, *Cazenave de la Roche*, para. 46; judgment of 7 June 2001, *Kress*, para. 90.

628 Judgment of 8 July 1986, *Lithgow*, para. 199. See, however, also the judgment of 23 April 1996, *Procola*, para. 69, concerning, *inter alia*, negotiations, expressly recognised by law, prior to formal expropriation proceedings before a court. The Court did assess whether the duration of the preliminary proceedings was reasonable.

With respect to criminal cases the Court has held that the beginning of the [illegible] period must be taken as the moment at which a 'criminal charge' is brought [illegible] is only from that moment that the 'determination of (...) any criminal charge' [illegible] involved.[630] However, the rationale mentioned above implies that the period does in all cases begin at the moment at which the person in question is officially [illegible] Even before that he may have been aware of the fact that he is suspected of a criminal offence, so that from that moment he has an interest in a speedy decision about the suspicion being made by the court. This is quite evident in those cases where [illegible] precedes the moment of the formal charge.[631] It is, therefore, important here [illegible] that in the Strasbourg case law an autonomous meaning is assigned to the concept of 'charge', the starting-point being that a substantive and not a formal concept of 'charge' must be used because of the great importance of the principle of a fair [illegible] for a democratic society.[632] As the Court held in the *Foti* Case and in the *Corigliano* Case: "Whilst 'charge' (...) may in general be defined as the official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence, it may in some instances take the form of other measures which carry the implication of such an allegation and which likewise substantially affect the situation of the suspect."[633]

Thus, the existence of a 'charge' is not always dependent on an official act. Examples of such 'other measures' are the search of the person's home,[634] the request that a person's immunity be lifted,[635] and the moment the person concerned is informed by the Tax Authority of its intention to impose additional taxes and tax surcharges on him.[636] However, the imposition of fiscal penalties on companies does not [illegible] that the managing director of the companies is charged personally.[637] In some cases the 'charge' does not constitute the *dies a quo* of the relevant period: if the accused did not receive the official notification and was tried in absence, one has to presume [illegible]

630 Judgment of 27 June 1968, *Neumeister*, para. 18; judgment of 27 February 1980, *Deweer*, para. 42.

631 In its judgment of 27 June 1968, *Wemhoff*, para. 19, the Court assumed that the two moments coincided. See further, *e.g.*, the judgment of 28 March 1990, *B v. Austria*, paras 9 and 48; judgment of 19 February 1991, *Alimena*, para. 15; judgment of 25 February 1993, *Dobbertin*, para 9 and 8. In the latter case there seems to be a clear difference between the moment of arrest and the [illegible] 'charge'. The Court took the moment of arrest as a starting-point.

632 See *supra* 10.2.1.

633 Judgments of 10 December 1982, para. 52 and para. 34, respectively.

634 Initially the Court took a formal criterion to determine the starting-point of the relevant [illegible] judgment of 27 June 1968, *Neumeister*, para. 18. Subsequently, it developed a substantive approach in the judgment of 15 July 1982, *Eckle*, para. 73, which culminated in the judgments of 10 December 1982, *Foti*, and *Corigliano*, para. 52 and para. 34, respectively.

635 See, *e.g.*, the judgment of 23 October 2003, *Diamantides*, para. 21; judgment of 28 October 2003, *Lopez Sole y Martin de Vargas*, para. 26.

636 Judgment of 19 February 1991, *Frau*, para. 14.

637 Judgments of 23 July 2002, *Västberga Taxi Aktiebolag and Vulic*, and *Janosevic*, para. 106 and para. 92, respectively.

638 Judgment of 22 May 1998, *Hozee*, paras 44-45.

[illegible] a 'charge',[639] but the reasonable-time requirement is not at stake (yet), [illegible] the accused did not live under the pressure of being prosecuted.[640] The period [illegible] the accused, who is aware of the 'charge', is on the run, is excluded from the calculation of the relevant period.[641]

Dies ad Quem

The above-mentioned rationale of the reasonable-time requirement of Article 6 entails that the end of the period to be taken into consideration is the moment at which the uncertainty concerning the legal position of the person in question has ended. In civil proceedings that is the moment the asserted legal position is determined in a final manner, [illegible] That is not, therefore, the moment at which the hearing in court starts, but the moment at which the decision is taken at highest instance[643] or has become final through the expiration of the time-limit for appeal.[644] Thus, as far as appeal or cassation proceedings 'are capable of affecting the outcome of the dispute', these proceedings must be taken into account in determining the relevant period.[645] Moreover, even stages subsequent to a judgment on the merits, such as enforcement proceedings[646] and proceedings concerning costs,[647] fall under the scope of the reasonable time requirement. However, the lapse of time caused by preliminary proceedings under Article 234 of the EC Treaty [former Article 177] before the Court of Justice of the European Communities is not taken into consideration in the assessment of the length of the proceedings.[648] The same holds good for the institution of extraordinary remedies.

639 Judgment of 12 February 1985, *Colozza*, para. 29. The applicant was sentenced by default and did have, according to the Court, a right to a 'fresh determination of the merits of the charge'. Compare also the judgment of 23 October 2003, *S.H.K. v. Bulgaria*, para. 26.

640 This consequence does not fully correspond with the definition of 'charge' as cited from the *Foti* judgment. The contradiction can be lifted by deleting the word 'likewise'.

641 Judgment of 19 February 1991, *Girolami*, para. 15; judgment of 12 October 1992, *Boddaert*, para. 35; judgment of 26 May 1993, *Bunkate*, para. 21.

643 See, *e.g.*, the judgments of 26 September 1996, *DiPede*, and *Zappia*, para. 22 and para 18, respectively; judgment of 28 October 1998, *Pérez de Rada Cavanilles*, para. 39.

644 See, *e.g.*, the judgment of 24 May 1991, *Vocaturo*, para. 14; judgment of 12 October 1992, *Salerno*, para. 18.

645 See, *e.g.*, the judgment of 24 May 1991, *Pugliese (No. 2)*, para. 16; judgment of 27 February 1992, *Diana*, para. 14.

646 See, *e.g.*, the judgment of 23 April 1987, *Poiss*, para. 52; judgment of 21 November 1995, *Acquaviva*, para. 52. The same holds good with regard to proceedings before a Consitutional Court: see *e.g.* the judgment of 23 June 1993, *Ruiz-Mateos*, para. 35; judgments of 1 July 1997, *Probstmeier*, and *Pammel*, para 46 and 48 and paras 51 and 53, respectively.

647 See, *e.g.*, the judgment of 23 March 1994, *Silva Pontes*, paras 35-36; judgment of 19 March 1997, *Hornsby*, para. 40; judgment of 7 June 2000, *Nuutinen*, para. 109.

648 Judgment of 23 September 1997, *Robins*, para. 28.

Judgment of 26 February 1998, *Pafitis*, para. 95.

The Court has chosen the same approach in 'criminal' cases. As the [illegible] in its *Wemhoff* judgment: "there is (...) no reason why the protection [illegible] persons concerned against the delays of the courts should end at the fix[illegible] a trial: unwarranted adjournments or excessive delays on the part of trial [illegible] also to be feared."[649]

The determination of the charge, also that by, for example, acquittal or [illegible] must be final.[650] As far as convictions are concerned the determination of [illegible] affords the certainty to the accused,[651] and then only at the moment at which [illegible] reasonably be assumed to have been informed of the final verdict and its mot[illegible] The decision to refrain from further prosecution may also imply the final d[illegible] tion of the 'charge'.[653]

10.7.3 REASONABLE TIME

After the length of the relevant period has been established, it must be dete[illegible] whether this period is to be regarded as reasonable. In many cases the Court [illegible] makes an overall assessment,[654] while in other cases it assesses the lapse of time [illegible] stage of the proceedings.[655] The reasonableness cannot be judged in the abstra[illegible] has to be assessed in view of the circumstances of each individual case.[656] The [illegible] of the person concerned in as prompt a decision as possible will have to be w[illegible] against the demands of a careful examination of the case and a proper conduct [illegible] proceedings.[657]

According to established case law, when assessing the reasonableness of the relev[illegible] period the Court applies, in particular, three criteria: a) the complexity of the [illegible] b) the conduct of the applicant, and c) the conduct of the authorities concerned. [illegible] ever, in an increasing number of cases the Court applies, in connection with the [illegible]

649 Judgment of 27 June 1968, para. 18.

650 See, *e.g.*, the judgments of 19 February 1991, *Pugliese (No. 1)*, para. 18; *Viezzer*, para. 17; [illegible] para. 15.

651 Judgment of 15 July 1982, *Eckle*, para. 77.

652 Report of 8 May 1984, *Vallon*, pp. 22-23.

653 Judgment of 23 October 2003, *S.H.K. v. Bulgaria*, para 27.

654 See, *e.g.*, the judgment of 19 February 1991, *Colacioppo*, para. 15; judgment of 18 July 1994, [illegible] para. 22; judgment of 26 October 2000, *G.J. v. Luxembourg*, paras 28-36; judgment of 20 [illegible] 2001, *Janssen*, paras 40-53.

655 See, *e.g.*, the judgment of 23 November 1993, *Scopelliti*, paras 22-26; judgment of 23 March [illegible] *Silva Pontes*, paras 40-41; judgment of 6 April 2000, *Comingersoll S.A.*, para. 22.

656 See, *e.g.*, the judgments of 19 February 1991, *Santilli*, and *Maj*, para. 20 and para. 15, resp[illegible] judgment of 23 July 2002, *Rajcevic*, para. 36.

657 See, *e.g.*, the judgment of 8 July 1987, *H v. the United Kingdom*, paras 71-86; judgment of 1[illegible] 1992, *X v. France*, para. 32; judgment of 23 March 1994, *Silva Pontes*, para. 39.

[illegible] the authorities, a fourth criterion: d) the importance of what is at stake for the [illegible] applicant.[658]

The question of whether a case is complex is, in general, hard to answer. The Court [illegible] attached importance to several factors such as the nature of the facts to be [illegible] established,[659] the number of accused persons[660] and witnesses,[661] the need to obtain [illegible] the file of a trial conducted abroad,[662] the joinder of the case to other cases,[663] the [illegible] intervention of other persons in the procedure[664] and the need to create a special [illegible] computer program.[665] The complexity may concern questions of fact as well as legal [illegible] issues.[666]

An attitude or behaviour of the party in question which led to a delay, weakens [illegible] the complaint about that delay.[667] However, an accused person is not required to [illegible] co-operate actively in expediting the proceedings which may lead to his own con[illegible] viction.[668] This may be different for parties to civil proceedings.[669] A party to pro[illegible] ceedings cannot be blamed for making use of his right to lodge an appeal.[670] It is [illegible] evident that this prolongs the proceedings, but this prolongation, too, must stand the [illegible] test of reasonableness.[671]

With regard to the third criterion, the conduct of the authorities, only delays [illegible] attributable to the State may cause a violation of the reasonable-time requirement.[672] [illegible] In particular, the efforts the judicial authorities have made to expedite the proceedings

658 See, *e.g.*, the judgment of 25 November 1992, *Abdoella*, para. 24; judgment of 30 October 1998, *Styranowski*, para. 47; judgment of 15 October 1999, *Humen*, para. 60; judgment of 27 February 2003, *Niederböster*, para. 39; judgment of 9 March 2004, *Jablonska*, para. 39.

659 See, *e.g.*, the judgment of 19 February 1991, *Triggiani*, para. 17; judgment of 30 October 1991, *Wiesinger*, para. 55; judgment of 27 February 1992, *Vorrasi*, para. 17; judgment of 25 February 1993, *Dobbertin*, para. 42; judgment of 1 August 2000, *C.P. v. France*, para. 30.

660 Judgment of 19 February 1991, *Angelucci*, para. 15.

661 Judgment of 27 February 1992, *Andreucci*, para. 17.

662 Judgment of 19 February 1991, *Manzoni*, para. 18.

663 Judgment of 27 February 1992, *Diana*, para. 17.

664 Judgment of 27 February 1992, *Manieri*, para. 18.

665 Judgment of 28 November 2000, *Rösslhuber*, para. 27.

666 Judgment of 27 February 1992, *Lorenzi, Bernardini, and Gritti*, para. 16; judgment of 27 October 1994, *Kutte Klitsche de la Grange*, para. 55.

667 See, *e.g.*, the judgment of 16 July 1971, *Ringeisen*, para. 110; judgment of 15 July 1982, *Eckle*, para. 82; judgment of 23 September 1998, *I.A. v. France*, para. 121; judgment of 31 July 2000, *Barfuss*, para. 81.

668 See, *e.g.*, the judgment of 15 July 1982, *Eckle*, para. 82; judgment of 25 February 1993, *Dobbertin*, para. 43; judgment of 25 November 1997, *Zana*, para. 79.

669 Judgment of 23 March 1994, *Muti*, para. 16.

670 See, *e.g.*, the judgment of 15 July 1982, *Eckle*, para. 82. Compare also the judgment of 24 October 1994, *Kutte Klitsche de la Grange*, para. 56. The applicant had applied to the Court of Cassation for a preliminary ruling on jurisdiction of the lower court. Although he could have made a subsequent appeal, his conduct was not open to criticism.

671 Judgment of 23 April 1987, *Lechner and Hess*, para. 59.

672 See, *e.g.*, the judgment of 20 February 1991, *Vernillo*, para. 14; judgment of 16 December 1997, *Proszak*, para. 40; judgment of 15 October 1999, *Humen*, para. 66.

as much as possible are an important factor.[673] A special duty rests upon the ... concerned to see to it that all those who play a role in the proceedings do their ... to avoid any unnecessary delay. This holds good as well in criminal as in civil ... where the initiative in the proceedings in principle may be left to the parties ... *Capuano* Case the Italian Government drew attention to the fact that the delay ... proceedings in first instance, which lasted for more than six years, were attributable ... to the experts, who filed their opinions too late. The Court held the court concerned ... responsible for the delays in preparing expert opinions in proceedings under the ... court's supervision.[675] In the *Idrocalce* and *Tumminelli* Cases the Court reached the ... same conclusion with reference to the delays in hearing witnesses.[676] If in a criminal ... case with two accused persons one of them retards the case, the prosecuting ... separate the cases, if possible, in order that the other accused does not become the ... victim of the delay.[677] Legislation or a judicial practice placing obstacles in the way of ... a plaintiff for a prompt institution of proceedings, as well as legislation enabling ... to leave the other party for a long time in uncertainty as to whether or not an action ... will be brought, without a reasonably short term of limitation preventing this, does ... not satisfy Article 6(1). On the other hand, the mere fact that the national authorities ... fail to comply with legal time-limits is in itself not contrary to Article 6(1).[678]

Under the fourth criterion, the importance of what is at stake for the applicant, ... the Court pays attention to special interests which may be involved. Thus in the ... *United Kingdom*, which concerned the length of the proceedings instituted by the ... applicant regarding her claimed access to her child, who had been entrusted to the ... care of a local authority, the Court put special emphasis on the importance of what ... was at stake for the applicant in the proceedings in question. Not only were the ... proceedings decisive for her future relations with her child, but they also had a particular quality of irreversibility, involving as they did what the High Court graphically described as the 'statutory guillotine' of adoption. In these circumstances the Court expected exceptional diligence on the part of the authorities.[679] Subsequently the Court has held that a particular diligence is required in cases concerning civil status ...

673 See, *e.g.*, the judgment of 28 June 1978, *König*, paras 104-105; judgment of 28 March 1990, *Austria*, para. 54; judgment of 23 March 1994, *Silva Pontes*, para. 39.

674 Judgment of 20 February 1991, *Vernillo*, para. 30.

675 Judgment of 25 June 1987, para. 30. See also the judgment of 26 February 1992, *Nibbio*, ... judgment of 23 November 1993, *Scopelliti*, para. 23.

676 Judgments of 27 February 1992, para. 18 and para. 17, respectively. See also from the same ... *Cooperativa Parco Cuma*, para. 18.

677 Appl. 6541/74, *Bonnechaux*, D&R 3 (1976), p. 86 (87).

678 Judgment of 27 February 1992, *G. v. Italy*, para. 17.

679 Judgment of 8 July 1987, para. 85.

... employment disputes,[681] including pension disputes,[682] and determinations ... compensation for the victims of road accidents[683] and for persons infected with HIV ... result of blood transfusion at hospitals.[684] Moreover, the (old) age of the person ... concerned may urge for swift proceedings.[685] Special diligence is also required in cases ... where a person is detained pending the determination of the criminal charge against ... him.[686]

... overburdening of the judiciary in general is not recognised as an excuse, since the ... Contracting States have the duty to organise the administration of justice in such a ... way that the various courts can meet the requirements of Article 6.[687] According to ... settled case law Contracting States are not liable in the event of a temporary backlog ... of business in their courts, provided that they take, with the requisite promptness, ... remedial action to deal with an exceptional situation of this kind. The measures taken ... are assessed as to their effectiveness and it is also ascertained whether they have been ... taken in good time;[688] measures taken afterwards cannot make up for the fact that the ... reasonable period has been exceeded.[689] When making this assessment the Court is ... required to take into consideration the political and social background in the country ... concerned.[690] In the *Bottazzi* Case the Court drew attention to the fact that it had found ...

... judgment of 29 March 1989, *Bock*, para. 49. See also, *e.g.*, the judgments of 27 February 1992, *Taituti*, ... para. 18, *Masciariello*, para. 18; and *Gana*, para. 17.

... See, *e.g.*, the judgment of 28 June 1990, *Obermeier*, para. 72; judgment of 24 May 1991, *Vocaturo*, ... para. 17; judgment of 16 July 2002, *Davies*, para. 26.

... Judgments of 26 February 1992, *Nibbio*, and *Borgese*, para. 18 and para. 18, respectively; judgment ... of 27 February 1992, *Ruotolo*, para. 17; judgment of 11 October 2001, *H.T. v. Germany*, para. 37.

... See, *e.g.*, the judgment of 26 October 1988, *Martins Moreira*, para. 46; judgment of 23 March 1994, *Silva Pontes*, para. 39; judgment of 14 October 2003, *Signe*, paras 28 and 38.

... See, *e.g.*, the judgment of 31 March 1992, *X. v. France*, para. 32; judgment of 8 February 1996, *A. and Others v. Denmark*, para. 78. Compare also the judgment of 4 April 2000, *Dewicka*, paras 55-56, with ... regard to the installation of a telephone line in the apartment of an old, disabled woman.

... Judgment of 9 March 2004, *Jablonska*, para. 43; judgment of 6 April 2004, *Krzak*, para. 42.

... Initially, the Court took this position with regard to the reasonable time requirement of Article 5 ... (3). See, *e.g.*, the judgment of 27 August 1992, *Tomasi*, para. 84; judgment of 24 September 1992, *Herczegfalvy*, para. 71. However, the same holds good for Article 6(1). See, *e.g.*, the judgment of 25 ... November 1992, *Abdoella*, para. 24; judgment of 21 December 2000, *Jablonski*, para. 102; judgment ... of 16 July 2001, *Kreps*, paras 52-54.

... See, *e.g.*, the judgment of 26 October 1984, *De Cubber*, para. 35; judgment of 26 November 1992, *Francesco Lombardo*, para. 23; judgment of 21 December 1999, *G.S. v. Austria*, para. 35; judgment ... of 20 December 2001, *Ludescher*, para. 23.

... Judgment of 13 July 1983, *Zimmermann and Steiner*, paras 29-32; judgment of 25 June 1987, *Baggetta*, ... para. 22-25; judgment of 26 October 1988, *Martins Moreira*, paras 53-61.

... Report of 12 March 1984, *Marijnissen*, D&R 40 (1985), p. 83 (90).

... See, *e.g.*, the judgment of 25 June 1987, *Milasi*, paras 17-20, where the Court took into account the ... disturbances in the Region concerned, and the judgment of 7 July 1989, *Unión Alimentaria S.A.*, ... para. 40. In its decision of 2 March 2005, *Maltzan and Others*, paras 133-134, the Court (Grand ... Chamber) took into account the wish of the Federal Constitutional Court to group together all cases ... on similar issues so as to obtain a comprehensive view of the matter, as well as the large flux of ... constitutional applications following German reunification.

numerous violations of the reasonable time requirement concerning civil [illegible] before the civil courts of the various regions of Italy. Therefore, it consider[ed] that there is an accumulation of identical breaches which are sufficiently numerous [illegible] amount not merely to isolated incidents. Such breaches reflect a continuing situation that has not yet been remedied and in respect of which litigants have no effective remedy (...). This accumulation of breaches accordingly constitutes a practice incompatible with the Convention."[691] Subsequently, with reference to its pilot judgment, the Court held many complaints against Italy to be well-founded without making a case-to-case assessment on the merits.[692]

The application of the criteria – the complexity of the case, the conduct of the applicant, the conduct of the authorities and what was at stake for the applicant – separately or in combination, may lead to different conclusions. In the *Bunkate* Case, for instance, a criminal case, the relevant period lasted two years and ten months. This lapse of time was amongst other factors caused by a period of total inactivity of fifteen and a half months between the filing of the appeal on points of law and the reception of the file by the registry of the Supreme Court. This period in itself infringed the reasonable time requirement.[693] On the other hand, in the *Boddaert* Case it took slightly more than six years to determine the 'criminal charge'. This lapse of time did not violate Article 6.[694] Comparable differences may be noted as far as civil proceedings are concerned. In the *Ciricosta and Viola* Case an overall period of more than 15 years did meet the requirements of Article 6(1),[695] but a lapse of time that lasted four years and five months in the *Pugliese II* Case did not pass muster.[696]

The requirement of a trial within a reasonable time equally entails that this time may not be unreasonably short, in consequence of which it is not possible for the parties to prepare the case properly. What is expressly provided in paragraph 3(b) for criminal proceedings by virtue of the general requirement of a fair hearing in the first paragraph, applies to civil proceedings as well.

691 Judgment of 28 July 1999, paras 22-23. Moreover, in its subsequent case law the Court has held that such a practice constitutes an aggravating circumstance of the violation of Article 6(1). See the judgments of 5 October 2000, *Giomi* and *Mennitto*, para. 12 and para. 30, respectively; judgment of 28 February 2002, *Christina Cardo*, para. 10; judgment of 9 July 2002, *Fragnito*, para. 14. In certain circumstances such a practice may also violate Article 13. See the judgment of 18 October 2000, *Kudla*, paras 146-160.

692 See, *e.g.*, the judgment of 16 November 2000, *Dorigo*, paras 9-10; judgment of 11 December 2001, *Vanzetti*, paras 10-11; judgment of 9 July 2002, *Nazarro and Others*, paras 14-15.

693 Judgment of 26 May 1993, paras 20-23.

694 Judgment of 12 October 1992, paras 35-40.

695 Judgment of 4 December 1995, paras 23-32.

696 Judgment of 24 May 1991, paras 50-63.

[illegible] does not stipulate what the consequences for the proceedings are, if the [illegible]-time requirement has not been met. It would seem to ensue from this pro[illegible] that, if the reasonable time has been exceeded and, consequently, the determination can no longer be made within a reasonable time, the proceedings would have to be stopped and the civil action or criminal charge to be declared inadmissible. However, in the Strasbourg case law a more flexible view has been adopted: "an excessive length of criminal proceedings can in principle be compensated for by measures of the domestic authorities, including in particular a reduction of the sentence on account of the length of procedure."[697]

Although this point of view does not easily fit into the text of Article 6(1), it offers the most appropriate solution in certain cases. In civil proceedings the applicant, who has an interest in a final determination, should not become the victim of an unreasonable delay for which the public authorities are to be blamed; both parties can be victims of the delay and be entitled to some form of just satisfaction. And in criminal proceedings the public interest in the prosecution and conviction of the criminal may be so great that the prosecution should not be stopped for the sole reason that the reasonable time has been transgressed; another, more proportionate compensation should be awarded to the victim of that transgression. In administrative procedures the interests of third parties may also have to be taken into account.

The Italian legislator has tried to stop the numerous violations of the reasonable time requirement by enacting the so-called Pinto Act, which enables parties concerned to seek reparation for losses they have sustained as a result of inordinate delays in proceedings before the domestic courts to which they have been parties. However, in a series of cases the Court held that the sums awarded by the Italian courts for non-pecuniary damage did not constitute a proper and adequate reparation for the violations of the reasonable time requirement.[698] In these judgments the Court has set out with regard to the just satisfaction under Article 41 of the Convention the criteria to be used to calculate compensation for non-pecuniary damage in length of proceedings cases.

697 Report of 12 December 1983, *Neubeck*, D&R 41 (1985), p. 13 (34). See also the judgment of 15 July 1982, *Eckle*, paras 87 and 94. In the judgment of 8 February 2000, *Majaric*, paras 47-48, the Court rejected the request of the applicant to order a retrial, because it has no jurisdiction under the Convention to order such a measure.

698 See, e.g., the decision of 27 March 2003, *Scordino*; judgment of 29 July 2004, *Scordino*, paras 65-70 and 113-115; judgments of 10 November 2004, *Apicella*, and *Cocchiarella*, paras 17-23, 26-30 and paras 17-23, 27-31, respectively.

10.8 INDEPENDENT AND IMPARTIAL TRIBUNAL

10.8.1 INTRODUCTION

The first paragraph of Article 6 provides that the determination there refer... made by an independent and impartial tribunal, established by law. The tribun... not be "a court of law of the classic kind, integrated within the standard ... machinery of the country".[699] For the notion of 'tribunal' it is essential that ... a power to decide matters "on the basis of rules of law, following proceed... conducted in a prescribed manner",[700] and that the judicial body has 'full jurisd... including the power to quash in all respects, on questions of fact and law, ... challenged decision'.[701] The latter requirement had not been met in the Chevrol... concerning the practice of the French *Conseil d'État* to ask preliminary questions ... the Minister of foreign affairs with regard to international treaties. In the instan... the position taken by the minister that the treaty in issue was not of a reciprocal character, was decisive for the outcome of the proceedings. The applicant did not ... any opportunity to give her opinion on the use of the referral procedure or the wording of the question, or to submit a reply to the minister's point of view. The *Conseil d'État* based its decision solely on the opinion of the minister and, in so doing, considered itself to be bound by that opinion. Thus, according to the Court, the *Conseil d'État* voluntarily deprived itself of the power to examine and take into account fresh evidence that could have been crucial for the practical resolution of the dispute before it. In these circumstances the Court considered that the applicant did not have access to a tribunal with full jurisdiction.[702] Inherent in the very notion of a 'tribunal' is that the decision taken by the tribunal may not be deprived of *its* effect by a ... judicial authority to the disadvantage of the individual party.[703] Moreover, Contracting ...

699 Judgment of 28 June 1984, *Campbell and Fell*, para. 76; judgment of 22 October 1984, ... para. 36. See also the judgment of 24 February 1995, *McMichael*, para. 80, with regard to ... adjudicatory body composed of three 'specially trained persons with substantial experience of children' and the judgment of 20 November 1995, *British-American Tobacco Company*, para. 77, concerning patent application proceedings.

700 Judgment of 22 October 1984, *Sramek*, para. 36 and the report of 8 December 1982 in ... p. 31. See also the judgment of 23 October 1985, *Benthem*, para. 40; judgment of 30 November ... *H v. Belgium*, para. 50; judgment of 27 August 1991, *Demicoli*, para. 39.

701 Judgments of 23 July 2002, *Västberga Taxi Aktiebolag and Vulic*, and *Janosevic*, para. ... para. 81, respectively. See also, *e.g.*, the judgment of 24 February 1994, *Bendenoun*, para. ... judgments of 23 October 1995, *Schmautzer*, and *Pfarrmeier*, para. 36 and para. 40, respectively.

702 Judgment of 13 February 2003, paras 76-84. See also the judgment of 17 December 1996, *Woningen B.V.*, para. 54.

703 See, *e.g.*, the judgment of 19 April 1994, *Van de Hurk*, paras 45-52; judgment of 28 October ... *Brumarescu*, para. 61; judgment of 26 February 2002, *Morris*, para. 73.

... domestic legal systems must guarantee the implementation of judicial decisions, ... the right of access to a court would be illusory.[704]

... adjectives 'independent' and 'impartial' are the expression of two different ... The notion of 'independence' refers to the lack of any connection between ... and other parts of government, whereas the 'impartiality' must exist in ... to the parties to the suit and the case at issue. However, the Court has not ... drawn a clear borderline between the two concepts, and often considers both ... together, as will be seen in the next sections.[705]

... principles established in the Court's case law with regard to the notions of ... and impartiality apply to professional judges as well as to lay judges and ... Where a complaint concerns lack of impartiality on the part of the decision-making body, the concept of full jurisdiction demands that the reviewing court not only considers the complaint but also has the power to quash the impugned decision and either take a new decision or remit the case for a new decision by an impartial body.[706]

10.8.2 INDEPENDENCE

... *Ringeisen* Case the Court held that the Regional Commission could be regarded as a 'tribunal' as it was "independent of the executive and also of the parties". The latter aspect, however, refers in fact not to the independence but to the impartiality of the body. The Court added that the members of the Regional Commission had been appointed for five years and the proceedings before it did offer the necessary guarantees.[707] A comparable line of reasoning was developed in the *Langborger* Case: "In order to establish whether a body can be considered 'independent' regard must be had, *inter alia* to the manner of appointment of its members and their term of office, to the existence of guarantees against outside pressures and to the question whether the body presents an appearance of independence."[708]

704 See *supra*, 10.4.

705 See, *e.g.*, the judgment of 25 February 1997, *Findlay*, para. 73; judgment of 9 June 1998, *Incal*, para. 65.

706 Judgment of 22 June 1989, *Langborger*, para. 30; judgment of 23 April 1996, *Remli*, paras 46-48; judgment of 10 June 1996, *Pullar*, paras 31-32; judgment of 25 February 1997, *Gregory*, paras 43-50; judgment of 9 May 2000, *Sander*, paras 22-35.
Judgment of 28 May 2002, *Kingsley* (Grand Chamber), para. 58, in which the Court held that the High Court and the Court of Appeal did not have full jurisdiction with regard to the decision taken by the Panel of the Gaming Board.

707 Judgment of 16 July 1971, para. 95.

708 Judgment of 22 June 1989, para. 32. See also, *e.g.*, the judgment of 28 September 1995, *Procola*, para. 45; judgment of 22 November 1995, *Bryan*, para. 37; judgment of 26 February 2002, *Morris*, para. 73.

These various characteristics of the notion of independence seem to [illegible] categories. Firstly, the tribunal must function independently of the executive [illegible] legislature) and base its decisions on its own free opinion about facts and [illegible] Secondly, there must be guarantees to enable the court to function indep[illegible] As far as the latter requirement is concerned, it is not necessary that the [illegible] been appointed for life, provided that they cannot be discharged at will or on [illegible] grounds by the authorities.[711] The absence of a formal recognition of the [illegible] of judges during their terms of office does not imply a lack of independence [illegible] as it is recognised in fact and the other necessary guarantees are present.[712] [illegible] even a semblance of dependence must be avoided. In the *Bryan* Case the [illegible] that the very existence of the power of the Secretary of State to revoke the [illegible] an inspector to decide an appeal under the Town and Country Planning [illegible] enough to deprive the inspector of the appearance of independence.[713] And in the *Sramek* Case, where a member of the court was hierarchically subordinate to [illegible] the parties to the suit, the Court held: "Litigants may entertain a legitimate doubt [illegible] his independence. Such a situation seriously affects the confidence which the [illegible] must inspire in a democratic society."[714] However, strictly speaking, the latter [illegible] no longer refers to the independence, but to the impartiality of the court.

As to the independence of the tribunal vis-à-vis the legislature, the fact that the Council of State of the Netherlands – like similar institutions in other member [illegible] – has an advisory function in the legislative process, does not affect its independence as a judicial body.[715]

10.8.3 IMPARTIALITY

For impartiality it is required that the court is not biassed with regard to the decision to be taken, does not allow itself to be influenced by information from outside the court room, by popular feeling, or by any pressure whatsoever, but bases its opinion on objective arguments on the ground of what has been put forward at the trial. Although a judge, as a matter of course, has personal emotions, including during the

710 In the judgments of 2 September 1998, *Lauko* and *Kadubec*, paras 63-65 and 56-58, respectively, the administrative authorities who had been entrusted with the prosecution and punishment of minor offences, appeared not to be independent of the executive because of the manner of appointment of the officers of the local and district offices and the lack of guarantees against outside pressure.

711 Implicitly the judgment of 16 July 1971, *Ringeisen*. With regard to military tribunals, see the judgment of 8 June 1976, *Engel*, para. 89.

712 Judgment of 28 June 1984, *Campbell and Fell*, para. 80; judgment of 26 February 2002, *Morris*, para. 68.

713 Judgment of 22 November 1995, para. 38.

714 Judgment of 22 October 1984, para. 42.

715 Judgment of 6 May 2003 (Grand Chamber), *Kleyn and Others*, paras 193-195.

[illegible] he must not allow himself to be led by them during the hearing of the [illegible] and in the formation of his opinion.[716] And although judges may have a political [illegible] and/or adhere to a specific religion or philosophy of life, and although it [illegible] that the various political streams, religions and philosophies of life are also [illegible] within the judiciary, it must not make any difference for the person in[illegible] whether he is tried by a judge with one or other preference.

[illegible] publicity surrounding a criminal case, where the difference between 'suspected [illegible] guilty of' is not always taken into account, in addition to putting at issue the [illegible] presumption of innocence-principle of the second paragraph of Article 6, may [illegible] constitute a threat to the right to a fair and impartial trial, in particular also when this [illegible] publicity proceeds from the authorities, *e.g.*, from the public prosecutor charged with [illegible] prosecution.[717] The judge must duly take this risk into account when forming his [illegible] opinion. In cases with a markedly political background the said risk and the necessity [illegible] for the court to be on the alert against improper influences applies to an even higher [illegible] degree.[718] In the Strasbourg case law it is assumed, however, that a professional judge will in general be aware of these external factors and will not readily allow himself to be influenced thereby,[719] while moreover on appeal the higher court, in this respect, [illegible] may control and compensate for the attitude of the lower court. Thus, in the *Lingens* Case the Commission held that the great publicity and the utterance of hostile feelings in this case could not be avoided, but that the Supreme Court had accurately ascertained on what testimony the lower courts had based their considerations.[720] In cases of trial by jury the risk of the jury being influenced by public opinion or by [illegible] statements of witnesses or experts is more likely.[721]

The requirement of Article 10(2) that the freedom of expression may be restricted 'for maintaining the authority and impartiality of the judiciary' is closely connected with the point of publicity surrounding a trial. This restriction, which relates to the prohibition of 'contempt of court' embedded in Anglo-American law, was discussed at length in Strasbourg in the *Sunday Times* Case. The complaint concerned the prohibition, imposed by the English courts up to the highest instance, on publishing during a given time an article about the so-called 'thalidomide children', who had been born with serious physical deformities in consequence of the use of the sedative

716 See Appl. 1727/62, *Boeckmans*, Yearbook VI (1963), p. 370 (416-420), where the complaint concerned a judge who, in his indignation about a specific defence, uttered a warning that its upholding might lead to an increase of the penalty. Later on this case was settled: report of the subcommittee of 17 February 1965.

717 Appl. 8403/78, *Jespers*, D&R 22 (1981), p. 100 (127).

718 Appls 8603, 8722, 8723 and 8729/79, *Crociani and Others*, D&R 22 (1981), p. 147 (222-223 and 227). Judgment of 5 December 2002, *Craxi*, para. 104.

719 Appl. 9403/81, *Menten*, D&R 27 (1982), p. 233 (238).

720 This risk was emphasised several times by the Commission. See, *e.g.*, Appl. 7542/76, *X v. the United Kingdom* (not published), where in a case which attracted much publicity the Commission attached great importance to the fact that the judge had drawn the jury's attention to the risk of prejudice.

thalidomide by their mothers during pregnancy. The prohibition had been [illegible] because, at that moment, various proceedings against the manufacturer of [illegible] were pending and the publication might have led to 'contempt of court'. The [illegible] although with a narrow majority, came to the conclusion that in this case [illegible] hibition was not justified. They took into account, *inter alia*, that a court is [illegible] influenced by publications of this kind.[722]

In testing whether a 'tribunal' or judge has been prejudiced, the Court makes a distinction between a subjective and an objective approach to impartiality. The subjective approach refers to the personal impartiality of the members of the tribunal involved. In this impartiality is presumed as long as the contrary has not been proved. The establishment of a personal bias is difficult. Even when a judicial decision has been amply reasoned, it is difficult to ascertain by what motives a court was led to it. It will therefore, only be possible to conclude that a judge is biassed when this is evident from his attitude during the proceedings or from the content of the judgment.[723] It will be even more difficult to prove the prejudice of (members of) a jury, because a decision of the jury does not include a written statement of reasons.[725]

The objective approach refers to the question of whether the way in which the tribunal is composed and organised, or a certain coincidence or succession of functions of one or more of its members, may give rise to doubt as to the impartiality of the tribunal or that member. If there is justified reason for such doubt, even if subjectively there is no concrete indication of bias of the person in question, this already amounts to an inadmissible jeopardy of the confidence which the court must inspire in a democratic society.[726] The fear that the tribunal or a particular judge lacks impartiality must be such that it can "be held to be objectively justified"; consequently, the standpoint of the accused on this matter, although important, is not decisive.[727]

This objective-approach-test has been applied in several cases. Despite the casuistic case law some main lines can be discerned. As the Court held in the *Buscemi* Case

722 Judgment of 26 April 1979, paras 65-68.

723 See, *e.g.*, the judgment of 1 October 1982, *Piersack*, para. 30; judgment of 24 May 1989 *Hauschildt*, para. 45; judgment of 25 June 1992, *Thorgeir Thorgeirson*, para. 49; judgment of 24 February 1993, *Fey*, para. 28; judgment of 22 April 1994, *Saraiva de Carvalho*, para. 33.

724 See, *e.g.*, the judgment of 27 January 2004, *Kyprianou*, paras 38-42. See also the judgment of 6 May 2003 (Grand chamber), *Kleyn and Others*, para. 195.

725 Compare the judgment of 10 June 1996, *Pullar*, paras 31-32; judgment of 25 February 1997, *Gregory*, para. 44; judgment of 9 May 2000, *Sander*, paras 25-26.

726 See, *e.g.*, the judgment of 1 October 1982, *Piersack*, para. 31; judgment of 26 October 1984, *De Cubber*, para. 30; judgment of 22 April 1994, *Saraiva de Carvalho*, para. 35; judgment of 26 February 1993, *Padovani*, para. 27; judgment of 22 February 1996, *Bulut*, para. 34; judgment of 10 February 2004, *Depiets*, paras 37-43.

727 See, *e.g.*, the judgment of 24 May 1989, *Hauschildt*, para. 48; judgment of 26 February 1993, *Padovani*, para. 27; judgment of 22 April 1994, *Saraiva de Carvalho*, para. 35; judgment of 20 May 1999, *Gregory*, para. 58; judgment of 9 June 1998, *Incal*, para. 71; judgment of 6 May 2003 (Grand Chamber), *Kleyn and Others*, para. 194.

authorities are required to exercise maximum discretion with regard to the cases with which they deal in order to preserve their image as impartial judges and, therefore, they should not make use of the press, even when provoked. Accordingly, the fact that the president of the court publicly used expressions which implied that he had already formed an unfavourable opinion of the applicant's case before presiding over the court that had to decide it, clearly violated the requirement of impartiality.[728] Also in the special circumstances of the *Sigurdsson* Case Article 6 had been violated because of, in short, the existence of strong financial links between the judge's husband and one of the parties to the suit, the National Bank of Iceland.[729]

The fact that a judge has taken decisions in the case prior to the trial and subsequently also acts as a trial judge is in itself not incompatible with the requirement of impartiality. What matters is the 'scope and nature' of the measures or decisions taken prior to the trial.[730] The fear of prejudice cannot, for instance, be justified solely by the fact that the judge has taken decisions on the prolongation of the detention on remand. Only special circumstances can give rise to a different conclusion.[731] Such special circumstances did occur in the *Hauschieldt* Case. In ordering the continued pre-trial detention the judge had to be convinced that there was 'a very high degree of clarity as to the question of guilt'. The difference between this assessment and the assessment that had to be made when giving judgment thus became (too) tenuous.[732] On the contrary, in case the prolongation of the detention on remand may be ordered if the judge is convinced that there exists '*prima facie* evidence', no problem with regard to the impartiality arises.[733] In the *Piersack* Case the fact that the president of the tribunal had been involved in an earlier phase of the case as a public prosecutor amounted to a violation of Article 6.[734] In the *De Cubber* Case a judge was involved who previously in the same case acted as an investigating judge and as a president

728 Judgment of 16 September 1999, paras 67-69; judgment of 28 November 2002, *Lavents*, paras 119-120.

729 Judgment of 10 April 2003, paras 37-41. See also the judgment of 17 June 2003, *Pescador Valero*, paras 23-29.

730 Judgment of 24 August 1993, *Nortier*, para. 33; judgment of 22 April 1994, *Saraiva de Carvalho*, para. 35. In the judgment of 24 February 1993, *Fey*, para. 30, the Court held 'the extent and nature' to be decisive.

731 Judgment of 24 May 1989, *Hauschieldt*, para. 50; judgment of 16 December 1992, *Sainte-Marie*, para. 32.

732 Judgment of 24 May 1989, paras. 51-53. See also the judgment of 25 July 2002, *Perote Pellon*, paras 46-52 and the judgment of 22 April 2004, *Cianetti*, paras 41-45.

733 Judgment of 24 August 1993, *Nortier*, para. 35; judgment of 22 April 1994, *Saraiva de Carvalho*, paras 38-40; judgment of 26 February 1993, *Padovani*, paras 28-29; judgment of 22 February 1996, *Bulut*, para. 34; judgment of 10 February 2004, *Depiets*, paras 37-43.

734 Judgment of 1 October 1982, paras 30-32. See also the judgment of 25 July 2000, *Tierce and Others*, paras 78-81.

of a chamber respectively. The Court held that these facts created [illegible] about the impartiality of the judge concerned in an objective sense.[735]

Doubt about impartiality is also justified in case a judge who [illegible] judgment at first instance also participates in the hearing of an appeal against [illegible] judgment.[736] The requirement of impartiality does not imply, however, that [illegible] court which quashes the decision of a lower court, is obliged to refer [illegible] another court or to a differently composed chamber of the lower court.[737] In the *Morales* Case the written statements of a judgment concerning a co-accused [illegible] the impression that the applicant was guilty. Therefore, the participation of [illegible] judges in the applicant's trial created objectively justified doubts with regard [illegible] impartiality.[738] In the *Werner* Case the requirement of impartiality had been [illegible] because the judge who submitted to the court a motion for the applicant to be [illegible] missed as a liquidator subsequently participated in the court's decision on the [illegible] motion.[739]

The consecutive carrying out of an advisory and a judicial function in the same [illegible] was at stake in the *Procola* Case. Procola, an association under Luxembourg [illegible] challenged the lawfulness of four ministerial orders for the Judicial Committee of the *Conseil d'Etat*. In deciding the case the Judicial Committee also had to give its opinion on the lawfulness of a regulation that had been the subject of an advisory opinion by the *Conseil d'Etat*. In fact, the *Conseil d'Etat* had recommended the inclusion of the very provision that was challenged by Procola. The Judicial Committee was composed of five members. The fact that four of them had pronounced on the lawfulness of the regulation in their advisory capacity, was, according to the Court, sufficient reason for casting doubt on the structural impartiality of the Luxembourg *Conseil d'Etat*. The Court reached the same conclusion in the *McGonnell* Case. It held that the fact that the deputy Bailiff presided over the States of Liberation when the [illegible] developing plan in issue was adopted, was capable of casting doubt on his impartiality [illegible]

735 Judgment of 26 October 1984, *De Cubber*, paras 29-30; The Court reached the same conclusion in the judgment of 27 January 2004, *Kyprianou*, paras 34-37, where a charge of contempt of court had been tried by the same judges before whom the contempt allegedly had been committed. See also, *e.g.*, the judgment of 29 April 1988, *Belilos*, para. 67, and the judgment of 7 August 1996, *Ferrantelli and Santangelo*, paras 53-59.

736 Judgment of 25 May 1991, *Oberschlick*, paras 50-52; judgment of 26 August 1997, *De Haan*, paras 47-51; judgment of 28 October 1998, *Castillo Algar*, paras 46-51; judgment of 29 July 2004, *Leonard Band Club*, paras 61-66.

737 Judgment of 16 July 1971, para. 97; judgment of 26 September 1995, *Diennet*, paras 36-38. See the judgment of 10 June 1996, *Thomann*, paras 27-37, concerning a criminal trial in absentia and retrial in the presence of the accused by the same judges.

738 Judgment of 16 November 2000, paras 33-35.

739 Judgment of 15 November 2001, paras 41-47. In the judgment of 6 June 2000, *Morel*, para. [illegible] the insolvency judge did meet the requirements of impartiality.

740 Judgment of 28 September 1995, paras 44-45.

[illegible] subsequently determined, as the sole judge of the law in the case, the applicant's planning appeal.[741]

In the *Kleyn* Case the applicants claimed that the institutionalised simultaneous exercise of both advisory and judicial functions by the Dutch Council of State was incompatible with the required objective impartiality, since no separation was made between the members involved in the exercise of the advisory functions and those involved in the exercise of the judicial functions. However, the Court distinguished the case from the *Procola* Case, because the advisory opinions on the Transport and Structure Planning Act and the subsequent judicial proceedings concerning the appeals against the railway routing decision, which was based on the Planning Act, did not concern 'the same case' or 'the same decision'.[742] The Court made, however, the observation, as a warning for possible complaints in the future, that it was not as evident as the Dutch Government that the arrangements made by the Council of State with a view to giving effect to the *Procola* judgment, were such as to ensure that the Administrative Jurisdiction Division of the Council of State constitutes in all cases an 'impartial tribunal' for the purposes of Article 6(1) of the Convention.[743]

The independence and impartiality of the members of the *Procureur général*'s department of the Belgian Court of Cassation was tested in the *Borgers* Case. The Court concluded, affirming its previous case law, that on this point no violation of Article 6 arose. A similar conclusion was reached with regard to the *Commissaire du Gouvernement* in French administrative proceedings.[744]

In the *Daktaras* Case the Court reached the opposite conclusion with regard to the role of the president of the criminal division of the supreme court of Lithuania, who was in effect taking up the case of the prosecution and also constituted the court which had to decide the case.[745]

The practice of having courts composed in whole or in part by the military to try members of the armed forces is not contrary to the notion of an independent and impartial tribunal, as long as sufficient safeguards are in place to guarantee the compliance with these concepts.[746] In a series of cases the Court had to deal with the independence and impartiality of British courts-martial convened pursuant to the Army and Air Force Acts 1955. In these cases the role of the convening officer appeared to

741 Judgment of 8 February 2000, paras 49-58.

742 Judgment of 6 May 2003 (Grand Chamber), paras 195-202. See also the judgment of 22 June 2004, *Pabla Ky*, paras 31-35, concerning a member of Parliament who participates as an expert lay member in the decision making in a court.

743 Judgment of 6 May 2003 (Grand Chamber), *Kleyn and Others*, para. 198.

744 Judgment of 30 October 1991, para. 26, and judgment of 7 June 2001, *Kress*, para. 71. See, on the position of the *Avocat général* and similar officers and the (im)possibility to react to their submissions, *supra*, 10.5.2.

745 Judgment of 10 October 2000, paras 33-38.

746 Judgment of 26 February 2002, *Morris*, para. 59.

be crucial. This officer had the final decision on the nature and detail of [illegible] to be brought and was responsible for convening the court-martial, whose [illegible] were subordinate in rank to him. Moreover, the convening officer acted as [illegible] firming officer: the decision of the court-martial was not effective until [illegible] him. According to the Court, these fundamental flaws in the court-martial system [illegible] not remedied by the presence of safeguards and, therefore, it held the [illegible] the accused persons about the independence and impartiality of the tribunal [illegible] dealt with their cases to be objectively justified.[747] Subsequently, the British [illegible] changed the impugned provisions. In the *Cooper* Case, concerning an air-force [illegible] martial, the Court held that the Armed Forces Act of 1996 did meet the requirements of Article 6. In particular, the presence in a court-martial of the Judge Advocate, a legally qualified civilian, constituted a significant guarantee of the independence of the court-martial proceedings. The Judge Advocate sums up the evidence and gives further directions to the other members of the court-martial beforehand and [illegible] refuse to accept a verdict if he considers it 'contrary to law' in which case he gives members of the court-martial further directions in open court, following which the members retire again to consider verdict.[748] Moreover, with regard to the ordinary members of the court-martial,[749] the Court considered that the so-called Briefing [illegible] not only instructed members of the need to function independently, but also [illegible] a significant impediment to any inappropriate pressure being brought to bear. In the *Grieves* Case the Court concluded that the Judge Advocate in a naval court-martial, who is not a civilian but a serving naval officer who, when not sitting in a court-martial, carries out regular naval duties, cannot be considered a strong guarantee of the independence of a naval court-martial.[751]

In several cases the composition of the Turkish National Security Courts has been at issue. These courts are composed of three judges, one of whom is a regular officer and member of the Military Legal Service. In the *Incal* Case the applicant had been convicted by the Izmir Security Court for disseminating leaflets capable of inciting people to resist the Government and to commit criminal offences. The applicant [illegible]

747 See, e.g, the judgment of 25 February 1997, *Findlay*, paras 73-80; judgment of 24 September 1997, *Coyne*, paras 56-58; judgment of 18 February 1999, *Cable and Others*, paras 20-24; judgment of 5 June 2001, *Mills*, paras 22-27.

748 Judgment of 16 December 2003 (Grand Chamber), para. 117.

749 Those members, who were appointed on an ad hoc basis and had no legal qualifications and little court-martial experience, remained subject to RAF discipline in a general sense and remained RAF officers. However, they could not be reported upon in relation to their decision-making.

750 Judgment of 16 December 2003, *Cooper* (Grand Chamber), para. 117. In the judgment of 26 [illegible] 2002, *Morris*, paras 66-79, the Court has reached a different conclusion. In that case the Kingdom Government had omitted to submit to the Court important information with the practice of court-martial. This new information appeared to be crucial in the Cooper case.

751 Judgment of 16 December 2003 (Grand Chamber), paras 82-91. See also the judgments of [illegible] 2004, *G.W. v. the United Kingdom* and *Le Petit*, paras 43-49 and paras 21-24, respectively.

[illegible] that his conviction had infringed Article 10 and Article 6 of the Convention. [illegible] Article 6 was concerned, the Court, taking the concepts of independence and impartiality together, firstly took stock of the legal system. It noted that the status of military judges as members of the Security Courts did provide certain guarantees of independence and impartiality. They underwent the same professional training, when [illegible] enjoyed the same constitutional safeguards as their civilian counterparts and, according to the Turkish Constitution, had to be free from the instructions of public authorities. However, other aspects made the independence and impartiality of military judges questionable: the judges concerned belonged to the army, which takes its orders from the executive; they remained subject to military discipline and assessment reports; decisions pertaining to their appointment were to a great extent taken by the administrative authorities and the army, and, finally, their term of office as National Security Court judges was only four years and could be renewed.[752] The Court further attached special importance to the fact that a civilian had to appear before a court partly composed of members of the armed forces. The Court concluded that because one of the judges of the National Security Court was a military judge, the applicant could legitimately fear that it might allow itself to be unduly influenced by considerations which had nothing to do with the nature of the case. Therefore, he had legitimate doubts about the independence and impartiality of the court.[753] As far as the composition of the Turkish National Security Courts is concerned the *Incal* Case may be regarded as leading case law.[754]

The requirement of impartiality may under circumstances restrict the participation of substitute judges, especially in view of any other profession exercised by them, *e.g.*, that of a practising lawyer. In the *Wettstein* Case the applicant was confronted with a substitute judge who had acted in a similar procedure as the legal representative of the opposing party. Although no material link existed between these two cases, in view of the fact that the proceedings partly overlapped in time, the Court concluded that the applicant could have had reason for concern that the judge would continue to see in him the opposing party.[755]

The mere fact that lay assessors also sit on a tribunal, as is frequently the case in disciplinary tribunals, does not mean on this ground alone that they are not impartial,

752 Judgment of 9 June 1998, para. 68.

753 *Ibidem*, paras 65-73.

754 See, e.g, the judgment of 28 October 1998, *Çiraklar*, paras 38-41; judgment of 8 July 1999, *Sürek (No. 1)*, paras 66-76; judgment of 14 October 2004, Yanikoglui, paras 23-25. See, with regard to a Turkish Martial Law Court, e.g., the judgment of 25 September 2001, *Sahiner*, paras 33-47; judgment of 22 June 2004, *Ahmet Koc*, paras 30-32.

755 Judgment of 21 December 2000, paras 44-50. In the judgment of 23 November 2004, *Puolitaival and Pirttimaki*, paras 45-54, the Court reached a different conclusion, taking into account, *inter alia*, the fact that the functions of the person concerned as counsel and judge had not overlapped in time, and the remoteness in time and subject-matter of both sets of proceedings.

even in cases where they constitute a majority.[756] But if persons are involved who are closely allied to one of the parties, which is often the case in arbitration tribunals, the impartiality may be open to doubt. An issue under Article 6(1) will then arise also when not all the parties or their interests are equally represented in the tribunal in question. Thus, in the *Le Compte, Van Leuven and De Meyere* Case, where the medical practitioners had been summoned before a disciplinary tribunal on account of their opposition to the obligatory membership of a professional association of medical practitioners, the Commission reached the conclusion that there was a defect in the course of proceedings, since the tribunal judging at first instance, the Provincial Council, was composed largely of persons who had been elected by members of the professional association, while the Appeal Council consisted of medical practitioners and judges on a fifty-fifty basis. The fact that appeal to the Court of Cassation was possible did not, in the Commission's opinion, eliminate this defect, because review was possible only on the ground of procedural errors or misapplication of the law. The Court, however, did not follow the Commission. Since an appeal had been lodged with the Appeal Council, in the Court's view the impartiality of the Provincial Council did not require examination. With regard to the Appeal Council, the Court held that the impartiality of such a tribunal must be presumed, unless the contrary can be proved, which had not been done in the present case in the Court's opinion.[757]

In the *AB Kurt Kellerman* Case the applicant company claimed that the Swedish labour court could not be composed of members representing the industrial sector, since the court had to examine the applicant company's argument that the collective union action, including a possible blockade of the company, had to be proportionate and socially relevant. The Court applied the objective-impartiality-test and held that the deciding issue was whether the balance of interests in the composition of the labour court was upset, and, if so, whether any such lack of balance would result in unfair proceedings. In the circumstances of the case, with five votes to two, the Court answered the first question in the negative and, therefore, a violation of Article 6 did not occur.[759] A comparable line of reasoning lead in the *Holm* Case to the conclusion that the impartiality (and independence) of the jury was open to doubt,[760] but in the *Pullar* Case the fact that a member of the jury was a junior employee in the bank of one of the witnesses for the prosecution, could pass the objective-impartiality test and Article 6 had not been violated.[761] When serious allegations are made that racist

756 See, *e.g.*, the judgment of 23 April 1987, *Ettl*, paras 38; judgment of 23 April 1997, *Stallinger and Kuso*, para. 37.

757 Report of 14 December 1979, B.38 (1984), pp. 40-42.

758 Judgment of 23 June 1981, para. 58; judgment of 10 February 1983, *Albert and Le Compte*, judgment of 28 June 1984, *Campbell and Fell*, para. 84.

759 Judgment of 26 October 2004, paras 60-69. The Court reached a different conclusion in the case of 22 June 1989, *Langborger*, paras 31-36.

760 Judgment of 25 November 1993, paras 30-33.

761 Judgment of 10 June 1996, paras 33-41.

... have been made by jurors, called upon to try a person of different ethnic origin, ... should take sufficient steps to check whether, as constituted, it is 'an impartial ... in the meaning of Article 6. In the *Remli* Case[762] and the *Sander* Case[763] the ... of the judge concerned appeared not to be sufficient. However, in the ... ances of the *Gregory* Case, where the allegation of racial bias was vague and ..., the Court held that the redirection of the jury did constitute a sufficient ...

... the *Hulki* Case the question arose whether the applicant had waived his right ... domestic law to object to the participation of a judge in a criminal trial, who ... taken part previously in the questioning of two witnesses. The approach of the ... in this case seems to be ambiguous. On the one hand, it held that it was irrele- ... whether a waiver had been made or not, because it was anyhow incumbent on ... Court to assess whether the composition of the trial court could cast doubt on its ... impartiality.[765] On the other hand, however, it concluded that the objective approach ... offer the applicant no success, since he had refrained from his right to challenge ... composition of the Court.[766] In the *McGonnell* Case the Court held that the ... on whether the applicant ought to have taken up his complaint with regard to ... lack of independence and impartiality with the national judicial authorities, ... decided on what was reasonable in the circumstances of the case. With reference ... the national case law and taking into account the fact that the argument of waiver ... not raised before the Commission but for the first time before the Court, the latter ... concluded that the failure to challenge the domestic tribunal could not be said to have ... been unreasonable and could not amount to a tacit waiver of the right to an ... independent and impartial tribunal.[767]

4.3.4 ESTABLISHED BY LAW

... prescription that the tribunal must be 'established by law' implies the guarantee ... the organisation of the judiciary in a democratic society is not left to the discretion ... the executive, but is regulated by law. The phrase covers not only the legal basis for ... very existence of a 'tribunal'. In the opinion of the Commission the organization ... functioning of the tribunal must also have a legal basis.[768] The Court left the issue

762 Judgment of 23 April 1996, paras 46-48.

763 Judgment of 9 May 2000, paras 22-35.

764 Judgment of 25 February 1997, paras 43-50.

765 Judgment of 22 February 1996, para. 30.

766 *Ibidem*, para. 34.

767 Judgment of 8 February 2000, paras 44-45; judgment of 15 June 2004, *Thompson*, paras 44-45. See, *mutatis mutandis*, also the judgment of 17 June 2003, *Pescadore Valero*, paras 23-26.

768 Report of 13 May 1981, *Piersack*, B.47 (1986), p. 23.

undecided in the *Piersack* Case,[769] but in the *Posokhov* Case it held that the requirement also covers the composition of the bench in each case.[770] As a rule the Court leaves interpretation of national law by the domestic judicial authorities more or less free, granted,[771] unless there appears to be a flagrant breach of the law.[772]

In the *Coëme and Others* Case four people had been accused of, in short, forgery and fraud. The criminal proceedings took place before the Belgian court of cassation as court of first instance, because the charges against them were closely linked to the prosecution of a former minister before the same court. Since Article 103 of the Belgian Constitution provided only for jurisdiction of the court of cassation as court of first instance in case of the prosecution of (former) ministers, the Court held, with respect to the proceedings against the four, that the court of cassation had not been established by law.[773] In the *Posokhov* Case, the failure to compile a list of lay judges implied the lack of any legal grounds for the participation of the lay judges in the administration of justice on the day of the applicant's trial and, therefore, amounted to a violation of Article 6.[774]

10.9 THE PRESUMPTION OF INNOCENCE

10.9.1 INTRODUCTION

Article 6(2) sets forth that the person who is charged with a criminal offence has to be presumed innocent until proved guilty according to law. As in the case of the first paragraph, this paragraph deals with a special aspect of the general concept of 'fair trial' in criminal cases. For that reason no further inquiry is made as to a possible violation of this provision when a violation of the first paragraph has already been found.[775] However, in the *Delta* Case the Court suggested that in special circumstances there is room for a separate investigation under paragraph 2, despite the fact that a violation of the first paragraph has been established already.[776]

From the case law concerning the autonomous meaning of the concept of 'criminal charge' in the first paragraph it follows that the second and third paragraphs are also applicable to proceedings other than criminal proceedings – *e.g.*, disciplinary proceedings and administrative proceedings[778] – which are to be equated with criminal proceedings by means of the criteria developed in the *Oztürk* Case. In the *Phillips* Case the Court held that Article 6(2) was not applicable to confiscation proceedings pursuant to the British Drug Trafficking Act 1994. The Court considered the proceedings which enabled the national court to assess the amount at which the confiscation order could properly be fixed, as analogous to the determination by a court of the amount of a fine or the length of a prison sentence and, therefore, the proceedings did not constitute any new "charge".[779] However, the Court held Article 6(1) to be applicable because Article 6(1) applies throughout the entirety of proceedings for "the determination (...) of any criminal charge", including proceedings whereby a sentence is fixed.[780]

In the *Minelli* Case the second paragraph was defined by the Court in the sense that this provision has been violated if "without the accused's having previously been proved guilty according to law and, notably, without his having had the opportunity of exercising his rights of defence, a judicial decision concerning him reflects an opinion that he is guilty."[781] A reasoning by which it is only suggested that the person in question is guilty is already sufficient for such a violation.

However, the presumption may be violated not only by a court but also by other public authorities,[782] including the legislator.[783]

10.9.2 WITH RESPECT TO EVIDENCE

The most important aspect of the presumption of innocence concerns the foundation of the conviction. This aspect is very closely connected with the requirement of the court's impartiality discussed above.[784] The court has to presume the innocence of the accused without any prejudice and may sentence him only on the basis of evidence

769 Judgment of 1 October 1982, para. 33.
770 Judgment of 4 March 2003, para. 39.
771 See, *e.g.*, the judgment of 22 February 1996, *Bulut*, para. 29.
772 Judgment of 28 November 2002, *Lavents*, para. 114.
773 Judgment of 22 June 2000, para. 105-108.
774 Judgment of 4 March 2003, paras. 41-42.
775 Judgment of 27 February 1980, *Deweer*, para. 56.
776 Judgment of 19 December 1990, para. 38.

778 Judgment of 10 February 1983, *Albert and Le Compte*, paras 38-42.
See with regard to tax penalties the judgments of 29 August 1997, *A.T., M.P. and T.P. v. Switzerland* and *E.L., R.L. and J.O.-L. v. Switzerland*, paras 37-43 and 42-48, respectively. In the judgment of 22 September 1994, *Hentrich*, paras 62-64, the exercise of the right of pre-emption by the French tax authorities because the sale price of land declared in the contract of sale was too low, was deemed not to imply an accusation of tax evasion and, accordingly, could not lead to a violation of Article 6(2).
779 Judgment of 5 July 2001, paras 28-36.
780 *Ibidem*, paras 37-39.
781 Judgment of 25 March 1983, para. 37. See also, *e.g.*, the judgments of 25 August 1987, *Lutz, Englert, and Nölkenbockhoff*, paras 59-60, 36-37 and 36-37, respectively; judgment of 10 October 2000, *Daktaras*, para. 41.
782 Judgment of 10 February 1995, *Allenet de Ribbemont*, para. 36.
783 Judgment of 7 October 1988, *Salabiaku*, paras 15-16.
784 Compare, *e.g.*, the judgment of 28 November 2002, *Lavents*, paras 119-121 and 125-128, and the judgment of 27 January 2004, *Kyprianou*, paras 51-58.

put forward during the trial, which moreover has to constitute 'lawful' [illegible] recognised as such by law. The Court has formulated the essence of the [illegible] follows: "Paragraph 2 embodies the principle of the presumption of [illegible] requires, *inter alia*, that when carrying out their duties, the members of a court [illegible] not start with the preconceived idea that the accused has committed the [illegible] charged; the burden of proof is on the prosecution, and any doubt should benefit [illegible] accused. It also follows that it is for the prosecution to inform the accused of [illegible] that will be made against him, so that he may prepare and present his [illegible] accordingly, and to adduce evidence sufficient to convict him."[785]

The evidence put forward at the trial may refer back to statements previously [illegible] by the accused or testimony by witnesses, provided that the latter can be [illegible] refuted during the trial.[786] If a witness does not wish to act as a witness during the [illegible] and can advance a legitimate reason for it, there is no objection to a reading of [illegible] testimony, provided that the right of the defence to question witnesses is sufficiently [illegible] upheld, *e.g.*, by having provided the opportunity to interrogate and contradict the [illegible] witness in an earlier phase of the proceedings. If this condition has not been met, the [illegible] verdict must not be based exclusively or largely on such testimony.[787]

Every instance giving rise to the least doubt with regard to the evidence has to be [illegible] construed in favour of the accused.[788] This does not necessarily mean that the evidence [illegible] put forward must be absolutely conclusive – in several legal systems ultimately the [illegible] viction on the part of the court is the point that matters – but it does mean that the [illegible] court must base its conviction exclusively on the evidence put forward during the trial. [illegible] A sentence may of course also be based on a confession of guilt on the part of the [illegible] accused. In that case, however, the court will have to ascertain thoroughly that the [illegible] confession has been made in complete freedom.[789] From a statement of the accused [illegible] which is not intended to be a confession of guilt, no such confession may be inferred. [illegible] Article 6(1) embodies the right of the accused not to incriminate himself and the right [illegible] to remain silent, which is closely linked to the presumption of innocence. In the [illegible] *Murray* Case, in which the prosecution had build up a 'formidable' case against the [illegible] applicant, the Court held that the drawing of adverse inferences from the applicant's [illegible] silence had not violated Article 6(1).[790] In the *Telfner* Case, however, it reached a different conclusion. The drawing of inferences from the applicant's silence had constituted [illegible]

785 Judgment of 6 December 1988, *Barberà, Messegué and Jabardo*, paras 67-68. See also the judgment of 20 March 2001, *Telfner*, para. 15.

786 See *infra* 10.10.5.

787 Judgment of 24 November 1986, *Unterpertinger*, A.110, paras 31-33. On the issue of anonymous witnesses, see *infra* 10.10.5.

788 Judgment of 6 December 1988, *Barberà, Messegué and Jabardo*, para. 77.

789 Insofar as the confession has been extorted by illegal means, such as physical or mental [illegible] follows already from the words 'according to law'; report of 31 March 1963, *Pfunders (Austria v. Italy)*, *Yearbook* VI (1963), p. 784.

790 Judgment of 8 February 1996, paras 44-58.

[illegible] of Article 6(2) because the prosecution had not been able to establish a [illegible] *prima facie* case against the applicant.[791]

[illegible] the trial statements are made or produced by the prosecutor, witnesses [illegible] from which bias on their part is evident, the court has to make a stand [illegible] these statements if it is to avoid the semblance of being biassed as well. If the [illegible] does so, the accused can no longer complain of such bias on the part of the first-[illegible] persons.[792] The same holds good if a sentence which the accused alleges [illegible] been dictated by bias, has been upheld on appeal, while the court of appeal [illegible] made an inquiry into this very matter. In that case the accused will be able to [illegible] only of bias on the part of this court of appeal or of the fact that the injury [illegible] by the bias of the lower court has not been redressed by the higher court.[793] [illegible] there has been publicity surrounding the proceedings in which publicity the guilt [illegible] accused is assumed, the latter will have to prove to some extent that his ultimate [illegible] was also influenced by that publicity. This will not be easy.[794] With respect [illegible] possible violation of the presumption of innocence by public authorities the [illegible] has emphasised "the importance of the choice of words by public officials" in [illegible] statements before an accused has been tried.[795] In particular, when those statements are made in a context independent of the criminal proceedings, prudence is [illegible] for.[796] However, the mere assertion by a prosecutor to the press that there is sufficient evidence to support a finding of guilt by a court does not violate the presumption of innocence.[797]

[illegible] judgment of 20 March 2001, paras 17-20. See on the right to remain silent *supra* 10.5.5.

[illegible] report of 31 March 1963, *Pfunders (Austria v. Italy)*, *Yearbook* VI (1963), p. 740 (784); report of 15 March 1961, *Nielsen*, *Yearbook* IV (1961), p. 490 (568). See also the judgment of 23 April 1998, *Remmal*, paras 37-41, where the Court held that the psychiatric experts appointed by the investigating judge logically had to start from the working hypothesis that the applicant had committed the crimes, which had given rise to the prosecution.

[illegible] report in the *Pfunders* Case, *ibidem*.

[illegible] See *e.g.* Appls 7572/76, 7586/76 and 7587/76, *Ensslin, Baader and Raspe*, Yearbook XXI (1978), p. 418 (462). The applicants alleged violation of Art. 6(2) on account of the press campaign against them, in which they were called criminals and murderers, and on account of the exceptional security measures around the suit, which could not but create an impression of guilt. The Commission took the position that the challenged publications and measures were a reaction to their own declarations and behaviour and were not aimed at creating an atmosphere unfavourable for the accused, and that a professional judge is sufficiently immune to any influence that might result from this.

[illegible] judgment of 10 October 2000, *Daktaras*, para. 41.

[illegible] *Ibidem*, para. 44 and the judgment of 26 March 2002, *Butkevicius*, para. 52.

[illegible] judgment of 26 March 2002, *Butkevicius*, para. 52. However, the declarations by the Chairman of the national Lithuanian Parliament of the applicant's guilt did violate Article 6(2) (paras 53-54). See also the judgment of 28 October 2004, *Y.B. and Others*, paras 43-51, where the combination of, on the one hand, the press release issued by the police, which could have been construed as confirmation that, according to the police, the applicants had committed the offences of which they were accused, and, on the other hand, the press conference at which journalists were able to take photographs of the applicants, amounted to a violation of the presumption of innocence.

[illegible] *supra*

The practice where during the trial the criminal record, if any, of the accused is brought to the notice of the court, does not constitute a conflict with Article 6(2). It is obvious, however, that such information may promote a presumption of guilt on the part of the court or the jury, so that the person in question has at least to be given an opportunity to advance evidence that the criminal record has undeservedly influenced the court.

The presumption of innocence requires that criminal liability does not subsist in a person who has allegedly committed the criminal act.[799]

10.9.3 WITH RESPECT TO TREATMENT OF THE ACCUSED

In addition to the establishment of guilt, Article 6(2) also has consequences for the treatment of the accused; in this respect, too, his innocence must be presumed. This applies to the treatment of the accused during the preliminary examination and the trial, as well as to the treatment of a person detained on remand: that treatment may not have a punitive character.[800] However, as the Court held in the *Peers* Case, Article 6 does not require separate treatment for convicted and accused persons in prison.

10.9.4 WITH RESPECT TO THE PRESUMPTION OF ACCOUNTABILITY

The principle embodied in paragraph 2 also applies in those criminal cases where the issue of guilt is not a central issue. In the *Salabiaku* Case the Court held that the Contracting States are in principle free, subject to certain conditions, to establish an offence on the basis of an objective fact as such, irrespective of whether it results from criminal intent or from negligence. The applicant was convicted not for the mere possession of unlawfully imported prohibited goods, but for smuggling such goods, while the presumption of accountability was inferred from their possession which led to his conviction. The Court stressed the relative nature of the distinction between presumption of accountability and presumption of guilt. Presumptions of fact or of law operate in every legal system; this is not contrary to the Convention. The Contracting States

798 Judgment of 10 February 1983, *Albert and Le Compte*, para. 40.

799 Judgments of 29 August 1997, *A.T., M.P. and T.P. v. Switzerland* and *E.L., R.L. and J.O.-L. v. Switzerland*, paras 44-48 and paras 49-53, respectively.

800 See the judgment of 5 July 2001, *Erdem*, para. 49, where the Court held, however, that it was not necessary to investigate the complaint under Article 6(2), because it had already found a violation of the reasonable time requirement of Article 5(3).

801 Judgment of 19 April 2001, para. 78. See, however, the Standard Minimum Rules for the Treatment of Prisoners.

... however under the obligation to remain within reasonable limits in this respect as regards their criminal law provisions, taking into account the importance of what is at stake and to maintain the rights of the defence. Indeed, the guarantee of Article 6(2) must also be respected by the legislature while, according to the Court, the words 'according to law' are not to be construed exclusively with reference to domestic law but contain a reference to the fundamental principle of the rule of law.[802]

In the *Phillips* Case national law required, in short, the court sentencing a person for drug trafficking offence to assume that any property appearing to have been held by him during the period of six years before the date on which the criminal proceedings were commenced, was received as a payment or reward in connection with drug trafficking. The Court held that the confiscation proceedings conducted against the applicant pursuant to this law had been fair. Although the assumption was mandatory, the legal system was not without safeguards, especially because the assumption could have been rebutted if the defendant had shown, on the balance of probabilities, that he had acquired the property other than through drug trafficking.[803]

In the *Radio France and Others* Case the director of the radio station and two journalists had been convicted for the broadcasting of news bulletins mentioning an article which alleged that a Deputy Prefect had overseen the deportation of thousand Jews in 1942 and 1943. The applicants complained that the Audiovisual Communication Act created an irrefutable presumption that the editorial director of the radio station was liable for the broadcasting of the defamatory accusations. The Court, however, taking into account what was at stake, i.e. the need to prevent the broadcasting of damaging statements in the media by obliging the editorial director to exercise strict control, concluded that the presumption of the Audiovisual Communication Act remained within the requisite 'reasonable limits'.[804]

10.9.5 WITH RESPECT TO POST-TRIAL DECISIONS

Article 6(2) may even be relevant after the formal determination of the 'charge', for instance when a decision has to be taken with regard to the costs of the suit or the compensation for pre-trial detention claimed by the former suspect.

Article 6 applies to these decisions as long as the question to be answered can be regarded as "a consequence and, to some extent, the concomitant of the criminal

802 Judgment of 7 October 1988, para. 28. See also the judgment of 25 September 1992, *Pham Hoang*, para. 33.

803 Judgment of 5 July 2001, paras 40-47. The Court discussed the matter under Article 6(1), because it held Article 6(2) not to be applicable.

804 Judgment of 30 March 2004, para. 24.

proceedings".[805] In the *Minelli* Case, where the court had concluded that the [illegible] in an action for insult could not sue since the period of limitation had [illegible] still had condemned the defendant to pay two thirds of the trial costs and [illegible] compensation in respect of the prosecutor's expenses, because in the court's [illegible] he would in all probability have been found guilty if the limitation had not [illegible] continuance of the proceedings, the Court held that the fact that the accused [illegible] to pay some of the costs of the suit if he is discharged need not yet in itself [illegible] Article 6(2), but that this *is* the case if the presumable guilt of the accused [illegible] the criterion for it, without the guarantees of Article 6 being observed.[806] In the *Sekanina* Case the Court held that "the voicing of suspicions regarding an accused's innocence" following a final aquittal on the merits, is no longer admissible [illegible] even in case the accused had been given the benefit of the doubt[807] and in cases where the accused is acquitted for technical reasons only.[809] The same holds good for compensation proceedings instituted by the victim of the alleged crime.[810] In the *Lutz*, *Englert* and *Nölkenbockhoff* Cases the Court held that the decision to refuse reimbursement of costs to a person 'charged with a criminal offence' in the event of discontinuance of the proceedings against him, may raise an issue under Article 6(2) if the [illegible] reasons amount in substance to a determination of the guilt of the accused without his having previously been proved guilty according to the law, in particular without having had an opportunity to exercise the right of defence.[811] Within this scope the Court distinguished in the *Baars* Case between decisions which describe a [illegible] and decisions which contain a 'finding of guilt' and held that only the latter [illegible] is incompatible with Article 6(2) of the Convention.[812]

10.2 MINIMUM RIGHTS FOR THE CRIMINAL SUSPECT

10.2.1 INTRODUCTION

Article 6(3) contains an enumeration of the minimum rights to which everyone charged with a criminal offence is entitled. This provision, unlike the first paragraph, does not relate to proceedings concerning the determination of civil rights and obligations. On the one hand, however, if a party to civil proceedings is denied the rights mentioned in paragraph 3, under certain circumstances this may entail that there is no 'fair hearing' in the sense of the first paragraph.[813] On the other hand, the fact that 'civil rights and obligations' are at issue does not exclude that the proceedings have a criminal character.[814]

The specific enumeration in the third paragraph for criminal proceedings does not imply that an examination for compatibility with the third paragraph makes an examination for compatibility with the first paragraph superfluous, since the guarantees contained in the third paragraph of Article 6 are constituent elements, *inter alia*, of the general notion of a fair trial.[815] The enumeration of the third paragraph is not exhaustive in that respect, and it is therefore possible that, although the guarantees mentioned there have been satisfied, the trial as a whole still does not satisfy the requirements of a fair trial. As a result of an extensive and functional interpretation of the third paragraph in the Strasbourg case law, however, examination for compatibility with the third and with the first paragraph is in fact likely to more or less coincide. At all events, in the case of a negative outcome of the examination for compatibility with the first paragraph an examination with regard to the third paragraph is deemed superfluous.[816]

Article 6 – and especially its paragraph 3 – applies not only to criminal court proceedings, but is also relevant to pre-trial proceedings, because an initial failure to

805 Judgment of 25 August 1993, *Sekanina*, para. 22; judgments of 25 August 1987, *Lutz*, para. 8 and *Nölkenbockhoff*, para. 35. This was not the case in the judgment of 11 February 2003, *Englert*, concerning the compensation claim of the victim of alleged sexual abuse. Despite the [illegible] acquittal in the criminal proceedings it was legally feasible to award compensation. The Court held that the compensation case was not a direct sequel to the criminal trial.

806 Judgment of 25 March 1983, paras 37-38.

807 Judgment of 25 August 1993, *Sekanina*, para. 30; judgments of 11 February 2003, *O. v. Norway* and *Hammern*, para. 39 and para. 47, respectively. See, however, also the judgment of 28 November [illegible] *Marziano*, where the Italian court decided to discontinue the criminal proceedings [illegible] applicant, who was accused of sexual abuse of his daughter. According to the Court [illegible] the grounds stated in the decision that the child's statements were true in substance but [illegible] contained contradictions, the accused could not be convicted, did not violate the presumption of innocence.

808 Judgment of 21 March 2000, *Rushiti*, paras 31-32; judgment of 10 July 2001, *Lamanna*, [illegible] judgment of 20 December 2001, *Weixelbraun*, paras 25-31.

809 Judgment of 9 November 2004, *Del Latte*, paras 32-34, where the national court based its [illegible] on the consideration that the applicants would inevitably have been convicted on the [illegible] if the prosecution had charged them with "threatening to commit a crime directed against [illegible] instead of attempted murder/manslaughter.

810 Judgment of 11 February 2003, *Y. v. Norway*, paras 43-47.

811 Judgments of 25 August 1987, paras 58-64, 37-41 and 35-41, respectively. See also, e.g. the [illegible] of 26 March 1996, *Leutscher*, paras 30-32.

812 Judgment of 28 October 2003, paras 26-32.

813 The lack of free legal aid may, for instance, bar the exercise of the right of 'access to court'; see *supra* 10.4.2.3.

814 Judgment of 25 March 1983, *Minelli*, para. 28.

815 Judgment of 9 April 1984, *Goddi*, para. 28; judgment of 12 February 1985, *Colozza*, para 26.

816 Judgment of 27 February 1980, *Deweer*, para. 56.

comply with the provisions of paragraph 3 before a case is sent for trial, may [illegible] the fairness of the trial.[817]

10.10.2 INFORMATION OF THE ACCUSED

Under paragraph 3(a) the accused is granted the right to be informed promptly [illegible] a language which he understands and in detail, of the nature and cause of the accusation against him. This right, which constitutes an 'essential prerequisite [illegible] trial,[818] is very closely related to the right granted under paragraph 3(b) [illegible] must have adequate time and facilities for the preparation of the defence. [illegible] the Court held in the *Pélissier and Sassi* Case, the provision implies the right [illegible] accused "to be informed not only of the cause of the accusation, that is to say [illegible] acts he is alleged to have committed and on which the accusation is based, [illegible] the legal characterisation given to those facts".[820] However, in this phase it is not necessary to furnish any evidence in support of the charge.[821] The obligation to inform the defendant, which rests entirely on the prosecuting authorities, cannot be supplied with passively by making information available without notifying the defence.[822]

The question of whether the required information has been furnished promptly (*dans le plus court délai*), has to be assessed in each individual case on the basis of its specific circumstances. In order to enable the accused to prepare his defence, the prosecutor will have to inform him as soon as it has been decided to institute criminal proceedings and, if necessary, make provisions for a translation or for the presence of an interpreter. On that occasion he will have to provide the relevant data available at that moment, which afterwards are to be supplemented, if need be, particularly when the summons is issued. However, adequate defence may already be of great importance in the phase preceding the ultimate decision as to whether or not to institute proceedings and it may even affect this decision, so that it results from [illegible]

817 See, *e.g.*, the judgment of 24 November 1993, *Imbrioscia*, para. 36; judgment of 8 February 1996, *Murray*, para. 62; judgment of 20 June 2002, *Berlinski*, para. 75.

818 See, *e.g.*, the judgment of 25 March 1999, *Pélissier and Sassi*, para. 52; judgment of 1 March 2001, *Dallos*, para. 47; judgment of 17 July 2001, *Sadak and Others*, para. 49.

819 See, *e.g.*, the judgment of 25 July 2000, *Mattoccia*, para. 60.

820 Judgment of 25 March 1999, para. 52. See also, *e.g.*, the judgment of 21 February 2002, *Sipavičius*, para. 27; judgment of 1 March 2001, *Dallos*, para. 47.

821 Appl. 7628/76, *X v. Belgium*, D&R 9 (1978), p. 169 (173); report of 5 May 1983, *Colozza and Rubinat*, A.89, p. 28.

822 Judgment of 25 July 2000, *Mattoccia*, para. 65.

[illegible] of paragraphs 3(a) and 3(b) that even before this formal decision the accused [illegible] be kept informed as fully as possible of the suspicion against him.[823] [illegible] paragraph 3(a) requires that the information must be furnished 'in detail', but does [illegible] impose any special formal requirement as to the manner in which the defendant [illegible] be informed.[824] The extent of details depends on the particular circumstances of [illegible] although it is clear that the information provided must suffice to understand [illegible] charges with a view to preparing an adequate defence.[825] An alternative charge [illegible] the requirement of specificity.[826]

[illegible] reclassification of an offence in the course of the proceedings may impair the [illegible] to his defence. Therefore, he must be made aware that the offence may be [illegible].[827] In case the reclassification concerns only an element intrinsic to the [illegible] accusation, the Court holds the view that the accused must be considered to [illegible] been aware of the possible reclassification.[828]

[illegible] from the words 'in a language which he understands' it follows that if the accused [illegible] insufficient mastery of the vernacular, the information must be translated for [illegible] for this no particular form is prescribed, but the Court seems to require a written [illegible]. An oral elucidation by the person who serves the writ of summons upon [illegible] accused, or by an interpreter would seem to be an insufficient basis for the [illegible] of his defence.[829] It also seems dubious whether paragraph 3(a) has been

[illegible] the judgment of 14 November 2000, *T. v. Austria*, the Court held Article 6 (1), taken in conjunction with Article 6(3) subparagraph (a) and (b), to have been violated. The district court had ordered the applicant to supplement his legal aid request, but it had not informed him of the suspicion that he had made false statements in his previous request. Subsequently the district court imposed a fine for abuse of process. The applicant learned about the accusation only when the district court's decision was served on him.

[illegible] judgment of 19 December 1989, *Kamasinski*, para. 79; judgment of 25 March 1999, *Pélissier and Sassi*, para. 53.

[illegible] judgment of 25 July 2000, *Mattoccia*, para. 60. In this case Article 6 had been violated *inter alia* because the information in the accusation had been vague on essential points concerning time and place and had been repeatedly contradicted and amended in the course of the trial (paras 63-72). See also the judgment of 27 January 2004, *Kyprianou*, paras 65-68, where the material facts which appeared to be crucial for the court's decision to impose on the applicant the sentence of imprisonment were not disclosed before that decision, which amounted to a violation of the presumption of innocence.

[illegible] Appl. 3894/68, *X v. the Netherlands*, Coll. 32 (1970), p. 47 (50).

[illegible] judgment of 25 March 1999, *Pélissier and Sassi*, para. 56; judgment of 1 March 2001, *Dallos*, para. 48; judgment of 17 July 2001, *Sadak and Others*, para. 52. A proposal made by the public authorities, acting as a civil party, to the registry of the Court of Appeal to reclassify the criminal acts, without informing the defendant of this proposal, was considered by the Commission to violate the third paragraph under (a): Report of 16 March 1989, *Chichlian and Ekindjian*, p. 52. Before the Court gave judgment, a friendly settlement was reached.

[illegible] judgment of 24 October 1996, *De Salvador Torres*, paras 30-33, with respect to an aggravated circumstance. In the judgment of 25 March 1999, *Pélissier and Sassi*, paras 57-61, the Court held that 'aiding and abetting criminal bankruptcy' did not constitute an intrinsic element of 'criminal bankruptcy'.

[illegible] judgment of 19 December 1989, *Kamasinski*, para. 79.

satisfied if the information is sent to counsel who has mastery of the ver... may find ways to inform his client, since in this way the authorities shift an... resting upon them on to counsel, while it is important for the accused that h... is also able to follow the defence put forward on his behalf as adequately as p... In the *Brozicek* Case the Court concluded that, since the applicant was not o... origin, did not reside in Italy and informed the judicial authorities that he ... understand the Italian language, it was for the judicial authority to pro... translation unless it could be established that the person concerned was ob... capable of understanding the content of the notification.[830]

10.10.3 TIME AND FACILITIES FOR THE DEFENCE

Under paragraph 3(b) the accused is guaranteed the right to have adequate ... facilities for the preparation of his defence. Apart from the above-mentioned ... with paragraph 3(a) there is also a close connection with paragraph 3(c), regu... legal aid. In that context the Commission has emphasised that here not only the ... of the accused are concerned, but equally the rights of counsel, so that for the ... ment of the overall situation the position of both of them has to be taken ... account.[831] In the *Makhfi* Case, after a session that lasted almost sixteen hours ... for the accused addressed the jury at 4.25 in the morning. The judge and jury ... held their deliberations between 6.15 and 8.15 in the morning, found the appl... guilty and sentenced him to eight years imprisonment. These facts amounted ... violation of the first paragraph taken together with the third paragraph of Arti... since the Court considered it essential that not only the accused but also his ... should be able to make their submissions without suffering from excessive fa...

The question of whether the accused has been allowed adequate time for ... preparation of his defence will have to be decided afterwards, according to the ... stances in which both the accused and his counsel found themselves, and on the ... of the nature of the case.[833] If the accused has great confidence in a particular law... who is very occupied at the relevant time, the judicial authorities will have to ta...

[830] Judgment of 19 December 1989, para. 41.

[831] Appl. 524/59, *Ofner*, Yearbook III (1960), p. 322 (352). The question whether the surveillance ... contacts of a detainee with his lawyer is permissible, will be discussed under paragraph 3(c).

[832] Judgment of 19 October 2004, paras 34-42.

[833] See, *e.g.*, the judgment of 12 March 2003, *Öcalan*, paras. 167-169, where Article 6 was found to ... been violated, inter alia, because of the fact that the defence received a 17,000 page file approxima... two weeks before the beginning of the trial and also the fact that the lawyers had only limited ... to their client; Appl. 7909/77, *X and Y v. Austria*, D&R 15 (1979), p. 160 (162-163), where ... Commission, notwithstanding the fact that counsel could communicate with his client only ... difficulty because of her poor psychological and physical condition, held that the time of seven ... days available to him was adequate, considering the complexity of the case.

... account as much as possible. On the other hand, in that case the accused cannot ... the resulting delay as a ground for violation of the first paragraph of Article ... one reason or another the accused has to change counsel, the new lawyer will ... be given adequate time to become acquainted with the case.[834] If there is a right ... legal aid, a lawyer has to be assigned in good time.[835] The accused, however, ... complain if through his own fault he has created a situation in which a lawyer ... to be appointed shortly before the hearing is to be held.[836]

... 'facilities' do not include the possibility to choose counsel or have one assigned, ... the right to legal aid is separately provided for under paragraph 3(c).

... appeal is open, the time-limit has to be such that a thorough study of the judgment ... be made to enable a decision as to whether an appeal should be brought, while ... ment of the hearing of the appeal in turn will have to leave adequate time for ... preparation of the hearing.[837] The words 'preparation of his defence', therefore, ... not be interpreted to mean that the provision of paragraph 3(b) is not applicable ... appeal proceedings in case the accused has been convicted at first instance and, ... quently, acts not as defendant but as plaintiff in these proceedings. In the ... *Monnet* Case the applicant had to give notice of appeal on points of law within ... time-limit of five days without having the opportunity to take cognisance of the ... written version of the judgment. The Court took the view that it is essential for the ... exercise of the defendant's right of appeal that the national courts indicate unambiguously the reasons on which they base their verdicts. As the applicant was barred in the circumstances of the case from submitting an additional memorial, the Court concluded that paragraph 3(b) in conjunction with paragraph 1 had been violated.[838] In the *Zoon* Case the Court held that it had been possible for the applicant, well before the expiry of the fourteen-day time limit for lodging an appeal, to take cognisance of the judgment in abridged form of the Dutch regional court. Moreover, in the circumstances of the case the judgment did contain sufficient information. Therefore, the rights of the defence had not been unduly affected by the absence of a complete

... See, *mutatis mutandis*, the judgment of 9 June 1998, *Twalib*, para. 40, and, with regard to ... paragraph 3 (c), the judgment of 21 April 1998, *Daud*, para. 38.

... Appl. 7909/77, *X and Y v. Austria*, D&R 15 (1979), p. 160 (162), where the Commission stated that ... the question what period is adequate cannot be answered *in abstracto*.

... Appl. 8251/78, *X v. Austria*, D&R 17 (1980), p. 166 (169-170).

... the judgment of 21 September 1993, *Kremzow*, para. 48, a period of three weeks between the ... receipt of the Attorney General's position paper (the so-called *croquis*) and the hearing of the Supreme ... Court did suffice to formulate a reply to the croquis. See for a case where the date for filing the ... grounds of appeal had not been fixed, but the appellant was informed about the date of the hearing: ... the judgment of 17 December 1996, *Vacher*, paras 22-30.

... judgment of 16 December 1992, paras 34-37.

judgment or a detailed enumeration of the items of evidence relied on to prove the conviction of the applicant.[839]

The reclassification of an offence in the course of proceedings does not violate subparagraph (b) as long as the defendant has adequate opportunity to reorganise his defence accordingly.[840]

In the *Bricmont* Case the Commission stated that subparagraph (b) recognises the right of the accused to have at his disposal, for the purposes of exonerating himself or obtaining a reduction of his sentence, all relevant elements that can be gathered by the competent authorities.[841] The accused cannot complain about lack of facilities if he does not co-operate in producing elements to his defence.[842]

Finally, the possibility of inspection of the files must also be mentioned as an important element of the 'facilities'.[843] The case law of the Court indicates that the right of access is incorporated in the provision under (b), although restriction of this right to the defendant's counsel is not incompatible with Article 6,[844] provided that the evidence is made available to the accused before the hearing and the lawyer of the accused has had the opportunity to comment on it.[845] A lack of adequate time for the preparation of the defence may be cured by way of review proceedings.[846]

10.10.4 THE RIGHT TO DEFEND ONESELF IN PERSON OR THROUGH LEGAL ASSISTANCE

10.10.4.1 General observations

Paragraph 3(c) guarantees the right of the accused to defend himself in person or through legal assistance of his own choosing or (and), if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require.
In the *Pakelli* Case the Court, referring to "the object and purpose of this paragraph which is designed to ensure effective protection of the rights of the defence", [illegible]

839 Judgment of 7 December 2000, paras 32-50.
840 Judgment of 25 March 1999, *Pélissier and Sassi*, para. 62; judgment of 17 July 2001, *Sadak and others*, para. 57.
841 Report of 15 October 1987, A.158, p. 47. See also the judgment of 16 December 1992, *Edwards*, para. 36.
842 Report of 15 October 1987, *Bricmont*, A.158, p. 49.
843 At least from the moment of the charge: Appl. 4622/70, *X v. Austria*, Coll. 40 (1972), p. 1[illegible]
844 Judgment of 19 December 1989, *Kamasinski*, para. 88; judgment of 21 September 1993, *Kremzow*, para. 52.
845 Judgment of 12 March 2003, *Öcalan*, para. 50.
846 Judgment of 20 October 1997, *Serves*, para. 51. The judgment of 9 June 1998, *Twalib*, does provide another example. See, however, the criticism expressed in the partly dissenting opinion with respect to complaints against reclassification: the judgment of 1 March 2001, *Dallos*, para. 47; judgment of 21 February 2002, *Sipavicius*, paras 32-33.

[illegible] in the French text, and not for the 'or' in the English text. This resulted in [illegible] interpretation by the Court: "a 'person charged with a criminal offence' [illegible] not wish to defend himself in person must be able to have recourse to legal [illegible] of his own choosing; if he does not have sufficient means to pay for such [illegible] he is entitled under the Convention to be given it free when the interests [illegible] so require."[847] There are, therefore, three juxtaposed rights included in this [illegible], which will be dealt with consecutively hereafter.
[illegible] manner in which the provision applies (in conjunction with the first paragraph [illegible]) in appeal and cassation proceedings or during a preliminary investigation [illegible] on the characteristics of the proceedings in question.[848]
[illegible] as the rights of the defence have not been irretrievably prejudiced, a failure [illegible] with the requirement of paragraph 3(c) may in principle be cured in appeal [illegible] condition that the appeal court may carry out a full review.[849]
[illegible] provision under paragraph 3(c) does not contain an "unlimited right to use [illegible] arguments". It does not in principle offer protection against a subsequent [illegible] of the accused because he made "false suspicions of punishable behaviour" [illegible] another person.[850]
[illegible] fact that the applicant has not suffered any damage from the non-fulfilment [illegible] requirement under paragraph 3(c) does not exclude that this provision has been [illegible].[851]

10.10.4.2 In Person

[illegible] right for the accused to defend himself in person is closely related to the right to [illegible] present at the hearing,[852] which in principle demands that a person charged with [illegible] criminal offence is entitled to be present at least at the first-instance trial hearing. [illegible] with regard to appeal and cassation proceedings Article 6 does not always entail the [illegible] to be present in person.[853]
[illegible] the *Gillow* Case the Court accepted the requirement of representation by a [illegible] to lodge an appeal as "a common feature of the legal systems in several member

[illegible] judgment of 25 April 1983, para. 31.
[illegible] See, e.g. the judgment of 2 March 1987, *Monnell and Morris*, para. 56; judgment of 22 February 1994, *Ingrosso*, para. 27; and with regard to the preliminary investigation: judgment of 24 November 1993, *Imbrioscia*, para. 38; judgment of 20 June 2002, *Berlinski*, para. 75.
[illegible] judgment of 24 May 1991, *Quaranta*, para. 37.
[illegible] judgment of 28 August 1991, *Brandstetter*, paras 50-54.
[illegible] judgment of 19 February 1991, *Alimena*, para. 20.
[illegible] See, e.g. the judgment of 25 November 1997, *Zana*, para. 68; judgment of 27 May 2004, *Yavuz*, paras 43-51. See on the right to be present *supra* 10.5.4.
[illegible] See, e.g. the judgment of 21 September 1993, *Kremzow*, para. 58; judgment of 25 March 1998, *Belziuk*, para. 37, and see *supra* 10.5.4.

States of the Council of Europe".[854] From paragraph 3(c) it then results that national law stipulates or the judicial authorities decide that the accused must be assisted by a lawyer, he must be able himself to choose this lawyer and, in case of inability to pay for such legal aid, must have a lawyer assigned to him; indeed, in such case such legal aid is evidently considered necessary by national law or the authorities in the interests of justice.

In the *Meftah* Case the applicants complained that they, unlike specialist lawyers, could not make oral representations in the proceedings before the Court of Cassation. The Court held that the special characteristics of cassation proceedings, with specialist lawyers being reserved a monopoly on making oral representations, meant that the applicants had had the choice of whether or not to be represented by a specialist lawyer, the Court rejected their claim.[855]

Although some restrictions of the right of the accused to defend himself in person are permitted, these restrictions cannot go so far that the protection offered by the Convention becomes illusory. In the *Kremzow* Case the situation at issue was that national legislation granted the right of a detained person to be present at the hearing of an appeal against his sentence only if the person concerned made a request to that effect in his appeal. The applicant had failed to make such a request. Nevertheless, because the applicant risked a substantial increase of his sentence of imprisonment, the Court held that the national authorities had been obliged to enable the applicant to be present at the hearing and to 'defend himself in person'. The failure to fulfil this duty amounted to a breach of paragraph 6(1) in conjunction with the provisions of paragraph 3(c).[856]

10.10.4.3 Legal Assistance and Implied Rights

In the *John Murray* Case the Court held that, if domestic law attaches consequences to the attitude of the accused at the initial stage of police interrogation, Article 6 in principle requires that the accused be allowed the benefit from the assistance of a lawyer in the pre-trial phase.[857] Subsequently, in the *Magee* Case the Court reformulated this rule in a more general way: "Article 6 will normally require that the accused be allowed to benefit from the assistance of a lawyer already at the initial stages of

[854] Judgment of 24 November 1986, para. 69.

[855] Judgment of 26 July 2002, paras 40-48.

[856] Judgment of 21 September 1993, paras 65-69; See also the judgments of 8 February 2000, *Mattoccia*, *Edward Cooke*, and *Josef Prinz*, paras 40-44 and paras 39-46 respectively. The former judgment is on crucial points almost identical to the *Kremzow* Case, but in the latter, concerning proceedings before the Austrian Supreme Court with regard to the question whether the conditions for the applicant's placement in an institution for mentally ill offenders were met, the absence of the applicant had not violated Article 6. Compare also the judgment of 3 October 2002, *Kucera*, para. 21.

[857] Judgment of 8 February 1996, *John Murray*, para. 63.

interrogation [although] this right, which is not explicitly set out in the Convention, may be subject to restriction for good cause."[858]

In the *John Murray* Case the applicant had been denied access to a lawyer for the first 48 hours of police interrogation. He had been told by the police that he had the right to remain silent but that adverse inferences could be drawn from his silence. He had been confronted at the beginning of the interrogation with a "fundamental dilemma" concerning his defence. The Court held that in this situation the denial of access to a lawyer had constituted a breach of Article 6(1) in conjunction with paragraph 3(c).[859] In the *Öcalan* Case the Court reached the same conclusion; where the applicant did not receive legal assistance for a period of seven days and made several self-incriminating statements that subsequently appeared to be crucial elements in the indictment, the decision to deny access to a lawyer might irreparably prejudice the defendant's rights.[860] However, in the *Brennan* Case the Court held that the 24 hour pre-trial period did not constitute a violation of Article 6, because the applicant had made no incriminating statements during that period and no inferences had been drawn from the statements or omissions made by him.[861]

The provision under sub-paragraph (c) embodies the right of an accused to communicate with his counsel out of hearing of a third person. Without this requirement the guarantee offered by the Convention would not be practical and effective.[862] However, the right of access to a solicitor may – here again – be subject to restrictions "for good cause" as long as the proceedings as a whole are fair.[863] The defendant must be able to claim to have been directly affected by the restriction in the exercise of his right of defence, but it is not necessary for him to prove that the restriction had a prejudicial effect on the course of the trial.[864] In the *Öcalan* Case the restriction of number and length of the visits by the applicant's lawyers to a rhythm of two one-hour meetings per week, violated the principle of fair trial in view of the highly complex charges and voluminous case file.[865] In the *Lanz* Case the Court held that only "very weighty reasons" could have justified the surveillance by the investigating judge of the contacts of a detainee with his defence counsel. The mere risk of collusion did

[858] Judgment of 6 June 2000, *Magee*, para. 41; judgment 20 June 2002, *Berlinski*, para. 75. See also, though less clear, the judgment of 11 July 2000, *Dikme*, para. 108.

[859] Judgment of 8 February 1996, paras 66-70. See also the judgment of 6 June 2000, *Averill*, paras 55-62, concerning a denial of access to a solicitor during the first 24 hours.

[860] Judgment of 12 March 2003, paras 140-143. See also the judgment of 6 June 2000, *Magee*, para. 42-46; judgment of 22 April 2004, *Sarikaya*, paras 67-68.

[861] Judgment of 16 October 2001, paras 44-48.

[862] Judgment of 28 November 1991, *S v. Switzerland*, para. 48. The Court reached this conclusion by referring to the Standard Minimum Rules for the Treatment of Prisoners and the European Agreement Relating to Persons Participating in Proceedings of the European Commission and Court of Human Rights.

[863] Judgment of 16 October 2001, *Brennan*, para. 58.

[864] Ibidem.

[865] Judgment of 12 March 2003, para. 154.

not meet the criterion because this was the very reason for which detention [illegible] been ordered.[866] However, the "extraordinary features" of the *Kempers* Case [illegible] the defendant had been suspected of being the member of a gang and [illegible] confidentiality had been necessary in order to catch the other members [illegible] restriction in issue.[867]

The Court has attached to the right of access to court, implied in Article [illegible] consequence that this right has been violated if a detainee is not permitted to correspond with a lawyer or another person giving legal assistance. The Court has held that "hindering the effective exercise of a right may amount to a breach of that right even if the hindrance is of a temporary character."[868] Consequently, as soon as a detainee wants to institute an action or wishes to prepare his defence against a criminal charge, such contact must be possible. This may hold good in the pre-trial phase and even with regard to an internal preliminary inquiry.[870]

Searching of counsel and inspection of the correspondence of counsel with the detained client by the prison authorities are in principle also incompatible with the position of counsel. Measures of this kind are justified only in very exceptional circumstances, where the authorities have sound reasons to assume that counsel himself is abusing his position or is allowing it to be abused.[871]

The provision under paragraph 3(c), in conjunction with the first paragraph of Article 6, also implies that counsel who attends the trial must be enabled to conduct the defence also in the absence of the accused, regardless of whether or not there is an excuse for the latter's absence[872] and whether or not it is possible to apply to have a conviction entered in default set aside.[873] Although in principle national legislation may discourage the unjustified absence of an accused at the trial,[874] this implied aspect

866 Judgment of 31 January 2002, para. 52. In the judgment of 28 November 1991, *S v. Switzerland*, para. 49, the fear that the lawyer of the applicant would collude with the lawyer of a co-accused was based on the fact that the lawyers proposed to coordinate their defence-strategy. This fact, however, did not justify the restriction on the free communication of the accused and his lawyer.

867 In the judgment of 31 January 2002, *Lanz*, para. 52, the Court refers to and endorses the decision on admissibility by the Commission in the *Kempers* Case, Appl. 21842/93, 27 February 1995.

868 Judgment of 21 February 1975, *Golder*, para. 26.

869 Judgment of 8 February 1996, *John Murray*, paras 66-70.

870 Appl. 7878/77, *Fell*, D&R 23 (1981), p. 102 (113). See also the report of 12 May 1982, *Campbell and Fell*, A.80, pp. 76-77.

871 See the judgment of 28 June 1984, *Campbell and Fell*, para. 108-11; the judgment of 13 November 1996, *Domenichini*, paras 35-39, where Article 6 subparagraph (b) had been found to have been breached because the monitoring of the letter of a detainee to his lawyer had caused a delay in sending the letter and consequently his lawyer had not been able to file in due time the grounds that support an appeal on points of law.

872 Judgments of 22 September 1994, *Lala*, and *Pelladoah*, para. 33 and para. 40, respectively.

873 See, *e.g.*, the judgment of 13 February 2001, *Krombach*, para. 85; judgment of 16 May 2002, *Lala and Sari*, para. 54.

874 See *supra* 10.5.4. However, see also *supra* 10.4.6.3.

[illegible] paragraph 3(c) may not be impaired because the legislator "cannot penalise the [illegible] by creating exceptions to the right of legal assistance".[875]

Legal Assistance and the Right to Choose a Lawyer

[illegible] *and Connors* Case the right to choose a lawyer had been violated because [illegible] law did not provide for a 'right' to legal representation in the adjudication [illegible] which could lead to the award of 'additional days' of imprisonment to [illegible] persons who had committed disciplinary offences.[876] On the other hand, a [illegible] requirement that an accused be assisted by counsel in criminal proceedings is [illegible] not incompatible with the right to choose a lawyer.[877]

According to Strasbourg case law the right of the accused to choose his own lawyer [illegible] an absolute right; he is bound by the provisions applying in the relevant legal [illegible] with regard to the question as to who may act as counsel in court.[878] In the [illegible] Case the Court expressed as its opinion that national courts when appointing [illegible] counsel must take into account the accused's wishes, although those wishes [illegible] be overridden if required "in the interests of justice".[879] In any case, if such an [illegible] satisfactory relationship between the accused and the lawyer assigned to him is [illegible] to exist that an adequate defence is impossible, or if the qualifications of the [illegible] lawyer are found to be inadequate considering the nature and/or complexity [illegible] case, paragraph 1 and paragraph 3(b) may imply that another lawyer must be [illegible] to the accused at the latter's request.[880] In the *Kamasinski* Case, however, the [illegible] held that the responsibility rests in the first place on the applicant: "the [illegible] national authorities are required under Article 6(3)(c) to intervene only [illegible] failure by legal aid counsel to provide effective representation is manifest or [illegible] brought to their attention in some other way."[881]

875 See, e.g., the judgment of 21 January 1999, *Van Geyseghem*, para. 34; judgment of 23 may 2000, *Van [illegible]*, para. 67; judgment of 13 February 2001, *Krombach*, para. 89.

876 Judgment of 15 July 2002, paras 103-106 and the judgment of 9 October 2003 (Grand Chamber), paras 132-134. See also the judgment of 20 June 2002, *Berlinski*, paras 77-78: Article 6 had been violated because the applicant had no defence council for more than a year, without any justification, and the judgment of 15 June 2004, *Thompson*, para. 47.

877 Judgment of 25 September 1992, *Croissant*, para. 50.

878 Appl. 722/60, *X v. Federal Republic of Germany*, Yearbook V (1962), p. 104 (106); Appls 7572/76, [illegible]/76 and 7587/76, *Ensslin, Baader and Raspe*, Yearbook XXI (1978), p. 418 (464).

879 Judgment of 25 September 1992, para. 29. In this case the applicant contested the necessity of the appointment of a third defence counsel.

880 See the judgment of 21 April 1998, *Daud*, paras 38-43.

881 Judgment of 19 December 1989, *Kamasinski*, para. 65. See also the judgment of 24 November 1993, *Imbrioscia*, para. 41. In the *Kamasinski* Case, the Court expressly mentioned that the responsibility rests in the first place on the defendant "whether counsel be appointed under a legal aid scheme or [illegible] privately financed". This passage was lacking in the *Imbrioscia* Case. Compare further the judgment of 22 February 1994, *Tripodi*, para. 30.

In this context the Court emphasised in the *Artico* Case that the authorities have not complied with their obligation by the mere assignment of a lawyer, since Article 6(3)(c) speaks of 'assistance' and not of 'nomination', so that it must be sufficiently ensured that real assistance is provided.[882] Here again, however, the accused can waive his right by personally creating the situation in which at the very last moment before the hearing another lawyer must be nominated.[883] In the *Lagerblom* Case the Court considered it not unreasonable, in view of the general desirability of limiting the costs of legal aid, that national authorities take a restrictive approach to requests to replace public defence counsel once they have been assigned to a case and have undertaken certain activities.[884] In the *Mayzit* Case the national court refused to appoint the applicant's sister and mother to act as defenders instead of professional advocates, which in itself was permissible under national law, because as lay persons they would not be able to ensure the applicant's efficient defence. According to the Court, this approach was not inconsistent with Article 6.[885]

10.10.4.5 Free Legal Assistance

Article 6(3)(c) stipulates that legal assistance should be given free to the accused who has not sufficient means to pay for it and when the interests of justice so require. The provision does not exclude that an accused is required to pay a contribution to the cost of legal assistance, as long as he has sufficient means to pay.[886] A system that does not contain any obligation for the accused who is acquitted to pay for his defence but requires the reimbursement of the costs of appointed lawyers in case the person concerned is convicted, is in itself not incompatible with the Convention. Surprisingly the Court left open the question whether it would be consistent with the provision under (c) for the national authorities to seek partial or even full reimbursement if it had been established in enforcement proceedings subsequent to the trial that the convicted person lacks sufficient means to pay the costs of his defence.[887] It is submitted that on this point the text of Article 6(3)(c) leaves no room for doubt: if the accused has insufficient means to bear the costs of legal assistance which is required in the 'interests of justice', it should be given to him free, without restrictions and regardless of the outcome of the case.

The concept of "interests of justice" as yet lacks clarity. In many cases the Court has applied two criteria to establish whether free legal aid is required: the seriousness

882 Judgment of 13 May 1980, para. 33. See also the judgment of 21 April 1998, *Daud*, para. 38; judgment of 10 October 2002, *Czekalla*, paras 60-71.

883 Appl. 8251/78, *X v. Austria*, D&R 17 (1980), p. 166 (169-170).

884 Judgment of 14 January 2003, para 59.

885 Judgment of 20 January 2005, para. 66.

886 Judgment of 26 February 2002, *Morris*, paras 88-89.

887 Judgment of 25 September 1992, *Croissant*, paras 33-38.

of the offence in conjunction with the severity of the penalty that the accused is facing, secondly, the complexity of the case.[888] The personal circumstances and the background of the accused seem to fall within the framework of the latter criterium.[889] In *R.D. v. Poland* the Court referred to these criteria but also formulated a more general test: "There is, however, a primary, indispensable requirement of the 'interests of justice' that must be satisfied in each case. That is the requirement of a fair procedure before courts, which, among other things, imposes on the State authorities an obligation to offer an accused a realistic chance to defend himself throughout the entire proceedings."[890]

In this case the national court had refused to grant the applicant further free assistance and had communicated its decision to him eight days before the expiry of the time-limit for the submissions of his cassation appeal. Because of the shortness of time left to the applicant for appointing a lawyer of his own choice and for preparing a well-founded cassation appeal, the Court held that the applicant did not have "a practical opportunity" to defend his case in the cassation court in a "concrete and effective way". Therefore, Article 6 had been violated.[891] Since the Court in its reasoning did not pay any attention to the two criteria mentioned above, it remains unclear how the test applied in *R.D. v. Poland* relates to these criteria. In the subsequent *Lagerblom* Case the more general test disappeared. The Court only referred to the seriousness of the offence, the severity of the penalty and the complexity of the case.[892] Be that as it may, where deprivation of liberty is at stake the interests of justice in principle call for legal representation,[893] and for the legal representative to be duly paid.[894]

If on the ground of the requirements of a fair hearing of the first paragraph an accused is entitled to free legal aid, that aid will also have to be considered to be granted in the interests of justice, while the general interest of the case exceeding the interests of the accused may also call for legal assistance. If it has been recognised with regard to the written phase of the proceedings that the interests of justice require the assignment of legal aid, as a rule, and even *a fortiori*, this will also apply for the subsequent oral phase.[895]

888 See, e.g., the judgment of 28 March 1990, *Granger*, paras 46-48; judgment of 24 May 1991, *Quaranta*, paras 32-38; judgment of 10 June 1996, *Benham*, paras 60-64; judgment of 9 June 1998, *Twalib*, para 32; judgment of 26 September 2000, *Biba*, para. 29.

889 Judgment of 24 May 1991, *Quaranta*, para. 35. See also the judgment of 25 September 1992, *Pham Hoang*, paras 39-41.

890 Judgment of 18 December 2001, para. 49. This test is not completely new (compare for instance the judgment of 24 May 1991, *Quaranta*, para. 36) but the way the Court presents it, is.

891 *Idem*, paras 50-52.

892 Judgment of 14 January 2003, para 51.

893 Judgment of 24 May 1991, *Quaranta*, para. 33; judgment of 10 June 1996, *Benham*, para. 61; judgment of 16 November 2004, *Hooper*, para. 20.

894 Judgment of 25 April 1983, *Pakelli*, paras. 36-40.

895 *Idem*

If a lawyer has been assigned to an accused, but the behaviour of [illegible] induced counsel to withdraw, the refusal of the court to assign a new lawyer [illegible] in conformity with the 'interests of justice', provided that from that [illegible] accused himself is given sufficient opportunity to defend himself in person.[896]

10.10.5 THE RIGHT TO SUMMON AND EXAMINE WITNESSES

Paragraph 3(d) grants to the accused the right 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. This provision is closely related to the principle of 'equality of arms' as an element of a 'fair hearing' in the sense of the first paragraph. Consequently, the Court often examines an alleged violation of the provision under sub-paragraph (d) under the two provisions taken together.[897] Although paragraph 3(d) is included among the guarantees applying specifically to criminal proceedings, in the case law the possibility has been recognised that the refusal by the court to permit a party to civil proceedings to have a particular witness summoned or examined constitutes a violation of the right to a fair hearing.[898]

The notion of 'witness' is interpreted autonomously. Statements not made directly in person, but for example to the police, are to be regarded as statements of witnesses as far as the national courts take account of these statements,[899] irrespective of whether the statement is made by a co-accused or a third person.[900] Complaints concerning the hearing or summons of an expert do not fall under the provision of paragraph 3(d) but under the general rule of the first paragraph of Article 6.[901]

Paragraph 3(d) does not grant the accused an unlimited right to secure the appearance of witnesses in court. In principle it is for the national courts to decide whether a particular witness should be heard.[902] Therefore, it is not sufficient for the applicant to complain in Strasbourg that he has not been allowed to question a certain witness; in addition he must explain why it is important for the witness concerned to be heard and the evidence must be necessary for the establishment of the truth.

896 Appl. 8386/78, *X v. the United Kingdom*, D&R 21 (1981), p. 126 (130-132).

897 Judgment of 27 October 1993, *Dombo Beheer B.V.*, para. 33-35. See also *supra* 10.5.2.

898 See, *e.g.*, the judgment of 19 December 1990, *Delta*, para. 34; judgment of 19 February 1991, *Isgrò*, para. 33; judgment of 28 August 1992, *Artner*, para. 19; judgment of 10 June 1996, *Pullar*, para. 45.

899 Judgment of 27 February 2001, *Lucà*, para. 41.

900 Judgment of 6 May 1985, *Bönisch*, para. 29; judgment of 28 August 1991, *Brandstetter*, para. 41; *supra* 10.5.2.

901 See, *e.g.*, the judgment of 22 April 1992, *Vidal*, para. 33; judgment of 26 March 1996, *Doorson*, para. 82; judgment of 27 July 2000, *Pisano*, para. 23; judgment of 6 May 2003, *Perna*, (Grand Chamber), para. 29; judgment of 3 February 2004, *Laukanen and Manninen*, para. 35.

902 Judgment of 6 May 2003, *Perna*, (Grand Chamber), para. 29.

[illegible] principle the Court does not assess whether statements of witnesses have been [illegible] admitted as evidence.[903] Thus, it is a matter for the domestic courts to assess [illegible] a statement given by a witness in open court and under oath should be relied [illegible] preference to another statement of the same witness, even when the former is [illegible] contradictory to the latter.[904]

The Court has deduced from the fact that an accused person is "entitled to take part in the hearing and to have his case heard in his presence by a tribunal", that all [illegible] evidence should "in principle be produced in the presence of the accused at a public [illegible] hearing with a view to adversarial argument".[905] In the *Hulki Günes* Case the lack of [illegible] confrontation with the witnesses who had identified the applicant as the person who had taken part in an armed attack during which one soldier died, deprived him [illegible] of a fair trial, since the judges had not been able to study their demeanour while giving [illegible] evidence and form a personal opinion as to their credibility.[906] However, it is not [illegible] incompatible with paragraph 3(d) and paragraph 1 to use as evidence statements made [illegible] at the pre-trial stage as long as the accused has been given "an adequate and proper [illegible] opportunity to challenge and question a witness against him, either at the time the witness was making his statement or at some later stage of the proceedings."[907] If the accused did not have "an adequate and proper opportunity" to question the witness, a conviction cannot solely or mainly be based on the testimony of the latter.[908] The case law does not seem to leave much room for exceptions to this rule. The use as evidence of a statement made in the pre-trial phase by a person who subsequently, in accordance with national law, refuses to give evidence in court, is in itself not incompatible with the Convention. However, it may lead to a conviction only if there is [illegible] evidence that corroborates the statement.[909] The same holds good for a statement of a witness who has disappeared and, therefore, cannot be summoned to appear in court.[910]

903 See, *e.g.*, the judgment of 6 December 1988, *Barberà, Messegué and Jabardo*, para. 68; judgment of 20 November 1989, *Kostovski*, para. 39; judgment of 31 October 2001, *Solakov*, para. 57.

904 Judgment of 26 March 1996, *Doorson*, para. 78.

905 See, *e.g.*, the judgment of 6 December 1988, *Barberà, Messegué and Jabardo*, para. 78; judgment of 15 June 1992, *Lüdi*, para. 47; judgment of 23 April 1997, *Van Mechelen*, para. 51.

906 Judgment of 19 June 2003, paras 86-96.

907 Judgment of 20 November 1989, *Kostovski*, para. 41. See also, *e.g.*, the judgment of 24 November 1986, *Unterpertinger*, para. 31; judgment of 26 April 1991, *Asch*, para 27; judgment of 20 September 1993, *Saïdi*, para. 43; judgment of 2 July 2002, *S.N. v. Sweden*, para. 44; judgment of 5 December 2002, *Craxi*, para. 86.

908 Judgment of 20 November 1989, *Kostovski*, para. 44; judgment of 27 September 1990, *Windisch*, para. 31; judgment of 19 February 1991, *Isgrò*, para 35; judgment of 28 August 1992, *Artner*, para. 22; judgment of 20 September 1993, *Saïdi*, para. 44.

909 Judgment of 24 November 1986, *Unterpertinger*, paras 31-33; judgment of 26 April 1991, *Asch*, paras 28-31.

910 Judgment of 28 August 1992, *Artner*, paras 22-24. In the judgment of 13 November 2003, *Rachdad*, paras 22-25, Article 6 was deemed to have been violated despite the existing difficulty in ascertaining the whereabouts of the witness and the fact that the applicant had contributed to that difficulty by [illegible]

This approach is also reflected in the case law with regard to the admissibility of testimony by anonymous witnesses. In the *Doorson* Case the Court held that a conviction should not be based either solely or to a decisive extent on anonymous statements".[911] It seemed to allow no exceptions to this rule. In this respect the judgment in the *Kostovski* Case had been less clear, where the Court, without formulating a similar starting-point, had concluded that the handicaps of the defence that had been caused by the anonymous statements, were not "counterbalanced by the procedures followed by the judicial authorities". Thus, the Court suggested that a conviction could have been based mainly on anonymous, but sufficiently counterbalanced statements.[912] This uncertainty had not been, at least not clearly, lifted in the *Windisch* Case.[913]

Moreover, the use of anonymous statements seems to be permissible only if they meet strict requirements. In the *Doorson* Case the Court took as a starting-point that the interests of the defence should be balanced "against those of witnesses or victims called upon to testify".[914] Subsequently it took account of the circumstances of the case which concerned the prosecution of a drug dealer, and concluded that the reasons to maintain the anonymity of some witnesses were relevant and sufficient. Furthermore, the Court held that the handicaps of the defence were "sufficiently counterbalanced by the procedures followed by the judicial authorities"[915] and based its conclusion on several facts: the witnesses had been questioned by an investigating judge who was aware of their identity, the national court had been able directly to assess the report of the investigating judge to draw conclusions about the reliability of the witnesses, counsel of the defence had been offered the opportunity to question the witnesses except in so far as their identity was concerned, and the witnesses had identified the applicant from a photograph.[916]

In case the anonymous witnesses are members of the police force the lack of confrontation seems (even) more difficult to repair. In the *Van Mechelen* Case the witnesses in question had been in a separate room in the presence of the investigating judge from which the accused and counsel had been excluded. All communication took place by way of a direct communication channel. Since the defence had not only been unaware of the identity of the police officers but also had been prevented from observing their demeanour under direct questioning, the Court held that the handicaps under the defence had not been sufficiently counterbalanced and the Court rejected the argument of the Dutch Government that the anonymity had been justified by operational needs of the police.[917] In the *Lüdi* Case, however, with respect to an undercover agent, a sworn police-officer whose function was known to the investigating judge, Article 6 did not object to the examination by the defence of an undercover agent without revealing the *real* identity of the agent, because the accused knew the agent by physical appearance.[918]

In criminal proceedings concerning sexual offences the Court accepted, with reference to the position of the perceived victim and taking into account that a minor was involved, that the provision under subparagraph (d) cannot be interpreted as requiring in all cases that questions be put directly by the accused or his or her defence counsel, through cross-examination or by other means.[919] In this case the Court noted that the videotape of the first police interview of the victim had been shown during the trial and appeal hearings, the record of the second interview had been read out before the District Court and the audiotape of that interview had been played back before the Court of Appeal. According to the Court these measures were sufficient to enable the defence to challenge the statements made by the perceived victim.[920] In this case the defence was aware of the victim's identity. Therefore, the question remains what approach the Court will choose in case the perceived victim wants to remain anonymous.[921]

Thus far the question of whether a testimony of a so-called crown witness, who receives benefits in exchange for his testimony, is permissible, has not been brought frequently before the Strasbourg authorities. The Court has recognised that an issue

failing to comply with court summonses and thus causing the courts to convict him in his absence. See also the judgment of 18 May 2004, *Destrehem*, paras 45-47, where the court of first instance acquitted the applicant after the hearing of several witnesses. The court of appeal convicted him, grounding its decision on a new interpretation of the evidence given by witnesses it had not itself examined, notwithstanding the applicant's requests to that effect. In these circumstances the defence rights had been considerably restricted and the refusal to hear the witnesses constituted a violation of Article 6.

911 Judgment of 26 March 1996, para. 76.

912 Judgment of 20 November 1989, para. 43.

913 Judgment of 27 September 1990, *Windisch*, paras 26-32.

914 Judgment of 26 March 1996, para. 70.

915 In the judgment of 20 November 1989, *Kostovski*, para. 43, and the judgment of 27 September 1990, *Windisch*, para 28, the Court held that the lack of a direct confrontation with the witnesses could not be repaired by the opportunity to put written questions. The awareness of the identity of the witnesses was of crucial importance to enable the defence to challenge their statements. A similar counterbalance also did not exist in the judgment of 17 July 2001, *Sadak and Others*, para. 67; judgment of 28 March 2002, *Birutis*, para. 34; judgment of 14 February 2002, *Visser*, para. 47.

916 Judgment of 26 March 1996, paras 71-75.

Judgment of 23 April 1997, paras 56-65. Moreover, the Court held that the conviction was based to a decisive extent on the anonymous statements (para. 63).

Judgment of 15 June 1992, *Lüdi*, para. 49. (Article 6 had nevertheless been violated because the defence did not have any opportunity to question the undercover agent.) Compare also the reference of the Court in the judgment of 23 April 1997, *Van Mechelen*, para. 60, to the Dutch Act of 11 November 1993 with regard to the use of make-up or disguise and the prevention of eye contact.

Judgment of 2 July 2002, *S.N. v. Sweden*, para. 52.

Ibidem. The requirements of Article 6 were found not to have been met in the judgment of 14 December 1999, *A.M. v. Italy*, paras 26-28, and the judgment of 10 November 2005, *Bocos-Cuesta*, paras 64-74.

In the *Baegen* Case, report of 20 October 1994, A.327-B, pp. 44-45, prior to the *Doorson* Case, the conviction of the applicant for rape had been based partly on the anonymous statements of the victim. The Commission held that, despite the lack of any opportunity for the applicant or his lawyer to examine the victim directly, the proceedings had not been unfair. The case has not been pursued before the Court.

under Article 6 may arise, but seems to have no objections of principle to
In the *Erdem* Case the Court declared a complaint with regard to the use of
witness inadmissible. Amongst other things it took into account that the
had not been granted complete immunity but only a reduction of his
that no financial benefits had been promised but benefits with regard
protection and a new identity and that the German practice of granting
crown-witnesses had been regulated by law.[922]

Sub-paragraph (d) does not contain any restriction with respect to the
the accused wants to ask the witnesses against him. However, in the case
Commission this provision has been deprived of a great deal of its effect
Commission left very wide discretion to the national court as to which
it allows.[923] If in this respect the court gives evidence of bias, the right to a
has been violated,[924] but this can hardly be proved. It is submitted that the
of paragraph 3(d) is satisfied only if the court affords the accused or
opportunity for the examination and only makes restrictions in case of
or improper use of the right to examination, or if the proceedings are
unacceptable degree.

In the *Unterpertinger* Case the Commission took the position that the
of paragraph 3(d) had not been violated, because the prosecution, too, had
the opportunity to examine the persons concerned.[925] Fortunately this
not adopted by the Court. Here the Commission transposed the equality
which is of decisive importance for the second limb of paragraph 3(d), *viz.* the
to summon witnesses for the defence, to the right to examine
prosecution. That position is untenable already from a systematic and
point of view.[926] Moreover, an inequality occurs if the prosecution puts
testimony made in a previous phase, since in that previous phase the
had the opportunity to examine the person in question, albeit perhaps only
police, while the accused has not.

The second limb of paragraph 3(d) clearly allows for discretion on the
national court because its only requirement is that the prosecution and the
receive equal treatment in this respect. With regard to the summoning of

922 Decision of 9 December 1999. See also the decisions of 27 January 2004, Lorsé, and
of 25 April 2004, *Cornelis*.

923 See Appl. 4428/70, *X v. Austria*, Yearbook XV (1972), p. 264 (282); Appl. 8417/78, *X v.*
16 (1979), p. 200 (207); report of 15 October 1987, *Bricmont*, A.158, p. 45.

924 This possibility was recognised by the Commission in its decision on Appl. 4428/70, *X v.*
Yearbook XV (1972), p. 264 (284-286).

925 Report of 11 October 1984, A.110, pp. 19-20.

926 See the dissenting opinion of Commission member Trechsel, *ibidem*, p. 25.

evidence and their examination, domestic law and the courts may set conditions
for these restrictions, provided that these equally apply in respect of the witnesses
for the prosecution.[927] Moreover, some initiative on the part of the accused may be
required as to the calling of witnesses, as well as, of course, during the examination;
the court need not call witnesses of its own accord.[928] However, here again the fact that
sub-paragraph 3(d) has not been violated does not yet mean that the requirements of the
first paragraph have been satisfied. Moreover, the Strasbourg Court has restricted the
discretion of the courts somewhat by requiring that the national courts should state
adequate reasons for rejecting a request of the accused to summon a witness.[929]

10.6 THE RIGHT TO THE FREE ASSISTANCE OF AN INTERPRETER

Paragraph 3(e), finally, grants to the accused the right to have the free assistance of
an interpreter if he cannot understand or speak the language used in court. Thus, the
fact that counsel of the accused understands the language used in court does not do
away with the latter's right to an interpreter. From paragraph 3(e) it follows that the
accused cannot claim that the trial or the examination be conducted in a language
other than the official vernacular.

Sub-paragraph (e), too, is linked so closely with the principle of a 'fair hearing'
of the first paragraph that also in cases of a determination of civil rights and obligations
the necessary costs for a translator or an interpreter may be so burdensome for a party
to the proceedings, that non-reimbursement may conflict with the first paragraph.[930]
The right to interpretation is not limited to the trial, but also applies to the pre-trial
investigations.[931] In the *Luedicke, Belkacem and Koç* Case the Court held that paragraph
3(e) relates to "all those documents or statements in the proceedings instituted against
him which it is necessary for him to understand in order to have the benefit of a fair
trial".[932] However, according to the Court, this does not imply that all items of written
evidence or official documents have to be translated. The requirement of sub-

927 Judgment of 22 April 1992, *Vidal*, p. 32.

928 Appl. 5981/72, *X v. the United Kingdom* (not published). In its decision the Commission stated that
the calling of witnesses "was a matter which was within the discretion of the applicant's solicitor and
counsel and the fact that they apparently chose to call only one medical witness does not suggest in
any way that the applicant's rights under this provision [i.e. Art. 6(3)(d)] were not respected".

929 Judgment of 22 April 1992, *Vidal*, para. 34; judgment of 27 July 2000, *Pisano*, para. 24.

930 Report of 18 May 1977, *Luedicke, Belkacem and Koç*, B.27 (1982), p. 26, and report of 9 March 1977,
Koç, B.30 (1983), p. 32.

931 Judgment of 19 December 1989, *Kamasinski*, para. 74.

932 Judgment of 28 November 1978, p. 20.

paragraph (e) is met if the accused is enabled to follow, and form an opinion on the [illegible] proceedings, so that he can put before the court his comment on the [illegible]

In the *Kamasinski* Case the questions put to the witnesses were not [illegible] separately. The interpretation at the trial was "consecutive and summarised" [illegible] does in itself not amount to a violation of subparagraph (e). Neither does the [illegible] of a written translation of the verdict, as long as the accused has sufficient knowledge [illegible] of the judgment and its reasoning to judge whether he should give notice of appeal.[933]

The obligation to appoint an interpreter rests on the competent authorities, although some personal initiative of the accused may be required.[934] In the *Luedicke* Case the requirements of Article 6 had not been satisfied by leaving it to the applicant to invoke the untested language skills of his brother. Since the judge had been alerted to counsel's own difficulties in communicating with the applicant, the verification of the applicant's need for interpretation facilities was a matter for the judge to determine.[936] The obligation to appoint an interpreter is not fulfilled by merely appointing one. If the authorities "are put on notice in the particular circumstances, [it may] extend to a degree of a subsequent control over the adequacy of the interpretation provided".[937]

In German legal practice paragraph 3(e) was applied in such a way that an interpreter was indeed freely made available to begin with, but the expense involved was ultimately made to fall under the general regulation concerning the costs of the case. This was considered by the Court to be contrary to the word 'free'.[938] Moreover, the Court indicated that paragraph 3(e) refers not only to the expenses of an interpreter but also to translation expenses, and then not only to the expenses relating to the hearing itself, but also to those concerning the translation of the charge brought against the accused, as referred to in Article 6(3)(a), and of the reasons for the arrest and the charges.

933 Judgment of 19 December 1989, *Kamasinski*, para. 74; judgment of 14 January 2003, [illegible] para. 61.
934 Judgment of 19 December 1989, para. 83.
935 Appl. 2689/65, *X v. Belgium*, Yearbook X (1967), p. 282 (318).
936 Judgment of 24 September 2002, para. 38.
937 Judgment of 19 December 1989, *Kamasinski*, para. 74.
938 Judgment of 28 November 1978, *Luedicke, Belkacem and Koç*, paras 39-46.

CHAPTER 11
FREEDOM FROM RETROSPECTIVE EFFECT OF PENAL LEGISLATION (Article 7)

REVISED BY EDWIN BLEICHRODT

CONTENTS

11.1 TEXT OF ARTICLE 7

1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.

2. This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations.

11.2 THE SCOPE OF ARTICLE 7

The first paragraph of Article 7 contains the following two separate principles, which are essential elements of the Rule of Law: (1) a criminal conviction can only be based on a norm which existed at the time of the incriminating act or omission (*nullum*