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CASE LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS RELATED TO PUBLIC INTERNATIONAL LAW

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This document contains press releases and legal summaries of relevant cases of the European Court of Human Rights related to public international law.

The full texts of the Court's judgments are accessible on its website (<http://www.hudoc.echr.coe.int>).

**CASE LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS RELATED TO PUBLIC
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- 43. *Eur.Court HR, Mangouras v. Spain, Grand Chamber Judgment of 28 September 2010, Application No. 12050/04, (Article 5-3, Right to be Brought Promptly before a Judge – No Violation).*** The applicant, the captain of a ship that had discharged 70,000 tonnes of fuel oil into the Atlantic Ocean and had thus caused a major environmental disaster and, unsuccessfully complained that the sum set for bail in his case had been excessive and had been fixed without his personal circumstances being taken into consideration. The Court however acknowledged that new realities had to be taken into consideration in interpreting the requirements of the Convention namely the growing and legitimate concern both in Europe and internationally in relation to environmental offences and the tendency to use criminal law as a means of enforcing the environmental obligations imposed by European and international law.182
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- 46. *Eur.Court HR, Ahorugeze v. Sweden, Fifth Section Judgment of 27 October 2011, Application No. 27075/09, (Article 3, Prohibition of Torture – No Violation; Article 6, Right to a Fair Trial – No Violation).*** The applicant, a Rwandan national and genocide suspect, unsuccessfully argued that his extradition from Sweden to Rwanda would put him at risk of ill-treatment and would amount to a flagrant denial of justice.190
- 47. *Eur.Court HR, Othman (Abu Qatada) v. the United Kingdom, Fourth Section Judgment of 17 January 2012, Application No. 8139/09, (Article 3, Prohibition of Torture – No Violation; Article 5, Right to Liberty and Security – No Violation; Article 6, Right to a Fair Trial – Violation; Article 13, Right to an Effective Remedy – No Violation).*** The applicant, a Jordanian national suspected of having links to al-Qaeda and wanted for terrorism charges in Jordan, unsuccessfully claimed that his planned deportation from the United Kingdom to Jordan would put him at a real risk of ill-treatment and would amount to a grossly unfair trial.193
- 48. *Eur.Court HR, Hirsi Jamaa and Others v. Italy, Grand Chamber Judgment of 23 February 2012, Application No. 27765/09, (Article 1, Obligation to Respect Human Rights – Jurisdiction Found; Article 3, Prohibition of Torture – Violation; Article 4 of Protocol No. 4, Prohibition of Collective Expulsions of Aliens – Violation; Article 13, Right to an Effective Remedy – Violation).*** The applicants, 11 Somali and 13 Eritrean migrants intercepted by the Italian Navy at sea, successfully claimed that they were under Italian jurisdiction upon interception, and would be put at real risk of ill-treatment if sent back to Libya.197
- 49. *Eur.Court HR, Toniolo v. San Marino and Italy, Third Section Judgment of 26 June 2012, Application No. 44853/10, (Article 5-1, Right to Liberty and Security – Violation).*** The applicant, an Italian national living in San Marino who was arrested in San Marino following criminal proceedings brought against him in Italy, successfully argued that his preventive detention and subsequent extradition to Italy were unlawful.202

- 50. Eur.Court HR, Wallishauser v. Austria, First Section Judgment of 17 July 2012, Application No. 156/04, (Article 6-1, Right to a Fair Hearing within a Reasonable Time - Violation).** The applicant, a former employee of the United States embassy in Vienna who was owed salary payments from September 1996 after her unlawful dismissal, successfully argued that she had been denied access to a court when the United States’ authorities had invoked its immunity and had refused to be served with summons to a hearing.204
- 51. Eur.Court HR, Nada v. Switzerland, Grand Chamber Judgment of 12 September 2012, Application No. 10593/08, (Article 5, Right to Liberty and Security – No Violation; Article 8, Right to Respect for Private and Family Life – Violation; Article 13, Right to an Effective Remedy – Violation).** The applicant, an Italian and Egyptian national living in an Italian enclave inside the Swiss Canton of Ticino and whose name was added to a list annexed to a federal Ordinance in the context of the implementation by Switzerland of the United Nations Security Council counter-terrorism resolutions, successfully argued that the ban imposed on him, preventing him from entering or transiting through Switzerland, breached his Convention rights.206
- 52. Eur.Court HR, Djokaba Lambi Longa v. the Netherlands, Third Section Decision of 9 October 2012, Application No. 33917/12, (Article 5, Right to Liberty and Security – Inadmissible; Article 13, Right to an Effective Remedy – Inadmissible).** The applicant, a defence witness at the International Criminal Court, claimed that the Netherlands had been responsible for his on-going imprisonment by the ICC in The Hague since the Netherlands had agreed to review his application for asylum. The Court in its judgment dismissed the application, recalling that Contracting States had the right to control the entry, residence and expulsion of aliens, and that States were under no obligation to allow foreign nationals to await the outcome of immigration proceedings on their territory.211
- 53. Eur.Court HR, Catan and Others v. Moldova and Russia, Grand Chamber Judgment of 19 October 2012, Application Nos. 43370/04, 8252/05 & 18454/06, (Article 2 of Protocol No. 1, Right to Education – No Violation, in respect of the Republic of Moldova; Article 2 of Protocol No. 1, Right to Education – Violation, in respect of the Russian Federation).** The applicants, children and parents from the Moldovan community in the unrecognised separatist entity Transnistria which split from Moldova in September 1990, successfully complained with respect to the Russian Federation about the forcible closure of their schools by the separatist regime in 2002 and 2004 and the measures taken by those authorities to harass and intimidate them because of their choice to pursue the childrens’ education at Moldovan/Romanian language schools.214
- 54. Eur.Court HR, El-Masri v. The Former Yugoslav Republic of Macedonia, Grand Chamber Judgment of 13 December 2012, Application No. 39630/09, (Article 3, Prohibition of Torture – Violation, on account of the inhuman and degrading treatment to which Mr El-Masri was subjected while being held in a hotel in Skopje, on account of his treatment at Skopje Airport, which amounted to torture, and on account of his transfer into the custody of the United States authorities, thus exposing him to the risk of further treatment contrary to Article 3; Article 3, Prohibition of Torture – Violation, on account of the failure of “the former Yugoslav Republic of Macedonia” to carry out an effective investigation into Mr El-Masri’s allegations of ill-treatment; Article 5, Right to Liberty and Security – Violation; Article 8, Right to Respect for Private and Family Life – Violation; Article 13, Right to an Effective Remedy – Violation).** The applicant, a German national of Lebanese origin, complained that he had been a victim of a secret “rendition” operation during which he had been arrested, held in isolation, questioned and ill-treated in a Skopje hotel for 23 days, transferred to Central Intelligence Agency agents who had brought him to a secret detention facility in Afghanistan, where he further suffered ill-treatment for more than four months, and successfully argued that all these extrajudicial abductions and arbitrary detentions had violated his Convention rights.219

- 55. *Eur.Court HR, Chapman v. Belgium, Fifth Section Decision of 5 March 2013, Application No. 39619/06, (Article 6-1, Access to a Court – Inadmissible).*** The applicant, a former employee of the North Atlantic Treaty Organization who was denied a judgment in his favour at the Brussels Employment Tribunal after the North Atlantic Treaty Organisation (NATO) invoked its jurisdictional immunity, claimed that this violated his right to access to a court. The Court declared the application inadmissible since the applicant would have had an effective internal procedure before the NATO Appeals Board if he had made use of that remedy.225
- 56. *Eur.Court HR, Oleynikov v. Russia, First Section Judgment of 14 March 2013, Application No. 36703/04, (Article 6, Right to a Fair Trial – Violation).*** The applicant, a Russian national who had lent money to the Khabarovsk Office of the Trade Counsellor of the Democratic People’s Republic of Korea (DPRK), sought repayment of the sum of money and successfully argued that both the Russian courts’ refusal to examine his claim as well as the DPRK’s failure to waive its immunity and give its consent to the examination of the claim by the Russian authorities, had constituted a violation of his Convention rights.227
- 57. *Eur.Court HR, Stichting Mothers of Srebrenica and Others v. the Netherlands, Third Section Decision of 11 June 2013, Application No. 65542/12, (Article 6, Right to a Fair Trial – Inadmissible).*** The applicant, a foundation under Dutch law created to bring proceedings on behalf of relatives of victims of the 1995 Srebrenica massacre as well as ten nationals of Bosnia and Herzegovina who are surviving relatives of the people killed in the massacre, argued that the Netherlands courts’ decision to declare their case against the United Nations (UN) inadmissible on the ground that the UN enjoyed immunity from national courts’ jurisdiction violated their right of access to a court. The Court declared the application inadmissible since it found that the granting of immunity to the UN had served a legitimate purpose and was and had not been disproportionate.230
- 58. *Eur.Court HR, Wallishauser v. Austria (No. 2), First Section Judgment of 20 June 2013, Application No. 14497/06, (Article 1 of Protocol No. 1, Protection of Property – No Violation; Article 14, Prohibition of Discrimination – No Violation).*** The applicant, an Austrian national formerly employed by the United States of America embassy in Vienna and ruled by an Austrian court to have been unfairly dismissed, unsuccessfully alleged that the extraterritorial nature of her employer was not a sufficient justification to require her to pay social security contributions and that it further imposed a disproportionate burden on her.234
- 59. *Eur.Court HR, Maktouf and Damjanović v. Bosnia and Herzegovina, Grand Chamber Judgment of 18 July 2013, Application Nos. 2312/08 & 34179/08, (Article 7, No Punishment without law – Violation).*** The applicants, two men convicted by the Court of Bosnia and Herzegovina of war crimes, successfully argued that the more stringent criminal law, namely the 2003 Criminal Code of Bosnia and Herzegovina, had been applied to them retroactively instead of the criminal law which had actually been applicable at the time they had committed the offences in 1992 and 1993.235
- 60. *Eur.Court HR, Janowiec and Others v. Russia, Grand Chamber Judgment of 21 October 2013, Application Nos. 55508/07 & 29520/09, (Article 2, Right to Life – No Competence to Examine; Article 3, Prohibition of Torture – Violation; Article 38, Examination of the Case – Failure to Comply).*** The applicants, 15 Polish nationals who are relatives of 12 victims of the Katyń massacre, successfully complained that an effective investigation had not been carried out into the deaths of their relatives, who at the time were prisoners of war following the Red Army’s invasion of the Republic of Poland, in 1940 as an instance of war crimes.240
- 61. *Eur.Court HR, Al-Dulimi and Montana Management Inc. v. Switzerland, Second Section judgment of 26 November 2013, Application No. 5809/08, (Article 6, Right to a Fair Trial –***

Violation). The applicants, an Iraqi national living in Jordan and a Panama-based company of which the first applicant was the managing director, successfully claimed that Switzerland's enforcement of the United Nations Security Council resolutions mandating the confiscation of the applicants' assets violated their Convention rights, especially in the absence of any procedure compatible with the Convention to challenge the asset freeze.245

62. Eur.Court HR, Perinçek v. Switzerland, Second Section Judgment of 17 December 2013, Application No. 27510/08, (Article 10, Freedom of Expression – Violation). The applicant successfully argued that he had been wrongfully convicted by the Swiss courts for having publicly described the Armenian genocide as an “international lie” at various conferences in Switzerland.249

63. Eur.Court HR, Jones and Others v. the United Kingdom, Fourth Section Judgment of 14 January 2014, Application Nos. 34356/06 & 40528/06, (Article 6-1, Right to a Fair Hearing within a Reasonable Time – No Violation). The applicants, four British nationals who had alleged that they had been tortured in Saudi Arabia by Saudi State officials, unsuccessfully complained about the United Kingdom courts' subsequent dismissal of suit for reasons of State immunity, the granting of which, according to the Court, had reflected generally recognised rules of public international law and had not amounted to an unjustified restriction on the applicants' access to court.253

64. Eur.Court HR, Cyprus v. Turkey, Grand Chamber Judgment of 12 May 2014, Application No. 25781/94, (Article 41, Just Satisfaction – Just Satisfaction Awarded). The applicant successfully claimed that the passage of time since the original judgment did not preclude the Court from adjudicating its claim for just satisfaction, notwithstanding a State's obligation to act without undue delay in an inter-state dispute.....257

65. Eur.Court HR, Margus v. Croatia, Grand Chamber Judgment of 27 May 2014, Application No. 4455/10, (Article 6-1, Right to a Fair Trial – No Violation; Article 4 of Protocol No. 7, Right not to be Tried or Punished Twice – Not Applicable & Inadmissible). The applicant, a former commander of the Croatian army, unsuccessfully claimed that the fact that he had been tried and granted an amnesty for the war crimes committed against the civilian population in 1991, meant that his conviction for the same offences nine years later was contrary to his Convention rights.261

66. Eur.Court HR, Jelić v. Croatia, First Section Judgment of 12 June 2014, Application No. 57856/11, (Article 2, Right to Life – Violation). The applicant, the wife of a Serbian man who had been arrested during the war in the Sisak area in Croatia in November 1991 and had been subsequently killed by the police in 1991, successfully complained that there had been no adequate investigation into his death.266

67. Eur.Court HR, Georgia v. Russia (I), Grand Chamber Judgment of 3 July 2014, Application No. 13255/07, (Article 4 of Protocol No. 4, Prohibition of Collective Expulsion of Aliens – Violation; Article 5-1, Right to Liberty and Security – Violation; Article 5-4, Right to Judicial Review of Detention – Violation; Article 3, Prohibition of Torture – Violation; Article 13, Right to an Effective Remedy – Violation; Article 38, Obligation to Furnish All Necessary Facilities for the Effective Conduct of Investigation – Violation; Article 8, Right to Respect for Private and Family Life – No Violation; Article 1 of Protocol No. 7, Procedural Safeguards relating to Expulsion of Aliens – No Violation; Article 1 of Protocol No. 1, Protection of Property – No Violation; Article 2 of Protocol No. 1, Right to Education – No Violation). The applicant successfully claimed that Russia's coordinated policy of detaining and expelling a large number of Georgian nationals amounted to an administrative practice contrary to

the Convention, taken as reprisals following the arrest of four Russian officers in Tbilisi in September 2006.269

68. Eur.Court HR, *Ališić and Others v. Bosnia and Herzegovina, Croatia, Serbia, Slovenia and The former Yugoslav Republic of Macedonia, Grand Chamber Judgment of 16 July 2014, Application No. 60642/08, (With regard to Mr Šahdanović: Article 1 of Protocol No. 1, Protection of Property – Violation; Article 13, Right to an Effective Remedy – Violation by Serbia; With regard to Ms Ališić and Mr Sadžak: Article 1 of Protocol No. 1, Protection of Property – Violation; Article 13, Right to an Effective Remedy – Violation by Slovenia; With regard to the other respondent States: Article 1 of Protocol No. 1, Protection of Property – No Violation; Article 13, Right to an Effective Remedy – No Violation; Article 14, Prohibition of Discrimination, taken together with Article 13 and Article 1 of Protocol No. 1 – No Violation).* The applicants, nationals of Bosnia and Herzegovina and having deposited money at national banks in the former Yugoslavia, were unable to retrieve that money after the dissolution of Yugoslavia and partially successfully claimed that the new States were responsible for the deposits made at national banks prior to dissolution.276

69. Eur.Court HR, *Al Nashiri v. Poland & Husayn (Abu Zubaydah) v. Poland, Former Fourth Section Judgments of 24 July 2014, Application Nos. 28761/11 & 7511/13, (Article 3, Prohibition of Torture – Violation; Article 5, Right to Liberty and Security – Violation; Article 8, Right to Respect for Private and Family Life – Violation; Article 13, Right to an Effective Remedy – Violation; Article 6-1, Right to a Fair Hearing within a Reasonable Time – Violation).* The applicants, a Saudi Arabian national of Yemeni descent and a stateless Palestinian, both suspected of terrorist acts, successfully challenged their extraordinary rendition to a secret Central Intelligence Agency facility in Poland and later Guantanamo Bay, alleging torture and ill-treatment, and failure to carry out a subsequent investigation.281

70. Eur.Court HR, *Trabelsi v. Belgium, Former Fifth Section Judgment of 4 September 2014, Application No. 140/10, (Article 3, Prohibition of Torture – Violation; Article 34, Individual Applications – Violation).* The applicant, a Tunisian national at that time incarcerated in the United States of America (USA), successfully argued that his extradition from Belgium to the USA where he was being prosecuted on charges of terrorist offences and facing life imprisonments, a sentence which, according to the Court, was irreducible as US law provided no adequate mechanism for reviewing this type of sentence, breached his Convention rights.287

71. Eur.Court HR, *Pleshkov v. Romania, Third Section Judgment of 16 September 2014, Application No. 1660/03, (Article 7, No Punishment without Law – Violation; Article 1 of Protocol No. 1, Protection of Property - Violation).* The applicant, a Bulgarian national, was prosecuted for illegal shark fishing within Romania’s Exclusive Economic Zone in the Black Sea and successfully argued that given the lack of clear delimitation of maritime boundaries, his conviction had been based on a direct application of United Nations Convention on the Law of the Sea, which did not contain provisions for individual criminal responsibility.291

72. Eur.Court HR, *Hassan v. United Kingdom, Grand Chamber Judgment of 16 September 2014, Application No. 29750/09, (Article 1, Jurisdiction of the State – Jurisdiction Found; Article 2, Right to Life – No Violation; Article 3, Prohibition of Torture – No Violation; Article 5, Right to Liberty and Security – No Violation).* The applicant, the brother of an Iraqi national who was captured and detained at Camp Bucca in south-eastern Iraq by the British armed forces and subsequently died during the hostilities in 2003, unsuccessfully claimed that his brother had been under the control of British forces for the purposes of extra-territorial jurisdiction of the Convention.294

73. *Eur.Court HR, Tarakhel v. Switzerland, Grand Chamber Judgment of 4 November 2014, Application No. 29217/12, (Article 3, Prohibition of Torture – Violation)*. The applicants, an Afghan couple with six children living in Lausanne (Switzerland) and seeking asylum in Switzerland, successfully argued that under the Dublin Regulation their return to Italy in the absence of individual guarantees concerning their care and without obtaining from the Italian authorities guarantees that they would be taken charge of in a manner adapted to the age of the children, would breach their Convention rights.....300
74. *Eur.Court HR, Jaloud v. the Netherlands, Grand Chamber Judgment of 20 November 2014, Application No. 47708/08, (Article 2, Right to Life – Violation)*. The applicant, an Iraqi national and the father of an Iraqi civilian man killed by gunshot wounds in April 2004 in an incident involving the Netherlands Royal army personnel in Iraq at the time following the invasion of Iraq in March 2003 by a coalition of armed forces led by the United States of America, successfully claimed that the investigation into his son’s death had neither been sufficiently independent nor effective.....304
75. *Eur.Court HR, Klausecker and Perez v. Germany, Fifth Section Decision of 29 January 2015, Application Nos. 415/07 & 15521/08, (Article 6, Right to a Fair Trial - Inadmissible)*. The applicants, both former employees at the European Patent Office and the United Nations respectively, complained about the lack of access to the German courts to challenge their refusal of employment and dismissal respectively. The Court declared the application inadmissible since Mr Klausecker had failed to make use of reasonably available means to protect his rights and Ms Perez had not exhausted all local remedies available to her.....309
76. *Eur.Court HR, Petropavlovskis v. Latvia, Fourth Section Judgment of 13 January 2015, Application No. 44230/06, (Article 10, Freedom of Expression – Inapplicable; Article 11, Freedom of Assembly and Association – Inapplicable; Article 13, Right to an Effective Remedy – Inapplicable)*. The applicant unsuccessfully contested the refusal to grant him citizenship by naturalisation due to his political views, leading the Court in its judgment to refer to the legal relationship between citizens and States.313
77. *Eur.Court HR, A.A. v. France & A.F. v. France, Fifth Section Judgment of 15 January 2015, Application Nos. 18039/11 & 80086/13, (Article 3, Prohibition of Torture – Violation)*. The applicants, two Sudanese nationals, successfully argued that given their special circumstances, their deportation to Sudan would put them at risk of inhuman and degrading treatment.....316
78. *Eur.Court HR, Eshonkulov v. Russia, First Section Judgment of 15 January 2015, Application No. 68900/13, (Article 3, Prohibition of Torture – Violation, in the event of Mr Eshonkulov’s forced return to Uzbekistan; Article 5-1, Right to Liberty and Security – Violation; Article 5-4, Right to Review of Lawfulness of Detention – Violation; Article 6, Right to a Fair Trial – Violation)*. The applicant, a wanted suspect in Uzbekistan on charges of membership of an extremist movement, successfully argued that his extradition to Uzbekistan and expulsion proceedings would put him at risk of torture and ill-treatment.319
79. *Eur.Court HR, Gallardo Sanchez v. Italy, Fourth Section Judgment of 24 March 2015, Application No. 11620/07, (Article 5-1-f, Right to Liberty and Security - Violation)*. The applicant, a Venezuelan national detained in Italy with a view to being extradited to Greece, successfully contested the duration of his detention pending extradition.321
80. *Eur.Court HR, Ouabour v. Belgium, Second Section Judgment of 2 June 2015, Application No. 26417/10, (Article 3, Prohibition of Torture – Violation; Article 13, Right to an Effective Remedy, taken in conjunction with Article 3 – No Violation)*. After six year’s imprisonment for activity in a terrorist organisation, the applicant, in view of his pending

extradition to Morocco, successfully raised a defence stating that his extradition for a person with his terrorist background would put him at risk of torture in Morocco.324

81. Eur.Court HR, Kyriacou Tsiakkourmas and Others v. Turkey, Second Section Judgment of 2 June 2015, Application No. 13320/02, (Article 3, Prohibition of Torture – No Violation, as regards degrading treatment; Article 3, Prohibition of Torture – Violation, as regards effective investigation; Article 5-1, Right to Liberty and Security – No Violation; Article 5-4, Review of Lawfulness of Detention – Violation). The applicants, 13 Greek Cypriot nationals, brought a case arising from the abduction of Mr Tsiakkourmas who was snatched by Turkish Cypriot officials of the Sovereign Base Areas (SBAs) under British jurisdiction in Cyprus and tortured and detained in the “Turkish Republic of Northern Cyprus”, and partially successfully complained that the abduction from the SBAs had violated national and international law.326

82. Eur.Court HR, J.K. and Others v. Sweden, Fifth Section Judgment of 4 June 2015, Application No. 59166/12, (Article 3, Prohibition of Torture – No Violation, in the event of the applicants’ deportation to Iraq). The applicants, an Iraqi married couple and their sons who had applied for asylum, unsuccessfully argued that their return to Iraq would put them at risk of persecution and ill-treatment by Al-Qaeda.328

83. Eur.Court HR, Sargsyan v. Azerbaijan, Grand Chamber Judgment of 16 June 2015, Application No. 40167/06, (Article 1 of Protocol No. 1, Protection of Property – Violation; Article 8, Right to Respect for Private and Family Life – Violation; Article 13, Right to an Effective Remedy – Violation). The applicant, a refugee from Armenia, successfully argued that as a result of having to flee from his home in Azerbaijan during the Nagorno-Karabakh conflict, he had been denied the right by his State to return to his village and to have access to his property. .329

84. Eur.Court HR, Chiragov and Others v. Armenia, Grand Chamber Judgment of 16 June 2015, Application No. 13216/05 (Article 1 of Protocol No. 1, Protection of Property – Violation; Article 8, Right to Respect for Private and Family Life – Violation; Article 13, Right to an Effective Remedy – Violation). The applicants, six Azerbaijani nationals, successfully argued that their inability to return to their homes and property as a result of the Armenian-Azerbaijani Nagorno-Karabakh conflict breached their Convention rights.335

85. Eur.Court HR, Manole and “Romanian Farmers Direct” v. Romania, Third Section Judgment of 16 June 2015, Application No. 46551/06, (Article 11, Freedom of Assembly and Association – No Violation). The applicants, wishing to register the union of self-employed farmers, argued that the refusal of the Romanian courts to register the farmers’ union had amounted to an infringement of their rights to freedom of association, but the Court, interpreting the International Labour Organization (ILO) Convention, ruled that a refusal to register the applicant’s union had not overstepped Romania’s margin of appreciation.341

86. Eur.Court HR, Delfi AS v. Estonia, Grand Chamber Judgment of 16 June 2015, Application No. 64569/09, (Article 10, Freedom of Expression – No Violation). Interpreting and applying the European Union Directive 2000/31/EC, the Court held, contrary to the applicant’s assertions, that the Estonian courts’ finding of liability for user-generated comments on an Internet news portal against the applicant had been a justified and proportionate restriction on the portal’s freedom of expression.344

87. Eur.Court HR, A.S. v. Switzerland, Second Section Judgment of 30 June 2015, Application No. 39350/12, (Article 3, Prohibition of Torture – No Violation; Article 8, Right to Respect for Private and Family Life – No Violation). The applicant, a Syrian national of Kurdish origin living in Geneva (Switzerland), unsuccessfully argued that his return to Italy,

following a request by the Swiss authorities under the European Union Dublin Regulation, would put him at risk of ill-treatment.350

88. Eur.Court HR, V.M. and Others v. Belgium, Second Section Judgment of 7 July 2015, Application No. 60125/11, (Article 3, Prohibition of Torture – Violation; Article 13, Right to an Effective Remedy, taken in conjunction with Article 3 – Violation; Article 2, Right to Life – No Violation). The applicants, a family of seven Serbian nationals, partially successfully argued that the reception conditions of their asylum in Belgium had not been commensurate to their specific vulnerability.....353

89. Eur.Court HR, A.H. and J.K. v. Cyprus, Fourth Section Judgment of 21 July 2015, Application Nos. 41903/10 and 41811/10, (Article 5-1, Right to Liberty and Security, as regards the lawfulness of the applicants’ detention from 11 June 2010 until 20 May 2011– Violation; Article 5-1, Right to Liberty and Security, as regards the lawfulness of the applicants’ detention from 11 June 2010 until 20 May 2011 – No Violation; Article 5-1, Right to Liberty and Security, as regards the lawfulness of the second applicant’s detention from 29 November 2012 until 20 December 2012 – Violation; Article 5-2, Information on Reasons for Arrest, in so far as the applicant’s arrest on 11 June 2010 and their ensuing detention on the basis of the deportation and detention orders issued on that date were concerned – No Violation; Article 5-4, Speediness of Review – Violation; Article 4 of Protocol No. 4, Prohibition of Collective Expulsion of Aliens – No Violation).....357

Eur.Court HR, H.S. and Others v. Cyprus, Fourth Section Judgment of 21 July 2015, Application No. 41753/10, (Article 5-4, Speediness of Review – Violation; Article 5-1, Right to Liberty and Security– Violation; Article 5-1, Right to Liberty and Security, in respect of nine of the applicants – No Violation; Article 5-1, Right to Liberty and Security, in respect of the remaining five applicants – Violation; Article 5-2, Information on Reasons for Arrest – No Violation; Article 5-4, Speediness of Review – Violation; Article 4 of Protocol No. 4, Prohibition of Collective Expulsion of Aliens – No Violation).....357

Eur.Court HR, K.F. v. Cyprus, Fourth Section Judgment of 21 July 2015, Application No. 41858/10, (Article 5-1, Right to Liberty and Security, as regards the lawfulness of the applicant’s detention on 11 June 2010 – Violation; Article 5-1, Right to Liberty and Security, as regards the lawfulness of the applicant’s detention on 11 June 2010 until 20 April 2011 – No Violation; Article 5-2, Information on Reasons for Arrest – No Violation; Article 5-4, Speediness of Review – Violation; Article 5-4 of Protocol No. 4, Prohibition of Collective Expulsion of Aliens – No Violation).357

The applicants, 17 Syrian asylum seekers, argued, partially successfully, that their collective expulsion and deportation from Cyprus to Syria would put them at risk of ill-treatment.357

90. Eur.Court HR, G.S. v. Georgia, Fourth Section Judgment of 21 July 2015, Application No. 2361/13, (Article 8, Right to Respect for Private and Family Life – Violation). The applicant, relying on the 1980 Hague Convention on the Civil Aspects of International Child Abduction, successfully complained about the refusal of the Georgian courts to order the return of her son to Ukraine.359

91. Eur.Court HR, Khlaifia and Others v. Italy, Second Section Judgment of 1 September 2015, Application No. 16483/12, (Article 3, Prohibition of Torture – No Violation, in respect of the conditions of detention on board the ships; Article 3, Prohibition of Torture – Violation, in respect of the conditions of detention in the Contrada Imbracola reception centre; Article 4 of Protocol No. 4, Prohibition of Collective Expulsion of Aliens – Violation; Article 5-1, Right to Liberty and Security – Violation; Article 5-2, Information on Reasons for Arrest –

Violation; Article 5-4, Speediness of Review – Violation; Article 13, Right to an Effective Remedy – Violation, taken in conjunction with Articles 3 and 4 of Protocol No. 4). The applicants, Tunisian nationals, successfully alleged, *inter alia*, that their asylum in detention centres on Lampedusa during the Arab springs of 2011 and their repatriation to Tunisia had been unlawful.362

92. *Eur.Court HR, Sõro v. Estonia, First Section Judgment of 3 September 2015, Application No. 22588/08, (Article 8, Right to Respect for Private and Family Life – Violation).* The applicant, a former employee for the Committee for State Security of the Union of Soviet Socialist Republics (KGB), successfully argued that the publication of his employment records had breached his right to respect for private life.....367

93. *Eur.Court HR, R.H. v. Sweden, Fifth Section Judgment of 10 September 2015, Application No. 4601/14, (Article 3, Prohibition of Torture – No Violation).* The applicant, a Somali asylum-seeker, unsuccessfully argued that her deportation back to Somalia would put her at risk of ill-treatment.370

94. *Eur.Court HR, L.M. and Others v. Russia, First Section Judgment of 15 October 2015, Application No. 40081/14, (Article 2, Right to Life – Violation; Article 3, Prohibition of Torture – Violation; Article 5-1, Right to Liberty and Security – Violation; Article 5-4, Speediness of Review – Violation; Article 34, Individual Applications – Failure to Comply).* The applicants, Syrian nationals and a stateless Palestinian from Syria, successfully argued that their impending expulsion from Russia to Syria would expose them to a real risk to their lives and personal security.371

95. *Eur.Court HR, Vasiliauskas v. Lithuania, Grand Chamber Judgment of 20 October 2015, Application No. 34343/05, (Article 7, No Punishment without Law – Violation).* The applicant, a former officer in the State security services of the Lithuanian partisans, successfully argued that his conviction for genocide, allegedly based on the offence of genocide derived from public international law and contained in particular in the Convention on the Prevention and Punishment of the Crime of Genocide of 1948, had been *ex post facto* and therefore unlawful. ...376

96. *Eur.Court HR, Tadzhibayev v. Russia, Third Section Judgment of 1 December 2015, Application No. 17724/14, (Article 3, Prohibition of Torture – Violation).* The applicant, an ethnic Uzbek refugee in Russia, successfully argued that his threatened extradition to Kyrgyzstan would put him at risk of ill-treatment.381

97. *Eur.Court HR, G.S.B. v. Switzerland, Third Section Judgment of 22 December 2015, Application No. 28601/11, (Article 8, Right to Respect for Private and Family Life – No Violation; Article 14, Prohibition of Discrimination – No Violation).* The applicant, a Saudi and United States of America (USA) national living in Switzerland, complained that his privacy had been breached when his bank details had been transferred to the USA authorities for tax purposes, but the Court, interpreting the European Convention on Human Rights in line with the Vienna Convention on the Law of Treaties (1969) with regard to the cooperation agreement signed between Switzerland and the USA, ruled against the applicant holding that there had been no violation.383

98. *Eur.Court HR, A.G.R v. the Netherlands, Third Section Judgment of 12 January 2016, Application No. 13442/08, (Article 3, Prohibition of Torture – No Violation, in the event of Mr A.G.R.’s removal to Afghanistan)*387

Eur.Court HR, A.W.Q and D.H. v. the Netherlands, Third Section Judgment of 12 January 2016, Application No. 25077/06, (Article 3, Prohibition of Torture – No Violation, in the event of Mr A.W.Q.’s removal to Afghanistan).387

Eur.Court HR, M.R.A. and Others v. the Netherlands, Third Section Judgment of 12 January 2016, Application No. 46856/07, (Article 3, Prohibition of Torture – No Violation, in the event of Mr M.R.A.’s removal to Afghanistan; Article 13, Right to an effective remedy, taken together with Article 3 – No Violation, in respect of Mr M.R.A.)387

Eur.Court HR, S.D.M and Others v. the Netherlands, Third Section Judgment of 12 January 2016, Application No. 8161/07, (Article 3, Prohibition of Torture – No Violation, in the event of Mr S.D.M.’s removal to Afghanistan).387

Eur.Court HR, S.S. v. the Netherlands, Third Section Judgment of 12 January 2016, Application No. 39575/06, (Article 3, Prohibition of Torture – No Violation, in the event of Mr S.S.’s removal to Afghanistan).....387

The applicants, Afghan asylum seekers in the Netherlands and former high ranking officers of the former Afghan intelligence service, unsuccessfully argued that their expulsion to Afghanistan would put them at real risk of ill-treatment.387

99. *Eur.Court HR, M.D. and M.A. v. Belgium, Second Section Judgment of 19 January 2016, Application No. 58689/12, (Article 3, Prohibition of Torture – Violation).* The applicants, a Russian couple of Chechen origin which had fled Russia after a deadly family dispute and after receiving several warnings that certain people were looking for them, unsuccessfully argued that their expulsion from Belgium back to Russia would put them at real risk of ill-treatment.....391

100. *Eur.Court HR, Sow v. Belgium, Second Section Judgment of 19 January 2016, Application No. 20781/13, (Article 3, Prohibition of Torture – No Violation; Article 13, Right to an Effective Remedy, in conjunction with Article 3, Prohibition of Torture – No Violation).* The applicant, a Guinean national who had been forced to undergo partial excision (female genital mutilation) and had subsequently fled Guinea, unsuccessfully argued that her expulsion back to Guinea would put her at risk of ill-treatment through, *inter alia*, re-excision.....393

101. *Eur.Court HR, L.E. v. Greece, First Section Judgment of 21 January 2016, Application No. 71545/12, (Article 4, Prohibition of Slavery and Forced Labour – Violation; Article 6-1, Right to a Fair Hearing within a Reasonable Time – Violation; Article 13, Right to an Effective Remedy – Violation).* The applicant, a Nigerian national who had been forced into prostitution in Greece, successfully argued that the effectiveness and duration of the investigation process conducted by Greece for the purposes of granting her the status as a victim of human trafficking, had been unreasonable.394

102. *Eur.Court HR, R. v. Russia, Third Section Judgment of 26 January 2016, Application No. 11916/15, (Article 3, Prohibition of Torture – Violation, in the event of Mr R.’s removal to Kyrgyzstan; Article 3, Prohibition of Torture – Violation, with regard to degrading treatment; Article 3, Prohibition of Torture – Violation, with regard to the effective investigation; Article 5-4, Speediness of Review – Violation; Article 5-1, Right to Liberty and Security – Violation).* The applicant, an ethnic Uzbek Kyrgyzstani national previously detained in Russia awaiting expulsion to Kyrgyzstan and having been subjected to degrading treatment in the detention centre, successfully argued that his expulsion would be in violation of the Convention rights and would put him at risk of ill-treatment considering his membership of a particularly vulnerable ethnic group.398

103. Eur.Court HR, *Nasr and Ghali v. Italy*, Fourth Section Judgment of 23 February 2016, Application No. 44883/09, (With regard to Mr Nasr: Article 3, Prohibition of Torture – Violation; Article 5, Right to Liberty and Security – Violation; Article 8, Right to Respect for Private and Family Life – Violation; Article 13, Right to an Effective Remedy, read in conjunction with Articles 3, 5 and 8 – Violation; with regard to Ms Ghali: Article 3, Prohibition of Torture – Violation; Article 8, Right to Respect for Private and Family Life – Violation; Article 13, Right to an Effective Remedy, read in conjunction with Articles 3 and 8 – Violation). The applicants, one of which was an Egyptian national who had been subjected to an instance of extrajudicial transfer, successfully argued that his abduction by the Central Intelligence Agency and subsequent secret detention in Egypt, with cooperation of Italian officials, was unlawful.400

104. Eur.Court HR, *K.J. v. Poland*, Fourth Section Judgment of 1 March 2016, Application No. 30813/14, (Article 8, Right to Respect for Private and Family Life - Violation). The applicant, in reliance on the 1980 Hague Convention on the Civil Aspects of International Child Abduction, successfully brought a claim seeking the return of his child to the United Kingdom from Poland.407

105. Eur.Court HR, *Arlewin v. Sweden*, Third Section Judgment of 1 March 2016, Application No. 22302/10, (Article 6-1, Right to a Fair Hearing within a Reasonable Time – Violation). The applicant, a self-employed Swedish businessman, successfully argued for his right of access to a court when the Swedish Courts had declined jurisdiction in defamation proceedings arising out of a defamatory television broadcast accusing the applicant of organised crime, and the Court in its judgment interpreted the Brussels I Regulation and the EU Audiovisual Media Services Directive.....410

106. Eur.Court HR, *F.G. v. Sweden*, Grand Chamber Judgment of 23 March 2016, Application No. 43611/11, (Article 2, Right to Life – No Violation; Article 3, Prohibition of Torture – No Violation). The applicant, an Iranian Asylum seeker who had converted to Christianity, argued unsuccessfully that an expulsion would put him at risk of ill-treatment for fear of being sentenced to death owing to his political past and his conversion to Christianity.413

107. Eur.Court HR, *Avotiņš v. Latvia*, Grand Chamber Judgment of 23 May 2016, Application No. 17502/07, (Article 6-1, Right to a Fair Hearing within a Reasonable Time – No Violation). The applicant complained to the Court that in issuing a declaration of enforceability in respect of a judgment from the Cypriot courts, which had been given in breach of his defence rights, the Latvian Supreme Court had infringed his right to a fair trial leading the Court in its judgment to examine observance of the guarantees of a fair hearing in the context of mutual recognition in civil and commercial matters based on European Union law, specifically the Brussels I Regulation.....418

108. Eur.Court HR, *Beortegui Martinez v. Spain*, Third Section Judgment of 31 May 2016, Application No. 36286/14, (Article 3, Prohibition of Torture – Violation, on account of the investigation conducted by the national authorities; Article 3, Prohibition of Torture – No Violation, as regards the applicant’s allegation of ill-treatment during his arrest and in police custody). The applicant complained that there had been no effective investigation into his complaint of having been ill-treated while held incommunicado in police custody and the Court in its judgment assessed the conditions of detention of the applicant, referring to the importance of adopting the measures recommended by the European Committee for the Prevention of Torture (CPT) and the reports by the Council of Europe Commissioner for Human Rights.424

109. Eur.Court HR, *R.D. v. France*, Fifth Section Judgment of 16 June 2016, Application No. 34648/14, (Article 3, Prohibition of Torture – Violation, in the event of Ms R.D.’s removal to

Guinea; Article 13, Right to an Effective Remedy, taken in conjunction with Article 3– No Violation). The applicant, a Guinean national who had been subjected to violent reprisals from her Muslim father and brothers following her marriage to a Christian, successfully argued that her deportation from France back to Guinea would put her at risk of ill-treatment.428

110. *Eur.Court HR, Nait-Liman v. Switzerland, Second Section Judgment of 21 June 2016, Application No. 51357/07, (Article 6, Right to a Fair Trial – No Violation).* Following the refusal of the Swiss civil courts to examine the applicant’s civil claim for compensation in respect of the non-pecuniary damage caused by his alleged torture in Tunisia, the Court held that the decision of the Swiss Courts to decline universal jurisdiction, despite the absolute prohibition on torture under international law, had not violated the applicant’s rights.430

111. *Eur.Court HR, Al-Dulimi and Montana Management Inc. v. Switzerland, Grand Chamber Judgment of 21 June 2016, Application No. 5809/08, (Article 6-1, Right to a Fair Hearing within a Reasonable Time – Violation).* The applicants, an Iraqi national living in Jordan and a Panama-based company of which the first applicant was the managing director, successfully claimed in an appeal from an earlier judgment that Switzerland’s enforcement of the United Nations Security Council resolutions mandating the confiscation of the applicants’ assets violated their Convention rights, especially in the absence of any procedure compatible with the Convention to challenge the asset freeze.433

1. ***Eur.Court HR, Drozd and Janousek v. France and Spain, Plenary Court Judgment of 26 June 1992, Application No. 12747/87, (Article 5-1, Right to Liberty and Security – No Violation)***. The applicants considered their detention in France unlawful in the absence of a legal basis and unsuccessfully claimed that their alleged lack of a fair trial by courts in Andorra was the responsibility of France and Spain.

Information Note on the Court's case-law No.

June 1992

Judgment 26.6.1992

Article 5

Article 5-1

Lawful arrest or detention

Procedure prescribed by law

Criminal proceedings before the Tribunal de Corts of the Principality of Andorra and imprisonment in France after convictions by that court: no violation

[This summary is extracted from the Court's official reports (Series A or Reports of Judgments and Decisions). Its formatting and structure may therefore differ from the Case-Law Information Note summaries.]

I. THE COURT'S JURISDICTION TO EXAMINE THE CASE FROM THE POINT OF VIEW OF ARTICLE 6

Applicants complained that they had not had a fair trial before the Tribunal de Corts and regarded France and Spain as responsible at international level for the conduct of the Andorran authorities.

Preliminary objections raised by the respondent Governments, as previously before the Commission, which had declared the application admissible but then declined jurisdiction.

A. Objection of lack of jurisdiction *ratione loci*

Court agreed in substance with the Governments' arguments and the Commission's opinion that the Convention was not applicable on the territory of Andorra, notwithstanding its ratification by France and Spain. It also took into consideration various circumstances: the Principality was not a member of the Council of Europe, which prevented it 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; territory of Andorra was not an area common to France and Spain or a Franco-Spanish condominium; 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".

Conclusion: objection upheld (unanimously).

The full texts of the Court's judgments are accessible on its website (<http://www.hudoc.echr.coe.int>)

B. Objection of lack of jurisdiction *ratione personae*

Term "jurisdiction": not limited to the national territory of the Contracting States, whose responsibility could be involved because of acts of their authorities producing effects outside their own territory.

Judges from France and Spain sat as members of the Andorran courts, 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 - their judgments not subject to supervision by the authorities of France or Spain. Nothing in the case-file to suggest that those authorities had attempted to interfere with the applicants' trial. Secondment of judges, or their placing at the disposal of foreign countries, also practised between member States of the Council of Europe.

Conclusion: objection upheld (unanimously).

II. ARTICLE 5 OF THE CONVENTION

Applicants considered their detention in France unlawful for want of a legal basis, and contrary to French *ordre public* in the absence of any control by the French authorities.

A. Preliminary objection of the French Government (failure to exhaust domestic remedies)

Objection of inadmissibility previously raised before the Commission, which asked the Court not to examine it - consistent case-law to the contrary.

Conclusion: Court had jurisdiction to examine the objection (unanimously).

Bringing criminal proceedings, with themselves as civil parties, against the officials or judges responsible for their detention, or bringing an action for a flagrantly unlawful act committed by them: aim of remedies was to obtain compensation for damage caused by deprivation of liberty and to impose sanctions on public officials - might have indirect effect of putting an end to detention, but had not hitherto had such a result where the detention originated in an Andorran court decision, as the French courts did not regard themselves as having jurisdiction to assess the lawfulness of such decisions.

Conclusion: objection dismissed (unanimously).

B. Merits of the complaint

1. Legal basis of the detention in issue

Review of the observance of Andorran legal procedures, and more generally of the lawfulness of the applicants' deprivation of liberty in terms of the law of the Principality: Court had no jurisdiction.

Compliance with French law: Court considered this established. Franco-Andorran custom had sufficient stability and legal force to serve as a basis for the detention in issue, notwithstanding the particular status of the Principality in international law.

2. Necessity of a control by the French courts of the conviction in issue

Tribunal de Corts: considered by the Court in this case as the "competent court" referred to in Article 5 § 1 (a). As the Convention did not require Contracting Parties to impose its standards on third States or territories, France was not obliged to verify whether the proceedings which resulted in the

The full texts of the Court's judgments are accessible on its website (<http://www.hudoc.echr.coe.int>)

applicants' conviction were compatible with all the requirements of Article 6. To require such a review would also thwart the current trend, in principle in the interests of those concerned, to strengthening international co-operation in the administration of justice. Contracting States obliged, however, to refuse their co-operation if it emerged that the conviction was the result of a flagrant denial of justice.

Court took note of the declaration by the French Government that France could and would refuse its customary co-operation if it was a question of enforcing on its territory an Andorran judgment which was manifestly contrary to the provisions of Article 6 or the principles embodied therein. Confirmation of this assurance in the decisions of French courts.

Not shown that France was required to refuse its co-operation in enforcing the sentences in issue.

Conclusion: no violation (twelve votes to eleven).

2. *Eur.Court HR, Stran Greek Refineries and Stratis Andreadis v. Greece, Chamber Judgment of 9 December 1994, Application No. 13427/87, (Article 1 of Protocol No. 1, Protection of Property – Violation; Article 6-1, Right to a Fair Hearing Within a Reasonable Time – Violation)*. The applicants, a liquidated company registered in Athens established for the purpose of constructing a crude oil refinery and its sole owner, successfully argued that after the State's failure in securing the necessary land and fulfilling the requirements to allow construction of the refinery, the annulment by legislative measure of an arbitration award establishing the existence of a debt owed by the defendant had breached their Convention rights.

Information Note on the Court's case-law

December 1994

Judgment 9.12.1994

Article 6

Civil rights and obligations

Fair hearing

Annulment by legislative measure of an arbitration award establishing the existence of a debt owed by the State: Article 6 § 1 applicable: *violation*

[This summary is extracted from the Court's official reports (Series A or Reports of Judgments and Decisions). Its formatting and structure may therefore differ from the Case-Law Information Note summaries.]

I. GOVERNMENT'S PRELIMINARY OBJECTION (failure to exhaust domestic remedies)

Respondent State required to indicate with sufficient clarity the effective remedies to which applicants have not had recourse, as it is not for Convention bodies to cure of their own motion any shortcomings or lack of precision in respondent State's arguments - there was accordingly estoppel.

Conclusion: objection dismissed (unanimously).

II. ARTICLE 6 § 1 OF THE CONVENTION

A. Applicability

Right under arbitration award and claim for damages allowed by arbitration court were pecuniary in nature - right to recover sums awarded by arbitration court was a "civil right", whatever the nature, under Greek law, of contract between applicants and Greek State - outcome of proceedings brought to have arbitration decision set aside was decisive for a "civil right".

Conclusion: Article 6 § 1 applicable (unanimously).

B. Compliance

The full texts of the Court's judgments are accessible on its website (<http://www.hudoc.echr.coe.int>)

1. Fair trial

Proceedings subsequent to entry into force of Law no. 1701/1987 of decisive importance for purposes of Court's investigation - enactment of that Law had represented turning-point in the proceedings, which up to that point had gone against State.

In litigation involving opposing private interests, equality of arms implies that each party must be afforded reasonable opportunity to present his case under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent.

Timing and manner of adoption of Article 12 - legislature's intervention took place at a time when judicial proceedings in which State was a party were pending.

Principle of rule of law and notion of fair trial preclude any interference by legislature with administration of justice designed to influence judicial determination of dispute - in instant case State intervened in decisive manner to ensure that the outcome, which was imminent, of proceedings in which it was a party was favourable to it.

Conclusion: violation (unanimously).

2. Length of proceedings

(a) Period to be taken into consideration

Starting-point: date on which Greek declaration accepting right of individual petition took effect.

End: delivery of Court of Cassation's judgment declaring the arbitration award void.

Total: four years, four months and twenty days.

(b) Reasonableness of length of proceedings

Proceedings in Court of Cassation lasted more than three years: period justified in view of need to take account of Law no. 1701/1987 and of Article 563 § 2 of the Code of Civil Procedure.

Conclusion: no violation (unanimously).

III. ARTICLE 1 OF PROTOCOL No. 1

1. Whether there was a "possession" within the meaning of Article 1

Necessary to ascertain whether a debt in the applicants' favour was sufficiently established to be enforceable.

Preliminary decision of Athens Court of First Instance merely furnished applicants with hope that they would secure recognition of the claim put forward.

Arbitration award clearly recognised State's liability up to a maximum of specified amounts - according to its wording, it was final and binding, did not require any further enforcement measure and was not susceptible to any ordinary or special appeal; under Greek legislation it had the force of a final decision and was deemed to be enforceable.

Right to sums awarded by decision was admittedly revocable, but decision had not been annulled by ordinary civil courts - constituted a "possession".

The full texts of the Court's judgments are accessible on its website (<http://www.hudoc.echr.coe.int>)

2. Whether there was an interference

Impossible for applicants to secure enforcement of arbitration award having final effect under which State was required to pay specified amounts in respect of expenditure incurred in seeking to fulfil their contractual obligations or even for them to take further action to recover such sums through the courts: amounted to interference with applicants' property right.

3. Whether the interference was justified

Recognition by case-law of international courts and arbitration tribunals that States have sovereign power to amend or even terminate contracts concluded with private individuals, provided they pay compensation - unilateral termination of contract does not take effect in relation to certain essential clauses, such as arbitration clauses.

Principle of autonomy of arbitration clauses accepted in Greek legal system and applied in instant case by Court of First Instance, Court of Appeal and, apparently, judge-rapporteur of Court of Cassation - applicants' claims originating before termination of contract not invalidated thereby.

Intervention in form of a law which invoked termination of contract in question in order to declare void arbitration clause and to annul arbitration award upset balance that must be struck between protection of right of property and requirements of public interest.

Conclusion: violation (unanimously).

IV. ARTICLE 50 OF THE CONVENTION

A. Pecuniary damage

Applicants entitled to reimbursement of sums accorded by arbitration decision.

Interest awarded.

B. Costs and expenses (before Convention institutions)

Sum to be reimbursed determined on equitable basis.

Conclusion: respondent State to pay applicants specified sums (unanimously).

3. ***Eur.Court HR, Loizidou v. Turkey, Grand Chamber Judgment of 18 December 1996, Application No. 15318/89, (Article 1 of Protocol No. 1, Protection of Property – Violation; Article 8, Right to Respect for Private and Family Life – No Violation).*** The applicant, a former resident of Northern Cyprus, was unable to access his property since the continuing division of the territory of Cyprus and successfully claimed that the Turkish Government was responsible for this interference.

Information Note on the Court's case-law

December 1996

Judgment 18.12.1996 [GC]

Article 1 of Protocol No. 1

Article 1 para. 1 of Protocol No. 1

Peaceful enjoyment of possessions

Denial of access to and interference with property rights in northern Cyprus: violation

[This summary is extracted from the Court's official reports (Series A or Reports of Judgments and Decisions). Its formatting and structure may therefore differ from the Case-Law Information Note summaries.]

I. GOVERNMENT'S PRELIMINARY OBJECTION (RATIONE TEMPORIS)

Turkish Government claimed inter alia that applicant's property had been irreversibly expropriated by virtue of Article 159 of "TRNC" ("Turkish Republic of Northern Cyprus") Constitution of 7 May 1985, prior to Turkey's declaration of 22 January 1990 accepting Court's jurisdiction.

Evident from international practice and resolutions of various international bodies that international community does not regard "TRNC" as State under international law and that Republic of Cyprus remains sole legitimate Government of Cyprus - Court cannot therefore attribute legal validity for purposes of Convention to provisions such as Article 159 of 1985 Constitution - accordingly, applicant cannot be deemed to have lost title to property - alleged violations are thus of continuing nature.

Conclusion: objection dismissed (eleven votes to six).

II. ARTICLE 1 OF PROTOCOL No. 1

A. Imputability issue

Obvious from large number of troops engaged in active duties in northern Cyprus that Turkish army exercises effective overall control there - in circumstances of case, this entails Turkey's responsibility for policies and actions of "TRNC" - thus, denial to applicant of access to property in northern Cyprus falls within Turkey's "jurisdiction" for purposes of Article 1 of Convention and is imputable to Turkey

The full texts of the Court's judgments are accessible on its website (<http://www.hudoc.echr.coe.int>)

- establishment of State responsibility does not require examination of lawfulness of Turkey's intervention in 1974.

B. Interference with property rights

Applicant remained legal owner of land, but since 1974 effectively lost all control, use and enjoyment of it - thus, continuous denial of access amounts to interference with rights under Article 1 of Protocol No. 1 - Turkish Government have not sought to justify interference and Court does not find such complete negation of property rights justified.

Conclusion: violation (eleven votes to six).

III. ARTICLE 8 OF THE CONVENTION

Since applicant did not have home on land in question, no interference for purposes of Article 8.

Conclusion: no violation (unanimously).

IV. ARTICLE 50 OF THE CONVENTION

Conclusion: question reserved (unanimously).

4. *Eur.Court HR, Guerra and Others v. Italy, Grand Chamber Judgment of 19 February 1998, Application No. 14967/89, (Article 8, Right to Respect for Private and Family Life – Violation)*. The applicants, who lived near a chemical processing factory which emitted toxic chemicals into the air, successfully claimed pursuant to Directive 82/501/EEC that the failure to provide the local population with information about the risk factor and how to proceed in the event of an accident at the nearby chemical factory, had breached their right to private and family life.

Information Note on the Court's case-law

February 1998

Judgment 19.2.1998 [GC]

Article 8

Positive obligations

Article 8-1

Respect for family life

Respect for private life

Failure to provide local population with information about risk factor and how to proceed in event of an accident at nearby chemical factory: Article 8 applicable; violation

[This summary is extracted from the Court's official reports (Series A or Reports of Judgments and Decisions). Its formatting and structure may therefore differ from the Case-Law Information Note summaries.]

I. ARTICLE 10 OF THE CONVENTION

A. Government's preliminary objection (non-exhaustion of domestic remedies)

First limb – urgent application (Article 700 of the Code of Civil Procedure): would have been a practicable remedy if applicants' complaint had concerned failure to take measures designed to reduce or eliminate pollution; in instant case, however, such an application would probably have resulted in factory's operation being suspended.

Second limb – lodging a criminal complaint: would at most have secured conviction of factory's managers, but certainly not communication of any information.

Conclusion: objection dismissed (nineteen votes to one).

B. Merits of complaint

Right of public to receive information had been recognised by Court on a number of occasions in cases concerning restrictions on freedom of press, as a corollary of specific function of journalists, which was to impart information and ideas on matters of public interest – facts of present case were, however, clearly distinguishable from aforementioned cases since applicants complained of a failure in system set up pursuant to relevant legislation – although prefect had prepared emergency plan on

basis of report submitted by factory and plan had been sent to Civil Defence Department on 3 August 1993, applicants had yet to receive relevant information.

Freedom to receive information basically prohibited a government from restricting a person from receiving information that others wished or might be willing to impart to him – that freedom could not be construed as imposing on a State, in circumstances such as those of present case, positive obligations to collect and disseminate information of its own motion.

Conclusion: Article 10 not applicable (eighteen votes to two).

II. ARTICLE 8 OF THE CONVENTION

Direct effect of toxic emissions on applicants' right to respect for their private and family life meant that Article 8 was applicable.

Applicants complained not of an act by State but of its failure to act – object of Article 8 was essentially that of protecting individual against arbitrary interference by public authorities – it did not merely compel State to abstain from such interference: in addition to that primarily negative undertaking, there might be positive obligations inherent in effective respect for private or family life.

In present case all that had to be ascertained was whether national authorities had taken necessary steps to ensure effective protection of applicants' right to respect for their private and family life.

Ministry for the Environment and Ministry of Health had jointly adopted conclusions on safety report submitted by factory – they had provided prefect with instructions as to emergency plan, which he had drawn up in 1992, and measures required for informing local population – however, District Council concerned had not by 7 December 1995 received any document concerning the conclusions.

Severe environmental pollution might affect individuals' well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely – applicants had waited, right up until production of fertilisers had ceased in 1994, for essential information that would have enabled them to assess risks they and their families might run if they continued to live at Manfredonia, a town particularly exposed to danger in event of an accident at factory.

Respondent State had not fulfilled its obligation to secure applicants' right to respect for their private and family life.

Conclusion: Article 8 applicable and violation (unanimously).

III. ARTICLE 2 OF THE CONVENTION

Conclusion: unnecessary to consider case under Article 2 also (unanimously).

IV. ARTICLE 50 OF THE CONVENTION

A. Damage

Pecuniary damage: not shown.

Non-pecuniary damage: each applicant awarded a specified sum.

B. Costs and expenses

Having regard to its lateness and amount already granted in legal aid, Court dismissed claim.

Conclusion: respondent State to pay each applicant a specified sum (unanimously).

5. *Eur.Court HR, Waite and Kennedy v. Germany; Beer and Regan v. Germany, Grand Chamber Judgment of 18 February 1999, Application Nos. 26083/94 & 28934/95, (Article 6-1, Right to a Fair Hearing within a Reasonable Time – No Violation)*. The applicants, former employees of the European Space Agency (ESA), unsuccessfully argued that the denial of their employment dispute hearing in the German employment tribunals due to the ESA's jurisdictional immunity had breached their Convention rights to a fair hearing.

ECHR 90 (1999)

18.02.1999

Press release issued by the Registrar

In judgments delivered at Strasbourg on 18 February 1999 in the cases of *Waite and Kennedy v. Germany* (application no. 26083/94) and *Beer and Regan v. Germany* (application no. 28934/95), the European Court of Human Rights held unanimously that there had been no violation of Article 6 § 1 (right of access to a tribunal) of the European Convention on Human Rights.

1. Principal facts

Mr Richard Waite is a British national, who was born in 1946 and lives in Griesheim. Mr Terry Kennedy is also a British national. He was born in 1950 and lives in Darmstadt.

Mr Karlheinz Beer is a German national, who was born in 1952 and lives in Darmstadt. Mr Philip Regan, a British national, was born in 1960 and lives in London in the United Kingdom.

All the applicants, employed by foreign companies, were placed at the disposal of the European Space Agency to perform services at the European Space Operations Centre in Darmstadt. When their contracts were not renewed they instituted proceedings before the Darmstadt Labour Court (Arbeitsgericht) against the ESA, arguing that, pursuant to the German Provision of Labour (Temporary Staff) Act (Arbeitnehmerüberlassungsgesetz), they had acquired the status of employees of the ESA. In these proceedings, the ESA relied on its immunity from jurisdiction under Article XV (2) of the ESA Convention and its Annex I. The Labour Court declared the actions inadmissible, considering that the ESA had validly relied on its immunity from jurisdiction. Section 20(2) of the Courts Act (Gerichtsverfassungsgesetz) provides that persons shall have immunity from jurisdiction according to the rules of general international law, or pursuant to international agreements or other legal rules

In the case of Mr Waite and Mr Kennedy, the Frankfurt/Main Labour Appeals Court (Landesarbeitsgericht) and the Federal Labour Court (Bundesarbeitsgericht) confirmed that immunity from jurisdiction was an impediment to court proceedings. The Federal Constitutional Court (Bundesverfassungsgericht) declined to accept their appeal for adjudication.

2. Procedure and composition of the Court

Application nos. 26083/94 and 28934/95 were lodged with the European Commission of Human Rights on 24 November 1994 and 13 September 1995, respectively. Having declared the applications admissible, the Commission adopted two reports on 2 December 1997 in which it expressed the opinion that there had been no violation of Article 6 § 1 of the Convention (seventeen votes to fifteen). The Commission referred the case to the Court on 16 March 1998.

The full texts of the Court's judgments are accessible on its website (<http://www.hudoc.echr.coe.int>)

Under the transitional provisions of Protocol No. 11 to the Convention, the case was transmitted to the Grand Chamber of the new European Court of Human Rights on the entry into force of the Protocol, on 1 November 1998.

Judgment was given by a Grand Chamber of 17 judges, composed as follows:

Luzius Wildhaber (Suisse) President,
 Elisabeth Palm (Swedish),
 Luigi Ferrari Bravo (Italian),
 Lucius Caflisch (Swiss),
 Jean-Paul Costa (French),
 Willi Fuhrmann (Austrian),
 Karel Jungwiert (Czech),
 Marc Fischbach (Luxemburger),
 Boštjan Zupančič (Slovenian),
 Nina Vajić (Croatian),
 John Hedigan (Irish),
 Wilhelmina Thomassen (Dutch),
 Margarita Tsatsa-Nikolovska (FYROMacedonia),
 Tudor Pantiru (Moldovan),
 Egils Levits (Latvian),
 Kristaq Traja (Albanian), judges,
 Eckhart Klein, ad hoc judge,
 and also of Paul Mahoney, Deputy Registrar.

3. Summary of the judgment

Complaint

The applicants contended that they had not had a fair hearing by a tribunal on the question of whether, pursuant to the German Provision of Labour (Temporary Staff) Act, a contractual relationship existed between them and the ESA. They alleged that there had been a violation of Article 6 § 1 of the Convention.

Decision of the Court

The Court reiterated the principle that Article 6 § 1 secures to everyone the right to have any claim relating to his civil rights and obligations brought before a court or tribunal. In this way the Article embodies the “right to a court”, of which the right of access, that is, the right to institute proceedings before courts in civil matters, constitutes one aspect only (*Golder v. the United Kingdom* judgment of 21 February 1975, Series A no.18).

The Court noted that the applicants’ action against ESA had been declared inadmissible and that the proceedings before the German labour courts had concentrated on the question of whether or not ESA could validly rely on its immunity from jurisdiction.

The Court considered that the reasons advanced by the German labour courts to give effect to the immunity from jurisdiction of the ESA could not be regarded as arbitrary. It next examined whether access limited to a preliminary issue was sufficient to secure the applicants’ “right to a court”, in the light of the principles established in its case-law (*Fayed v. the United Kingdom* judgment of 21 September 1994, Series A no. 294), in particular the need for such restricted access to pursue a

The full texts of the Court’s judgments are accessible on its website (<http://www.hudoc.echr.coe.int>)

legitimate aim and for there to be a reasonable relationship of proportionality between the means employed and the aim sought to be achieved.

According to the Court, the rule of immunity from jurisdiction, which the German courts applied to the ESA, had a legitimate objective. In this respect, it noted that the attribution of privileges and immunities to international organisations was an essential means of ensuring the proper functioning of such organisations free from unilateral interference by individual governments.

In turning to the issue of proportionality, the Court considered that where States established international organisations in order to pursue or strengthen their cooperation in certain fields of activities, and where they attributed to these organisations certain competences and accord them immunities, there might be implications as to the protection of fundamental rights. It would be incompatible with the purpose and object of the Convention if the Contracting States were thereby absolved from their responsibility under the Convention in relation to the field of activity covered by such attribution.

For the Court, a material factor in determining whether granting ESA immunity from German jurisdiction was permissible was whether the applicants had available to them reasonable alternative means to protect effectively their rights under the Convention. It was the opinion of the Court that, since the applicants had claimed the existence an employment relationship with ESA, they could and should have had recourse to the ESA Appeals Board, which is “independent of the Agency”, has jurisdiction “to hear disputes relating to any explicit or implicit decision taken by the Agency and arising between it and a staff member” (Regulation 33.1 of the ESA Staff Regulations). The Court had further regard to the possibility open to temporary workers to seek redress from the firms that had employed them and hired them out.

The Court concluded that the test of proportionality could not be applied in such a way as to compel an international organisation to submit itself to national litigation in relation to employment conditions prescribed under national labour law. Such an interpretation of Article 6 § 1 of the Convention would thwart the proper functioning of international organisations and run counter to the current trend towards extending and strengthening international cooperation.

In view of all these circumstances, the Court found that, in giving effect to the immunity from jurisdiction of ESA, the German courts did not exceed their margin of appreciation.

6. *Eur.Court HR, Streletz, Kessler and Krenz v. Germany, Grand Chamber Judgment of 22 March 2001, Application Nos. 34044/96, 35532/97 & 44801/98, (Article 7-1, No Punishment without Law – No Violation; Article 14, Prohibition of Discrimination – No Violation)*. The Court rejected the applicants' claim that their convictions for intentional homicide, subsequent to German reunification, as officials in the German Democratic Republic (GDR) complicit in the killing of civilians, did not constitute offences under the law of the GDR or international law at the time when the offences were committed.

Eur.Court HR, K.-H.W. v. Germany, Grand Chamber Judgment of 22 March 2001, Application No. 37201/97, (Article 7-1, No Punishment without Law – No Violation; Article 14, Prohibition of Discrimination – No Violation). The Court rejected the applicants' claim that their convictions for intentional homicide, subsequent to German reunification, as officials in the German Democratic Republic (GDR) complicit in the killing of civilians, did not constitute offences under the law of the GDR or international law at the time when they were committed.

Information Note on the Court's case-law No. 28

March 2001

Judgment 22.3.2001 [GC]

Article 7

Article 7-1

Nullum crimen sine lege

Conviction of senior GDR officials for participating in the killing of East Germans attempting to escape to West Germany: no violation

[This summary also covers the judgment in the case of *K.-H.W. v. Germany* [GC], 37201/97, 22 March 2001]

Facts: Three of the applicants, all German nationals, were senior officials of the German Democratic Republic (GDR): Fritz Streletz, who was born in 1926, was a Deputy Minister of Defence; Heinz Kessler, who was born in 1920, was a Minister of Defence; Egon Krenz, who was born in 1937, was President of the Council of State. The fourth applicant, Mr K.-H.W., likewise a German national, was born in 1952. He was a member of the GDR's National People's Army (NVA) and was stationed as a border guard on the border between the two German States.

All four applicants were convicted by the courts of the Federal Republic of Germany (FRG), after German unification on 3 October 1990, under the relevant provisions of the GDR's Criminal Code, and subsequently those of the FRG's Criminal Code, which were more lenient than those of the GDR. Mr Streletz, Mr Kessler and Mr Krenz were sentenced to terms of imprisonment of five-and-a-half years, seven-and-a-half years and six-and-a-half years respectively for intentional homicide as indirect principals (Totschlag in mittelbarer Täterschaft), on the ground that through their participation in decisions of the GDR's highest authorities, such as the National Defence Council or the Politbüro, concerning the regime for the policing of the GDR's border (Grenzregime), they were responsible for

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the deaths of a number of people who had tried to flee the GDR across the intra-German border between 1971 and 1989. Mr K.-H.W. was sentenced to one year and ten months' imprisonment, suspended, for intentional homicide (Totschlag), on the ground that by using his firearm he had caused the death of a person who had attempted to escape from the GDR across the border in 1972.

The applicants' convictions were upheld by the Federal Court of Justice and declared by the Federal Constitutional Court to be compatible with the Constitution.

The applicants submitted that their actions, at the time when they were committed, did not constitute offences under the law of the GDR or international law and that their conviction by the German courts had therefore breached Article 7 § 1 of the European Convention on Human Rights (no punishment without law). They also relied on Articles 1 (obligation to respect human rights) and 2 § 2 (exceptions to the right to life) of the Convention.

Law: The reasoning of the two judgments is largely identical, except where expressly indicated below.

Article 7 § 1

The Court observed that its task was to consider, from the standpoint of Article 7 § 1 of the Convention, whether, at the time when they were committed, the applicants' acts constituted offences defined with sufficient accessibility and foreseeability by the law of the GDR or international law.

(a) National law

(i) Legal basis for the convictions – The Court noted that the legal basis for the applicants' convictions was the criminal law of the GDR applicable at the material time, and that their sentences corresponded in principle to those prescribed in the relevant provisions of the GDR's legislation; in the event, the sentences imposed on the applicants had been lower, thanks to the principle of applying the more lenient law, which was that of the FRG.

(ii) Grounds of justification under GDR law – The applicants relied in particular on section 17 § 2 of the GDR's People's Police Act and section 27 § 2 of the State Borders Act.

In the light of the principles enshrined in the GDR's Constitution and other legal provisions (which expressly included the principles of proportionality and the need to preserve human life when firearms were used), the Court considered that that the applicants' conviction by the German courts, which had interpreted those provisions and applied them to the cases in issue, did not appear at first sight to have been either arbitrary or contrary to Article 7 § 1 of the Convention.

(iii) Grounds of justification derived from GDR State practice – The Court pointed out that although the aim of the GDR's State practice had been to protect the border between the two German States "at all costs" in order to preserve the GDR's existence, which was threatened by the massive exodus of its own population, the reason of State thus invoked had to be limited by the principles enunciated in the Constitution and legislation of the GDR itself; above all, it had to respect the need to preserve human life, enshrined in the GDR's Constitution, People's Police Act and State Borders Act, regard being had to the fact that even at the material time the right to life was already, internationally, the supreme value in the hierarchy of human rights.

(iv) Foreseeability of the convictions

Streletz, Kessler and Krenz v. Germany: The Court considered that the broad divide between the GDR's legislation and its practice was to a great extent the work of the applicants themselves.

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Because of the very senior positions they occupied in the State apparatus, they evidently could not have been ignorant of the GDR's Constitution and legislation, or of its international obligations and the criticisms of its border-policing regime that had been made internationally. Moreover, they themselves had implemented or maintained that regime, by superimposing on the statutory provisions, published in the GDR's Official Gazette, secret orders and service instructions on the consolidation and improvement of the border-protection installations and the use of firearms. The applicants had therefore been directly responsible for the situation which had obtained at the border between the two German States from the beginning of the 1960s until the fall of the Berlin Wall in 1989.

K.-H.W. v. Germany: The Court took the view that even a private soldier could not show total, blind obedience to orders which flagrantly infringed not only the GDR's own legal principles but also internationally recognised human rights, in particular the right to life, the supreme value in the hierarchy of human rights. Even though the applicant was in a particularly difficult situation on the spot, in view of the political context in the GDR at the material time, such orders could not justify firing on unarmed persons who were merely trying to leave the country. In addition, the Court noted that the German courts had examined in detail the extenuating circumstances in the applicant's favour and had duly taken account of the differences in responsibility between the former leaders of the GDR and the applicant by sentencing the former to terms of imprisonment and the latter to a suspended sentence subject to probation.

Reasoning common to both judgments: The Court considered that it was legitimate for a State governed by the rule of law to bring criminal proceedings against persons who had committed crimes under a former regime; similarly, the courts of such a State, having taken the place of those which existed previously, could not be criticised for applying and interpreting the legal provisions in force at the material time in the light of the principles governing a State subject to the rule of law.

Moreover, regard being had to the pre-eminence of the right to life in all international instruments on the protection of human rights, including the Convention itself, in which the right to life was guaranteed by Article 2, the Court considered that the German courts' strict interpretation of the GDR's legislation in the present case was compatible with Article 7 § 1 of the Convention.

Lastly, the Court considered that a State practice such as the GDR's border-policing policy, which flagrantly infringed human rights and above all the right to life, the supreme value in the international hierarchy of human rights, could not be covered by the protection of Article 7 § 1 of the Convention. That practice, which emptied of its substance the legislation on which it was supposed to be based, and which was imposed on all organs of the GDR, including its judicial bodies, could not be described as "law" within the meaning of Article 7 of the Convention.

Having regard to all of the above considerations, the Court held that at the time when they were committed the applicants' acts constituted offences defined with sufficient accessibility and foreseeability in GDR law.

(b) International law

(i) Applicable rules – The Court considered that it was its duty to examine the cases from the standpoint of the principles of international law also, particularly those relating to the international protection of human rights, to which the German courts had referred.

(ii) International protection of the right to life – In that connection, the Court noted in the first place that in the course of the development of that protection the relevant conventions and other instruments had constantly affirmed the pre-eminence of the right to life. It held that, regard being had to the arguments set out above, the applicants' acts were not justified in any way under the exceptions to the right to life contemplated in Article 2 § 2 of the Convention.

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(iii) International protection of the freedom of movement – Like Article 2 § 2 of Protocol No. 4 to the Convention, Article 12 § 2 of the International Covenant on Civil and Political Rights provided: “Everyone shall be free to leave any country, including his own.”

(iv) The GDR’s State responsibility and the applicants’ individual responsibility – If the GDR still existed, it would be responsible from the viewpoint of international law for the acts concerned. It remained to be established that alongside that State responsibility the applicants individually bore criminal responsibility at the material time. Even supposing that such responsibility could not be inferred from the above-mentioned international instruments on the protection of human rights, it could be deduced from those instruments when they were read together with Article 95 of the GDR’s Criminal Code, which explicitly provided, and from as long ago as 1968 moreover, that individual criminal responsibility was to be borne by those who violated the GDR’s international obligations or human rights and fundamental freedoms.

In the light of all of the above considerations, the Court considered that at the time when they were committed the applicants’ acts also constituted offences defined with sufficient accessibility and foreseeability by the rules of international law on the protection of human rights.

In addition, the applicants’ conduct could be considered, likewise under Article 7 § 1 of the Convention, from the standpoint of other rules of international law, notably those concerning crimes against humanity. However, the conclusion reached by the Court made consideration of that point unnecessary.

(c) Conclusion – Accordingly, the applicants’ conviction by the German courts after reunification had not breached Article 7 § 1. In the light of that finding, the Court was not required to consider whether their convictions were justified under Article 7 § 2 of the Convention.

Article 1

The applicants submitted that as former citizens of the GDR they could not rely on the constitutional principle of the non-retroactiveness of criminal statutes.

The Court held that the applicants’ complaint could not be raised under Article 1 of the Convention, which was a framework provision that could not be breached on its own. It could, however, be examined under Article 14 of the Convention taken together with Article 7, as the applicants had complained in substance of discrimination they had allegedly suffered as former citizens of the GDR.

However, the Court considered that the principles applied by the Federal Constitutional Court had general scope and were therefore equally valid in respect of persons who were not former nationals of the GDR.

Accordingly, there had been no discrimination contrary to Article 14 of the Convention taken together with Article 7.

7. *Eur.Court HR, Cyprus v. Turkey, Grand Chamber Judgment of 10 May 2001, Application No. 25781/94*, (As regards the Greek-Cypriot missing persons and their relatives: Article 2, Right to Life – Violation; Article 5, Right to Liberty and Security – Violation; Article 3, Prohibition of Torture – Violation. As regards the home and property of displaced persons: Article 8, Right to Respect for Private and Family Life – Violation; Article 1 of Protocol No. 1, Protection of Property – Violation; Article 13, Right to an Effective Remedy – Violation. As regards the living conditions of Greek Cypriots in Karpas region of northern Cyprus: Article 9, Freedom of Thought, Conscience and Religion – Violation; Article 10, Freedom of Expression – Violation; Article 1 of Protocol No. 1, Protection of Property – Violation; Article 2 of Protocol No. 1, Right to Education – Violation; Article 3, Prohibition of Torture – Violation; Article 8, Right to Respect for Private and Family Life – Violation, Article 13, Right to an Effective Remedy – Violation. As regards the rights of Turkish Cypriots living in northern Cyprus: Article 6, Right to a Fair Trial – Violation). Cyprus made claims for the alleged violations of the Convention arising out of the situation which had existed in Northern Cyprus since the conduct of military operations there by Turkey in July and August 1974 and the continuing division of the territory of Cyprus, alleging that the Turkish Government was responsible for the Convention abuses in question. The Court, referring to its earlier statements made in *Loizidou v. Turkey*, concurred that the allegations in question had fallen under the jurisdiction of Turkey and thus entailed its responsibility.

ECHR 341 (2001)
10.05.2001

Press release issued by the Registrar

In a Grand Chamber judgment delivered at Strasbourg on 10 May 2001 in the case of *Cyprus v. Turkey* (application no. 25781/94), the European Court of Human Rights held, by sixteen votes to one, that the matters complained of by Cyprus in its application entailed Turkey's responsibility under the European Convention on Human Rights.

The Court held that there had been the following 14 violations of the Convention (see Decision of the Court for details):

Greek-Cypriot missing persons and their relatives

- a continuing violation of Article 2 (right to life) of the Convention concerning the failure of the authorities of the respondent State to conduct an effective investigation into the whereabouts and fate of Greek-Cypriot missing persons who disappeared in life-threatening circumstances;
- a continuing violation of Article 5 (right to liberty and security) concerning the failure of the Turkish authorities to conduct an effective investigation into the whereabouts and fate of the Greek-Cypriot missing persons in respect of whom there was an arguable claim that they were in Turkish custody at the time of their disappearance;
- a continuing violation of Article 3 (prohibition of inhuman or degrading treatment) in that the silence of the Turkish authorities in the face of the real concerns of the relatives attained a level of severity which could only be categorised as inhuman treatment.

The full texts of the Court's judgments are accessible on its website (<http://www.hudoc.echr.coe.int>)

Home and property of displaced persons

- a continuing violation of Article 8 (right to respect for private and family life, home and correspondence) concerning the refusal to allow the return of any Greek-Cypriot displaced persons to their homes in northern Cyprus;
- a continuing violation of Article 1 of Protocol No. 1 (protection of property) concerning the fact that Greek-Cypriot owners of property in northern Cyprus were being denied access to and control, use and enjoyment of their property as well as any compensation for the interference with their property rights;
- a violation of Article 13 (right to an effective remedy) concerning the failure to provide to Greek Cypriots not residing in northern Cyprus any remedies to contest interferences with their rights under Article 8 and Article 1 of Protocol No. 1.

Living conditions of Greek Cypriots in Karpas region of northern Cyprus

- a violation of Article 9 (freedom of thought, conscience and religion) in respect of Greek Cypriots living in northern Cyprus, concerning the effects of restrictions on freedom of movement which limited access to places of worship and participation in other aspects of religious life;
- a violation of Article 10 (freedom of expression) in respect of Greek Cypriots living in northern Cyprus in so far as school-books destined for use in their primary school were subject to excessive measures of censorship;
- a continuing violation of Article 1 of Protocol No. 1 in respect of Greek Cypriots living in northern Cyprus in that their right to the peaceful enjoyment of their possessions was not secured in case of their permanent departure from that territory and in that, in case of death, inheritance rights of relatives living in southern Cyprus were not recognised;
- a violation of Article 2 of Protocol No. 1 (right to education) in respect of Greek Cypriots living in northern Cyprus in so far as no appropriate secondary-school facilities were available to them;
- a violation of Article 3 in that the Greek Cypriots living in the Karpas area of northern Cyprus had been subjected to discrimination amounting to degrading treatment;
- a violation of Article 8 concerning the right of Greek Cypriots living in northern Cyprus to respect for their private and family life and to respect for their home;
- a violation of Article 13 by reason of the absence, as a matter of practice, of remedies in respect of interferences by the authorities with the rights of Greek Cypriots living in northern Cyprus under Articles 3, 8, 9 and 10 of the Convention and Articles 1 and 2 of Protocol No. 1.

Rights of Turkish Cypriots living in northern Cyprus

- a violation of Article 6 (right to a fair trial) on account of the legislative practice of authorising the trial of civilians by military courts.

The Court further held that there had been no violation concerning a number of complaints, including all those raised under: Article 4 (prohibition of slavery and forced labour), Article 11 (freedom of assembly and association), Articles 14 (prohibition of discrimination), Article 17 (prohibition of abuse of rights) and Article 18 (limitation on use of restrictions on rights) read in conjunction with all those provisions. As regards a number of other allegations, the Court held that it was not necessary to consider the issues raised.

The Court also decided, unanimously, that the question of the possible application of Article 41 (just satisfaction) of the Convention was not ready for decision.

The full texts of the Court's judgments are accessible on its website (<http://www.hudoc.echr.coe.int>)

1. Principal facts

The case relates to the situation that has existed in northern Cyprus since the conduct of military operations there by Turkey in July and August 1974 and the continuing division of the territory of Cyprus. In connection with that situation, Cyprus maintained that Turkey had continued to violate the Convention in northern Cyprus after the adoption of two earlier reports by the European Commission of Human Rights, which were drawn up following previous applications brought by Cyprus against Turkey.

In the Convention proceedings, Cyprus contended that Turkey was accountable under the Convention for the violations alleged notwithstanding the proclamation of the “Turkish Republic of Northern Cyprus” in November 1983 and the subsequent enactment of the “TRNC Constitution” in May 1985. Cyprus maintained that the “TRNC” was an illegal entity from the standpoint of international law and pointed to the international community’s condemnation of the establishment of the “TRNC”. Turkey, on the other hand, maintained that the “TRNC” was a democratic and constitutional State, which was politically independent of all other sovereign States, including Turkey. For that reason, Turkey stressed that the allegations made by Cyprus were imputable exclusively to the “TRNC” and that Turkey could not be held accountable under the Convention for the acts or omissions on which those allegations were based.

2. Procedure

The application was lodged with the European Commission of Human Rights on 22 November 1994. Having declared the application admissible on 28 June 1996, the Commission appointed Delegates who took evidence in respect of various matters raised by the application in Strasbourg (27-28 November 1997), Cyprus (21-24 February 1998) and London (22 April 1998). Having concluded that there was no basis on which a friendly settlement could be secured, the Commission, following an oral hearing, adopted a report on 4 June 1999 in which it established the facts and expressed an opinion as to whether the facts disclosed the alleged breaches by Turkey of its obligations under the Convention.

The case was referred to the Court by the Government of the Republic of Cyprus on 30 August 1999 and by the Commission on 11 September 1999. The panel of the Grand Chamber of the Court decided that the case should be examined by the Grand Chamber.

3. Composition of the Court

Judgment was given by the Grand Chamber of seventeen judges, composed as follows:

Luzius Wildhaber (Swiss), President,
 Elisabeth Palm (Swedish),
 Jean-Paul Costa (French),
 Luigi Ferrari Bravo (Italian),
 Lucius Caflisch (Swiss),
 Willi Fuhrmann (Austrian),
 Karel Jungwiert (Czech),
 Marc Fischbach (Luxemburger),
 Boštjan Zupančič (Slovenian),
 Nina Vajić (Croatian),
 John Hedigan (Irish),
 Margarita Tsatsa-Nikolovska (FYROMacedonia),
 Tudor Panțiru (Moldovan),
 Egils Levits (Latvian),

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Anatoly Kovler (Russian), judges,
 Kutlu Tekin Fuad, ad hoc judge in respect of Turkey,
 Silvio Marcus-Helmons, ad hoc judge in respect of Cyprus,

and also Michele de Salvia, Registrar.

4. Complaints

Before the Court, Cyprus alleged violations of the Convention under Articles 1 (obligation to respect human rights), 2, 3, 4, 5, 6, 8, 9, 10, 11, 13, Articles 1 and 2 of Protocol No. 1, and Articles 14, 17, and 18. According to Cyprus, these Articles were violated as a matter of administrative practice by the respondent State.

The allegations concerned the following issues:

(a) Greek-Cypriot missing persons and their relatives

In respect of Greek-Cypriot missing persons, it was alleged that, if any were still in Turkish custody, this would constitute a form of slavery or servitude contrary to Article 4 and a grave breach of their right to liberty under Article 5. In addition, Cyprus maintained that there had been a violation of Articles 2 and 5 on account of Turkey's failure to carry out an investigation into the disappearance of these persons in life-threatening circumstances and to account for their whereabouts.

In respect of the relatives of missing persons, Cyprus alleged violations of Articles 3, 8 and 10 on account of the Turkish authorities' consistent and continuing failure to provide information on the fate of the missing persons.

(b) Home and property of displaced persons

Cyprus complained, among other things, under Article 8 (the continuing refusal to allow Greek Cypriots to return to their homes and families in northern Cyprus; implantation of Turkish settlers in northern Cyprus to the detriment of the demographic and cultural environment of northern Cyprus), Article 1 of Protocol No. 1 (denial of access to and enjoyment of property, re-assignment of property, withholding of compensation and deprivation of title), Article 13 of the Convention (failure to provide any remedy to displaced persons in respect of the alleged violations of Article 8 and Article 1 of Protocol No. 1) and Article 14 taken in conjunction with the preceding Articles (discrimination against Greeks and Greek Cypriots as regards, among other things, enjoyment of their property). Cyprus further invoked Article 3 (discrimination against displaced persons amounting to ill-treatment), and Articles 17 (abuse of rights) and 18 (impermissible use of restrictions on rights).

(c) Living conditions of Greek Cypriots in the Karpas region of northern Cyprus

As regards the Karpas Greek Cypriots, Cyprus relied on, among other things, Articles 2 (denial of adequate medical treatment and services), 3 (discriminatory treatment; in particular in view of their advanced age, the restrictions placed on them and methods of coercion used were said to amount to inhuman and degrading treatment), 5 (threat to security of person and absence of official action to prevent this), 6 (lack of a fair hearing before an independent and impartial tribunal established by law for the determination of their civil rights), 8 (interference with their right to respect for their private and family life, home and correspondence), 9 (interference with their right to manifest their religion on account of restrictions on their freedom of movement and access to places of worship), 10 (excessive censorship of school-books and restrictions on importation of Greek-language newspapers and books), 11 (impediments to their participation in bi or inter-communal events or gatherings), 13 (denial of an effective remedy in respect of their complaints) and 14 (discrimination on racial,

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religious and linguistic grounds), and Articles 1 (interference with the property of deceased Greek Cypriots as well as with the property of such persons who permanently leave northern Cyprus) and 2 (denial of secondary-education facilities to Greek-Cypriot children) of Protocol No. 1.

(d) Complaints relating to Turkish Cypriots, including members of the Gypsy community, living in northern Cyprus

Cyprus alleged, among other things, violations in relation to Turkish Cypriots who are opponents of the “TRNC” régime of Articles 5 (arbitrary arrest and detention), 6 (trial by “military courts”), 8 (assaults and harassment by third parties), 10 (prohibition of Greek-language newspapers and interference with the right to freedom of expression), 11 (denial of the right to associate freely with Greek Cypriots), Article 1 of Protocol No.1 (failure to allow Turkish Cypriots to return to their properties in southern Cyprus). Violations were also alleged of Articles 3, 5, 8 and 13 and Article 2 of Protocol No. 1 in relation to the treatment of Turkish-Cypriot Gypsies living in northern Cyprus.

5. Decision of the Court

Preliminary issues

The Court considered, unanimously, that, notwithstanding Turkey’s failure either to submit a memorial to the Court or to attend the oral hearing held on 20 September 2000 and to plead these issues afresh, it had jurisdiction to examine those preliminary issues raised by Turkey in the proceedings before the Commission which the Commission reserved for the merits stage.

The Court held, unanimously, that the applicant Government had both locus standi to bring the application, given that the Republic of Cyprus was the sole legitimate government of Cyprus, and a legitimate legal interest in having the merits of the application examined since neither of the resolutions adopted by the Committee of Ministers of the Council of Europe on the Commission’s previous reports had resulted in a decision which could be said to be dispositive of the issues raised in the application. Furthermore, the Court, unanimously, confirmed the Commission’s conclusion that situations which ended more than six months before the date of introduction of the application (22 May 1994) fell outside the scope of its examination.

As to Turkey’s denial of liability under the Convention for the allegations made against it, the Court held, by sixteen votes to one, that the facts complained of in the application fell within the “jurisdiction” of Turkey within the meaning of Article 1 of the Convention and therefore entailed the respondent State’s responsibility under the Convention. In reaching this conclusion, the Court noted that such a finding was consistent with its earlier statements in its *Loizidou v. Turkey* (merits) judgment. In that judgment, the Court had noted that Turkey exercised effective overall control of northern Cyprus through its military presence there, with the result that its responsibility under the Convention was engaged for the policies and actions of the “TRNC” authorities. In the instant case, the Court stressed that Turkey’s responsibility under the Convention could not be confined to the acts of its own soldiers and officials operating in northern Cyprus but was also engaged by virtue of the acts of the local administration (“the TRNC”), which survived by virtue of Turkish military and other support.

The Court further held, by ten votes to seven, that, for the purposes of the exhaustion requirements under the former Article 26 (current Article 35 § 1), remedies available in the “TRNC” may be regarded as “domestic remedies” of the respondent State and that the question of the effectiveness of these remedies had to be considered in the specific circumstances where it arose, on a case-by case basis. The majority of the Court, in line with the majority viewpoint of the Commission, considered, among other things, and with reference to the Advisory Opinion of the International Court of Justice in the *Namibia* case, that in situations similar to those arising in the present case, the obligation to

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disregard acts of de facto entities, like the “TRNC”, was far from absolute. For the Court, life went on in the territory concerned for its inhabitants and that life must be made tolerable and be protected by the de facto authorities, including their courts. It considered that, and in the interests of the inhabitants, the acts of those authorities could not simply be ignored by third States or by international institutions, especially courts. To hold otherwise would amount to stripping the inhabitants of the territory of all their rights whenever they were discussed in an international context, which would amount to depriving them even of the minimum standard of rights to which they were entitled. In reaching this conclusion, the Court’s majority stressed that its reasoning did not in any way legitimise the “TRNC” and reaffirmed the view that the government of the Republic of Cyprus remained the sole legitimate government of Cyprus.

(a) Greek-Cypriot missing persons and their relatives

The Court, unanimously, found that there had been no violation of Article 2 by reason of an alleged violation of a substantive obligation under that Article in respect of any of the missing persons. The evidence before it did not substantiate to the required standard that any of the missing persons were killed in circumstances engaging the respondent State’s liability.

On the other hand, the Court found, by sixteen votes to one, 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 into the whereabouts and fate of Greek-Cypriot missing persons who disappeared in life-threatening circumstances.

The Court concluded, unanimously, that no violation of Article 4 had been established.

Although it found, unanimously, that it had not been established that, during the period under consideration, any of the missing persons were actually in detention, the Court ruled, by sixteen votes to one, that there had been a continuing violation of Article 5 by virtue of the failure of the authorities of the respondent State to conduct an effective investigation into the whereabouts and fate of the Greek-Cypriot missing persons in respect of whom there was an arguable claim that they were in Turkish custody at the time of their disappearance.

As to the relatives of the Greek-Cypriot missing persons, the Court held, by sixteen votes to one, that there had been a continuing violation of Article 3. In the Court’s opinion, the silence of the authorities of the respondent State in the face of the real concerns of the relatives attained a level of severity which could only be categorised as inhuman treatment.

Having regard to that conclusion, the Court held, unanimously, that it was not necessary to examine whether Articles 8 and 10 of the Convention had been violated in respect of the relatives of the Greek-Cypriot missing persons.

(b) Home and property of displaced persons

The Court held, by sixteen votes to one, that there had been a continuing violation of Article 8 by reason of the refusal to allow the return of any Greek-Cypriot displaced persons to their homes in northern Cyprus. Having regard to that conclusion, the Court found, unanimously, that it was not necessary to examine whether there had been a further violation of that Article by reason of the alleged manipulation of the demographic and cultural environment of the Greek-Cypriot displaced persons’ homes in northern Cyprus. As to the applicant Government’s complaint under Article 8 concerning the interference with the right to respect for family life on account of the refusal to allow the return of any Greek-Cypriot displaced persons to their homes in northern Cyprus, the Court held, unanimously, that this complaint fell to be considered in the context of their allegations in respect of the living conditions of the Karpas Greek Cypriots.

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Furthermore, the Court held, by sixteen votes to one, that there had been a continuing violation of Article 1 of Protocol No. 1 by virtue of the fact that Greek-Cypriot owners of property in northern Cyprus were being denied access to and control, use and enjoyment of their property as well as any compensation for the interference with their property rights.

The Court also held, by sixteen votes to one, that there had been a violation of Article 13 by reason of the failure to provide to Greek Cypriots not residing in northern Cyprus any remedies to contest interferences with their rights under Article 8 and Article 1 of Protocol No. 1. It did not find it necessary (unanimously) to examine whether in this case there had been a violation of Article 14 taken in conjunction with Articles 8 and 13 and Article 1 of Protocol No. 1, or whether the alleged discriminatory treatment of Greek-Cypriot displaced persons also gave rise to a breach of Article 3. It was also of the unanimous view that it was not necessary to examine separately the applicant Government's complaints under Articles 17 and 18, having regard to its findings under Articles 8 and 13 and Article 1 of Protocol No. 1.

(c) Living conditions of Greek Cypriots in Karpas region of northern Cyprus

The Court held, by sixteen votes to one, that there had been a violation of Article 9 in respect of Greek Cypriots living in northern Cyprus. As regards Maronites living in northern Cyprus it found, unanimously, no violation of Article 9. The Court also held, by sixteen votes to one, that there had been a violation of Article 10 in respect of Greek Cypriots living in northern Cyprus in so far as school-books destined for use in their primary school were subject to excessive measures of censorship.

The Court further held, by sixteen votes to one, that there had been a continuing violation of Article 1 of Protocol No. 1 in respect of Greek Cypriots living in northern Cyprus in that their right to the peaceful enjoyment of their possessions was not secured in case of their permanent departure from that territory and in that, in case of death, inheritance rights of relatives living in southern Cyprus were not recognised.

The Court also ruled, by sixteen votes to one, that there had been a violation of Article 2 of Protocol No. 1 in respect of Greek Cypriots living in northern Cyprus in so far as no appropriate secondary-school facilities were available to them.

In addition, the Court found, by sixteen votes to one, that there had been a violation of Article 3 in that the Greek Cypriots living in the Karpas area of northern Cyprus had been subjected to discrimination amounting to degrading treatment. It observed in this connection that the Karpas Greek-Cypriot population was compelled to live in a situation of isolation and that its members were controlled and restricted in their movements and had no prospect of renewing or developing their community. For the Court, the conditions under which the population was condemned to live were debasing and violated the very notion of respect for the human dignity of its members. The discriminatory treatment attained a level of severity which amounted to degrading treatment.

The Court further held, by sixteen votes to one, that, from an overall standpoint, there had been a violation of Article 8 concerning the right of Greek Cypriots living in northern Cyprus to respect for their private and family life and to respect for their home. In this connection the Court noted that the population concerned was subjected to serious restrictions on the exercise of these rights, including monitoring of its members' movements and contacts. The surveillance effected by the authorities even extended to the physical presence of State agents in the homes of Greek Cypriots on the occasion of social or other visits paid by third parties, including family members. Having regard to that conclusion, the Court found, unanimously, that it was not necessary to examine separately the applicant Government's complaint under Article 8 concerning the effect of the respondent State's alleged colonisation policy on the demographic and cultural environment of the Greek Cypriots'

The full texts of the Court's judgments are accessible on its website (<http://www.hudoc.echr.coe.int>)

homes. The Court further found, unanimously, no violation of Article 8 concerning the right to respect for correspondence by reason of an alleged practice of interference with the right of Greek Cypriots living in northern Cyprus to respect for their correspondence.

The Court found, by sixteen votes to one, that there had been a violation of Article 13 by reason of the absence, as a matter of practice, of remedies in respect of interferences by the authorities with the rights of Greek Cypriots living in northern Cyprus under Articles 3, 8, 9 and 10 of the Convention and Articles 1 and 2 of Protocol No. 1. On the other hand, it held, by eleven votes to six, that no violation of Article 13 had been established by reason of the alleged absence of remedies in respect of interferences by private persons with the rights of Greek Cypriots living in northern Cyprus under Article 8 and Article 1 of Protocol No. 1.

The Court held, by sixteen votes to one, that no violation of Article 2 had been established by reason of an alleged practice of denying access to medical services to Greek Cypriots and Maronites living in northern Cyprus and, by the same margin, that there had been no violation of Article 5. Furthermore, by eleven votes to six, it held that no violation of Article 6 had been established in respect of Greek Cypriots living in northern Cyprus by reason of an alleged practice of denying them a fair hearing by an independent and impartial tribunal in the determination of their civil rights and obligations. The Court also held, unanimously, that no violation of Article 11 had been established by reason of an alleged practice of denying Greek Cypriots living in northern Cyprus the right to freedom of association and that no violation of Article 1 of Protocol No. 1 had been established by virtue of an alleged practice of failing to protect the property of Greek Cypriots living in northern Cyprus against interferences by private persons.

The Court decided, unanimously, that it was not necessary to examine whether there had been a violation of Article 14 taken in conjunction with Article 3 in respect of Greek Cypriots living in northern Cyprus, having regard to its finding under Article 3 and, by fourteen votes to three, that, having regard to the particular circumstances of this case, it was not necessary for it to examine whether there had been a breach of Article 14 taken in conjunction with other relevant Articles.

(d) Right of displaced Greek Cypriots to hold elections

The Court held, unanimously, that it was not necessary to examine whether the facts disclosed a violation of the right of displaced Greek Cypriots to hold free elections, as guaranteed by Article 3 of Protocol No. 1.

(e) Rights of Turkish Cypriots, including members of Gypsy community, living in northern Cyprus

Under this heading, the Court, unanimously, declined jurisdiction to examine those aspects of the applicant Government's complaints under Articles 6, 8, 10 and 11 in respect of political opponents of the regime in the "TRNC" as well as their complaints under Articles 1 and 2 of Protocol No. 1 in respect of the Turkish-Cypriot Gypsy community, which were held by the Commission not to be within the scope of the case as declared admissible.

The Court found, by sixteen votes to one, that there had been a violation of Article 6 on account of the legislative practice of authorising the trial of civilians by military courts.

The Court further held, unanimously, that there had been no violation of Articles 3, 5, 8, 10 and 11 concerning the rights of Turkish Cypriot opponents of the regime in northern Cyprus by reason of an alleged administrative practice, including an alleged practice of failing to protect their rights under these Articles. By sixteen votes to one, the Court found no violation of Articles 3, 5, 8 and 14 concerning the rights of members of the Turkish-Cypriot Gypsy community by reason of an alleged

administrative practice, including an alleged practice of failing to protect this group's rights under these Articles.

It held, unanimously, that: no violation of Article 10 had been established by reason of an alleged practice of restricting the right of Turkish Cypriots living in northern Cyprus to receive information from the Greek-language press; no violation of Article 11 had been established by reason of an alleged practice of interference with the right to freedom of association or assembly of Turkish Cypriots living in northern Cyprus; no violation of Article 1 of Protocol No. 1 had been established by reason of an alleged administrative practice, including an alleged practice of failing to secure enjoyment of their possessions in southern Cyprus to Turkish Cypriots living in northern Cyprus.

By eleven votes to six, the Court found that no violation of Article 13 had been established by reason of an alleged practice of failing to secure effective remedies to Turkish Cypriots living in northern Cyprus.

(f) Alleged violations of Articles 1, 17, 18 and former Article 32 § 4

The Court held unanimously that it was not necessary to examine separately the applicant Government's complaints under these Articles.

Judges Palm, Costa, Jungwiert, Panfîru, Levits, Kovler, Fuad and Marcus-Helmons expressed partly dissenting opinions, which are annexed to the judgment.

8. *Eur.Court HR, Prince Hans-Adam II of Liechtenstein v. Germany, Grand Chamber Judgment of 12 July 2001, Application No. 42527/98, (Article 6-1, Right to a Fair Hearing within a Reasonable Time – No Violation; Article 1 of Protocol No. 1, Protection of Property – No Violation; Article 14, Prohibition of Discrimination – No Violation)*. The applicant claimed that his father's property, seized by the former Czechoslovakia in 1946 and later transferred to the Municipality of Cologne, ought to be returned to him since the seizure had allegedly been contrary to public international law but the Court rejected this claim, stating that the status of reunited Germany under international law provided a legitimate objective to the State for denying his claim.

ECHR 526 (2001)
12.07.2001

Communiqué du Greffier¹

Par un arrêt rendu à Strasbourg le 12 juillet 2001 dans l'affaire Prince Hans-Adam II de Liechtenstein c. Allemagne (requête n° 42527/98), la Cour européenne des Droits de l'Homme conclut à l'unanimité :

- à la **non-violation de l'article 6 § 1** (accès à un tribunal et équité de la procédure) de la Convention européenne des Droits de l'Homme ;
- à la **non-violation de l'article 1 du Protocole n° 1** (protection de la propriété) à la Convention ;
- à la **non-violation de l'article 14** (interdiction de discrimination).

1. Principaux faits

Le prince Hans-Adam II de Liechtenstein, souverain du Liechtenstein, est né en 1945 et réside à Vaduz.

Un tableau de Pieter van Laer intitulé « Scène romaine : le four à chaux » (Szene an einem römischen Kalkofen), qui avait été la propriété du père du requérant, fut confisqué par l'ex-Tchécoslovaquie alors qu'il se trouvait sur le territoire de cet Etat, en vertu du décret n° 12 sur « la confiscation et la répartition accélérée des terres agricoles des ressortissants allemands et hongrois et des traîtres et ennemis du peuple tchèque et slovaque », pris par le président de l'ex-Tchécoslovaquie le 21 juin 1945.

Lorsqu'en 1991, la ville de Cologne reçut le tableau en prêt de la République tchèque, le requérant intenta contre elle une action en restitution du tableau.

Les juridictions civiles allemandes déclarèrent l'action irrecevable au motif qu'elles étaient incompétentes. Elles s'appuyèrent sur le chapitre sixième, article 3 §§ 1 et 3, de la Convention sur le règlement de questions issues de la guerre et de l'occupation signée en 1952 et amendée en 1954. Aux termes de cette disposition n'étaient pas recevables les réclamations et les actions dirigées contre des personnes qui avaient acquis ou transféré des droits de propriété, en vertu des mesures prises à l'égard des avoirs allemands à l'étranger ou des autres biens saisis au titre des réparations ou des restitutions, ou en raison de l'état de guerre, ou en se fondant sur des accords spécifiques. Les tribunaux estimèrent

¹ Available only in French.

que la confiscation des biens du père de l'intéressé en vertu du décret n° 12 constituait une mesure au sens du chapitre sixième, article 3 § 3.

La Cour constitutionnelle fédérale rejeta le recours constitutionnel du requérant car il n'avait aucune perspective d'aboutir. Elle estima notamment que l'exception d'incompétence ne s'analysait pas en une violation du droit de propriété puisque ces clauses et la Convention sur le règlement dans son ensemble visaient à régler des questions remontant à une période antérieure à l'entrée en vigueur de la Loi fondamentale. Elle confirma que le chapitre sixième, article 3 §§ 1 et 3, de la Convention sur le règlement n'avait pas été abrogé par le Traité portant règlement définitif concernant l'Allemagne.

Le tableau fut par la suite restitué à la République tchèque.

2. Procédure et composition de la Cour

La requête a été introduite devant la Commission européenne des Droits de l'Homme le 28 juillet 1998. Elle a été transmise à la Cour européenne des Droits de l'Homme le 1er novembre 1998. Une chambre de la quatrième section de la Cour l'a déclarée recevable le 6 juin 2000. Le 14 septembre 2000, la chambre s'est dessaisie au profit de la Grande Chambre, aucune des parties ne s'y étant opposée. Une audience a eu lieu le 31 janvier 2001.

L'arrêt a été rendu par une Grande Chambre de dix-sept juges ainsi composée :

Elisabeth Palm (Suédoise), présidente,

Christos Rozakis (Grec),
 Georg Ress (Allemand),
 Jean-Paul Costa (Français),
 Antonio Pastor Ridruejo (Espagnol),
 Ireneu Cabral Barreto (Portugais),
 Marc Fischbach (Luxembourgeois),
 Volodymyr Butkevych (Ukrainien),
 Josep Casadevall (Andorran),
 Boštjan Zupančič (Slovène),
 Nina Vajić (Croate),
 John Hedigan (Irlandais),
 Matti Pellonpää (Finlandais),
 Margarita Tsatsa-Nikolovska (Macédonienne),
 Kristaq Traja (Albanais),
 Snejana Botoucharova (Bulgare),
 Anatoly Kovler (Russe), juges,
 ainsi que de Michele de Salvia, juriconsulte, pour le greffier.

3. Résumé de l'arrêt

Griefs

Le requérant alléguait en particulier avoir été privé d'un accès effectif à un tribunal quant à son action en restitution du tableau en question. Il prétendait également que les décisions des juridictions allemandes de déclarer son action irrecevable et la restitution consécutive du tableau à la République tchèque avaient emporté violation de son droit de propriété. Il invoquait l'article 6 § 1 de la Convention et l'article 1 du Protocole n° 1, lu isolément et combiné avec l'article 14 de la Convention.

Décision de la Cour

Article 6 § 1

Accès à un tribunal

Pour la Cour, l'exclusion de la juridiction de l'Allemagne en vertu du chapitre sixième, article 3, de la Convention sur le règlement est une conséquence du statut particulier de ce pays au regard du droit international public après la Seconde Guerre mondiale. La Cour constate que ce n'est qu'à la suite des Accords de Paris de 1954 relatifs à la République fédérale d'Allemagne et du Traité de 1990 portant règlement définitif concernant l'Allemagne que la République fédérale a obtenu l'autorité d'un Etat souverain sur ses affaires intérieures et extérieures pour l'Allemagne unie. Dans ce contexte tout à fait particulier, la restriction à l'accès à une juridiction allemande, découlant de la Convention sur le règlement, poursuivait un but légitime.

En outre, de l'avis de la Cour, l'on ne saurait affirmer que l'interprétation du chapitre sixième, article 3, de la Convention sur le règlement donnée dans l'affaire du requérant était en contradiction avec la jurisprudence antérieure des cours et tribunaux allemands ou que l'application de cette disposition était manifestement erronée ou de nature à conduire à des conclusions arbitraires.

La Cour conclut également que l'intérêt du requérant à saisir la justice allemande n'était pas suffisant pour l'emporter sur l'intérêt général capital qu'il y avait à ce que l'Allemagne obtînt à nouveau sa souveraineté et réalisât l'unification. Dès lors, il n'y a pas eu violation du droit d'accès de l'intéressé à un tribunal, au sens de la jurisprudence de la Cour.

Equité de la procédure devant la Cour constitutionnelle fédérale

La Cour estime le requérant a bénéficié d'une procédure contradictoire devant la Cour constitutionnelle fédérale et a eu la possibilité de plaider sur les points qui lui paraissaient importants pour son affaire. Elle n'aperçoit aucun élément d'iniquité dans la manière dont la procédure litigieuse a été conduite.

Article 1 du Protocole n° 1

Relevant qu'elle n'est pas compétente pour examiner les circonstances de l'expropriation opérée en 1946 ou les effets continus produits par elle jusqu'à ce jour, la Cour estime que l'on ne saurait considérer, aux fins de l'article 1 du Protocole n° 1, que le requérant, en tant qu'héritier de son père, a conservé un droit de propriété ou un droit à restitution à l'encontre de la République fédérale d'Allemagne s'analysant en une « espérance légitime » au sens de la jurisprudence de la Cour. Il n'y a donc pas eu atteinte aux « biens » de l'intéressé au sens de l'article 1 du Protocole n° 1.

Article 14

La Cour estime que l'article 14 ne trouve pas à s'appliquer à l'espèce, les faits dénoncés par le requérant sur le terrain de l'article 1 du Protocole n° 1, c'est-à-dire les décisions des juridictions allemandes et la restitution du tableau à la République tchèque, ne s'analysant pas en une atteinte à l'un des droits de l'intéressé garantis par cette disposition.

M. le juge Ress a exprimé une opinion concordante à laquelle s'est rallié M. le Juge Zupančič, et M. le juge Costa une opinion également concordante.

9. *Eur.Court HR, McElhinney v. Ireland, Grand Chamber Judgment of 21 November 2001, Application No. 31253/96, (Article 6-1, Right to a Fair Hearing within a Reasonable Time – No Violation)*. The applicant, an Irish national, unsuccessfully attempted to claim compensation from the British Government for an incident in the Northern Ireland border, in which a British soldier, who was carried over the border on the tow-bar of the applicant's vehicle, had assaulted the applicant. The applicant had his case set aside in the Irish courts after the United Kingdom invoked the doctrine of sovereign immunity and the Court in its judgment held that the granting of sovereign immunity to a State in civil proceedings had pursued the legitimate aim of complying with international law.

ECHR 873 (2001)

21.11.2001

Press release issued by the Registrar

In the case of *McElhinney v. Ireland* (application number 31253/96), the Court held:

- by 12 votes to five, that there had been no violation of Article 6 § 1 (right to a fair hearing) of the European Convention on Human Rights.

1. Principal facts

John McElhinney, an Irish national born in 1944 and living in Greencastle, County Donegal, is a Garda (policeman). Following an incident in March 1991 at the Northern Ireland border, in which a British soldier was carried over the border on the tow-bar of the applicant's vehicle, the applicant was allegedly assaulted by the soldier in the Republic of Ireland. The precise circumstances of the incident are disputed between the parties. The applicant was subsequently prosecuted and convicted for his refusal to provide blood and urine samples, after being arrested on suspicion of driving having consumed excess alcohol. In June 1993 the applicant lodged an action against the soldier and the British Government claiming damages. The Irish High Court accepted the British Government's application to have the summons set aside, applying the doctrine of sovereign immunity, on the ground that the applicant was not entitled to bring an action in the Irish courts against a member of a foreign sovereign government. This decision was upheld on appeal by the Supreme Court.

2. Procedure

McElhinney v. Ireland, which originated in an application brought against both Ireland and the United Kingdom, was lodged with the European Commission of Human Rights on 16 April 1996. On 1 November 1998, it was transmitted to the Court. On 31 August 1999, a Chamber of seven judges decided to relinquish jurisdiction in favour of the Grand Chamber in accordance with Article 30 of the Convention and Rule 72 § 1 of the Rules of Court. By a decision of 9 February 2000, following a hearing on admissibility and the merits, the Grand Chamber declared the case partly admissible concerning Ireland and inadmissible concerning the United Kingdom.

3. Composition of the Court

In *McElhinney v. Ireland* judgment was given by the Grand Chamber, composed as follows:

Luzius Wildhaber (Swiss), President,

The full texts of the Court's judgments are accessible on its website (<http://www.hudoc.echr.coe.int>)

Elisabeth Palm (Swedish),
 Christos Rozakis (Greek),
 Luigi Ferrari Bravo[1] (Italian),
 Gaukur Jörundsson (Icelandic),
 Lucius Caflisch[2] (Swiss),
 Loukis Loucaides (Cypriot),
 Ireneu Cabral Barreto (Portuguese),
 Karel Jungwiert (Czech),
 Nicolas Bratza (British),
 Boštjan Zupančič (Slovenian),
 Nina Vajić (Croatian),
 Matti Pellonpää (Finnish),
 Margarita Tsatsa-Nikolovska (FYROMacedonia),
 Egils Levits (Latvian),
 Anatoly Kovler (Russian), Judges,
 Nicolas Kearns (Irish), ad hoc Judge,
 and also Paul Mahoney, Registrar.

4. Summary of the judgments

Complaints

Mr McElhinney complained principally that by applying the doctrine of sovereign immunity the Irish courts had denied him the right to a judicial determination of his compensation claim, in breach of Article 6 § 1.

Decision of the Court

Article 6 § 1

The Court noted that sovereign immunity was a concept of international law, by virtue of which one State was not subject to the jurisdiction of another. It considered that granting sovereign immunity to a State in civil proceedings pursued the legitimate aim of complying with international law to promote comity and good relations between States through the respect of another State's sovereignty.

The Court further observed that the European Convention on Human Rights should so far as possible be interpreted in harmony with other rules of international law of which it formed part, including those relating to State immunity. It followed that measures which reflected generally-recognised rules of public international law on State immunity could not in principle be regarded as imposing a disproportionate restriction on the right of access to court as embodied in Article 6 § 1.

The Court observed that there appeared to be a trend in international and comparative law towards limiting State immunity in respect of personal injury caused by an act or omission within the forum State, but that this practice was by no means universal. Further, it appeared that the trend might primarily refer to "insurable" personal injury, that is incidents arising out of ordinary road traffic accidents, rather than matters relating to the core area of State sovereignty such as the acts of a soldier on foreign territory which, of their very nature, might involve sensitive issues affecting diplomatic relations between States and national security. The Court agreed with the Irish Supreme Court that it was not possible, given the present state of the development of international law, to conclude that Irish law conflicted with its general principles.

The Court also noted that it would have been open to the applicant to bring an action in Northern Ireland against the United Kingdom Secretary of State for Defence. The Court recalled that it had held

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inadmissible, for non-exhaustion of domestic remedies, the applicant's complaint that it was not open to him to pursue an action against the United Kingdom in Northern Ireland.

The decisions of the Irish courts upholding the United Kingdom's claim to immunity could not, therefore, be said to have exceeded the margin of appreciation allowed to States in limiting an individual's right to access to court. There had, therefore, been no violation of Article 6 § 1.

In *McElhinney v. Ireland* Judges Rozakis and Loucaides expressed separate dissenting opinions and Judges Caflisch, Cabral Barreto and Vajić expressed a joint dissenting opinion.

10. Eur.Court HR, Fogarty v. the United Kingdom, Grand Chamber Judgment of 21 November 2001, Application No. 37112/97, (Article 6-1, Right to a Fair Hearing within a Reasonable Time – No Violation; Article 14, Prohibition of Discrimination – No Violation). The applicant, an Irish national, unsuccessfully attempted to secure compensation for an alleged sex discrimination after being dismissed from her post at a United States embassy and failing to be re-hired. Her case was set aside after the embassy invoked immunity from proceedings and the Court, having regard to rules of public international law, considered that in conferring immunity on the United States in the present case, the United Kingdom had not exceeded the margin of appreciation allowed to States in limiting an individual's access to court.

ECHR 873 (2001)

21.11.2001

Press release issued by the Registrar

In *Fogarty v. the United Kingdom* (no. 37112/97), the Court held:

- by 16 votes to one, that there had been **no violation of Article 6 § 1**,
- unanimously, that there had been **no violation of Article 14** (prohibition of discrimination) **taken in conjunction with Article 6 § 1.**

1. Principal facts

Mary Fogarty is an Irish national, born in 1959 and living in London. On 8 November 1993 she started working as an administrative assistant at the United States Embassy in London, in the Foreign Broadcasting Information Service, a subsidiary of the Central Intelligence Agency. After being dismissed in February 1995, she issued proceedings against the United States Government before an industrial tribunal. She claimed that her dismissal had been the result of sex discrimination, contrary to the Sex Discrimination Act 1975 (the 1975 Act), alleging that she had suffered persistent sexual harassment from her supervisor and that working relationships had broken down in consequence. On 13 May 1996 the tribunal upheld her complaint and she was paid 12,000 pounds sterling in compensation.

In June 1996 and August 1996 she applied unsuccessfully for two posts at the US Embassy. On 15 September 1996 she issued a second application before an industrial tribunal, claiming the embassy had refused to re-employ her as a consequence of her previous successful sex discrimination claim, which constituted victimisation and discrimination under the 1975 Act. On 6 February 1997 she was advised that the United States Government were entitled to claim immunity under the 1978 Act, which grants immunity from suit in relation to administrative and technical staff of a diplomatic mission seeking to bring proceedings concerning their contract of employment.

2. Procedure

Fogarty v. the United Kingdom was lodged with the commission on 8 July 1997, and transmitted to the Court on 1 November 1998. On 19 October 1999, a Chamber decided to relinquish jurisdiction in favour of the Grand Chamber. By a decision of 1 March 2000, following a hearing on admissibility and the merits held on 9 February 2000, the Grand Chamber declared the case admissible. On 13 September 2000 the Grand Chamber decided to grant the United Kingdom Government's request for a further hearing on the merits and a hearing took place on 15 November 2000.

The full texts of the Court's judgments are accessible on its website (<http://www.hudoc.echr.coe.int>)

3. Composition of the Court

Judgment was given by the Grand Chamber, composed as follows:

Luzius Wildhaber (Swiss), President,
 Elisabeth Palm (Swedish),
 Christos Rozakis (Greek),
 Jean-Paul Costa (French),
 Luigi Ferrari Bravo (Italian),
 Gaukur Jörundsson (Icelandic),
 Lucius Caflisch (Swiss),
 Loukis Loucaides (Cypriot),
 Ireneu Cabral Barreto (Portuguese),
 Karel Jungwiert (Czech),
 Nicolas Bratza (British),
 Boštjan Zupančič (Slovenian),
 Nina Vajić (Croatian),
 Matti Pellonpää (Finnish),
 Margarita Tsatsa-Nikolovska (FYROMacedonia),
 Egils Levits (Latvian),
 Anatoly Kovler (Russian), Judges,

and also Paul Mahoney, Registrar.

4. Summary of the judgments

Complaints

Ms Fogarty complained, relying on Articles 6 § 1 and 14, of lack of access to a court and discrimination.

Decision of the Court

Article 6 § 1

The Court noted that sovereign immunity was a concept of international law, by virtue of which one State was not subject to the jurisdiction of another. It considered that granting sovereign immunity to a State in civil proceedings pursued the legitimate aim of complying with international law to promote comity and good relations between States through the respect of another State's sovereignty.

The Court further observed that the European Convention on Human Rights should so far as possible be interpreted in harmony with other rules of international law of which it formed part, including those relating to State immunity. It followed that measures which reflected generally-recognised rules of public international law on State immunity could not in principle be regarded as imposing a disproportionate restriction on the right of access to court as embodied in Article 6 § 1.

The Court observed that there appeared to be a trend in international and comparative law towards limiting State immunity in respect of employment-related disputes. However, where the proceedings related to employment in a foreign mission or embassy, international practice was divided on the question whether State immunity continued to apply and, if it did, whether it covered disputes relating to the contracts of all staff or only more senior members of the mission. Certainly, it could not be said that the United Kingdom was alone in holding that immunity attached to suits by employees at

The full texts of the Court's judgments are accessible on its website (<http://www.hudoc.echr.coe.int>)

diplomatic missions or that, in affording such immunity the United Kingdom fell outside any currently accepted international standards.

The Court further observed that the proceedings which the applicant wished to bring did not concern the contractual rights of a current embassy employee, but instead related to alleged discrimination in the recruitment process. Questions relating to the recruitment of staff to missions and embassies might by their very nature involve sensitive and confidential issues, relating to the diplomatic and organisational policy of a foreign State. The Court was not aware of any trend in international law towards a relaxation of the rule of State immunity regarding issues of recruitment to foreign missions.

The Court therefore considered that, in conferring immunity on the United States in the present case by virtue of the provisions of the 1978 Act, the United Kingdom could not be said to have exceeded the margin of appreciation allowed to States in limiting an individual's access to court. It therefore followed that there has been no violation of Article 6 § 1.

Article 14

The Court recalled that the applicant was prevented from pursuing her claim in the Industrial Tribunal by virtue of sections 1 and 16(1)(a) of the 1978 Act, which conferred an immunity in respect of proceedings concerning the employment of embassy staff. This immunity applied in relation to all such employment-related disputes, irrespective of their subject-matter and of the sex, nationality, place of residence or other attributes of the complainant. It could not therefore be said that the applicant was treated any differently from other people wishing to bring employment-related proceedings against an embassy, or that the restriction placed on her right to access to court was discriminatory. It followed that there had been no violation of Article 14 in conjunction with Article 6 § 1.

In *Fogarty v. the United Kingdom* Judges Caflisch, Costa and Vajić expressed a joint concurring opinion and Judge Loucaides expressed a dissenting opinion.

11. Eur.Court HR, Al-Adsani v. the United Kingdom, Grand Chamber Judgment of 21 November 2001, Application No. 35763/97, (Article 3, Prohibition of Torture – No Violation; Article 6-1, Right to a Fair Hearing within a Reasonable Time – No Violation). The applicant unsuccessfully attempted to secure a civil compensation for torture allegedly committed by Kuwait authorities, stating that the *jus cogens* nature of the offences superseded jurisdictional immunity of the State, but the applicant's case was set aside in the British courts, with the reasoning that Kuwait enjoyed State immunity from the proceedings. The Court in its judgment agreed and did not find it established that there was yet acceptance in international law of the proposition that States were not entitled to immunity in respect of civil claims for damages for alleged torture committed outside the forum State.

ECHR 873 (2001)
21.11.2001

Press release issued by the Registrar

In *Al-Adsani v. the United Kingdom* (no. 35763/97), the Court held:

- unanimously, that there had been no violation of Article 3 (prohibition of torture) of the Convention,
- by nine votes to eight, that there had been no violation of Article 6 § 1.

1. Principal facts

Sulaiman Al-Adsani, who has dual British and Kuwaiti nationality, was born in 1961 and lives in London. He is a pilot.

The applicant's description of events underlying the dispute can be summarised as follows. The applicant served in the Kuwaiti Air Force during the Gulf War and, after the Iraqi invasion, remained behind as a member of the resistance movement. He came into possession of sexual videotapes involving Sheikh Jaber Al-Sabah Al-Saud Al-Sabah ("the Sheikh"), who is related to the Emir of Kuwait. By some means these tapes entered general circulation, for which the applicant was held responsible by the Sheikh. On or about 2 May 1991, the Sheikh and two others gained entry to the applicant's house, beat him and took him at gunpoint in a government jeep to the Kuwaiti State Security Prison, where he was falsely imprisoned for several days and repeatedly beaten by security guards. He was released on 5 May 1991, having been forced to sign a false confession. On or about 7 May 1991 the Sheikh took the applicant at gunpoint in a government car to the Emir of Kuwait's brother's palace. The applicant's head was repeatedly held underwater in a swimming pool containing corpses, and he was then dragged into a small room where the Sheikh set fire to mattresses soaked in petrol.

The applicant spent six weeks in hospital in England being treated for burns covering 25 per cent of his body. He suffered psychological damage and has been diagnosed as suffering from a severe form of post-traumatic stress disorder.

In August 1992 he instituted civil proceedings in England for compensation against the Kuwaiti Government and the Sheikh and, in December 1992, obtained a default judgment against the Sheikh. In January 1994 the Court of Appeal granted a renewed application to serve the writ on the Kuwaiti Government. In May 1995 the High Court ordered that the action be struck out finding that State

The full texts of the Court's judgments are accessible on its website (<http://www.hudoc.echr.coe.int>)

immunity applied under the State Immunity Act 1978 (the 1978 Act), which granted immunity to sovereign States for acts committed outside their jurisdiction, without an implied exception for acts of torture. This ruling was upheld by the Court of Appeal and the applicant was refused leave to appeal to the House of Lords. His attempts to obtain compensation from the Kuwaiti authorities via diplomatic channels have proved unsuccessful.

2. Procedure

Al-Adsani v. the United Kingdom was lodged with the Commission on 3 April 1997, and transmitted to the Court on 1 November 1998. On 19 October 1999, a Chamber decided to relinquish jurisdiction in favour of the Grand Chamber. By a decision of 1 March 2000, following a hearing on admissibility and the merits held on 9 February 2000, the Grand Chamber declared the case admissible. On 13 September 2000 the Grand Chamber decided to grant the United Kingdom Government's request for a further hearing on the merits in both cases and a hearing took place on 15 November 2000.

3. Composition of the Court

Judgment was given by the Grand Chamber, composed as follows:

Luzius Wildhaber (Swiss), President,
 Elisabeth Palm (Swedish),
 Christos Rozakis (Greek),
 Jean-Paul Costa (French),
 Luigi Ferrari Bravo (Italian),
 Gaukur Jörundsson (Icelandic),
 Lucius Caflisch (Swiss),
 Loukis Loucaides (Cypriot),
 Ireneu Cabral Barreto (Portuguese),
 Karel Jungwiert (Czech),
 Nicolas Bratza (British),
 Boštjan Zupančič (Slovenian),
 Nina Vajić (Croatian),
 Matti Pellonpää (Finnish),
 Margarita Tsatsa-Nikolovska (FYROMacedonia),
 Egils Levits (Latvian),
 Anatoly Kovler (Russian), Judges,
 and also Paul Mahoney, Registrar.

4. Summary of the Judgments

Mr Al-Adsani contended that the United Kingdom had failed to secure his right not to be tortured, contrary to Article 3, read in conjunction with Articles 1 (obligation to respect human rights) and 13 (right to an effective remedy). He also complained of a violation of his right of access to a court under Article 6 § 1.

Decision of the Court

Article 6 § 1

The Court noted that sovereign immunity was a concept of international law, by virtue of which one State was not subject to the jurisdiction of another. It considered that granting sovereign immunity to a State in civil proceedings pursued the legitimate aim of complying with international law to promote comity and good relations between States through the respect of another State's sovereignty.

The full texts of the Court's judgments are accessible on its website (<http://www.hudoc.echr.coe.int>)

The Court further observed that the European Convention on Human Rights should so far as possible be interpreted in harmony with other rules of international law of which it formed part, including those relating to State immunity. It followed that measures which reflected generally-recognised rules of public international law on State immunity could not in principle be regarded as imposing a disproportionate restriction on the right of access to court as embodied in Article 6 § 1.

While noting the growing recognition of the overriding importance of the prohibition of torture, the Court did not find it established that there was yet acceptance in international law of the proposition that States were not entitled to immunity in respect of civil claims for damages for alleged torture committed outside the forum State. The 1978 Act, which grants immunity to States in respect of personal injury claims unless the damage was caused within the United Kingdom, was not inconsistent with those limitations generally accepted by the community of nations as part of the doctrine of State immunity. The application by the English courts of the provisions of the 1978 Act to uphold Kuwait's claim to immunity could not, therefore, be said to have amounted to an unjustified restriction on the applicant's access to court. It followed that there had been no violation of Article 6 § 1.

Article 3

The applicant did not contend that the alleged torture took place within the jurisdiction of the United Kingdom or that the United Kingdom authorities had any causal connection with its occurrence. In those circumstances, it could not be said that the United Kingdom was under a duty to provide a civil remedy to the applicant in respect of torture allegedly carried out by the Kuwaiti authorities. It therefore followed that there had been no violation of Article 3.

In *Al-Adsani v. the United Kingdom*, concurring opinions were expressed by: Judge Zupančič and Judges Pellonpää and Bratza. Judges Rozakis and Caflisch, joined by Judges Wildhaber, Costa, Cabral Barreto and Vajić, expressed a joint dissenting opinion and separate dissenting opinions were expressed by Judges Ferrari Bravo and Loucaides.

12. Eur.Court HR, *Banković and Others v. Belgium and Others*, Grand Chamber Decision of 12 December 2001, Application No. 52207/99, (Article 1, Obligation to Respect Human Rights – No Jurisdiction; Article 2, Right to Life – Inadmissible; Article 10, Freedom of Expression – Inadmissible; Article 13, Right to an Effective Remedy – Inadmissible). The applicants, six Yugoslav nationals from Belgrade, brought claims on their own behalf and on behalf of their deceased relatives for deaths and injuries suffered during the North Atlantic Treaty Organization (NATO) bombing of Radio Television Serbia, claiming that they had fallen within the jurisdiction of those states. The Court declared the application inadmissible since the impugned act was performed extra-territorially and in the present case did not constitute an exercise of jurisdiction within the meaning of Article 1 ECHR.

ECHR 970 (2001)
19.12.2001

Press release issued by the Registrar

The European Court of Human Rights has today announced its decision on admissibility in the case *Banković and Others v. Belgium and 16 Other Contracting States* (application no. 52207/99) at a public hearing in the Human Rights Building, Strasbourg. The Grand Chamber of the Court has unanimously declared the case inadmissible.

Press releases and the text (in English and French) of the decision are available on the Court's Internet site (<http://www.echr.coe.int>).

1. Principal Facts

The application was brought by six Yugoslav nationals, living in Belgrade, the Federal Republic of Yugoslavia ("FRY"). Vlastimir and Borka Banković, born in 1942 and 1945 respectively, applied to the Court on their own behalf and on behalf of their deceased daughter, Ksenija Banković. Živana Stojanović, born in 1937, applied on her own behalf and on behalf of her deceased son, Nebojsa Stojanović. Mirjana Stoimenovski, applied on her own behalf and on behalf of her deceased son, Darko Stoimenovski. Dragana Joksimović, born in 1956, applied on her own behalf and on behalf of her deceased husband, Milan Joksimović. Dragan Suković, applied in his own right.

The case concerned the bombing by the North Atlantic Treaty Organisation ("NATO") of the Radio Televizije Srbije (Radio-Television Serbia, "RTS") headquarters in Belgrade as part of NATO's campaign of air strikes against the FRY during the Kosovo conflict. In the early hours of 23 April 1999, one of the RTS buildings at Takovska Street was hit by a missile launched from a NATO aircraft. Two of the four floors of the building collapsed and the master control room was destroyed. Sixteen people were killed, including Ksenija Banković, Nebojsa Stojanović, Darko Stoimenovski and Milan Joksimović and another 16 were seriously injured, including Dragan Suković.

The case is brought against the 17 member States of NATO which are also Contracting States to the European Convention on Human Rights: Belgium, Czech Republic, Denmark, France, Germany, Greece, Hungary, Iceland, Italy, Luxembourg, Netherlands, Norway, Poland, Portugal, Spain, Turkey and United Kingdom.

2. Complaints

The full texts of the Court's judgments are accessible on its website (<http://www.hudoc.echr.coe.int>)

The applicants complained that the bombardment of the RTS headquarters by NATO violated Articles 2 (right to life), 10 (freedom of expression) and 13 (right to an effective remedy) of the European Convention on Human Rights.

3. Procedure

The application was lodged in October 1999. On 14 November 2000 a Chamber of the First Section relinquished the case to the Grand Chamber. On 24 October 2001 the Court held a hearing on the admissibility of the case, the main issues relating to whether the applicants fell within the “jurisdiction” of the respondent States within the meaning of Article 1 of the Convention (obligation to respect human rights), to whether the actions of NATO forces were imputable to the Governments of the respondent States and to whether the applicants had exhausted all remedies within the meaning of Article 35 § 1 of the Convention.

4. Summary of the Decision

Noting that the impugned act was performed, or had effects, outside the territory of the respondent States (“the extra-territorial act”), the Court considered that the essential question to be examined was whether the applicants and their deceased relatives were, as a result of that extra-territorial act, capable of falling within the jurisdiction of the respondent States.

As to the “ordinary meaning” of the term jurisdiction in Article 1 of the Convention, the Court was satisfied that, from the standpoint of public international law, the jurisdictional competence of a State was primarily territorial. While international law did not exclude a State’s exercise of jurisdiction extra-territorially, the suggested bases of such jurisdiction (including nationality, flag, diplomatic and consular relations, effect, protection, passive personality and universality) were, as a general rule, defined and limited by the sovereign territorial rights of the other relevant States. The Court considered that Article 1 of the Convention must be considered to reflect this ordinary and essentially territorial notion of jurisdiction, other bases of jurisdiction being exceptional and requiring special justification in the particular circumstances of each case.

The Court found State practice in the application of the Convention since its ratification to be indicative of a lack of any apprehension on the part of the Contracting States of their extra-territorial responsibility in contexts similar to the present case. Although there had been a number of military missions involving Contracting States acting extra-territorially since their ratification of the Convention (among others, in the Gulf, in Bosnia and Herzegovina and in the FRY), no State had indicated a belief that its extra-territorial actions involved an exercise of jurisdiction within the meaning of Article 1 by making a derogation pursuant to Article 15 (derogation in time of emergency) of the Convention.

The Court also observed that it had recognised only exceptionally extra-territorial acts as constituting an exercise of jurisdiction, when the respondent State, through the effective control of the relevant territory and its inhabitants abroad as a consequence of military occupation or through the consent, invitation or acquiescence of the Government of that territory, exercised all or some of the public powers normally to be exercised by that Government.

Regarding the applicants’ claim that the positive obligation under Article 1 extended to securing the Convention rights in a manner proportionate to the level of control exercised in any given extra-territorial situation, the Court considered that this was tantamount to arguing that anyone adversely affected by an act imputable to a Contracting State, wherever in the world that act may have been committed or its consequences felt, was thereby brought within the jurisdiction of that State for the purpose of Article 1.

The Court considered that Article 1 did not provide any support for the applicants' suggestion that the positive obligation in Article 1 to secure "the rights and freedoms defined in Section I of this Convention" could be divided and tailored in accordance with the particular circumstances of the extra-territorial act in question. The applicants' approach did not explain the application of the words "within their jurisdiction" in Article 1 and went so far as to render those words superfluous and devoid of any purpose. Had the drafters of the Convention wished to ensure jurisdiction as extensive as that advocated by the applicants, they could have adopted a text the same as or similar to the contemporaneous Articles 1 of the four Geneva Conventions of 1949.

Furthermore, the applicants' notion of jurisdiction equated the determination of whether an individual fell within the jurisdiction of a Contracting State with the question of whether that person could be considered to be a victim of a violation of rights guaranteed by the Convention. These were separate and distinct admissibility conditions, each of which had to be satisfied before an individual could invoke the Convention provisions against a Contracting State.

As to whether the exclusion of the applicants from the respondent States' jurisdiction would defeat the *ordre public* mission of the Convention and leave a regrettable vacuum in the Convention system of human rights protection, the Court's obligation was to have regard to the special character of the Convention as a constitutional instrument of European public order for the protection of individual human beings and its role was to ensure the observance of the engagements undertaken by the Contracting Parties.

The Convention was a multi-lateral treaty operating, subject to Article 56 (territorial application) of the Convention, in an essentially regional context and notably in the legal space of the Contracting States. The FRY clearly did not fall within this legal space. The Convention was not designed to be applied throughout the world, even in respect of the conduct of Contracting States.

The Court was not therefore persuaded that there was any jurisdictional link between the persons who were victims of the act complained of and the respondent States. Accordingly, it was not satisfied that the applicants and their deceased relatives were capable of coming within the jurisdiction of the respondent States on account of the extra-territorial act in question.

Accordingly, the Court concluded that the impugned action of the respondent States did not engage their Convention responsibility and that it was not therefore necessary to consider the other admissibility issues raised by the parties. The application had therefore to be declared inadmissible.

13. Eur.Court HR, M.C. v. Bulgaria, First Section Judgment of 4 December 2003, Application No. 39272/98, (Article 3, Prohibition of Torture – Violation; Article 8, Right to Respect for Private and Family Life – Violation). In response to the applicant, a rape victim who was alleging violations of her Convention rights due to the flawed practice of Bulgaria in the investigation into rape cases, the Court in its judgment made reference to the jurisprudence of the International Criminal Tribunal for the former Yugoslavia as well as the work of the Council of Europe’s Committee of Ministers and the United Nations Committee on the Elimination of Discrimination against Women.

ECHR 621 (2003)
04.12.2003

Press release issued by the Registrar

The European Court of Human Rights has today notified in writing a judgment in the case of *M.C. v. Bulgaria* (application no. 39272/98).

The Court held, unanimously, that there had been:

- a violation of Article 3 (prohibition of degrading treatment) and Article 8 (right to respect for private life) of the European Convention on Human Rights as the respondent State failed to comply with its positive obligations under those provisions ;
- that no separate issue arose under Article 13 (right to an effective remedy);
- and that it is not necessary to examine the applicant’s complaint under Article 14 (prohibition of discrimination).

Under Article 41 (just satisfaction) of the Convention, the Court awarded the applicant 8,000 euros (EUR) for non-pecuniary damage and EUR 4,110 for costs and expenses. (The judgment is available only in English.)

1. Principal facts

The applicant, M.C., is a Bulgarian national born in 1980 who alleged that she was raped by two men, A. and P., aged 20 and 21, when she was 14 years old, the age of consent for sexual intercourse in Bulgaria.

M.C. claimed that, on 31 July 1995, she went to a disco with the two men and a friend of hers. She then agreed to go on to another disco with the men. On the way back, A. suggested stopping at a reservoir for a swim. M.C. remained in the car. P. came back before the others, allegedly forcing M.C. to have sexual intercourse with him. M.C. maintained that she was left in a very disturbed state. In the early hours of the following morning, she was taken to a private home. She claimed that A. forced her to have sex with him at the house and that she cried continually both during and after the rape. She was later found by her mother and taken to hospital where a medical examination found that her hymen had been torn.

A. and P. both denied raping M.C.

The criminal investigations conducted found insufficient evidence that M.C. had been compelled to have sex with A. and P.. The proceedings were terminated on 17 March 1997 by the District Prosecutor, who found that the use of force or threats had not been established beyond reasonable

The full texts of the Court’s judgments are accessible on its website (<http://www.hudoc.echr.coe.int>)

doubt. In particular, no resistance on the applicant's part or attempts to seek help from others had been established. The applicant appealed unsuccessfully.

Written expert opinions submitted to the European Court of Human Rights by M.C. identified "frozen fright" (traumatic psychological infantilism syndrome) as the most common response to rape, where the terrorised victim either submits passively to or dissociates her or himself psychologically from the rape. Of the 25 rape cases analysed, concerning women in Bulgaria aged between 14 and 20, 24 of the victims had responded to their aggressor in this way.

2. Procedure and composition of the Court

The application was lodged with the European Commission of Human Rights on 23 December 1997 and transmitted to the Court on 1 November 1998. It was declared admissible on 5 December 2002. *Interights*, a non-governmental organisation based in London, submitted comments after being given leave to intervene as a third party.

Judgment was given by a Chamber of seven judges, composed as follows:

Christos Rozakis (Greek), *President*,
 Françoise Tulkens (Belgian),
 Nina Vajić (Croatian),
 Egil Levits (Latvian),
 Snejana Botoucharova (Bulgarian),
 Anatoli Kovler (Russian),
 Vladimiro Zagrebelsky (Italian), *judges*,

and also Søren Nielsen, *Deputy Section Registrar*.

3. Summary of the judgment

Complaints

M.C. complained that Bulgarian law and practice do not provide effective protection against rape and sexual abuse, as only cases where the victim resists actively are prosecuted. She submitted that Bulgaria has a positive obligation under the European Convention on Human Rights to protect the individual's physical integrity and private life and to provide an effective remedy. She also complained that the authorities had not effectively investigated the events in question. She relied on Article 3 (prohibition of degrading treatment), Article 8 (right to respect for private life), Article 13 (right to an effective remedy) and Article 14 (prohibition of discrimination).

Decision of the Court

Articles 3 and 8 of the Convention

The Court reiterated that, under Articles 3 and 8 of the Convention, Member States had a positive obligation both to enact criminal legislation to effectively punish rape and to apply this legislation through effective investigation and prosecution.

The Court then observed that, historically, proof of the use of physical force by the perpetrator and physical resistance on the part of the victim was sometimes required under domestic law and practice in rape cases in a number of countries. However, it appeared that this was no longer required in European countries. In common-law jurisdictions, in Europe and elsewhere, any reference to physical force had been removed from legislation and/or case-law. Although in most European countries

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influenced by the continental legal tradition, the definition of rape contained references to the use of violence or threats of violence by the perpetrator, in case-law and legal theory, it was lack of consent, not force, that was critical in defining rape.

The Court also noted that the Member States of the Council of Europe had agreed that penalising non-consensual sexual acts, whether or not the victim had resisted, was necessary for the effective protection of women against violence and had urged the implementation of further reforms in this area. In addition, the International Criminal Tribunal for the former Yugoslavia had recently found that, in international criminal law, any sexual penetration without the victim's consent constituted rape, reflecting a universal trend towards regarding lack of consent as the essential element of rape and sexual abuse. As *Interights* had submitted, victims of sexual abuse - in particular, girls below the age of majority - often failed to resist for a variety of psychological reasons or through fear of further violence from the perpetrator. In general, law and legal practice concerning rape were developing to reflect changing social attitudes requiring respect for the individual's sexual autonomy and for equality. Given contemporary standards and trends, Member States' positive obligation under Articles 3 and 8 of the Convention requires the penalisation and effective prosecution of any non-consensual sexual act, even where the victim had not resisted physically.

The applicant alleged that the authorities' attitude in her case was rooted in defective legislation and reflected a practice of prosecuting rape perpetrators only where there was evidence of significant physical resistance. In the absence of case-law explicitly dealing with the question, the Court considered it difficult to arrive at safe general conclusions on the issue. However, the Bulgarian Government were unable to provide copies of judgments or legal commentaries clearly disproving the applicant's allegations of a restrictive approach in the prosecution of rape. Her claim was therefore based on reasonable arguments which had not been disproved.

The presence of two irreconcilable versions of the facts obviously called for a context-sensitive assessment of the credibility of the statements made and for verification of all the surrounding circumstances. Little was done, however, to test the credibility of the version of events put forward by P. and A. - even the assertion that the applicant, aged 14, had started caressing A. minutes after having had sex for the first time in her life with another man - or to test the credibility of the witnesses called by the accused or the precise timing of the events. Neither were the applicant and her representative able to question witnesses, whom she had accused of perjury. The authorities had therefore failed to explore the available possibilities for establishing all the surrounding circumstances and did not assess sufficiently the credibility of the conflicting statements made.

The reason for that failure appeared to be that the investigator and prosecutor considered that a "date rape" had occurred, and, in the absence of "direct" proof of rape such as traces of violence and resistance or calls for help, that they could not infer proof of lack of consent and, therefore, of rape from an assessment of all the surrounding circumstances. While the prosecutors did not exclude the possibility that the applicant might not have consented, they adopted the view, in the absence of proof of resistance, that it could not be concluded that the perpetrators had understood that the applicant had not consented. They did not assess evidence that P. and A. had deliberately misled the applicant in order to take her to a deserted area, thus creating an environment of coercion, or judge the credibility of the versions of the facts proposed by the three men and witnesses called by them.

The Court considered that the Bulgarian authorities should have explored all the facts and should have decided on the basis of an assessment of all the surrounding circumstances. The investigation and its conclusions should also have been centred on the issue of non-consent. Without expressing an opinion on the guilt of P. and A., the Court found that the effectiveness of the investigation of the applicant's case and, in particular, the approach taken by the investigator and the prosecutors fell short of Bulgaria's positive obligations under Articles 3 and 8 of the Convention - viewed in the light of the

relevant modern standards in comparative and international law - to establish and apply effectively a criminal-law system punishing all forms of rape and sexual abuse.

Articles 13 and 14 of the Convention

The Court found that no separate issue arose under Article 13 and that it was not necessary to examine the complaint under article 14.

Judge Tulkens expressed a concurring opinion which is annexed to the judgment.

14. Eur.Court HR, Assanidze v. Georgia, Grand Chamber Judgment of 8 April 2004, Application No. 71503/01, (Article 5-1, Right to Liberty and Security – Violation; Article 6-1, Right to a Fair Hearing within a Reasonable Time – Violation; Article 10, Freedom of Expression – No Violation). The applicant, a Georgian national held in custody in the Ajarian Autonomous Republic within Georgia, despite having received a presidential pardon in 1999 for a first offence and having been acquitted of the second offence by the Supreme Court of Georgia in 2001, partially successfully argued that Georgia was responsible for his on-going imprisonment.

**ECHR 177 (2004)
8.4.2004**

Press release issued by the Registrar

The European Court of Human Rights has today delivered at a public hearing a Grand Chamber judgment in the case of Assanidze v. Georgia (application no. 71503/01).

The Court held:

- unanimously that there had been **a violation of Article 5 § 1** (right to liberty and security) of the European Convention on Human Rights on account of the applicant's detention since 29 January 2001;
- by 14 votes to 3 that there had been **a violation of Article 6 § 1** (right to a fair hearing) of the Convention on account of the failure to comply with a judgment acquitting the applicant;
- unanimously that there had been **no violation of Article 10** (freedom of expression);
- by 14 votes to 3 that it was unnecessary to examine the complaint under Article 5 § 4 (right to have the lawfulness of the detention decided speedily);
- unanimously that it was unnecessary to examine the complaints under Article 13 (right to an effective remedy) and Article 2 of Protocol No. 4 (freedom of movement).

Under Article 41 (just satisfaction) of the Convention, the Court awarded the applicant 150,000 euros (EUR) for pecuniary and non-pecuniary damage and EUR 5,000 for costs and expenses. It also held unanimously that the Georgian State had to secure the applicant's release at the earliest possible date.

(The judgment is available in English and French.)

1. Principal facts

The applicant, Tengiz Assanidze, is a Georgian national who was born in 1944. He is currently in custody in Batumi, the capital of the Ajarian Autonomous Republic in Georgia. He was formerly the mayor of Batumi and a member of the Ajarian Supreme Council.

He was accused of illegal financial dealings in the Batumi Tobacco Manufacturing Company, and of unlawfully possessing and handling firearms. On 28 November 1994 he was sentenced to eight years' imprisonment and orders were made for his assets to be confiscated and requiring him to make good the pecuniary losses sustained by the company. On 27 April 1995 the Supreme Court of Georgia, on an appeal on points of law, upheld the applicant's conviction for illegal financial dealings. The applicant was granted a pardon by the President of the Republic on 1 October 1999, but was not released by the local Ajarian authorities.

The full texts of the Court's judgments are accessible on its website (<http://www.hudoc.echr.coe.int>)

While the applicant was still in custody (despite having been pardoned), further charges were brought against him on 11 December 1999 in connection with a separate case of kidnapping. On 2 October 2000 the Ajarian High Court convicted the applicant and sentenced him to twelve years' imprisonment. Although he was subsequently acquitted by the Supreme Court of Georgia on 29 January 2001, he has still not been released by the Ajarian authorities. Consequently, more than three years later, he remains in custody in a cell at the Short-Term Remand Prison of the Ajarian Security Ministry.

2. Procedure and composition of the Court

The application was lodged on 2 July 2001 and declared partly admissible in 12 November 2002. On 18 March 2003 the Chamber relinquished jurisdiction in favour of the Grand Chamber (Article 30 of the Convention and Rule 72 of the Rules of Court). The Court held a hearing on the merits of the case on 19 November 2003.

Judgment was given by the Grand Chamber of 17 judges, composed as follows:

Luzius Wildhaber (Swiss), President,
 Christos Rozakis (Greek),
 Jean-Paul Costa (French),
 Georg Ress (German),
 Nicolas Bratza (British),
 Lucius Caflisch (Swiss),
 Loukis Loucaides (Cypriot)
 Ireneu Cabral Barreto (Portuguese),
 Viera Strážnická (Slovakian),
 Karel Jungwiert (Czech),
 Josep Casadevall (Andorran),
 Boštjan Zupančič (Slovenian),
 Wilhelmina Thomassen (Netherlands),
 Snejana Botoucharova (Bulgarian),
 Mindia Ugrekhelidze (Georgian),
 Vladimiro Zagrebelsky (Italian),
 Antonella Mularoni (San Marinense), judges,

and also Paul Mahoney, Registrar.

3. Summary of the judgment

Complaints

The applicant complained that he was still being held by the authorities of the Ajarian Autonomous Republic despite having received a presidential pardon in 1999 for the first offence and having been acquitted of the second by the Supreme Court of Georgia in 2001. He relied on Article 5 §§ 1, 3 and 4, Article 6 § 1, and Articles 10 and 13 of the Convention, and Article 2 of Protocol No. 4.

Decision of the Court

Article 1

The Court observed that Georgia had ratified the Convention for the whole of its territory, without making any specific reservation with regard to the Adjarian Autonomous Republic or to difficulties in exercising its jurisdiction over that territory. The Adjarian Autonomous Republic was indisputably an

The full texts of the Court's judgments are accessible on its website (<http://www.hudoc.echr.coe.int>)

integral part of the territory of Georgia and subject to its competence and control. Furthermore, it was common ground that the Adjarian Autonomous Republic had no separatist aspirations and that no other State exercised effective overall control there. Consequently, the Court found that the actual facts out of which the allegations of violations had arisen were within the “jurisdiction” of the Georgian State within the meaning of Article 1 of the Convention (obligation to respect human rights).

The Court noted that the central authorities had taken all procedural steps possible under domestic law to secure compliance with the judgment acquitting the applicant, had sought to resolve the dispute by political means and had repeatedly urged the Adjarian authorities to release him, all to no avail. Consequently, the matters complained of by the applicant were directly imputable to the local Adjarian authorities.

However, even though it was not inconceivable that States would encounter difficulties in securing compliance with the rights guaranteed by the Convention in all parts of their territory, each State that had ratified the Convention was responsible for events occurring anywhere within its national territory. Consequently, the Court found that the facts were within the “jurisdiction” of Georgia and that, even though within the domestic system those matters were directly imputable to the local authorities of the Adjarian Autonomous Republic, it was solely the responsibility of the Georgian State that was engaged under the Convention.

Article 5 § 1

As regards the complaint concerning the period of detention from 1 October 1999 (when the presidential pardon was granted) to 11 December 1999 (when the applicant was charged), the Court ruled that it had to be declared inadmissible as being out of time. As to the period from 11 December 1999 (when the applicant was charged) to 29 January 2001, it found that the complaint was outside the scope of the case referred to the Grand Chamber for examination.

The Court noted that on 29 January 2001 the Supreme Court of Georgia ordered the applicant’s release. However, he had remained in custody since then despite the fact that his case had not been reopened and no further order had been made authorising his detention. Thus, there was no statutory or judicial basis for his deprivation of liberty. The Court accordingly found that since 29 January 2001 the applicant had been arbitrarily detained, in breach of Article 5 § 1. In the light of that finding, it held that no separate examination of the complaint concerning his place of detention was necessary.

Article 6 § 1

The Court held that the fact that the judgment of 29 January 2001, which was a final and enforceable judicial decision, had not been complied with more than three years after its delivery had deprived the provisions of Article 6 § 1 of the Convention of all useful effect.

Articles 5 § 4 and 13

The Court noted that the complaints under these provisions were based on the failure to comply with the provision of the judgment ordering the applicant’s immediate release. They therefore raised essentially the same legal issue on the basis of the same facts as the issue which had been examined under Article 6 § 1 of the Convention. Consequently, no separate examination of those complaints was necessary.

Article 3

The full texts of the Court’s judgments are accessible on its website (<http://www.hudoc.echr.coe.int>)

As to the applicant's complaint that his being held in total isolation in a cell at the Ajarian Security Ministry prison constituted a breach of Article 3 of the Convention, the Court noted that it had been raised for the first time after the admissibility decision, which determined the scope of the proceedings to be examined by the Court. Accordingly, it was outside the scope of the case that had been referred to the Grand Chamber for examination.

Article 5 § 3

The Court found that this complaint was out of time, as the period of detention for which the applicant was entitled to benefit from the guarantees set out in Article 5 § 3 had ended on 2 October 2000 with his conviction at first instance by the Ajarian High Court.

Article 10

The Court found that the applicant's complaints under Article 10 § 1 of the Convention was unsubstantiated.

Article 2 of Protocol No. 4

The Court considered that it was not necessary to examine this complaint as the present case was not concerned with a mere restriction on freedom of movement within the meaning of Article 2 of Protocol No 4 but, as it had already stated, with arbitrary detention falling under Article 5 of the Convention.

Article 41

The Court reiterated that it was for the States, subject to supervision by the Committee of Ministers, to decide on and take measures to put an end to any violations that are found. Having regard to the particular circumstances of the case and the urgent need to put an end to the violation of the Convention, the Court held that Georgia had to secure the applicant's release at the earliest possible date.

Judges Costa, Bratza and Thomassen expressed a partly dissenting opinion, Judge Costa a partly concurring opinion and Judge Loucaides a concurring opinion, all of which are annexed to the judgment.

15. Eur.Court HR, *Ilaşcu and Others v. Moldova and Russia, Grand Chamber Judgment of 8 July 2004, Application No. 48787/99, (Article 3, Prohibition of Torture – Violation, by Moldova; Article 3, Prohibition of Torture – Violation, by Russia; Article 3, Prohibition of Torture – Violation by Moldova; Article 3, Prohibition of Torture – Violation, by Russia; Article 3, Prohibition of Torture – Violation, Moldova; Article 3, Prohibition of Torture – Violation, by Russia; Article 5, Right to Liberty and Security – Violation, by Moldova; Article 5, Right to Liberty and Security – Violation, by Moldova; Article 5, Right to Liberty and Security – Violation, by Russia; Article 1 of Protocol No. 1, Protection of Property – No Violation).* The applicants, one of which was the local leader of the Popular Front working towards the unification of Moldova and Romania, were arrested at their homes in Moldova by people bearing the insignia of the former USSR’s Fourteenth Army, accused of anti-Soviet activities, charged with offences (one of them sentenced to death and the others given lengthy prison sentences) and detained in Transnistria. The applicants subsequently successfully claimed that the court which had convicted them had had no jurisdiction to do so *inter alia* because the Moldovan authorities had been responsible for the alleged violations in question and the Russian Federation had shared the responsibility as the territory of Transnistria was under Russia’s control.

**ECHR 349 (2004)
8.7.2004**

Press release issued by the Registrar

The European Court of Human Rights has today delivered at a public hearing its Grand Chamber judgment in the case of *Ilaşcu and Others v. Moldova and Russia* (application no. 48787/99). The Court held

- by eleven votes to six, that the applicants came within the jurisdiction of Moldova within the meaning of Article 1 of the European Convention on Human Rights (State jurisdiction) as regards its positive obligations; and
- by sixteen votes to one, that the applicants came within the jurisdiction of Russia within the meaning of Article 1 of the Convention;

Treatment and conditions suffered by the applicants

- by eleven votes to six, that there had been no violation of Article 3 (prohibition of torture and inhuman or degrading treatment or punishment) by Moldova on account of the ill-treatment inflicted on Mr Ilaşcu and the conditions in which he was detained while under the threat of execution;
- by sixteen votes to one, that there had been a violation of Article 3 (prohibition of torture) by Russia on account of the ill-treatment inflicted on Mr Ilaşcu and the conditions in which he was detained while under the threat of execution;
- by eleven votes to six, that there had been a violation of Article 3 (prohibition of torture) by Moldova since May 2001 on account of the ill-treatment inflicted on Mr Ivanțoc and the conditions in which he had been detained;
- by sixteen votes to one, that there had been a violation of Article 3 (prohibition of torture) by Russia on account of the ill-treatment inflicted on Mr Ivanțoc and the conditions in which he had been detained;

The full texts of the Court’s judgments are accessible on its website (<http://www.hudoc.echr.coe.int>)

- by eleven votes to six, that there had been a violation of Article 3 (prohibition of inhuman and degrading treatment) by Moldova since May 2001 on account of the ill-treatment inflicted on Mr Leşco and Mr Petrov-Popa and the conditions in which they had been detained;
- by sixteen votes to one, that there had been a violation of Article 3 (prohibition of inhuman and degrading treatment) by Russia on account of the ill-treatment inflicted on Mr Leşco and Mr Petrov-Popa and the conditions in which they had been detained;

Deprivation of liberty

- by eleven votes to six, that there had been no violation of Article 5 of the Convention (right to liberty and security) by Moldova on account of Mr Ilaşcu's detention;
- by eleven votes to six, that there had been and continued to be a violation of Article 5 of the Convention by Moldova on account of the detention of Mr Ivanţoc, Mr Leşco and Mr Petrov-Popa after May 2001;
- by sixteen votes to one, that there had been a violation of Article 5 by Russia as regards Mr Ilaşcu until May 2001 and that there had been and continued to be a violation of Article 5 as regards Mr Ivanţoc, Mr Leşco and Mr Petrov-Popa;

The Court further held

- unanimously, that there was no cause to examine separately the complaint of a violation of Article 2 (right to life) on account of the fact that Mr Ilaşcu was sentenced to death;
- unanimously, that there was no cause to examine separately the complaint under Article 8 (right to respect for private and family life);
- unanimously, that it did not have jurisdiction to examine the complaint under Article 6 of the Convention (right to a fair trial);
- by fifteen votes to two, that there had been no violation of Article 1 of Protocol No. 1 (protection of property)
- by sixteen votes to one, that Moldova and Russia had failed to discharge their obligations under Article 34 of the Convention (individual applications).

Under Article 41 of the Convention (just satisfaction), the Court held

- by ten votes to seven, that Moldova was to pay Mr Ivanţoc, Mr Leşco and Mr Petrov-Popa 60,000 euros (EUR) each for pecuniary and non-pecuniary damage, EUR 3,000 to each applicant for non-pecuniary damage arising from the breach of Article 34 and an overall sum of EUR 7,000 for costs and expenses, less EUR 1,321.34 already received in legal aid;
- By sixteen votes to one, that Russia was to pay EUR 180,000 to Mr Ilaşcu and EUR 120,000 to each of the other applicants for pecuniary and non-pecuniary damage, EUR 7,000 to each applicant for non-pecuniary damage arising from the breach of Article 34 and an overall sum of EUR 14,000 for costs and expenses, less EUR 2,642.66 already received in legal aid.

The Court further held, unanimously, that Moldova and Russia were to take all the necessary steps to put an end to the arbitrary detention of the applicants still imprisoned and secure their immediate release.

(The judgment is available in English and in French).

1. Principal facts

The applicants, Ilie Ilaşcu, Alexandru Leşco, Andrei Ivanţoc and Tudor Petrov-Popa, who were Moldovan nationals at the time when the application was lodged, were born in 1952, 1955, 1961 and

The full texts of the Court's judgments are accessible on its website (<http://www.hudoc.echr.coe.int>)

1963 respectively. Mr Ilaşcu acquired Romanian nationality in 2000, as did Mr Leşcu and Mr Ivanţoc in 2001. The applicants, with the exception of Mr Ilaşcu and Mr Leşcu, who were released in May 2001 and June 2004 respectively, are currently detained in the Transnistrian region.

At the material time Mr Ilaşcu was the local leader of the Popular Front and was working towards the unification of Moldova with Romania. He was twice elected to the Moldovan Parliament and was appointed as a member of the Moldovan delegation to the Parliamentary Assembly of the Council of Europe. In December 2000 he was elected to the Senate of the Romanian Parliament and appointed as a member of the Romanian delegation to the Parliamentary Assembly.

Between 2 and 4 June 1992 the applicants were arrested at their homes in Tiraspol by a number of people, some of whom were wearing uniforms bearing the insignia of the former USSR's Fourteenth Army. They were accused of anti-Soviet activities and illegally combating the legitimate government of the State of Transnistria, under the direction of the Moldovan Popular Front and Romania. They were also charged with a number of offences which included two murders. On 9 December 1993 the "Supreme Court of the Transnistrian region" sentenced Mr Ilaşcu to death and ordered the confiscation of his property. The other applicants were sentenced by the same court to terms of 12 to 15 years' imprisonment, and their property was likewise ordered to be confiscated.

2. Procedure and composition of the Court

The application was lodged on 14 June 1999. On 20 March 2001 the Chamber to which the case had been allocated relinquished jurisdiction in favour of the Grand Chamber (Article 30 of the Convention). The Grand Chamber decided to hold a hearing on the admissibility and merits of the application, and the President invited the Romanian Government to take part. By a decision of 4 July 2001 the application was declared partly admissible, after a hearing had been held on 6 June 2001. A delegation of the Court conducted an on-the-spot investigation in Chişinău and Tiraspol from 10 to 15 March 2003.

Judgment was given by the Grand Chamber of 17 judges, composed as follows:

Luzius Wildhaber (Swiss), President,
 Christos Rozakis (Greek),
 Jean-Paul Costa (French),
 Georg Ress (German),
 Nicolas Bratza (British),
 Loukis Loucaides (Cypriot),
 Ireneu Cabral Barreto (Portuguese)
 Françoise Tulkens (Belgian),
 Corneliu Bîrsan (Romanian),
 Josep Casadevall (Andorran),
 Boštjan Zupančič (Slovenian),
 John Hedigan (Irish)
 Wilhelmina Thomassen (Netherlands),
 Tudor Panţîru (Moldovan),
 Egil Levits (Latvian)
 Anatoli Kovler (Russian),
 Elisabet Fura-Sandström (Swedish), judges,
 and also Paul Mahoney, Registrar.

3. Summary of the judgment

Complaints

The full texts of the Court's judgments are accessible on its website (<http://www.hudoc.echr.coe.int>)

The applicants complained of a violation of Article 6 of the Convention on the grounds that the court which had convicted them did not have jurisdiction and that, at all events, the proceedings which had led to their conviction had not been fair. They also complained, under Article 1 of Protocol No. 1 to the Convention, of the confiscation of their possessions, and maintained that their detention had been unlawful, contrary to Article 5. Mr. Ilaşcu further complained of a violation of Article 2 on account of his being sentenced to death. All the applicants complained in addition of the conditions of their detention, relying expressly on Articles 3 and 8 and, in substance, Article 34.

They submitted that the Moldovan authorities were responsible for the violations they alleged since they had not taken adequate measures to put a stop to them. In their submission, the Russian Federation shared that responsibility as the territory of Transdniestria was under Russia's de facto control owing to the stationing of its troops and military equipment there and the support it gave to the separatists.

Decision of the Court

Article 1

As regards Moldova

On the basis of all the material in its possession, 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 Transdniestrian region. 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 that it was in its power to take and were in accordance with international law to secure to the applicants 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 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 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

As regards Russia

During the Moldovan conflict in 1991-92 forces of the former Fourteenth Army (which had owed allegiance to the USSR, the CIS and the Russian Federation in turn) stationed in Transdniestria, had

The full texts of the Court's judgments are accessible on its website (<http://www.hudoc.echr.coe.int>)

fought with and on behalf of the Transnistrian separatist forces. Large quantities of weapons from the stores of the Fourteenth Army had been voluntarily transferred to the separatists, who had also been able to seize possession of other weapons unopposed by Russian soldiers. In addition, throughout the clashes between the Moldovan authorities and the Transnistrian separatists the Russian leaders had supported the separatist authorities by their political declarations.

The Russian authorities had therefore contributed both militarily and politically to the creation of a separatist regime in the region of Transnistria, part of the territory of the Republic of Moldova. Even after the ceasefire agreement of 21 July 1992 Russia had continued to provide military, political and economic support to the separatist regime, thus enabling it to survive by strengthening itself and by acquiring a certain amount of autonomy vis-à-vis Moldova. In the Court's opinion, all of the acts committed by Russian soldiers with regard to the applicants, including their transfer into the charge of the separatist regime, in the context of the Russian authorities' collaboration with that illegal regime, were capable of engaging responsibility for the consequences of the acts of that regime.

The Russian army was still stationed in Moldovan territory in breach of the undertakings to withdraw them completely given by Russia at the OSCE summits in 1999 and 2001. Both before and after 5 May 1998, when the Convention came into force with regard to Russia, in the security zone controlled by the Russian peacekeeping forces Transnistria continued to deploy its troops illegally and to manufacture and sell weapons in breach of the agreement of 21 July 1992. All of the above proved that the Transnistrian region remained under the effective authority, or at the very least under the decisive influence, of Russia, and in any event that it survived by virtue of the military, economic, financial and political support that Russia gave it.

That being so, the Court considered that there was a continuous and uninterrupted link of responsibility on the part of Russia for the applicants' fate, as its policy of support for the regime and collaboration with it had continued beyond 5 May 1998, and after that date Russia had made no attempt to put an end to the applicants' situation brought about by its agents and had not acted to prevent the violations allegedly committed. The applicants therefore came within the "jurisdiction" of Russia and its responsibility was engaged with regard to the acts complained of.

The Court's jurisdiction

The Court observed that the Convention had come into force with regard to Moldova on 12 September 1997 and with regard to Russia on 5 May 1998. It pointed out that the Convention applied only to events subsequent to its entry into force with regard to the Contracting States concerned. Consequently, the Court did not have jurisdiction to examine the complaint under Article 6 and had jurisdiction to examine those under Articles 3, 5 and 8 only in so far as they concerned events subsequent to the dates on which the Convention had entered into force with regard to Moldova and Russia. Lastly, the Court had jurisdiction to examine Mr Ilaşcu's complaint under Article 2.

Article 2

Since Mr Ilaşcu had been released and was now living with his family in Romania, the Court considered that the risk of enforcement of the death penalty imposed on him was more hypothetical than real. On the other hand, it was not disputed that after ratification of the Convention by the two respondent States Mr Ilaşcu must have suffered as a consequence both of the death sentence imposed on him and of his conditions of detention while under the threat of execution of that sentence. That being so, the Court considered that the facts complained of by Mr Ilaşcu did not call for a separate examination under Article 2 of the Convention, but would be more appropriately examined under Article 3 instead.

Article 3

The full texts of the Court's judgments are accessible on its website (<http://www.hudoc.echr.coe.int>)

As regards Mr Ilaşcu

During the very long period he had spent on “death row” the applicant had lived in the constant shadow of death, in fear of execution. Unable to exercise any remedy, he had lived for many years, including the time after the Convention’s entry into force, in conditions of detention apt to remind him of the prospect of his sentence being enforced. The anguish and suffering he felt had been aggravated by the fact that the sentence had no legal basis or legitimacy for Convention purposes. The “Supreme Court of the Transdnestrian region” which had passed sentence on Mr Ilaşcu had been set up by an entity which was illegal under international law and had not been recognised by the international community. That “court” belonged to a system which could hardly be said to function on a constitutional and legal basis reflecting a judicial tradition compatible with the Convention. That was evidenced by the arbitrary nature of the circumstances in which the applicants had been tried and convicted, as they had described them in an account which had not been disputed by the other parties and as described and analysed by the institutions of the OSCE.

As regards the applicant’s conditions of detention while on death row, the Court noted that Mr Ilaşcu had been detained for eight years in very strict isolation: he had had no contact with other prisoners, no news from the outside - since he was not permitted to send or receive mail - and no right to contact his lawyer or receive regular visits from his family. His cell had been unheated, even in severe winter conditions, and had had no natural light source or ventilation. Mr Ilaşcu had also been deprived of food as a punishment, and, given the restrictions on receiving parcels, even the food he received from outside had often been unfit for consumption. He had been able to take showers only very rarely, often having to wait several months between one and the next. On that subject the Court referred to the report of the Committee for the Prevention of Torture following its visit to Transdnestria in 2000, in which it had described isolation for so many years as indefensible.

The applicant’s conditions of detention had had deleterious effects on his health, which had deteriorated in the course of the many years he had spent in prison; he had not received proper care, having been deprived of regular medical examinations and treatment and dietetically appropriate meals. The Court noted with concern the existence of rules authorising discretion in relation to correspondence and prison visits, on the part of both prison warders and other authorities, and emphasised that such rules were arbitrary and incompatible with the appropriate and effective safeguards against abuses which any prison system in a democratic society must put in place. Moreover, in the present case, such rules had made the applicant’s conditions of detention even more difficult.

The death sentence imposed on the applicant, coupled with the conditions he had been living in and the treatment he had suffered during his detention had been particularly serious and cruel and must accordingly be considered acts of torture within the meaning of Article 3. As Mr Ilaşcu had been detained at the time when the Convention came into force with regard to Russia, the latter was responsible for his conditions of detention, the treatment inflicted on him and the suffering caused to him in prison. Mr Ilaşcu had been released in May 2001 and it was only from that date on that Moldova’s responsibility was engaged for failure to discharge its positive obligations. Consequently, there had been a violation of Article 3 by Russia but not by Moldova.

As regards Mr Ivanţoc

In the light of all the information at its disposal, the Court considered that it could take it as established that during the applicant’s detention he had received a large number of blows and other ill-treatment, and that at times he had been denied food and all forms of medical assistance in spite of his state of health, which had been weakened by these conditions of detention. In particular, the Court drew attention to the persecution and ill-treatment to which he had been subjected in May 1999 after lodging his application to the Court.

The full texts of the Court’s judgments are accessible on its website (<http://www.hudoc.echr.coe.int>)

In addition, Mr Ivanțoc had been detained since his conviction in 1993 in solitary confinement, without contact with other prisoners and without access to newspapers. He was not permitted to see a lawyer, his only contacts with the outside world taking the form of visits and parcels from his wife, subject to authorisation by the prison authorities when they saw fit to give it. All these restrictions, which had no legal basis and were left to the authorities' discretion, were incompatible with a prison regime in a democratic society and had played their part in increasing the applicant's distress and mental suffering. He had been detained in an unheated, badly ventilated cell without natural light, and had not received the treatment required by his state of health, despite a few medical examinations authorised by the prison authorities.

Taken as a whole, and regard being had to its seriousness, its repetitive nature and its purpose, the treatment inflicted on Mr Ivanțoc had caused "severe" pain and suffering, had been particularly serious and cruel and had constituted acts of torture within the meaning of Article 3. As Mr Ivanțoc had been detained at the time when the Convention came into force with regard to the Russian Federation, the latter was responsible on account of his conditions of detention, the treatment inflicted on him and the suffering caused to him in prison. There had therefore been a violation of Article 3 by Russia and by Moldova.

As regards Mr Leșco and Mr Petrov-Popa

The Court considered that it could take it as established that during their detention Mr Leșco and Mr Petrov-Popa had experienced extremely harsh conditions of detention (visits and parcels from their families subject to the discretionary authorisation of the prison administration; deprivation of food at times, or distribution of food unfit for consumption, deprivation most of the time of all forms of appropriate medical assistance despite their state of health, which had been weakened by these conditions of detention; lack of the dietetically appropriate meals prescribed by their doctors). These conditions had deteriorated since 2001.

In addition, Mr Petrov-Popa had been held in solitary confinement since 1993, having no contact with other prisoners or access to newspapers in his own language. Both Mr Petrov-Popa and Mr Leșco had been denied access to a lawyer until June 2003.

Such treatment was apt to engender pain or suffering, both physical and mental. Taken as a whole, and regard being had to its seriousness, it could be termed inhuman and degrading treatment within the meaning of Article 3. As Mr Leșco and Mr Petrov-Popa had been detained at the time when the Convention came into force with regard to Russia, the latter was responsible for their conditions of detention, the treatment inflicted on them and the suffering caused to them in prison. There had therefore been a violation of Article 3 by Russia and by Moldova.

Article 5

Referring to its conclusions under Article 3 regarding the nature of the proceedings in issue, the Court found that none of the applicants had been convicted by a "court", and that a sentence of imprisonment passed by a judicial body such as the "Supreme Court of the Transdnestrian region" at the close of proceedings like those conducted in the present case could not be regarded as "lawful detention" ordered "in accordance with a procedure prescribed by law". That being so, the deprivation of liberty suffered by the applicants could not satisfy the conditions laid down in paragraph 1 (a) of Article 5 of the Convention. It followed that there had been a violation of Article 5 § 1 of the Convention until May 2001 as regards Mr Ilașcu, and that there had been and continued to be a violation of that provision as regards the applicants still detained.

Having regard to the fact that the applicants were detained at the time of the Convention's entry into force with regard to Russia, the Court concluded that the conduct constituting a violation of Article 5

was imputable to the Russian Federation as regards all the applicants. Taking into account its conclusion that the responsibility of the Republic of Moldova by virtue of its positive obligations was engaged from May 2001, the Court concluded that there had been no violation of Article 5 by Moldova as regards Mr Ilaşcu, but a violation of that provision as regards the other applicants.

Article 8

The applicants' complaint was limited to the fact that it was impossible to write freely to their families and the Court from prison and to the difficulties they had encountered in receiving visits from their families. As to the complaint relating to the impossibility of applying to the Court from prison, this fell more naturally under Article 34, which the Court was to examine separately. However, having taken these allegations into account in the context of Article 3, the Court considered that it was not necessary to examine them separately from the standpoint of Article 8.

Article 1 of Protocol No. 1

Even on the supposition that it had jurisdiction to rule on this complaint, the Court noted that it had not been substantiated, and therefore concluded that there had been no violation of the provision relied on.

Article 34

The Court noted that the applicants had asserted that they had not been able to apply to it from their place of detention and that their application, which had been signed by their wives, had been lodged by the only lawyer who was representing them at the beginning of the proceedings. It further noted the threats made against the applicants by the Transdniestrian prison authorities and the deterioration in their conditions of detention after their application was lodged. Such acts constituted an improper and unacceptable form of pressure which had hindered their exercise of the right of individual petition.

In addition, the Court noted with concern the content of a note of April 2001 sent by Russia to the Moldovan authorities, from which it appeared that the Russian authorities had requested Moldova to withdraw the observations it had submitted to the Court in October 2000 in so far as these implied responsibility on the part of Russia on account of the fact that its troops were stationed in Moldovan territory, in Transdniestria. At the hearing on 6 June 2001 the Moldovan Government had declared that it wished to withdraw the part of its observations concerning Russia. Such conduct on the part of the Russian Government 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 the Court's 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 Russia of Article 34 of the Convention.

The Court further noted that after Mr Ilaşcu's release he had spoken to the Moldovan authorities about the possibility of obtaining the release of the other applicants, and that in that context Mr Voronin, the President of Moldova, had publicly accused Mr Ilaşcu of being the cause of his comrades' continued detention, through his refusal to withdraw his application against Moldova and Russia. Such remarks by the highest authority of a Contracting State, making an improvement in the applicants' situation depend on withdrawal of the application lodged against that State or another Contracting State, represented direct pressure intended to hinder exercise of the right of individual petition. That conclusion held good whatever the real or theoretical influence that authority might have on the applicants' situation. Consequently, Mr Voronin's remarks amounted to an interference by Moldova with the applicants' exercise of their right of individual petition, in breach of Article 34.

Judge Casadevall expressed a partly dissenting opinion, joined by Judges Ress, Tulkens, Bîrsan and Fura-Sandström. Judges Ress and Loucaides each expressed a partly dissenting opinion. Judge Bratza expressed a partly dissenting opinion, joined by Judges Rozakis, Hedigan, Thomassen and Panțiru. Judge Kovler expressed a dissenting opinion. These opinions are annexed to the judgment.

16. Eur.Court HR, Issa and Others v. Turkey, Second Section Judgment of 16 November 2004, Application No. 31821/96, (Article 1, Obligation to Respect Human Rights – No Violation). The applicants unsuccessfully complained about the alleged unlawful arrest, detention, ill-treatment and subsequent killing of their relatives in the course of a military operation conducted by the Turkish army in northern Iraq in April 1995.

ECHR 574 (2004)

16.11.2004

Press release issued by the Registrar

The European Court of Human Rights has today notified in writing a judgment in the case of *Issa and Others v. Turkey* (application no. 31821/96).

The Court held unanimously that the applicants' relatives had not been within the jurisdiction of Turkey within the meaning of Article 1 (obligation to respect human rights) of the European Convention on Human Rights.

(The judgment is available only in English.)

1. Principal facts

The applicants, Halima Musa Issa, Beebin Ahmad Omer, Safia Shawan Ibrahim, Fatime Darwish Murty Khan, Fahima Salim Muran and Basna Rashid Omer are Iraqi nationals, born in 1950, 1970, 1951, 1939, 1949, and 1947 respectively. The first applicant brought the application on her own behalf and on behalf of her deceased son, Ismail Hassan Sherif. The remaining applicants brought the application on their own behalf and on behalf of their deceased husbands, Ahmad Fatah Hassan, Abdula Teli Hussein, Abdulkadir Izat Khan Hassan, Abdulrahman Mohammad Sherriff and Guli Zekri Guli respectively. The fourth applicant has also brought the application on behalf of her deceased son, Sarabast Abdulkadir Izzat.

The facts of the case are in dispute between the parties.

The applicants' version of events

According to the applicants, a group of shepherds from the village of Azadi in Sarsang province near the Turkish border left the village on the morning of 2 April 1995 to take their flocks to the hills. They encountered Turkish soldiers who were allegedly carrying out military operations in the area and who immediately abused and assaulted them. The women were told to return to the village and the men were led away.

Subsequently representations were made to the local Turkish commanders with a view to obtaining information about the missing shepherds' whereabouts and securing their release, but without success.

Following the withdrawal of the Turkish troops from the area, the bodies of the shepherds were found. The bodies had bullet wounds and were severely mutilated. Five bodies were found on 3 April close to where the shepherds had last been seen. The remaining two bodies were found two days later.

The Government's version of events

The full texts of the Court's judgments are accessible on its website (<http://www.hudoc.echr.coe.int>)

The Government confirmed that a Turkish military operation had taken place in northern Iraq between 19 March 1995 and 16 April 1995. The Turkish forces had advanced to Mount Medina. The records of the armed forces did not show the presence of any Turkish soldiers in the area indicated by the applicants, the Azadi village being ten kilometres south of the operation zone. There was no record of a complaint having been made to any of the officers of the units operating in the Mount Medina region.

2. Procedure and composition of the Court

The application was lodged with the European Commission of Human Rights on 2 October 1995 and transmitted to the Court on 1 November 1998. It was declared admissible on 30 May 2000.

Judgment was given by a Chamber of 7 judges, composed as follows:

Jean-Paul Costa (French), President,
 András Baka (Hungarian),
 Karel Jungwiert (Czech),
 Volodymyr Butkevych (Ukrainian),
 Wilhelmina Thomassen (Netherlands),
 Mindia Ugrekhelidze (Georgian), judges,
 Feyyaz Gölcüklü (Turkish), ad hoc judge,
 and also Lawrence Early, Deputy Section Registrar.

3. Summary of the judgment

Complaints

The applicants complained of the alleged unlawful arrest, detention, ill-treatment and subsequent killing of their relatives in the course of a military operation conducted by the Turkish army in northern Iraq in April 1995. They relied on Articles 2 (right to life), 3 (prohibition of torture and inhuman or degrading treatment), 5 (right to liberty and security), 8 (right to respect for private and family life), 13 (right to an effective remedy), 14 (prohibition of discrimination) and 18 (limitation on the use of restrictions on rights) of the Convention.

Decision of the Court

Article 1 of the Convention

Notwithstanding the fact that the Government had not explicitly raised the issue of jurisdiction within the meaning of Article 1 of the Convention prior to the admissibility decision, it was a live issue, since it was inextricably linked to the facts underlying the applicants' allegations. As such it was to be taken to have been implicitly reserved for the merits stage.

It followed from Article 1 of the Convention that Contracting States must answer for any infringement of the rights and freedoms protected by the Convention committed against individuals placed under their "jurisdiction". The established case-law indicated that the concept of "jurisdiction" for the purposes of Article 1 of the Convention had to be considered to reflect the term's meaning in public international law, according to which a State's jurisdictional competence was primarily territorial. However, the concept of "jurisdiction" within the meaning of Article 1 of the Convention was not necessarily restricted to the national territory of the Contracting Parties. In exceptional circumstances the acts of Contracting States performed outside their territory or which produced effects there might amount to exercise by them of their jurisdiction within the meaning of Article 1 of the Convention. Thus a State's responsibility might be engaged where, as a consequence of military action – whether

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lawful or unlawful – that State in practice exercised effective control of an area situated outside its national territory. Moreover, a State might also be held accountable for violation of the Convention rights and freedoms of persons who are in the territory of another State but who are found to be under the former State’s authority and control through its agents operating – whether lawfully or unlawfully - in the latter State. Accountability in such situations stemmed from the fact that Article 1 of the Convention could not be interpreted so as to allow a State party to perpetrate violations of the Convention on the territory of another State, which it could not perpetrate on its own territory.

The Court consequently had to ascertain whether the applicants’ relatives had been under the authority and/or effective control, and therefore within the jurisdiction, of the respondent State as a result of the latter’s extra-territorial acts. In this connection, it was undisputed between the parties that the Turkish armed forces had carried out military operations in northern Iraq over a six-week period between 19 March and 16 April 1995.

However, notwithstanding the large number of troops involved in these military operations, it did not appear that Turkey had exercised effective overall control of the entire area of northern Iraq. The essential question to be examined was therefore whether at the relevant time Turkish troops had conducted operations in the area where the killings took place. The standard of proof employed by the Court in seeking to determine this issue in the light of documentary and other evidence was “beyond reasonable doubt”.

The Court noted among other things that the applicants had not given any particulars as to the identity of the commander or of the regiment involved in the impugned acts. Nor had they given a detailed description of the soldiers’ uniforms. There was moreover no independent eye-witness account of the presence of Turkish soldiers in the area in question or of the detention of the shepherds.

Furthermore, the Court was unable to determine, on the basis of the evidence available to it, whether the deaths were caused by gunfire discharged by Turkish troops. In this connection the Court could not overlook the fact that the area where the applicants’ relatives were killed had been the scene of fierce fighting between PKK militants and KDP peshmergas at the relevant time. Moreover, although news reports and official records confirmed the conduct of cross-border operations and the presence of the Turkish army in northern Iraq at the material time, these materials did not make it possible to conclude with any degree of certainty that Turkish troops went as far as the Azadi village in the Spna area.

Finally, the applicants’ allegations that they had made representations to Turkish army officers could not be found to be substantiated. The applicants had failed to provide any cogent and convincing evidence capable of rebutting the Government’s contention that no such complaint had ever been made to Turkish army officers in northern Iraq.

On the basis of all the material in its possession, the Court considered that it had not been established to the required standard of proof that the Turkish armed forces had conducted operations in the area in question, and, more precisely, in the hills above the village of Azadi where, according to the applicants’ statements, the victims had been at that time. The Court was accordingly not satisfied that the applicants’ relatives had been within the “jurisdiction” of the respondent State for the purposes of Article 1 of the Convention.

That finding made it unnecessary to examine the applicants’ substantive complaints under Articles 2, 3, 5, 8, 13, 14 and 18 of the Convention.

17. Eur.Court HR, Mamatkulov and Askarov v. Turkey, Grand Chamber Judgment of 4 February 2005, Application Nos. 46827/99 and 46951/99, (Article 3, Prohibition of Torture – No Violation; Article 6, Right to a Fair Trial – Inadmissible, concerning the extradition proceedings in Turkey; Article 6-1, Right to a Fair Hearing within a Reasonable Time – No Violation, concerning the criminal proceedings in Uzbekistan; Article 34, Individual Applications – Failure to Comply). The applicants, two Uzbek nationals living in Turkey, alleged firstly and unsuccessfully that their extradition to Uzbekistan had put them at real risk of being tortured or ill-treated and secondly further complained of the unfairness of the extradition proceedings in Turkey and the criminal proceedings in Uzbekistan.

ECHR 053 (2005)
04.02.2005

Press release issued by the Registrar

The European Court of Human Rights has today delivered at a public hearing a Grand Chamber judgment in the case of *Mamatkulov and Askarov v. Turkey* (application no. 46827/99).

The Court held:

- by 14 votes to three, that there had been **no violation of Article 3** (prohibition of torture or inhuman or degrading treatment or punishment) of the European Convention on Human Rights;
- unanimously, that no separate examination of the complaint under Article 2 (right to life) of the Convention was necessary;
- unanimously, that Article 6 § 1 (right to a fair trial) did not apply to the extradition proceedings in Turkey;
- by 13 votes to four, that there had been **no violation of Article 6 § 1** concerning the criminal proceedings in Uzbekistan; and,
- by 14 votes to three, that Turkey had **failed to comply with its obligations under Article 34** (right of individual petition).

Under Article 41 (just satisfaction), the Court awarded each of the applicants 5,000 euros (EUR) for non-pecuniary damage and EUR 15,000, jointly, for costs and expenses (less EUR 2,613.17 received from the Council of Europe in legal aid). (The judgment is available in English and French.)

1. Principal facts

The case concerns applications brought by two Uzbek nationals, Rustam Mamatkulov and Abdurasulovic Askarov, who were born in 1959 and 1971 respectively.

The applicants are members of the *ERK* “Freedom” Party (an opposition party in Uzbekistan). They were extradited from Turkey to Uzbekistan on 27 March 1999 and are understood to be currently in custody there.

Mr Mamatkulov arrived in Istanbul from Kazakhstan on 3 March 1999 on a tourist visa. The Turkish police arrested him at Atatürk Airport (Istanbul) and took him into police custody. Mr Askarov came into Turkey on 13 December 1998 on a false passport. The security forces arrested him and took him into police custody on 5 March 1999.

The full texts of the Court’s judgments are accessible on its website (<http://www.hudoc.echr.coe.int>)

Both men were suspected of murder, causing injuries by the explosion of a bomb in Uzbekistan, and an attempted terrorist attack on the President of the Republic. They were brought before a judge who ordered them to be remanded in custody. Uzbekistan requested their extradition under a bilateral treaty with Turkey.

Mr Mamatkulov was questioned by a judge at Bakirköy Criminal Court and Mr Askarov was brought before Fatih Criminal Court (Istanbul). The judge and court noted that the offences with which the applicants were charged were neither political nor military in nature, but ordinary criminal offences. They ordered them to be detained pending their extradition.

The applicants lodged applications with the European Court of Human Rights, which on 18 March 1999 indicated to the Turkish Government, under Rule 39 (interim measures) of the Rules of Court, that “it was desirable in the interests 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 application further at its forthcoming session on 23 March”. On that date the Chamber extended the interim measure until further notice. In the meantime, on 19 March 1999, the Turkish Cabinet had issued a decree for the applicants’ extradition. They were handed over to the Uzbek authorities on 27 March 1999.

In a judgment of 28 June 1999 the High Court of the Republic of Uzbekistan found the applicants guilty of the offences as charged and sentenced them to 20 and 11 years’ imprisonment respectively.

2. Procedure

The applications were lodged with the European Court of Human Rights respectively on 11 and 22 March 1999. They were both declared admissible on 31 August 1999. A Chamber hearing was held on 23 October 2001.

In a Chamber judgment of 6 February 2003 the Court held, unanimously, that there had been no violation of Article 3; that Article 6 was inapplicable to the extradition procedure in Turkey; and, that no issue arose regarding the second complaint lodged under Article 6. It held, by six votes to one, that there had been a breach of Article 34 because Turkey had not complied with the interim measures indicated by the Court.

On 28 April 2003 the Turkish Government requested that the case be referred to the Grand Chamber. The panel of the Grand Chamber granted the request on 21 May 2003.

On 18 December 2003 the President of the Grand Chamber granted three non-governmental organisations – the Aire Centre (London), Human Rights Watch (New York) and the International Commission of Jurists (Geneva) – leave to intervene as third parties in the proceedings.

A Grand Chamber hearing took place in public in the Human Rights Building, Strasbourg, on 17 March 2004.

3. Composition of the Court

Judgment was given by the Grand Chamber of 17 judges, composed as follows:

Luzius **Wildhaber** (Swiss), *President*,
 Christos **Rozakis** (Greek),
 Jean-Paul **Costa** (French),
 Nicolas **Bratza** (British),
 Giovanni **Bonello** (Maltese),

The full texts of the Court’s judgments are accessible on its website (<http://www.hudoc.echr.coe.int>)

Lucius **Cafilisch** (Swiss),
 Elisabeth **Palm** (Swedish)
 Ireneu **Cabral Barreto** (Portuguese),
 Riza **Türmen** (Turkish),
 Françoise **Tulkens** (Belgian),
 Nina **Vajić** (Croatian),
 John **Hedigan** (Irish),
 Matti **Pellonpää** (Finnish),
 Margarita **Tsatsa-Nikolovska** (Citizen of “the Former Yugoslav Republic of Macedonia”),
 András **Baka** (Hungarian),
 Anatoli **Kovler** (Russian),
 Stanislav **Pavlovski** (Moldovan), *judges*,

and also Paul **Mahoney**, *Registrar*.

4. Summary of the judgment

Complaints

Relying on Articles 2 and 3, the applicants’ representatives submitted that, at the time of the applicants’ extradition, they faced a real risk of being tortured or ill-treated.

They also complained, under Article 6, of the unfairness of the extradition procedure in Turkey and of the criminal proceedings in Uzbekistan.

They further maintained that, in extraditing the applicants, Turkey had failed to discharge its obligations under the Convention by not acting in accordance with the indications given by the Court under Rule 39 of its Rules of Court.

Decision of the Court

Articles 2 and 3

The Court took note of reports from international human-rights organisations denouncing an administrative practice of torture and other forms of ill-treatment of political dissidents in Uzbekistan and the Uzbek regime’s repressive policy towards such dissidents. Amnesty International stated in its report for 2001: “Reports of ill-treatment and torture by law enforcement officials of alleged supporters of banned Islamist opposition parties and movements ... continued...”.

However, the Court found that, although those findings described the general situation in Uzbekistan, they did not support the specific allegations made by the applicants, which required corroboration by other evidence.

The Court took into consideration the date the applicants were extradited (27 March 1999) when assessing whether there was a real risk of their being subjected in Uzbekistan to treatment proscribed by Article 3.

The Turkish Government had contended that the applicants were extradited after an assurance was obtained from the Uzbek Government that “[t]he applicants’ property will not be liable to general confiscation, and the applicants will not be subjected to acts of torture or sentenced to capital

punishment". The Government also produced medical reports from the doctors of the Uzbek prisons where Mr Mamatkulov and Mr Askarov were being held.

In the light of the material before it, the Court was not able to conclude that substantial grounds existed on 27 March 1999 for believing that the applicants faced a real risk of treatment proscribed by Article 3. Turkey's failure to comply with the indication given under Rule 39 prevented the Court from assessing whether a real risk existed in the manner it considered appropriate in the circumstances of the case. Consequently, no violation of Article 3 could be found.

Having considered the applicants' allegations under Article 3, the Court found it unnecessary to examine them separately under Article 2.

Article 6 § 1

Concerning the applicants' complaint that they had not had a fair hearing before the criminal court that ruled on their extradition, the Court reiterated that decisions regarding the entry, stay and deportation of aliens did not concern the determination of an applicant's civil rights or obligations or of a criminal charge against him, within the meaning of Article 6 § 1. Consequently, Article 6 § 1 was not applicable.

Concerning the applicants submission that there was no possibility of their being given a fair trial in Uzbekistan, the Court considered that the risk of a flagrant denial of justice had to be assessed by reference to the facts which the State knew or should have known when it extradited those concerned. When extradition was deferred following an indication by the Court under Rule 39, the risk of a flagrant denial of justice had also be assessed in the light of the information available to the Court when it considered the case.

Although, in the light of the information available, there might have been reasons for doubting at the relevant time that the applicants would receive a fair trial in the State of destination, there was not sufficient evidence to show that any possible irregularities in the trial were liable to constitute a flagrant denial of justice. Consequently, no violation of Article 6 § 1 could be found.

Article 34

The Court noted that the applicants, once extradited, lost contact with their lawyers, and therefore lost an opportunity to gather evidence in support of their allegations under Article 3. As a consequence, the Court was prevented from properly assessing whether the applicants were exposed to a real risk of ill-treatment.

The Court observed that, in a number of recent decisions and orders, international courts and institutions had stressed the importance and purpose of interim measures and pointed out that compliance with such measures was necessary to ensure the effectiveness of their decisions. In proceedings concerning international disputes, the purpose of interim measures was to preserve the parties' rights.

The Court also stressed that the Convention right to individual application had over the years become of high importance and was now a key component of the machinery for protecting the rights and freedoms set out in the Convention.

In that context, the Court noted that, in the light of the general principles of international law, the law of treaties and international case-law, the interpretation of the scope of interim measures could not be dissociated from the proceedings to which they related or the decision on the merits they sought to protect. The Court reiterated that Article 31 § 1 of the Vienna Convention on the Law of Treaties

The full texts of the Court's judgments are accessible on its website (<http://www.hudoc.echr.coe.int>)

provided that treaties had to be interpreted in good faith in the light of their object and purpose, and also in accordance with the principle of effectiveness.

The Court observed that the International Court of Justice, the Inter-American Court of Human Rights, the Human Rights Committee and the Committee against Torture of the United Nations had all confirmed in their reasoning in recent decisions that the preservation of the asserted rights of the parties in the face of the risk of irreparable damage represented an essential objective of interim measures in international law. Whatever the legal system in question, the proper administration of justice required that no irreparable action be taken while proceedings were pending.

Under the Convention system, interim measures, as they had consistently been applied in practice, played a vital role in avoiding irreversible situations that would prevent the Court from properly examining the application and, where appropriate, securing to the applicant the practical and effective benefit of the Convention rights asserted. Accordingly, in those conditions, a failure by a State which had ratified the Convention to comply with interim measures would undermine the effectiveness of the right of individual application guaranteed by Article 34 and the State's formal undertaking in Article 1 to protect the rights and freedoms in the Convention.

Indications of interim measures given by the Court allowed it, not only to carry out an effective examination of the application, but also to ensure that the protection afforded to the applicant by the Convention was effective; such indications also subsequently allowed the Council of Europe's Committee of Ministers to supervise execution of the final judgment. Such measures therefore enabled the State concerned to discharge its obligation to comply with the final judgment of the Court, which was legally binding by virtue of Article 46 of the Convention.

Consequently, the effects of the indication of an interim measure to a Contracting State – in this case Turkey – had to be examined in the light of the obligations which are imposed by Articles 1, 34 and 46 of the Convention.

The facts of the case clearly showed that the Court was prevented by the applicants' extradition to Uzbekistan from conducting a proper examination of their complaints in accordance with its settled practice in similar cases and ultimately from protecting them, if need be, against potential violations of the Convention as alleged. As a result, the applicants were hindered in the effective exercise of their right of individual application guaranteed by Article 34, which the applicants' extradition rendered meaningless.

The Court reiterated that, by virtue of Article 34, States which had ratified the Convention undertook to refrain from any act or omission that might hinder the effective exercise of an individual applicant's right of application. A failure to comply with interim measures had to be regarded as preventing the Court from effectively examining the applicant's complaint and as hindering the effective exercise of his or her right and, accordingly, as a violation of Article 34.

Having regard to the material before it, the Court concluded that, by failing to comply with the interim measures indicated under Rule 39 of the Rules of Court, Turkey was in breach of its obligations under Article 34.

Judge Cabral Barreto expressed a concurring opinion; Judge Rozakis expressed a partly dissenting opinion; Judges Sir Nicolas Bratza, Bonello and Hedigan expressed a joint partly dissenting opinion and Judges Caflisch, Türmen and Kovler expressed a joint partly dissenting opinion, all of which are annexed to the judgment.

18. *Eur.Court HR, Shamayev and Others v. Georgia and Russia, Former Second Section Judgment of 12 April 2005, Application No. 36378/02, (Concerning Georgia: Article 2, Right to Life – No Violation, as regards Mr Aziev; Article 3, Prohibition of Torture – No Violation, as regards five extradited applicants; Article 2, Right to Life – No Violation, as regards five extradited applicants; Article 5-1, Right to Liberty and Security – No Violation; Article 5-2, Right to be Informed Promptly of the Reasons of One’s Arrest– Violation, as regards all the applicants; Article 5-4, Right to a Speedy Ruling on the Lawfulness of Detention – Violation, as regards all the applicants; Article 3 – Violation, if the decision to extradite Mr Gelogayev were to be enforced; Article 3 – Violation, as regards Mr Shamayev, Mr Aziev, Mr Khadjiev, Mr Vissitov, Mr Baimurzayev, Mr Khashiev, Mr Gelogayev, Mr Magomadov, Mr Kushtanashvili, Mr Issayev and Mr Khanchukayev on account of the treatment inflicted on them during the night of 3 to 4 October 2002; Article 13, Right to an Effective Remedy, taken together with Articles 2 and 3 – Violation, as regards Mr Shamayev, Mr Adayev, Mr Aziev, Mr Khadjiev and Mr Vissitov; Article 34, Individual Applications – Violation, as regards Mr Shamayev, Mr Aziev, Mr Khadjiev and Mr Vissitov) (Concerning Russia: Article 38-1-a, Examination of the Case – Violation, on account of the lack of cooperation by the Russian authorities; Article 34, Individual Applications – Violation, as regards the five applicants extradited to Russia on 4 October 2002 and the two applicants arrested by the Russian authorities on 19 February 2004). The applicants, 13 Russian and Georgian nationals of Chechen origin, unsuccessfully claimed that their extradition to Russia, where capital punishment had not been abolished, exposed them to a real danger of death or torture and further complained of the treatment inflicted on them in the night of 3 to 4 October 2002 during the prison clashes.*

ECHR 196 (2005)
12.04.2005

Press release issued by the Registrar

The European Court of Human Rights has today notified in writing its judgment in the case of *Shamayev and 12 Others v. Georgia and Russia* (application no. 36378/02).

Concerning Georgia

The Court held unanimously:

- that there had been **no violation of Article 2** of the European Convention on Human Rights (right to life) as regards Mr Aziev;
- that there had been **no violation of Article 3** of the Convention (prohibition of inhuman and degrading treatment) as regards the five extradited applicants;
- that there had been **no violation of Article 2** as regards the five extradited applicants;
- that there had been **no violation of Article 5 § 1** (right to liberty and security);
- that there had been a **violation of Article 5 § 2** (right to be informed promptly of the reasons for one’s arrest) as regards all the applicants;
- that there had been a **violation of Article 5 § 4** (right to a speedy ruling on the lawfulness of detention) as regards all the applicants;

The full texts of the Court’s judgments are accessible on its website (<http://www.hudoc.echr.coe.int>)

- that it was not necessary to examine Mr Khadjiev's complaint concerning Article 5 § 2 of the Convention under Article 6 § 3;
- that it was not necessary to examine Mr Khadjiev's complaint concerning the fact that he had been handed over to the Russian authorities without any court decision from the standpoint of Article 2 § 1 of the Convention and Article 4 of Protocol No. 4 (freedom of movement);

and by six votes to one:

- that there **would be a violation of Article 3** of the Convention if the decision to extradite Mr Gelogayev were to be enforced;
- that there had been a **violation of Article 3** as regards Mr Shamayev, Mr Aziev, Mr Khadjiev, Mr Vissitov, Mr Baimurzayev, Mr Khashiev, Mr Gelogayev, Mr Magomadov, Mr Kushtanashvili, Mr Issayev and Mr Khanchukayev on account of the treatment inflicted on them during the night of 3 to 4 October 2002;
- that there had been a **violation of Article 13** (right to an effective remedy) taken together with Articles 2 and 3 as regards Mr Shamayev, Mr Adayev, Mr Aziev, Mr Khadjiev and Mr Vissitov;
- that there had been a **violation of Article 34** (right of individual application) as regards Mr Shamayev, Mr Aziev, Mr Khadjiev and Mr Vissitov;

Concerning Russia

The Court held:

- unanimously, that there had been a **violation of Article 38 § 1 (a)** (obligation to furnish all necessary facilities for the adversarial examination of the case) on account of the lack of cooperation by the Russian authorities;
- by six votes to one, that there had been a **violation of Article 34** as regards the five applicants extradited to Russia on 4 October 2002 and the two applicants arrested by the Russian authorities on 19 February 2004;
- unanimously, that it did not have jurisdiction to examine the complaints Mr Khadjiev made against Russia on 27 October 2003;
- unanimously, that it did not have jurisdiction to examine the other complaints under Article 2, Article 3 and Article 6 §§ 1, 2 and 3.

Under 41 (just satisfaction) the Court held by six votes to one that Georgia was to pay the 13 applicants, for non-pecuniary damage, the overall sum of 80,500 euros (EUR), in awards ranging from EUR 2,500 to EUR 11,000, and EUR 4,000 to the applicants jointly for costs and expenses. The Court also held unanimously that the finding of a potential violation of Article 3 provided Mr Gelogayev with sufficient just satisfaction for any non-pecuniary damage he might have sustained.

In addition, the Court held by six votes to one that Mr Shamayev, Mr Aziev, Mr Khadjiev, Mr Adayev, Mr Vissitov, Mr Khashiev, and Mr Baimurzayev should receive from Russia EUR 6,000 each for non-pecuniary damage, and EUR 2,000 jointly for costs and expenses.

Lastly, the Court held unanimously that Russia was to pay into the budget of the Council of Europe EUR 1,580.70 in respect of the Court's operational expenditure, that sum corresponding to the costs incurred by the Court for the planned fact-finding visit to Russia.

1. Principal facts

The full texts of the Court's judgments are accessible on its website (<http://www.hudoc.echr.coe.int>)

The applicants are 13 Russian and Georgian nationals of Chechen origin. Their names and years of birth are as follows: Abdul-Vakhab Shamayev, 1975; Rizvan (or Rezvan) Vissitov, 1977; Khusein Aziev, 1973; Adlan (or Aslan) Adayev (or Adiev), 1968; Khusein Khadjiev, 1975; Ruslan Gelogayev, 1958; Ahmed Magomadov, 1955; Hamzat Issayev, 1975; Robinzon Margoshvili, 1967; Giorgi Kushtanashvili (year of birth undisclosed), Aslambek Khanchukayev, 1981; Islam Khashiev *alias* Rustam Elihadjiev *alias* Bekkhan Mulkoyev, 1979 or 1980; and Timur (Ruslan) Baimurzayev *alias* Khusein Alkhanov qui est né en 1975.

Between 3 and 5 August 2002 the applicants were arrested by the Georgian border police at a checkpoint in the village of Guirevi and charged with crossing the border illegally, carrying offensive weapons and arms trafficking. On 6 and 7 August 2002 the Tbilisi Court of First Instance remanded them in custody for three months.

On 6 August 2002 the Russian authorities applied to the Georgian authorities for their extradition, asserting that the persons detained were terrorist rebels who had taken part in the fighting in Chechnya. At the request of the Georgian procurator-general's office, the Russian authorities supplied their Georgian counterparts with additional documents on 12 and 19 August and on 30 September 2002. Having examined those documents and other evidence, the Georgian procurator-general's office identified, in the first place, five of the applicants. In the light of the gravity of the charges against the persons concerned in Russia, Georgia's deputy procurator-general decided to authorise their extradition on 2 October 2002.

In the night of 3 to 4 October 2002, while 11 of the applicants were in the same cell in Tbilisi no. 5 prison, Mr Adayev and Mr Margoshvili being at that time in the prison infirmary, the applicants learned from the television that the extradition of some of their number was imminent. Later that night, when prison officers asked them to leave their cell so that it could be disinfected, the applicants refused to comply. Violent clashes took place between them and about fifteen members of the special forces under the orders of the Georgian Ministry of Justice.

On 4 October 2002 Mr Shamayev, Mr Adayev, Mr Aziev, Mr Khadjiev and Mr Vissitov were extradited from Georgia to Russia. They were placed on 17 and 18 October 2002 in a remand prison ("*SIZO*") in A, a town in the Stavropol region. The place where they were detained between 4 and 17-18 October 2002 remains unknown. On 26 July 2003 Mr Shamayev, Mr Khadjiev, Mr Vissitov and Mr Adayev were transferred to a *SIZO* in town B in the Stavropol region; the Russian Government affirms that Mr Aziev was also transferred there on an unknown date. According to the Russian Government, at the end of the proceedings against them Mr Shamayev and Mr Khadjiev were sentenced to three years and six months' imprisonment, Mr Vissitov to ten years and Mr Adayev to one year and six months.

The applicants who had not been extradited continued to be detained in Georgia. Subsequently, Mr Margoshvili was released on his acquittal on 8 April 2003, Mr Gelogayev was released following a judgment of 6 February 2004, and Mr Khanchukayev, Mr Issayev, Mr Magomadov and Mr Kushtanashvili were released in January and February 2005. After disappearing in Tbilisi on 16 or 17 February 2004, Mr Khashiev and Mr Baimurzayev were arrested by the Russian authorities on 19 February 2004; they are apparently now detained in Russia, at the Essentuki remand prison.

2. Procedure and composition of the Court

On 4 and 9 October 2002 the applicants sent to the European Court of Human Rights a preliminary application contesting their imminent extradition to Russia. Applying Rule 39 (interim measures) of its Rules of Court, the Court indicated to the Georgian Government that it was desirable, as an interim measure, not to extradite the applicants to Russia before the Chamber had had the opportunity to examine the application in the light of the information to be supplied by the Georgian Government.

The full texts of the Court's judgments are accessible on its website (<http://www.hudoc.echr.coe.int>)

The Russian Government were notified of the application as a matter of urgency under Rule 40. On 26 November 2002 the Court decided not to extend the application of Rule 39 in the light of the undertakings given by Russia.

A hearing was held on 16 September 2003, following which the Chamber declared the application admissible. From 23 to 25 February 2004 a delegation of the Court took oral evidence in Tbilisi from six applicants who had not been extradited and 12 witnesses. A fact-finding visit due to be made to Russia had to be cancelled on 4 May 2004 on account of the uncooperative attitude of the Russian authorities.

Judgment was given by a Chamber of 7 judges, composed as follows:

Jean-Paul **Costa** (French), *President*,
 András **Baka** (Hungarian),
 Loukis **Loucaides** (Cypriot),
 Karel **Jungwiert** (Czech),
 Volodymyr **Butkevych** (Ukrainian),
 Mindia **Ugrekheldze** (Georgian),
 Anatoli **Kovler** (Russian), *judges*,

and also Sally **Dollé**, *Section Registrar*.

3. Summary of the judgment

Complaints

The applicants submitted that their extradition to Russia, where capital punishment had not been abolished, exposed them to a real danger of death or torture contrary to Articles 2 and 3 of the Convention. They further complained of the treatment inflicted on them in the night of 3 to 4 October 2002. Their lawyers also asserted that Mr Aziev had died while being extradited. The applicants complained in addition of violations of Article 5 §§ 1, 2 and 4, Article 13 and Article 6 §§ 1 and 3.

Decision of the Court

AS REGARDS GEORGIA

Articles 2 and 3 of the Convention

The alleged death of Mr Aziev

There was no evidence justifying the conclusion that Mr Aziev had died before, during or after his extradition. Moreover, he had lodged a further application in August 2003, directed solely against Russia, in which he had not made any complaint about alleged ill-treatment. That being so, the Court held unanimously that there had been no violation of Article 2 in respect of Mr Aziev.

The alleged risks of being sentenced to death and of ill-treatment following extradition

With regard to the five extradited applicants: the Court concluded that in the light of the material in its possession the facts of the case did not support “beyond a reasonable doubt” the assertion that at the time when the Georgian authorities took the decision there were serious and well-founded reasons to believe that extradition would expose the applicants to a real personal risk of suffering inhuman or degrading treatment, within the meaning of Article 3 of the Convention. There had accordingly been no violation of that provision by Georgia.

The full texts of the Court’s judgments are accessible on its website (<http://www.hudoc.echr.coe.int>)

With regard to the applicants against whom no extradition order had been made: namely Mr Issayev, Mr Khantchukayev, Mr Magomadov, Mr Kushtanashvili and Mr Margoshvili, the Court declared their complaint inadmissible because to date there had been no decision to extradite them. Moreover, Mr Kushtanashvili and Mr Margoshvili were not at risk of extradition on account of their Georgian nationality.

With regard to the applicants against whom an extradition order had been made: namely Mr Baimurzayev, Mr Khashiev and Mr Gelogayev, the Court noted that Mr Baimurzayev and Mr Khashiev were currently detained in Russia after disappearing in Georgia and took the view on that account that it was not necessary to determine whether there would have been a violation of Articles 2 and 3 of the Convention if the extradition order made against them on 28 November had been enforced.

The extradition order made against Mr Gelogayev had been suspended but might be enforced when the proceedings concerning his refugee status ended. In order to determine whether his extradition could entail a violation of the Convention, the Court had to take account of the present circumstances.

Having regard to the material placed before it, the Court considered that the assessments on which the decision to extradite Mr Gelogayev had been founded two years before no longer sufficed to exclude all risk of ill-treatment prohibited by the Convention being inflicted on him. The Court noted in particular the new extremely alarming phenomenon of persecution and killings of persons of Chechen origin who had lodged applications with it. According to reports by human rights organisations, there had been a sudden rise in 2003 and 2004 in the number of cases of persecution of persons who had lodged applications with the Court, in the form of threats, harassment, detention, enforced disappearances and killings.

Consequently, the Court considered that if the decision of 28 November 2002 to extradite Mr Gelogayev were to be enforced on the basis of the assessments made on that date, there would be a violation of Article 3 of the Convention.

The risk of extrajudicial execution

The Court noted that governmental and non-governmental organisations had reported numerous cases of killings of persons of Chechen origin or their arbitrary detention followed by their disappearance in the Republic of Chechnya. However, in the present case there was nothing to justify the assertion that at the time when the Georgian authorities took the relevant decision there were serious and well-founded reasons to believe that extradition would expose the applicants to a real risk of extrajudicial execution, contrary to Article 2 of the Convention. Accordingly, there had been no violation of that provision.

The events of the night of 3 to 4 October 2002

The Court considered that it had been established that force had been used to make 11 applicants leave the cell in which they were all being held with a view to the extradition of some of their number and that that use of force had been preceded by peaceful attempts to persuade the prisoners to comply with the order to leave the cell. There was no doubt that the applicants had put up a hostile resistance to the prison officers and special forces, by arming themselves with various objects. In those circumstances the Court considered that the intervention of 15 special forces officers, armed with truncheons, could reasonably be considered necessary to ensure the safety of the prison staff and prevent disorder spreading through the rest of the prison.

However, it appeared that the applicants had been informed only that the extradition of some of them was imminent, without being told which ones, that this information had not been given to them until 3

October 2002 in the middle of the night, and that a few hours later prison officers ordered them to leave their cell giving fictitious reasons. Such conduct on the part of the authorities amounted to attempted deception. In the Court's view the attitude of the Georgian authorities and the way in which they had managed the extradition enforcement procedure had incited the applicants to resist, so that the recourse to physical force had not been justified by the prisoners' conduct.

As a result of this confrontation the applicants received various wounds and fractures which were noted in a medical report dated 4 October 2002, as regards the non-extradited applicants at least. Four of the applicants had been found guilty of injuring members of the special forces and sentenced in Georgia to two years and five months' imprisonment. However, no inquiry had been conducted into the disproportionate nature of the intervention.

Having regard to the unacceptable circumstances of the procedure for the enforcement of the extradition orders against four applicants by the Georgian authorities, and in view of the injuries inflicted on some of the applicants by the special forces, followed by the lack of appropriate medical treatment in good time, the Court considered that the 11 applicants detained in Tbilisi no. 5 prison that night were subjected to physical and mental suffering of such a nature that it amounted to inhuman treatment. It accordingly held that there had been a violation of Article 3.

Article 5 of the Convention

Lawfulness of the detention

The Court considered that the detention of the applicants in Georgia from 3 August to 4 October 2002 was justified in principle by virtue of Article 5 § 1 (f) of the Convention and that there had accordingly been no violation of Article 5 § 1 of the Convention.

The detention of Mr Khashiev and Mr Baimurzayev following their disappearance

As the disappearance of these two applicants had occurred after it had delivered its admissibility decision in the case, the Court did not have jurisdiction to examine or comment on their arrest or detention by the Russian authorities.

Alleged violation of Article 5 §§ 2 and 4

The Court noted that ten of the applicants had met trainee prosecutors from the Georgian procurator-general's office but had not received sufficient information about their detention pending extradition. It accordingly held that there had been a violation of Article 5 § 2. In the light of that finding, it did not consider it necessary to examine Mr Khadjiev's complaint under Article 5 § 2 of the Convention from the standpoint of Article 6 § 3 also.

As the applicants had not been informed that they were being detained pending extradition, and as they had not been given copies of any of the documents in the file, their right to appeal against their detention had been deprived of all substance. The Court accordingly held that there had been a violation of Article 5 § 4 of the Convention.

Article 13 taken together with Articles 2 and 3 of the Convention

The Court considered that the applicants extradited on 4 October 2002 and their lawyers had not been informed of the extradition orders made against them on 2 October 2002 and that the relevant authorities had unjustifiably hindered their exercise of the right to seek a remedy that should, at least in theory, have been available to them. In that connection, the Court made it clear that it found it unacceptable for a person to learn that he was to be extradited only moments before being taken to the

airport, when his reason for fleeing the receiving country had been his fear of breaches of Articles 2 and 3 of the Convention.

The Court accordingly held that there had been a violation of Article 13 with regard to the five extradited applicants in that they had not had any opportunity of submitting to a national authority their complaints under Articles 2 and 3. In the light of that finding, it considered that it was not necessary to examine the same complaint by Mr Khadjiev under Article 2 § 1 and Article 4 of Protocol No. 4.

Article 34 of the Convention

On 4 October 2004, between 3.35 and 4.20 p.m. the Court received by fax from 11 of the applicants requests that it indicate interim measures to ensure that they would not be extradited. At 6 p.m. on the same day, and again at 7.59 p.m., the Court informed the Georgian Government that it had decided to indicate such measures in the case. However, at 7.10 p.m. the Georgian authorities extradited five of the applicants. Once extradited they had been held in isolation, without contact with their representatives. The Russian Government had even maintained that they did not wish to lodge an application against Russia and that examination of the case was impossible from the procedural point of view.

The principle of equality of arms, inherent in the effective exercise of the right of petition during the proceedings before the Court, had thus been unacceptably infringed. In addition, the Court itself had not been able to carry out the fact-finding visit to Russia it had decided to undertake by virtue of Article 38 § 1 (a) of the Convention, and, on the sole basis of a few written communications with the extradited applicants, had not been in a position to complete its examination of the merits of their complaints against Russia. The gathering of evidence had thus been frustrated. As a result, the applicants' exercise of their right of petition had therefore been seriously obstructed, and the Court concluded that Georgia had failed to discharge its obligations under Article 34 of the Convention as regards the extradited applicants.

AS REGARDS RUSSIA

Article 38 of the Convention

The Court reiterated the fundamental importance of the principle that Contracting States must cooperate with it. In addition to that obligation, the Russian Government had a duty to comply with the specific undertakings it had given the Court on 19 November 2002, notably the undertaking to allow the Court access without any hindrance to the extradited applicants, including the possibility of a fact-finding visit. On the basis of those undertakings the Court had decided to lift the interim measure indicated to Georgia and to hold an on-the-spot investigation in Georgia and Russia. However, it had been able to carry out only the Georgian part of the inquiry.

Faced with the refusal of access to the applicants, the Court had repeatedly urged the Russian Government to permit it to conduct the investigation in order to establish the facts and thus to discharge its obligations under Article 38 § 1 (a) of the Convention. The Russian Government had not responded favourably to those requests and none of the reasons it had given was capable of absolving the Russian State from its obligation to cooperate with the Court in its attempts to establish the truth.

By obstructing the Court's fact-finding visit and denying it access to the applicants detained in Russia the Russian Government had unacceptably hindered the establishment of part of the facts in the case and had therefore failed to discharge its obligations under Article 38 § 1 (a) of the Convention.

Article 34 of the Convention

The full texts of the Court's judgments are accessible on its website (<http://www.hudoc.echr.coe.int>)

The Court observed that in addition to its obligations under Article 34 the Russian Government had a duty to comply with the specific undertakings it had given the Court on 19 November 2002, including the undertaking to ensure that all the applicants, without exception, would have unobstructed access to the Court. On the basis of those unequivocal undertakings the Court had lifted the interim measure indicated to Georgia.

Yet despite the Court's requests the applicants' representatives had not been able to enter into contact with them and even the Court had been refused permission to interview them. In addition, the Russian Government had several times expressed doubt as to the extradited applicants' intention to apply to the Court, and as to the authenticity of their applications and the authority they had given their representatives to act on their behalf. They had asserted in reply to one letter sent by the Court to the applicants' Russian lawyers that the applicants had complained about the Court's attempts to contact them. Moreover, the Russian Government had submitted at first that a letter sent by the Court to the extradited applicants directly in prison had not been received. They had also contended that those applicants had never sent the Court any complaint against Russia, an assertion which four of the persons concerned unequivocally denied later.

That being so, the Court considered that there was reason for serious doubt as to the freedom of the extradited applicants to correspond with it without hindrance and to put forward their complaints in greater detail, which they had been prevented from doing by the haste with which they had been extradited.

As regards Mr Baimurzayev and Mr Khashiev, the two respondent Governments had not yet supplied any convincing explanation of either their disappearance a few days before the arrival of the Court's delegation in Tbilisi or their arrest three days later by the Russian authorities.

In conclusion, the Court considered that the effective examination of the applicants' complaints against Georgia had been detrimentally affected by the conduct of the Russian Government, and examination of the admissible part of the application against Russia had been impossible. It considered that the measures taken by the Russian Government had hindered the effective exercise by Mr Shamayev, Mr Aziev, Mr Vissitov, Mr Khadjiev, Mr Adayev, Mr Khashiev and Mr Baimurzayev of the right to apply to the Court, as guaranteed by Article 34 of the Convention. There had therefore been a violation of that provision.

Other complaints

The Court considered that it did not have jurisdiction to examine the complaints under Articles 2, 3, and 6 §§ 1, 2 and 3 of the Convention.

Judge Kovler expressed a dissenting opinion which is annexed to the judgment.

19. *Eur.Court HR, Öcalan v. Turkey, Grand Chamber Judgment of 12 May 2005, Application No. 46221/99, (Article 5-4, Right to Have Lawfulness of Detention Decided Speedily by a Court – Violation; Article 5-1, Right to Liberty and Security – No Violation; Article 5-3, Right to be Brought Promptly before a Judge – Violation; Article 6-1, Right to a Fair Trial – Violation; Article 6-1, Right to a Fair Trial, taking together with 6-3-b, Right to Adequate time and Facilities for Preparation of Defence, and 6-3-c, Right to Legal Assistance – Violation; Article 2, Right to Life – No Violation; Article 14, Prohibition of Discrimination, taken in conjunction with Article 2, Right to Life – No Violation; Article 3, Prohibition of Torture – No Violation, concerning the implementation of the death penalty; Article 3, Prohibition of Torture – Violation, concerning the imposition of the death penalty following an unfair trial; Article 3, Prohibition of Torture – No Violation, concerning the conditions in which the applicant had been transferred from Kenya to Turkey or the conditions of his detention on the island of İmralı; Article 34, Individual Applications – No Violation).* The applicant was a Turkish national who was expelled from Syria and Kenya and subject to seven arrest warrants and wanted notices circulated by Interpol and was further accused of instigating terrorist acts and founding an armed gang in order to destroy the integrity of the Turkish State. The applicant partially successfully complained *inter alia* that the imposition of the death penalty on him in Turkey would be in violation of his Convention rights, as was his transfer from Kenya to Turkey, his detention in Turkey and his impartial trial in Turkey which was presided over by a military judge.

ECHR 254 (2005)
12.05.2005

Press release issued by the Registrar

The European Court of Human Rights has today delivered at a public hearing its Grand Chamber judgment in the case of *Öcalan v. Turkey* (application no. 46221/99).

In its judgment the Grand Chamber made the same findings of violation and non-violation of the European Convention on Human Rights as the Chamber in its judgment of 12 March 2003.

Detention

The Court held, unanimously, that there had been:

- a violation of Article 5 § 4 (right to have lawfulness of detention decided speedily by a court) of the European Convention on Human Rights, given the lack of a remedy by which the applicant could have had the lawfulness of his detention in police custody decided;
- no violation of Article 5 § 1 (no unlawful deprivation of liberty) of the Convention, concerning the applicant's arrest;
- a violation of Article 5 § 3 (right to be brought promptly before a judge) given the failure to bring the applicant before a judge promptly after his arrest.

Fair trial

The Court held:

The full texts of the Court's judgments are accessible on its website (<http://www.hudoc.echr.coe.int>)

- by 11 votes to six, that there had been a violation of Article 6 § 1 (right to a fair trial) in that the applicant had not been tried by an independent and impartial tribunal; and,
- unanimously, that there had been a violation of Article 6 § 1, taken together with Article 6 § 3 (b) (right to adequate time and facilities for preparation of defence) and (c) (right to legal assistance), in that the applicant had not had a fair trial.

Death penalty

The Court held:

- unanimously, that there had been no violation of Article 2 (right to life);
- unanimously, that there had been no violation of Article 14 (prohibition of discrimination) taken in conjunction with Article 2, concerning the implementation of the death penalty;
- unanimously, that there had been no violation of Article 3 (prohibition of ill-treatment), concerning the implementation of the death penalty;
- and, by 13 votes to four, that there had been a violation of Article 3 concerning the imposition of the death penalty following an unfair trial.

Treatment and conditions

The Court held, unanimously, that there had been:

- no violation of Article 3 concerning the conditions in which the applicant had been transferred from Kenya to Turkey or the conditions of his detention on the island of İmralı.

Other complaints

The Court also held, unanimously, that:

- there had been no violation of Article 34 (right of individual application); and that
- it was not necessary to examine separately the applicant's remaining complaints under Articles 7 (no punishment without law), 8 (right to respect for private and family life), 9 (freedom of thought, conscience and religion), 10 (freedom of expression), 13 (right to an effective remedy), 14 and 18 (limitation on use of restrictions on rights).

Under Article 41 (just satisfaction), the Court held, unanimously, that its findings of violations of Articles 3, 5 and 6 constituted in themselves sufficient just satisfaction for any damage sustained by the applicant and awarded the applicant's lawyers 120,000 euros (EUR) for costs and expenses.

(The judgment is available in English and French.)

1. Principal facts

The case concerns an application brought by a Turkish national, Abdullah Öcalan, who was born in 1949. He is currently incarcerated in İmralı Prison (Bursa, Turkey).

At the time of the events in question, the Turkish courts had issued seven warrants for Mr Öcalan's arrest and a wanted notice (red notice) had been circulated by Interpol. He was accused of founding an armed gang in order to destroy the integrity of the Turkish State and of instigating terrorist acts resulting in loss of life.

On 9 October 1998 he was expelled from Syria, where he had been living for many years. From there he went to Greece, Russia, Italy and then again Russia and Greece before going to Kenya, where, on the evening of 15 February 1999, in disputed circumstances, he was taken on board an aircraft at Nairobi airport and arrested by Turkish officials. He was then flown to Turkey.

The full texts of the Court's judgments are accessible on its website (<http://www.hudoc.echr.coe.int>)

On arrival in Turkey, he was taken to İmralı Prison, where he was held in police custody from 16 to 23 February 1999 and questioned by the security forces. He received no legal assistance during that period. His lawyer in Turkey was prevented from travelling to visit him by members of the security forces. 16 other lawyers were also refused permission to visit on 23 February 1999.

On 23 February 1999 the applicant appeared before an Ankara State Security Court judge, who ordered him to be placed in pre-trial detention.

The applicant was allowed only restricted access to his lawyers who were not authorised by the prison authorities to provide him with a copy of the documents in the case file, other than the indictment. It was not until the hearing on 4 June 1999 that the State Security Court gave the applicant permission to consult the case file under the supervision of two registrars and authorised his lawyers to provide him with a copy of certain documents.

On 29 June 1999 Ankara State Security Court found the applicant guilty of carrying out actions calculated to bring about the separation of a part of Turkish territory and of forming and leading an armed gang to achieve that end. It sentenced him to death, under Article 125 of the Criminal Code. That decision was upheld by the Court of Cassation.

Under Law no. 4771, published on 9 August 2002, the Turkish Assembly resolved to abolish the death penalty in peacetime. On 3 October 2002 Ankara State Security Court commuted the applicant's death sentence to life imprisonment.

An application to set aside the provision abolishing the death penalty in peacetime for persons convicted of terrorist offences was dismissed by the Constitutional Court on 27 December 2002.

2. Procedure and composition of the Court

The application was lodged with the European Court of Human Rights on 16 February 1999. A Chamber hearing was held on 21 November 2000 and the case was declared partly admissible on 14 December 2000. In its Chamber judgment of 12 March 2003, the Court held, among other things, that there had been a violation of Article 5 §§ 3 and 4, Article 6 §§ 1 and 3 (b) and (c), and also of Article 3 on account of the fact that the death penalty had been imposed after an unfair trial.

The case was referred to the Grand Chamber at the request of the applicant and the Government. A Grand Chamber hearing was held on 9 June 2004.

Judgment was given by the Grand Chamber of 17 judges, composed as follows:

Luzius Wildhaber (Swiss), *President*,
 Christos Rozakis (Greek),
 Jean-Paul Costa (French),
 Georg Ress (German),
 Nicolas Bratza (British),
 Elisabeth Palm (Swedish),
 Lucius Caflisch (Swiss)
 Loukis Loucaides (Cypriot),
 Riza Türmen (Turkish),
 Viera Strážnická (Slovakian),
 Peer Lorenzen (Danish),
 Volodymyr Butkevych (Ukrainian),
 John Hedigan (Irish),
 Mindia Ugrekhelidze (Georgian),
 Lech Garlicki (Polish),

The full texts of the Court's judgments are accessible on its website (<http://www.hudoc.echr.coe.int>)

Javier Borrego Borrego (Spanish),
Alvina Gyulumyan (Armenian), *judges*,

and also Paul Mahoney, *Registrar*.

3. Summary of the judgment

Complaints

The applicant complained, in particular, that:

- the imposition and/or execution of the death penalty was or would be in violation of Articles 2, 3 and 14 of the Convention;
- the conditions in which he was transferred from Kenya to Turkey and detained on the island of İmralı – in particular that the Turkish authorities failed to facilitate transport to and from the island, making it difficult for his family and lawyers to visit him – amounted to inhuman treatment in breach of Article 3;
- he was deprived of his liberty unlawfully, that he was not brought promptly before a judge and that he did not have access to proceedings to challenge the lawfulness of his detention, in breach of Article 5 §§ 1, 3 and 4;
- he did not have a fair trial because he was not tried by an independent and impartial tribunal (given the presence of a military judge on the bench of the State Security Court), that the judges were influenced by hostile media reports and that his lawyers were not given sufficient access to the court file to enable them to prepare his defence properly, in breach of Article 6 § 1;
- his legal representatives in Amsterdam were prevented from contacting him after his arrest and that the Turkish Government failed to reply to the request of the European Court of Human Rights for them to supply information, in violation of Article 34.

He also relied on Articles 7, 8, 9, 10, 13, 14 and 18.

Decision of the Court

Detention

Right to have lawfulness of detention decided speedily by a court

The Government had raised a preliminary objection that the applicant had failed to exhaust his domestic remedies under this head. However, the Grand Chamber saw no reason to depart from the Chamber's findings in this respect, notably as to the impossibility for the applicant in the circumstances in which he found himself while in police custody to have effective recourse to the remedy indicated by the Government. Nor could the possibility of obtaining compensation satisfy the requirement of a judicial remedy to determine the lawfulness of detention. The applicant did not therefore have an effective remedy available to him and there had accordingly been a violation of Article 5 § 4 of the Convention.

No unlawful deprivation of liberty

The Grand Chamber agreed with the Chamber that the applicant's arrest on 15 February 1999 and his detention had been in accordance with "a procedure prescribed by law" and that there had, therefore, been no violation of Article 5 § 1.

Right to be brought promptly before a judge

The full texts of the Court's judgments are accessible on its website (<http://www.hudoc.echr.coe.int>)

The Grand Chamber found that the total period spent by the applicant in police custody before being brought before a judge came to a minimum of seven days. It could not accept that it was necessary for the applicant to be detained for such a period without being brought before a judge. There had accordingly been a violation of Article 5 § 3.

Fair trial

Whether Ankara State Security Court was independent and impartial

The Grand Chamber noted that the military judge on the bench of Ankara State Security Court which convicted the applicant had been replaced on 23 June 1999. However, the replacement of the military judge before the end of the proceedings could not dispose of the applicant's reasonably held concern about the trial court's independence and impartiality. There had been a violation of Article 6 § 1 in this respect.

Whether the proceedings before the State Security Court were fair

The Grand Chamber agreed with the Chamber's findings that the applicant's trial was unfair because: he had no assistance from his lawyers during questioning in police custody; he was unable to communicate with his lawyers out of the hearing of third parties; he was unable to gain direct access to the case file until a very late stage in the proceedings; restrictions were imposed on the number and length of his lawyers' visits; and his lawyers were not given proper access to the case file until late in the day. The Grand Chamber found that the overall effect of those difficulties taken as a whole had so restricted the rights of the defence that the principle of a fair trial, as set out in Article 6, had been contravened. This amounted to a violation of Article 6 § 1, taken together with Article 6 § 3 (b) and (c).

The Grand Chamber further held that it was unnecessary to examine the other complaints under Article 6 relating to the fairness of the proceedings.

Death Penalty

Implementation of the death penalty

The Grand Chamber noted that the death penalty had been abolished in Turkey and the applicant's sentence had been commuted to one of life imprisonment. Furthermore, on 12 November 2003, Turkey had ratified Protocol No. 6 to the Convention concerning the abolition of the death penalty. Accordingly, there had been no violation of Articles 2, 3 or 14 on account of the implementation of the death penalty.

Legal significance of the practice of Contracting States regarding the death penalty

The Grand Chamber shared the Chamber's view that capital punishment in peacetime had come to be regarded as an unacceptable form of punishment which was no longer permissible under Article 2.

The fact that there were still a large number of States which had yet to sign or ratify Protocol No. 13 concerning the abolition of the death penalty in all circumstances might prevent the Court from finding that it was the established practice of the Contracting States to regard the implementation of the death penalty as inhuman and degrading treatment contrary to Article 3, since no derogation might be made from that provision, even in times of war. However, the Grand Chamber agreed with the Chamber that it was not necessary to reach any firm conclusion on this point since it would be contrary to the Convention, even if Article 2 were to be construed as still permitting the death penalty, to implement a death sentence following an unfair trial.

Death penalty following an unfair trial

The full texts of the Court's judgments are accessible on its website (<http://www.hudoc.echr.coe.int>)

The Grand Chamber agreed with the Chamber that in considering the imposition of the death penalty under Article 3, regard had to be had to Article 2, which precluded the implementation of the death penalty concerning a person who had not had a fair trial.

In the Grand Chamber's view, to impose a death sentence on a person after an unfair trial was to subject that person wrongfully to the fear that he would be executed. The fear and uncertainty as to the future generated by a sentence of death, in circumstances where there existed a real possibility that the sentence would be enforced, inevitably gave rise to a significant degree of human anguish. Such anguish could not be dissociated from the unfairness of the proceedings underlying the sentence which, given that human life was at stake, became unlawful under the Convention.

The Grand Chamber noted that there had been a moratorium on the implementation of the death penalty in Turkey since 1984 and that, in the applicant's case, the Turkish Government had complied with the Court's interim measure under Rule 39 of the Rules of Court to stay the execution. It was further noted that the applicant's file had not been sent to Parliament for approval of the death sentence as was then required by the Turkish Constitution.

However, the Grand Chamber agreed with the Chamber that the applicant's background as the leader and founder of the PKK, an organisation which had been engaged in a sustained campaign of violence causing many thousands of casualties, had made him Turkey's most wanted person. In view of the fact that the applicant has been convicted of the most serious crimes existing in the Turkish Criminal Code and of the general political controversy in Turkey – prior to the decision to abolish the death penalty – surrounding the question of whether he should be executed, there was a real risk that the sentence might be implemented. In practical terms, the risk remained for more than three years of the applicant's detention in İmralı from the date of the Court of Cassation's judgment of 25 November 1999 affirming the applicant's conviction until Ankara State Security Court's judgment of 3 October 2002 which commuted the death penalty to which the applicant had been sentenced to one of life imprisonment.

Consequently, the Grand Chamber concluded that the imposition of the death sentence on the applicant following an unfair trial by a court whose independence and impartiality were open to doubt amounted to inhuman treatment in violation of Article 3.

Treatment and conditions

Conditions of the applicant's transfer from Kenya to Turkey

The Grand Chamber considered that it had not been established 'beyond all reasonable doubt' that the applicant's arrest and the conditions in which he was transferred from Kenya to Turkey exceeded the usual degree of humiliation that was inherent in every arrest and detention or attained the minimum level of severity required for Article 3 to apply. Consequently, there had been no violation of Article 3 on that account.

Detention conditions on İmralı

While concurring with the Council of Europe's Committee for the Prevention of Torture's recommendations that the long-term effects of the applicant's relative social isolation should be attenuated by giving him access to the same facilities as other high security prisoners in Turkey, such as television and telephone contact with his family, the Grand Chamber agreed with the Chamber that the general conditions in which the applicant was being detained at İmralı Prison had not reached the minimum level of severity required to constitute inhuman or degrading treatment within the meaning of Article 3. Consequently, there had been no violation of Article 3 on that account.

The full texts of the Court's judgments are accessible on its website (<http://www.hudoc.echr.coe.int>)

Other complaints

Article 34

The Grand Chamber noted that there was nothing to indicate that the applicant had been hindered in the exercise of his right of individual petition to any significant degree. And, while regrettable, the Turkish Government's failure to supply information requested by the Court earlier had not, in the special circumstances of the case, prevented the applicant from setting out his complaints about the criminal proceedings that had been brought against him. There had accordingly been no violation of Article 34.

Other complaints

The Grand Chamber considered that no separate examination of the complaints under Articles 7, 8, 9, 10, 13, 14 and 18 was necessary.

Article 46

The Grand Chamber reiterated that the Court's judgments were essentially declaratory in nature and that, in general, it was primarily for the State concerned to choose, subject to supervision by the Committee of Ministers, the means to be used in its domestic legal order in order to discharge its legal obligation under Article 46.

However, exceptionally, with a view to assisting the State concerned to fulfil its obligations under Article 46, the Court had sought to indicate the type of measure that might be taken in order to put an end to a systemic situation. In such circumstances, it might propose various options and leave the choice of measure and its implementation to the discretion of the State concerned. In other exceptional cases, the nature of the violation found might be such as to leave no real choice as to the measures required to remedy it and the Court might decide to indicate only one such measure.

In the specific context of cases against Turkey concerning the independence and impartiality of the state security courts, Chambers of the Court had indicated in certain judgments that were delivered after the Chamber judgment in the applicant's case that, in principle, the most appropriate form of redress would be for the applicant to be given a retrial without delay if he or she so requested.

The Grand Chamber endorsed this general approach. It considered that, where an individual, as in the applicant's case, had been convicted by a court which did not meet the Convention requirements of independence and impartiality, a retrial or a reopening of the case, if requested, represented in principle an appropriate way of redressing the violation.

However, the specific remedial measures, if any, required of a respondent State in order to discharge its obligations under Article 46 had to depend on the particular circumstances of the individual case and be determined in the light of the terms of the Court's judgment in that case, and with due regard to the above case-law of the Court.

Judge Garlicki expressed a partly concurring, partly dissenting opinion; Judges Wildhaber, Costa, Caflisch, Türmen, Garlicki and Borrego Borrego expressed a joint partly dissenting opinion and Judges Costa, Caflisch, Türmen and Borrego Borrego expressed a further joint partly dissenting opinion, all of which are annexed to the judgment.

20. Eur.Court HR, *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Sirketi v. Ireland, Grand Chamber Judgment of 30 June 2005, Application No. 45036/98, (Article 1 of Protocol No. 1, Protection of Property – No Violation)*. The applicant, an airline charter company registered in Turkey by the name of Bosphorus Hava Yollari Turizm ve Ticaret Anonim Şirketi (“Bosphorus Airways”), unsuccessfully complained that the manner in which Ireland had implemented the United Nations sanctions regime to impound its aircraft had been a reviewable exercise of discretion within the meaning of Article 1 of the Convention and a violation of its right to property.

ECHR 362 (2005)
30.06.2005

Press release issued by the Registrar

The European Court of Human Rights has today delivered at a public hearing a judgment in the case of *“Bosphorus Airways” v. Ireland* (application no. 45036/98). The Court held unanimously that there had been no violation of Article 1 of Protocol No. 1 (protection of property) to the European Convention on Human Rights. (The judgment is available in English and French.)

1. Principal facts

The case concerns an application brought by an airline charter company registered in Turkey, Bosphorus Hava Yollari Turizm ve Ticaret Anonim Şirketi (“Bosphorus Airways”).

In May 1993 an aircraft leased by Bosphorus Airways from Yugoslav Airlines (“JAT”) was seized by the Irish authorities. It had been in Ireland for maintenance by TEAM Aer Lingus, an aircraft maintenance company owned by the Irish State, and it was seized under EC Council Regulation 990/93 which, in turn, had implemented the UN sanctions regime against the Federal Republic of Yugoslavia (Serbia and Montenegro).

Bosphorus Airways’ challenge to the retention of the aircraft was initially successful in the High Court, which held in June 1994 that Regulation 990/93 was not applicable to the aircraft. However, on appeal, the Supreme Court referred a question under Article 177 of the EEC Treaty to the European Court of Justice (ECJ) on whether the aircraft was covered by Regulation 990/93. The ECJ found that it was and, in its judgment of November 1996, the Supreme Court applied the decision of the ECJ and allowed the State’s appeal.

By that time, Bosphorus Airways’ lease on the aircraft had already expired. Since the sanctions regime against the Federal Republic of Yugoslavia (Serbia and Montenegro) had also been relaxed by that date, the Irish authorities returned the aircraft directly to JAT. Bosphorus Airways consequently lost approximately three years of its four-year lease of the aircraft, which was the only one ever seized under the relevant EC and UN regulations.

2. Procedure and composition of the Court

The application was lodged with the European Commission of Human Rights on 25 March 1997 and transmitted to the Court on 1 November 1998. Following a hearing on the admissibility and merits, it was declared admissible on 13 September 2001. On 30 January 2004 the Chamber relinquished jurisdiction in favour of the Grand Chamber.

The full texts of the Court’s judgments are accessible on its website (<http://www.hudoc.echr.coe.int>)

A public hearing before the Grand Chamber took place in the Human Rights Building, Strasbourg, on 29 September 2004. Written submissions were received from the Governments of Italy and the United Kingdom and from the European Commission and the “Institut de Formation en Droits de L’Homme Du Barreau de Paris”, which were given leave by the Court’s President to intervene. The European Commission also obtained leave to participate in the oral hearing.

Judgment was given by the Grand Chamber of 17 judges, composed as follows:

Christos Rozakis (Greek), President,
 Jean-Paul Costa (French),
 Georg Ress (German),
 Nicolas Bratza (British),
 Ireneu Cabral Barreto (Portuguese),
 Françoise Tulkens (Belgian),
 Viera Strážnická (Slovakian)
 Karel Jungwiert (Czech),
 Volodymyr Butkevych (Ukrainian),
 Nina Vajić (Croatian),
 John Hedigan (Irish),
 Matti Pellonpää (Finnish),
 Kristaq Traja (Albanian),
 Snejana Botoucharova (Bulgarian),
 Vladimiro Zagrebelsky (Italian),
 Lech Garlicki (Polish),
 Alvina Gyulumyan (Armenian), judges,
 and also Paul Mahoney, Registrar.

3. Summary of the judgment

Complaint

Bosphorus Airways complained that the manner in which Ireland implemented the sanctions regime to impound its aircraft was a reviewable exercise of discretion within the meaning of Article 1 of the Convention and a violation of Article 1 of Protocol No. 1.

Decision of the Court

Article 1

It was not disputed that the impoundment of the aircraft leased by Bosphorus Airways was implemented by the Irish authorities on its territory following a decision by the Irish Minister for Transport. In such circumstances Bosphorus Airways fell within the “jurisdiction” of the Irish State.

Article 1 of Protocol No. 1

Legal basis for the impoundment of the aircraft

The Court observed that, once adopted, EC Regulation 990/93 was “generally applicable” and “binding in its entirety” (under Article 189, now Article 249, of the EC Treaty), so that it applied to all Member States, none of whom could lawfully depart from any of its provisions. In addition, its “direct applicability” was not, and in the Court’s view could not be, disputed. The Regulation became part of Irish domestic law with effect from 28 April 1993, when it was published in the Official Journal, prior to the date of the impoundment and without the need for implementing legislation.

The full texts of the Court’s judgments are accessible on its website (<http://www.hudoc.echr.coe.int>)

The Court considered it entirely foreseeable that a Minister for Transport would implement the impoundment powers contained in Article 8 of EC Regulation 990/93. The Irish authorities rightly considered themselves obliged to impound any departing aircraft to which they considered Article 8 of EC Regulation 990/93 applied. Their decision that it did so apply was later confirmed, among other things, by the ECJ

The Court also agreed with the Irish Government and the European Commission that the Supreme Court had no real discretion to exercise, either before or after its preliminary reference to the ECJ.

The Court concluded that the impugned interference was not the result of an exercise of discretion by the Irish authorities, either under EC or Irish law, but rather amounted to compliance by the Irish State with its legal obligations flowing from EC law and, in particular, Article 8 of EC Regulation 990/93.

Was the impoundment justified?

The Court found that the protection of fundamental rights by EC law could have been considered to be, and to have been at the relevant time, “equivalent” to that of the Convention system. Consequently, a presumption arose that Ireland did not depart from the requirements of the Convention when it implemented legal obligations flowing from its membership of the EC. Such a presumption could be rebutted if, in a particular case, it was considered that the protection of Convention rights was manifestly deficient. In such cases, the interest of international co-operation would be outweighed by the Convention’s role as a “constitutional instrument of European public order” in the field of human rights.

The Court took note of the nature of the interference, of the general interest pursued by the impoundment and by the sanctions regime and of the ruling of the ECJ, a ruling with which the Supreme Court was obliged to and did comply. It considered it clear that there was no dysfunction of the mechanisms of control of the observance of Convention rights.

In the Court’s view, therefore, it could not be said that the protection of Bosphorus Airways’ Convention rights was manifestly deficient. It followed that the presumption of Convention compliance had not been rebutted and that the impoundment of the aircraft did not give rise to a violation of Article 1 of Protocol No. 1.

Judge Ress expressed a concurring opinion and Judges Rozakis, Tulkens, Traja, Botoucharova, Zagrebelsky and Garlicki expressed a joint separate opinion, both of which are annexed to the judgment.

21. Eur.Court HR, *N v. Finland*, Fourth Section Judgment of 26 July 2005, Application No. 38885/02, (Article 3, Prohibition of Torture – Violation). The applicant, a national from the Democratic Republic of Congo (DRC), successfully complained that he would face inhuman treatment if deported to the DRC, given his professional background as a member of the special division in charge of protecting the former president and his resulting close connections with former President Mobutu.

**ECHR 416 (2005)
26.07.2005**

Press release issued by the Registrar

The European Court of Human Rights has today notified in writing a judgment in the case of *N. v. Finland* (application no. 38885/02).

The Court held:

- by six votes to one, that the applicant's expulsion to the Democratic Republic of Congo (DRC) at the present time would amount to **a violation of Article 3** (prohibition of inhuman or degrading treatment) of the European Convention on Human Rights;
- unanimously, that no separate issue arose under Article 8 (right to respect for private and family life) of the Convention

Under Article 41 (just satisfaction), the Court also held, unanimously, that the finding that the applicant's expulsion to the DRC would amount to a violation of Article 3 constituted in itself sufficient just satisfaction for any non-pecuniary damage. (The judgment is available only in English.)

1. Principal facts

The applicant, Mr N., comes from the DRC (formerly Zaire).

He arrived in Finland on 20 July 1998, requesting political asylum on the strength of having been a member of the special division (Division *Spéciale Présidentielle*, the DSP) responsible for protecting former President Mobutu, his family and property. In particular, he was an infiltrator and informant in the DSP, reporting directly to very senior-ranking officers close to the former President. The applicant claimed his life was in danger because the regime under Laurent-Désiré Kabila, which replaced that of President Mobutu in May 1997, had started killing those who had worked under Mobutu. In addition he was a member of the Ngbandi tribe to which Mobutu also belonged.

In 1999 the applicant met another asylum seeker, Ms E., and they lived together until Ms E. was deported on 22 February 2000.

The DRC regime changed again in 2001, following which the general situation in the country improved.

On 6 March 2001 the Directorate of Immigration ordered the applicant's deportation to the DRC, finding his submissions inconsistent, that he had failed to prove his identity and that, if deported, he would not face a real risk of treatment contrary to Article 3 of the European Convention on Human Rights. Mr N. appealed unsuccessfully.

The full texts of the Court's judgments are accessible on its website (<http://www.hudoc.echr.coe.int>)

Some time after her prohibition on re-entry had expired, Ms E. returned to Finland and had a son with the applicant.

On 5 November 2002 the Government of Finland decided not to expel the applicant to the DRC until the European Court of Human Rights had examined his application, following a request from the Court under Rule 39 (interim measures) of the Rules of Court.

On 4 March 2003 the Supreme Administrative Court refused a further appeal from the applicant noting that: his identity and ethnic origin remained unclear; he had not shown in a credible manner that he had remained in the DRC until 17 May 1997; and, that the applicant's family life as established in Finland was not such as to attract protection under Article 8 of the Convention, given that neither parent had a valid residence permit or any other connection with Finland.

On 17 June 2003 Helsinki Administrative Court refused E.'s appeal against the refusal of asylum or a residence permit on humanitarian grounds. On 16 July 2003 the Directorate of Immigration refused E. and her new-born child a residence permit and ordered their expulsion to Russia, E's country of origin, with her two other children. E. remains in Finland pending the results of her appeal to the Supreme Administrative Court.

2. Procedure and composition of the Court

The application was lodged before the European Court of Human Rights on 31 October 2002. The President of the Chamber dealing with the case and the Chamber decided, on 5 and 12 November 2002 respectively, to apply Rule 39 measures, indicating to the Finish Government that the applicant should not be expelled pending the Court's decision. On 23 September 2003 the application was declared admissible.

From 18-19 March 2004 Court delegates questioned the applicant and witnesses on a fact-finding mission in Helsinki.

Judgment was given by a Chamber of seven judges, composed as follows:

Nicolas Bratza (British), President,
 Josep Casadevall (Andorran),
 Matti Pellonpää (Finnish),
 Rait Maruste (Estonian),
 Stanislav Pavlovschi (Moldovan),
 Lech Garlicki (Polish),
 Elisabet Fura-Sandström (Swedish), judges,
 and also Michael O'Boyle, Section Registrar.

3. Summary of the judgment

Complaints

The applicant complained that he would face inhuman treatment if deported to the DRC, given his background and, in particular, his close connections with former President Mobutu. He also maintained that his deportation would violate his right to respect for his private and family life, as his family is living in Finland. He relied on Article 3 and 8 of the Convention.

Decision of the Court

Article 3

The full texts of the Court's judgments are accessible on its website (<http://www.hudoc.echr.coe.int>)

The Court observed that, as the applicant had left the DRC eight years ago, it could not be excluded that the current DRC authorities' interest in detaining and possibly ill-treating him due to his past DSP activities might have diminished with the passage of time. The regime had also changed in 2001. It was of some importance, though not decisive, that the applicant had never been in direct contact with President Mobutu and did not hold a senior military rank when forced to leave the country. The Court noted however that factors other than rank – such as the soldier's ethnicity or connections to influential people – might also be of importance when considering the risk he or she might be facing if returned to the DRC. While a number of Mobutu supporters appeared to have been returning voluntarily to the DRC in recent years, the Court did not place any decisive weight on that fact when assessing the risk facing the applicant if he were compelled to return.

The Court considered that decisive regard must be had to the applicant's specific activities as an infiltrator and informant in President Mobutu's special protection force, reporting directly to very senior-ranking officers close to the former President. On account of those activities, the Court found that he would still run a substantial risk of treatment contrary to Article 3, if now expelled to the DRC. The Court added that the risk of ill-treatment to which the applicant would be exposed might not necessarily emanate from the current authorities but from relatives of dissidents who might seek revenge for the applicant's past activities in the service of President Mobutu.

The overall evidence before the Court supported the applicant's account of his having worked in the DSP, having formed part of President Mobutu's inner circle and having taken part in various events during which dissidents seen as a threat to the President were singled out for harassment, detention and possibly execution. There was therefore reason to believe that the applicant's situation could be worse than that of most other former Mobutu supporters, and that the authorities would not necessarily be able or willing to protect him.

Neither could it be excluded that the publicity surrounding the applicant's asylum claim and appeals in Finland might engender feelings of revenge in relatives of dissidents possibly affected by the applicant's actions in the service of President Mobutu.

In those circumstances, and having assessed all the material before it, the Court concluded that sufficient evidence had been adduced to establish substantial grounds for believing that the applicant would be exposed to a real risk of treatment contrary to Article 3, if expelled to the DRC at the present time. Accordingly, the enforcement of the order issued to that effect would violate Article 3 for as long as the risk persisted.

Article 8

In view of its conclusion that the applicant's expulsion to the DRC would violate Article 3, the Court found that no separate issue arose under Article 8.

Judge Maruste expressed a partly dissenting opinion, which is annexed to the judgment.

22. Eur.Court HR, Xenides and Arestis v. Turkey, Third Section Judgment of 22 December 2005, Application No. 46347/99, (Article 8, Right to Respect for Private and Family Life – Violation; Article 1 of Protocol No. 1, Protection of Property – Violation). The applicant, a Cypriot national of Greek-Cypriot origin born and living in Nicosia, successfully claimed that the Turkish military forces preventing her access and enjoyment of her home and property since August 1974 as a result of the continuing division of Cyprus since the conduct of military operations in Northern Cyprus by Turkey breached her Convention rights.

ECHR 712 (2005)
22.12.2005

Press release issued by the Registrar

The European Court of Human Rights has today notified in writing its Chamber judgment in the case of *Xenides-Arestis v. Turkey* (application no. 46347/99).

The Court held:

- by six votes to one, that there had been a **violation of Article 8** (right to respect for the applicant's home) of the European Convention on Human Rights;
- by six votes to one, that there had been a **violation of Article 1 of Protocol No. 1** (protection of property) to the Convention;
- unanimously, that it was not necessary to examine the applicant's complaint under Article 14; and
- unanimously, that Turkey should introduce a remedy, within three months, which secures, in respect of the Convention violations identified in the judgment, genuinely effective redress for the applicant as well as in relation to all similar applications (approximately 1,400) pending before the Court. Pending the implementation of general measures, the Court adjourned its consideration of all similar applications.

The Court further held, unanimously that, as far as any pecuniary or non-pecuniary damage was concerned, the question of the application of Article 41 (just satisfaction) was not ready for decision and awarded the applicant EUR 65,000 for costs and expenses. (The judgment is available only in English.)

1. Principal facts

The applicant, Myra Xenides-Arestis, is a Cypriot national of Greek-Cypriot origin who was born in 1945 and lives in Nicosia.

The applicant owns half a share in a plot of land in the area of Ayios Memnon, in Famagusta (Northern Cyprus), which was given to her by her mother. There are a shop, a flat and three houses on the land. One of the houses was her home, where she lived with her husband and children, and the rest of the property was either used by members of the family or rented out. She also owns part of a plot of land with an orchard.

The applicant has been prevented from living in her home or using her property since August 1974, as a result of the continuing division of Cyprus since the conduct of military operations in northern Cyprus by Turkey in July and August 1974.

The full texts of the Court's judgments are accessible on its website (<http://www.hudoc.echr.coe.int>)

On 30 June 2003 the “Parliament of the Turkish Republic of Northern Cyprus” enacted the “Law on Compensation for Immovable Properties Located within the Boundaries of the Turkish Republic of Northern Cyprus”. A commission was set up under this “law” with a mandate to deal with compensation claims.

The United Nations plan for the reunification of Cyprus (the Foundation Agreement – Settlement Plan or “Annan Plan”) was put to the vote in Cyprus on 24 April 2004, with two separate referendums being held for the Greek-Cypriot and Turkish-Cypriot communities. As the plan was rejected in the Greek-Cypriot referendum, it did not enter into force.

2. Procedure and composition of the Court

The application was lodged with the European Court of Human Rights on 4 November 1998. A hearing on the admissibility of the application took place in the Human Rights Building, Strasbourg, on 2 September 2004. By a decision of 14 March 2005 the Court declared the application admissible.

Judgment was given by a Chamber of seven judges, composed as follows:

Georg **Ress** (German), *President*,
 Ireneu **Cabral Barreto** (Portuguese),
 Lucius **Caflich** (Swiss),
 Riza **Türmen** (Turkish),
 John **Hedigan** (Irish),
 Kristaq **Traja** (Albanian),
 Alvina **Gyulumyan** (Armenian), *judges*,

and also Vincent **Berger**, *Section Registrar*.

3. Summary of the judgment

Complaints

The applicant complained of a continuing violation of her rights under Article 8 of the Convention (right to respect for her home) and Article 1 of Protocol No. 1 (protection of property) to the Convention in that, since August 1974, she has been deprived of her right to property and her home. She also maintained that Turkish military forces prevent her from having access to and from using and enjoying her home and property because she is Greek Orthodox and of Greek-Cypriot origin, in violation of Article 14 (prohibition of discrimination) of the Convention.

Decision of the Court

Article 8

The Court observed that the applicant’s situation differed from that of the applicant in the case *Loizidou v. Turkey* (judgment of 18 December 1996) since, unlike Mrs Loizidou, the applicant had actually lived in Famagusta. Since 1974 she had been unable to gain access to, to use and enjoy her home.

The Court concluded, as it had also found in *Cyprus v. Turkey* (judgment of 10 May 2001), that the complete denial of the right of the applicant, a Greek-Cypriot displaced person, to respect for her home in northern Cyprus constituted a continuing violation of Article 8.

Article 1 of Protocol No. 1

The full texts of the Court’s judgments are accessible on its website (<http://www.hudoc.echr.coe.int>)

The Court pointed out that the Turkish Government continued to exercise overall military control over northern Cyprus and that the fact that the Greek-Cypriots had rejected the Annan Plan did not have the legal consequence of bringing to an end the continuing violation of the rights of displaced persons.

The Court further found that the applicant had still to be regarded as the legal owner of her land.

The Court found no reason to depart from the conclusions which it had reached in previous cases, in particular the case *Loizidou v. Turkey*: “As a consequence of the fact that the applicant has been refused access to the land since 1974, she has effectively lost all control over, as well as all possibilities to use and enjoy her property. The continuous denial of access must therefore be regarded as an interference with her rights under Article 1 of Protocol No. 1 [...] It has not [...] been explained how the need to rehouse displaced Turkish Cypriot refugees in the years following the Turkish intervention in the island in 1974 could justify the complete negation of the applicant's property rights in the form of a total and continuous denial of access and a purported expropriation without compensation. Nor can the fact that property rights were the subject of inter-communal talks involving both communities in Cyprus provide a justification for this situation under the Convention”.

Accordingly, the Court concluded that there had been and continues to be a violation of Article 1 of Protocol No. 1 by virtue of the fact that the applicant is denied access to, control, use and enjoyment of her property and any compensation for the interference with her property rights.

Article 14

The Court found, in line with its Grand Chamber judgment in the case *Cyprus v. Turkey*, that, in the circumstances of the case, the applicant's complaints under Article 14 amounted in effect to the same complaints, albeit seen from a different angle, as those considered in relation to Article 8 of the Convention and Article 1 of Protocol No. 1. Since it had already found violations of those articles, the Court considered that it was not necessary to examine whether there had been a violation of Article 14 taken in conjunction with Article 8 and Article 1 of Protocol No. 1 by virtue of the alleged discriminatory treatment of Greek Cypriots not residing in northern Cyprus as regards their rights to the peaceful enjoyment of their possessions.

Article 46

It was inherent in the Court's findings that the violation of the applicant's rights guaranteed by Article 8 and Article 1 of Protocol No. 1 originated in a widespread problem affecting large numbers of people, i.e. the unjustified hindrance on the applicant's “respect for her home” and “peaceful enjoyment of her possessions” which is enforced as a matter of policy or practice in the “Turkish Republic of Northern Cyprus”. Moreover, the Court could not ignore the fact that there were already approximately 1,400 property cases pending before the Court brought primarily by Greek-Cypriots against Turkey.

The Court considered that Turkey had to introduce a remedy which secured, in respect of the Convention violations identified in the judgment, genuinely effective redress for the applicant as well as in relation to all similar applications pending before the Court, in accordance with the principles for the protection of the rights laid down in Article 8 and Article 1 of Protocol No. 1. Such a remedy should be available within three months and redress should occur three months after that.

Judge Türmen expressed a dissenting opinion, which is annexed to the judgment.

23. Eur.Court HR, Kolk and Kislyiy v. Estonia, Fourth Section Decision of 17 January 2006, Application Nos. 23052/04 and 24018/04, (Article 7, No Punishment without Law – Inadmissible; Article 7-2, General Principles of Law Recognised by Civilised Nations – Inadmissible). The applicants, who had participated in the deportation of the civilian population from the occupied Republic of Estonia to remote areas of the Soviet Union in 1949 and were sentenced to eight years' suspended imprisonment with a probation period of three years, complained that their conviction of crimes against humanity had been based on the retrospective application of criminal law. The Court declared the application inadmissible and found no reason to question the Estonian courts' interpretation of international law, since it agreed with the Estonian courts that even if the acts committed by the applicants could have been regarded as lawful under the Soviet law at the material time, they had nevertheless been found to constitute crimes against humanity under international law at the time of their commission.

Information Note on the Court's case-law No. 82

January 2006

Decision 17.1.2006 [Section IV]

Article 7

Article 7-2

General principles of law recognised by civilised nations

Inapplicability of prescription to crimes against humanity: *inadmissible*

Facts: A county court convicted the applicants of crimes against humanity under the Estonian Criminal Code and sentenced them to eight years' suspended imprisonment with a probation period of three years. The court found that in 1949 the applicants had participated in the deportation of the civilian population from the occupied Republic of Estonia to remote areas of the Soviet Union. The applicants appealed, alleging that at the material time the Criminal Code of 1946 of the Russian Soviet Federative Socialist Republic (SFSR) had been applicable on the territory of Estonia. That Code had not provided for a punishment for crimes against humanity. The criminal responsibility for crimes against humanity had been established only in 1994 by the amendments made to the Estonian Criminal Code of 1992. With reference to Article 7 of the Convention, the defence argued that the county court had not established whether the deportation had been a crime against humanity under international and domestic law in 1949 and whether the applicants had had a possibility to foresee, at that time, that they were committing an offence. A court of appeal nevertheless upheld the lower court's judgment, noting that crimes against humanity were punishable, irrespective of the time of the commission of the offence, both according to the Estonian Criminal Code and the Penal Code. Moreover, Article 7(2) of the Convention did not prevent punishment of a person for an act which, at the time of its commission, had been criminal according to the general principles of law recognised by civilised nations. Deportations committed by the applicants had been considered crimes against humanity by civilised nations in 1949. Such acts had been defined as criminal in the Charter of the International Military Tribunal (the Nuremberg Tribunal) and affirmed as principles of international

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law by the General Assembly of the United Nations in its Resolution No. 95 adopted in 1946. The applicants were refused leave to appeal to the Supreme Court.

Law: The Court noted that Estonia had lost its independence as a result of the Treaty of Non-Aggression between Germany and the Union of Soviet Socialist Republics and the Soviet Army's large-scale entry into the country in 1940. Except for being occupied by German forces from 1941 to 1944, Estonia had remained occupied by the Soviet Union until its restoration of independence in 1991. Accordingly, Estonia as a state had been temporarily prevented from fulfilling its international commitments. The Court noted, however, that deportation of the civilian population had been expressly recognised as a crime against humanity in the Charter of the Nuremberg Tribunal of 1945. Although the Nuremberg Tribunal had been established for trying the major war criminals of the European Axis countries for the offences they had committed before or during the Second World War, the universal validity of the principles concerning crimes against humanity had been subsequently confirmed by, *inter alia*, Resolution No. 95 of the General Assembly of the United Nations adopted in 1946. Article 7(2) of the Convention expressly provides that Article 7 shall not prejudice the trial and punishment of a person for any act or omission which, at the time it was committed, was criminal according to the general principles of law recognised by civilised nations. That is true of crimes against humanity, in respect of which the rule that they cannot be time-barred was laid down by the Charter of the Nuremberg International Tribunal. Even if the acts committed by the applicants could have been regarded as lawful under the Soviet law at the material time, they were nevertheless found by the Estonian courts to constitute crimes against humanity under international law at the time of their commission. The Court saw no reason to come to a different conclusion. Furthermore, as the Soviet Union had been a party to the 1945 agreement whereby the Nuremberg Charter had been adopted as well as a member of the United Nations when its General Assembly had adopted its resolution No. 95, it could not be claimed that the principles in question had been unknown to the Soviet authorities. Furthermore, Estonia had acceded to the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity on having regained its independence in 1991. In sum, the Court found no reason to call into question the Estonian courts' interpretation and application of domestic law made in the light of the relevant international law: *manifestly ill-founded*.

24. Eur.Court HR, Weber and Saravia v. Germany, Third Section Decision of 29 June 2006, Application No. 54934/00, (Article 8, Right to Respect for Private and Family Life – Inadmissible; Article 10, Freedom of Expression – Inadmissible; Article 13, Right to an Effective Remedy - Inadmissible). The applicants challenged a law permitting German security services to monitor signals emitted from foreign countries. The Court declared the application inadmissible and ruled the claims as manifestly ill-founded since it considered the safeguards which ensured that the data obtained was used only to prevent certain serious criminal offences to be adequate and effective.

Information Note on the Court's case-law No. 88

July-August 2006

Decision 29.6.2006 [Section III]

Article 8

Article 8-1

Respect for correspondence

Respect for private life

Strategic monitoring of telecommunications, follow-up case to *Klass v. Germany: inadmissible*

In 1994 the Act of 13 August 1968 on Restrictions on the Secrecy of Mail, Post and Telecommunications (*Gesetz zur Beschränkung des Brief-, Post- und Fernmeldegeheimnisses*), also called “the G 10 Act” (See *Klass and Others v. Germany*, judgment of 6 September 1978, Series A no. 28) was amended to accommodate the so-called strategic monitoring of telecommunications, that is, collecting information by intercepting telecommunications in order to identify and avert serious dangers facing the Federal Republic of Germany, such as an armed attack on its territory or the commission of international terrorist attacks and certain other serious offences. The changes notably concern the extension of the powers of the Federal Intelligence Service (*Bundesnachrichtendienst*) with regard to the recording of telecommunications in the course of strategic monitoring, as well as the use of personal data obtained thereby and their transmission to other authorities. The first applicant, a German national, is a freelance journalist; the second applicant, a Uruguayan national, took telephone messages for the first applicant and passed them on to her. In 1995 the applicants lodged a constitutional complaint with the Federal Constitutional Court challenging the new amendments. In a judgment of 14 July 1999, the Federal Constitutional Court held that the second applicant had no *locus standi* but upheld the first applicant's complaint in part. The application is based on the applicants' remaining complaints. A new version of the G 10 Act entered into force on 29 June 2001.

Article 8 – Restating earlier case-law, the Court notes that the mere existence of legislation which allows a system for the secret monitoring of communications entails a threat of surveillance for all those to whom the legislation may be applied. This threat necessarily strikes at freedom of communication between users of the telecommunications services and thereby amounts in itself to an interference with the exercise of the applicants' rights under Article 8, irrespective of any measures actually taken against them. The transmission of data to and their use by other authorities, which enlarges the group of persons with knowledge of the personal data intercepted and can lead to

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investigations being instituted against the persons concerned, constitutes a further separate interference with the applicants' rights under Article 8. Moreover, the impugned provisions interfere with these rights in so far as they provide for the destruction of the data obtained and for the refusal to notify the persons concerned of surveillance measures taken in that this may serve to conceal monitoring measures interfering with the applicants' rights under Article 8 which have been carried out by the authorities. As to whether these interferences are "in accordance with the law", the Court notes that the term "law" within the meaning of the Convention refers back to national law, including rules of public international law applicable in the State concerned; as regards allegations that a respondent State has violated international law by breaching the territorial sovereignty of a foreign State, the Court requires proof in the form of concordant inferences that the authorities of the respondent State have acted extraterritorially in a manner that is inconsistent with the sovereignty of the foreign State and therefore contrary to international law. The impugned provisions of the amended G 10 Act authorise the monitoring of international wireless telecommunications, that is, telecommunications which are not effected via fixed telephone lines but, for example, via satellite or radio relay links, and the use of data thus obtained. Signals emitted from foreign countries are monitored by interception sites situated on German soil and the data collected are used in Germany. In the light of this, the Court finds that the applicants failed to provide proof in the form of concordant inferences that the German authorities, by enacting and applying strategic monitoring measures, have acted in a manner which interfered with the territorial sovereignty of foreign States as protected in public international law. As to the statutory basis of the amended G 10 Act, the Court accepts the judgment of the Federal Constitutional court that it satisfies the Basic Law and finds no arbitrariness in its application. As to the quality of the law, firstly, its accessibility raises no problem; secondly, the Court concludes that the impugned provisions of the G 10 Act, seen in their legislative context, contained the minimum safeguards against arbitrary interference as defined in the Court's case-law and therefore gave citizens an adequate indication as to the circumstances in which and the conditions on which the public authorities were empowered to resort to monitoring measures, and the scope and manner of exercise of the authorities' discretion. The "legitimate aims" pursued were to safeguard national security and/or to prevent crime. As to whether the interferences were "necessary in a democratic society", the Court recognises that the national authorities enjoy a fairly wide margin of appreciation in choosing the means for protecting national security. Nevertheless, in view of the risk that a system of secret surveillance for the protection of national security may undermine or even destroy democracy under the cloak of defending it, the Court must be satisfied that there exist adequate and effective guarantees against abuse. As to strategic monitoring per se, although the amended G 10 Act broadens the range of subjects in respect of which it can be carried out, safeguards against abuse were spelled out in detail and the Federal Constitutional Court in fact raised the threshold in respect of at least one crime; the Court is satisfied that there was an administrative procedure designed to ensure that measures were not ordered haphazardly, irregularly or without due and proper consideration. As regards supervision and review of monitoring measures, the system of supervision was essentially the same as that found by the Court in its *Klass and Others judgment* not to violate the Convention; there is no reason to reach a different conclusion in the present case. As to the transmission of non-anonymous personal data obtained by the Federal Intelligence Service to the Federal Government, the Court accepts that transmission of personal – as opposed to anonymous – data might prove necessary. The additional safeguards introduced by the Federal Constitutional Court, namely that the personal data contained in the report to the Federal Government were marked and remain connected to the purposes which had justified their collection, are appropriate for the purpose of limiting the use of the information obtained to what is necessary to serve the purpose of strategic monitoring. As to the transmission of personal data to, among other authorities, the Offices for the Protection of the Constitution, the Court notes that the crimes for which this was possible were limited to certain designated serious criminal offences and that following the Federal Constitutional Court's judgment such transmission, which had to be recorded in minutes, was only possible if the suspicion that someone had committed such an offence was based on specific facts as opposed to mere factual indications; the safeguards against abuse, as thus strengthened by the Federal Constitutional Court, were adequate. As to the destruction of personal data, an acceptable procedure for verifying whether

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the conditions were met was in place; moreover, the Federal Constitutional Court had ruled that data which were still needed for court proceedings could not be destroyed immediately and had extended the supervisory powers of the G 10 Commission to cover the entire process of using data up to and including their destruction. Finally, as to the notification of persons whose communications had been monitored, this was to be done as soon as possible without jeopardising the purpose of the monitoring; rules contained in the judgment of the Federal Constitutional Court prevented the duty of notification from being circumvented, save in cases where the data were destroyed within three months without ever having been used. *Manifestly ill-founded.*

Article 10 – The first applicant submitted that the amended G 10 Act prejudiced the work of journalists investigating issues targeted by surveillance measures. She could no longer guarantee that information she received in the course of her journalistic activities remained confidential. In the Court's view, the threat of surveillance constitutes an interference to her right, in her capacity as a journalist, to freedom of expression. The Court finds, on the reasons set out under Article 8, that this interference is prescribed by law and pursues a legitimate aim. As to necessity in a democratic society, the Court notes that strategic surveillance was not aimed at monitoring journalists; generally the authorities would know only when examining the intercepted telecommunications, if at all, that a journalist's conversation had been monitored. Surveillance measures were, in particular, not directed at uncovering journalistic sources. The interference with freedom of expression by means of strategic monitoring cannot, therefore, be characterised as particularly serious. It is true that the impugned provisions of the amended G 10 Act did not contain special rules safeguarding the protection of freedom of the press and, in particular, the non-disclosure of sources, once the authorities had become aware that they had intercepted a journalist's conversation. However, the Court, having regard to its findings under Article 8, observes that the impugned provisions contained numerous safeguards to keep the interference with the secrecy of telecommunications – and therefore with the freedom of the press – within the limits of what was necessary to achieve the legitimate aims pursued. In particular, the safeguards which ensured that data obtained were used only to prevent certain serious criminal offences must also be considered adequate and effective for keeping the disclosure of journalistic sources to an unavoidable minimum. *Manifestly ill-founded.*

Article 13 – No arguable claim under Article 8 or Article 10; Article 13 is therefore not applicable. *Manifestly ill-founded.*

25. Eur.Court HR, Iosub Caras v. Romania, Third Section Judgment of 27 July 2006, Application No. 7198/04, (Article 8, Right to Respect for Private and Family Life – Violation). The applicant, an Israeli and Romanian national residing in Israel, successfully claimed that a Romanian court's decision in divorce proceedings to grant sole custody of his daughter to his wife in Romania, breached the 1980 Hague Convention on the Civil Aspects of International Child Abduction since the court had refused to grant a request to stay those proceedings.

ECHR 448 (2006)

27.07.2006

Press release issued by the Registrar

The applicants, Andrei Dorian Iosub Caras and his daughter Iris Iosub Caras, are Israeli and Romanian nationals. Mr Iosub Caras was born in 1972 and lives in Petah Tikva (Israel). His daughter was born in 2001 and currently lives in Romania. Mr Iosub Caras and his wife, both Romanian and Israeli citizens, have had their permanent residence in Israel since 1997. Their child Iris was born there, in 2001, and acquired Israeli citizenship from birth.

At the end of their visit to Romania in September 2001, Mr Iosub Caras returned to Israel while his wife and daughter remained in Romania. Mr Iosub Caras later filed a request for the return of the child, under the Hague Convention of 25 October 1980 ("the Hague Convention"), on the civil aspects of international child abduction, while his wife filed for divorce and custody of the child with the Romanian courts.

Mr Iosub Caras filed his request through the Israeli Ministry of Justice to the Romanian Ministry of Justice ("the Ministry") which received it on 26 November 2001. Mr Iosub Caras claimed that his wife was wrongfully retaining their daughter in Romania, without his consent. He asked the Ministry to apply for a stay in the divorce proceedings which his wife had instituted, for as long as the Hague proceedings were pending.

In January 2002, the Ministry, acting as the Central Authority for the purpose of the Hague Convention, instituted proceedings on behalf of Mr Iosub Caras for the return of the child. In a final decision of 5 June 2003 the Bucharest Court of appeal rejected the request on the ground that, since the date of the commencement of the Hague proceedings, another Romanian court had ruled on the divorce of the parents and had granted sole custody of the child to the mother, in a final decision of 18 September 2002.

The applicants complained that their right to respect for their family life had been violated by the courts that had dealt with both the Hague Convention and the divorce proceedings and that the authorities had not acted expeditiously in the Hague proceedings. They relied in particular on Article 8 (right to respect for private and family life), Article 6 § 1 (right to a fair hearing) and Article 1 of Protocol No. 1 (protection of property).

The Court noted that under the Hague Convention, the authorities were obliged to take all necessary measures to prevent harm to the child or prejudice to the interested parties. However, although the authorities had knowledge of the existence of the divorce proceedings before the Romanian courts, they did nothing to defer the judgment until the Hague proceedings were finalised. The Court found that by failing to inform the divorce courts of the existence of the Hague proceedings, the authorities,

in particular the Ministry, deprived the Hague Convention of its very purpose, that is to prevent a decision on the merits of the right to custody being taken in the State of refuge.

In matters pertaining to the reunification of children with their parents, the adequacy of a measure is also to be judged by the swiftness of its implementation. Despite this recognised urgency, a period of more than eighteen months elapsed from the date on which Mr Iosub Caras lodged his request for the return of the child to the date of the final decision. No satisfactory explanation was put forward by the Government for this delay. It followed that the time it took for the courts to adopt the final decision in the present case failed to meet the urgency of the situation.

The Court concluded that the Romanian authorities failed to fulfil their positive obligations and held unanimously that there had been a violation of Article 8. It further held unanimously that there was no need to examine the complaints under Article 6 § 1 and Article 1 of Protocol No. 1. Mr Iosub Caras was awarded EUR 20,000 in respect of non-pecuniary damage and EUR 1,500 for costs and expenses. (The judgment is available only in English.)

26. Eur.Court HR, *Markovic and Others v. Italy*, Grand Chamber Judgment of 14 December 2006, Application No. 1398/03, (Article 6, Right to a Fair Trial – No Violation). The applicants, all nationals of the former Serbia and Montenegro Republic and close relatives of people who were killed during the Kosovo conflict when an air strike on the headquarters of Radio Televizije Srbije (RTS) in Belgrade on 23 April 1999 by the North Atlantic Trade Organization (NATO) alliance resulted in 16 deaths, unsuccessfully claimed that the extensive Italian participation in the acts in question placed the acts within the jurisdiction of Italy and that subsequently they had been denied access to a court in order to claim compensation in Italian Courts.

ECHR 789 (2006)
14.12.2006

Press release issued by the Registrar

The European Court of Human Rights has today delivered at a public hearing its Grand Chamber judgment in the case of *Markovic and Others v. Italy* (application no. 1398/03).

The Court held, by 10 votes to seven, that there had been no violation of Article 6 (right to a fair trial) of the European Convention on Human Rights.

(The judgment is available in English and French.)

1. Principal facts

The application concerned an action in damages brought by the applicants in the Italian courts in respect of the deaths of their relatives as a result of air strikes against the Federal Republic of Yugoslavia.

The ten applicants are all nationals of the former Serbia and Montenegro and close relatives of people who were killed during the Kosovo conflict when an air strike on the headquarters of Radio Televizije Srbije (RTS) in Belgrade on 23 April 1999 by the NATO alliance resulted in 16 deaths.

Dusan and Zoran Markovic were born in 1924 and 1952; their application concerns the death of Dejan Markovic, the former's son and the latter's brother. Dusika and Vladimir Jontic were born in 1948 and 1978; their application concerns the death of Slobodan Jontic, the former's husband and the latter's father. Draga Jankovic was born in 1947 and her application concerns the death of her husband, Milovan Jankovic. Mirjana and Slavica Stevanovic were born in 1945 and 1974; their application concerns the death of Slavisa Stevanovic, the former's son and the latter's brother. Milena, Obrad and Dejan Dragojevic were born in 1953, 1946 and 1975 respectively; their application concerns Mr and Mrs Dragojevic's son and Dejan's brother, Dragorad Dragojevic.

The applicants brought an action in damages in the Rome District Court, as they considered that Italy's involvement in the relevant military operations had been more extensive than that of the other NATO members in that Italy had provided major political and logistical support, such as the use of its air bases by aircraft engaged in the strikes on Belgrade and the RTS. The defendants to the action were the Prime Minister's Office, the Italian Ministry of Defence and the NATO Allied Forces Southern Europe (AFSOUTH) Command.

The full texts of the Court's judgments are accessible on its website (<http://www.hudoc.echr.coe.int>)

The Prime Minister's Office and the Italian Ministry of Defence applied to the Court of Cassation for a preliminary ruling on the issue of jurisdiction under Article 41 of the Code of Civil Procedure. In a judgment of 8 February 2002 which brought the applicants' action to an end, the Court of Cassation held that the Italian courts had no jurisdiction because Italy's decision to take part in the air strikes had been a political one and could not, therefore, be reviewed by the courts.

2. Procedure and composition of the Court

The application was lodged on 6 December 2002 and declared partially inadmissible on 12 June 2003. On 28 February 2005 the Government of Serbia and Montenegro requested permission to intervene as a third party and, on 28 April 2005, the Chamber relinquished jurisdiction in favour of the Grand Chamber. On 21 June 2005 the United Kingdom Government was given permission to submit written observations.

A hearing of the Grand Chamber was held in public at the Human Rights Building in Strasbourg on 14 December 2005

Judgment was given by the Grand Chamber of 17 judges, composed as follows:

Luzius Wildhaber (Swiss), President,
 Christos Rozakis (Greek),
 Jean-Paul Costa (French),
 Nicolas Bratza (British),
 Boštjan M. Zupančič (Slovenian),
 Lucius Caflisch (Swiss),
 Ireneu Cabral Barreto (Portuguese)
 Karel Jungwiert (Czech),
 John Hedigan (Irish),
 Margarita Tsatsa-Nikolovska (citizen of "the former Yugoslav Republic of Macedonia"),
 Mindia Ugrekhelidze (Georgian),
 Anatoli Kovler (Russian),
 Vladimiro Zagrebelsky (Italian),
 Egbert Myjer (Dutch),
 David Thór Björgvinsson (Icelandic),
 Danutė Jočienė (Lithuanian),
 Ján Šikuta (Slovakian), judges,
 and also Lawrence Early, Section Registrar.

3. Summary of the judgment

Complaint

The applicants complained, under Article 6 (right to a fair hearing) of the Convention, read in conjunction with Article 1 (obligation to respect human rights), that they were denied access to a court.

Decision of the Court

Article 6

The full texts of the Court's judgments are accessible on its website (<http://www.hudoc.echr.coe.int>)

The Italian Government submitted that the applicants had not exhausted domestic remedies as they had failed to resume the proceedings against NATO. The Court said that no concrete example of a civil action being successfully brought against NATO had been provided so that it was not convinced by the Government's argument that the proceedings against NATO would have offered better prospects of success than those against the Italian State. It added that once the applicants had brought a civil action in the Italian courts, there indisputably existed a "jurisdictional link" for the purposes of Article 1 of the Convention. It ruled that Article 6 was applicable and dismissed the Italian Government's preliminary objections.

The Court then reiterated that it was for the national authorities to interpret and apply domestic law and that that rule also applied where domestic law referred to rules of general international law or international agreements. The Court's role was confined to ascertaining whether the effects of such an interpretation were compatible with the Convention.

The Court noted that the Italian Court of Cassation's comments on the international conventions that had been cited by the applicants did not appear to contain any errors of interpretation and that Italian law permitted preliminary jurisdictional points to be raised. Accordingly, it was not possible to conclude from the manner in which the domestic law had been interpreted or the relevant international treaties applied that a "right" to reparation under the law of tort existed in circumstances such as those in the case before it.

As to the Court of Cassation's ruling, it did not amount to recognition of immunity, but was merely indicative of the extent of the courts' powers of review of acts of foreign policy such as acts of war.

Consequently, the Court considered that the applicants' claims had been fairly examined in the light of the Italian legal principles applicable to the law of tort. The applicants had been afforded access to a court, but that access had been limited in scope, as it did not enable them to secure a decision on the merits.

The Court accordingly held that there had been no violation of Article 6.

Judge Costa expressed a concurring opinion, as did Sir Nicolas Bratza, joined by Judge Rozakis. Judge Zagrebelsky, joined by Judges Zupančič, Jungwiert, Tsatsa-Nikolovska, Ugrekhelidze, Kovler and David Thór Björgvinsson, expressed a dissenting opinion. These opinions are annexed to the judgment.

27. Eur.Court HR, Jorgic v. Germany, Fifth Section Judgment of 12 July 2007, Application No. 74613/01, (Article 6-1, Right to a Fair Hearing within a Reasonable Time – No Violation; Article 5-1, Right to Liberty and Security – No Violation; Article 7 – No Punishment without Law – No Violation). The applicant, a Bosnian and Herzegovina national accused in 1995 of committing acts of genocide in 1992 and convicted by a German court, attempted to challenge the German courts' jurisdiction to try this crime. The Court in its judgment however observed that the German courts' interpretation of the Genocide Convention and their establishment of jurisdiction to try the applicant had been widely confirmed by the statutory provisions and case-law of numerous other Contracting States to the European Convention on Human Rights and by the case-law of the International Criminal Tribunal for Yugoslavia. The Court further noted that the German courts' interpretation of the applicable provisions and rules of public international law had not been arbitrary.

ECHR 503 (2007)
12.07.2007

Press release issued by the Registrar

The European Court of Human Rights has today notified in writing its Chamber judgment in the case of **Jorgic v. Germany** (application no. 74613/01).

The Court held unanimously that there had been:

- **no violation of Article 6 § 1** (right to a fair trial) of the European Convention on Human Rights;
- **no violation of Article 5 § 1** (right to liberty and security) of the Convention concerning Mr Jorgic's complaint about the German courts' lack of jurisdiction to try him on charges of genocide; and,
- **no violation of Article 7** (no punishment without law).

(The judgment is available only in English.)

1. Principal facts

The applicant, Nicola Jorgic, is a national of Bosnia and Herzegovina, of Serb origin, who was born in 1946 in Doboj (Bosnia). He legally resided in Germany from 1969 to 1992. At the time of lodging his application, he was serving a sentence of life imprisonment in Bochum (Germany).

In 1992 Mr Jorgic returned to his place of birth, Doboj. In December 1995 he was arrested on his return to Germany and placed in pre-trial detention on the ground that he was strongly suspected of having committed acts of genocide during the ethnic cleansing which took place in the Doboj region between May and September 1992.

Mr Jorgic was accused of setting up a paramilitary group which had participated in the arrest, detention, assault, ill-treatment and killing of Muslim men from three villages in Bosnia in the beginning of May and June 1992. In June 1992, he had also shot 22 inhabitants of another village, including women, the elderly and disabled. Subsequently, Mr Jorgic with his paramilitary group had chased some 40 men from their village and had ordered them to be ill-treated and six of them to be shot. A seventh injured person had died from being burnt along with the corpses of those six people.

The full texts of the Court's judgments are accessible on its website (<http://www.hudoc.echr.coe.int>)

In September 1992 he had killed a prisoner with a wooden truncheon in order to demonstrate a new method of ill-treatment and killing.

In a judgment of 26 September 1997, Düsseldorf Court of Appeal, relying on Article 220a of the Criminal Code, convicted the applicant of those accusations. He was found guilty, in particular, of acting with intent to commit 11 counts of genocide, murder of 22 people and dangerous assault and deprivation of liberty. Stating that his guilt was of a particular gravity, the court sentenced him to life imprisonment.

The court stated that it had jurisdiction over the case pursuant to Article 6 no. 1 of the Criminal Code. There was a legitimate link for criminal prosecution in Germany, as this was in accordance with Germany's military and humanitarian missions in Bosnia and Herzegovina and the applicant had resided in Germany for more than 20 years and had been arrested there. Furthermore, agreeing with the findings of an expert in public international law, the court found that the German courts were not debarred under public international law from trying the case. In particular, neither Article VI of the Convention on the Prevention and Suppression of the Crime of Genocide (Genocide Convention) (1948), nor Article 9 of the Statute of the International Criminal Tribunal for the Former Yugoslavia (ICTY Statute) (1993) excluded the jurisdiction of German courts over acts of genocide committed outside Germany by a foreigner against foreigners.

The court also found that the applicant had acted with intent to commit genocide within the meaning of Article 220a of the Criminal Code. Referring to the views expressed by several legal writers, it stated that the “destruction of a group” within the meaning of Article 220a of the Criminal Code meant destruction of the group as a social unit in its distinctiveness and particularity and its feeling of belonging together ; a biological-physical destruction was not necessary. It concluded that the applicant had therefore acted with intent to destroy the group of Muslims in the North of Bosnia, or at least in the Doboij region.

Ultimately, following further proceedings before the domestic courts, the judgment of Düsseldorf Court of Appeal of 26 September 1997 remained final regarding the applicant's conviction for genocide and on eight counts of murder, including the court's finding that his guilt was of a particular gravity.

2. Procedure and composition of the Court

The application was lodged with the European Court of Human Rights on 23 May 2001.

Judgment was given by a Chamber of seven judges, composed as follows:

Peer Lorenzen (Danish), President,
Snejana Botoucharova (Bulgarian),
Volodymyr Butkevych (Ukrainian),
Margarita Tsatsa-Nikolovska (citizen of “the former Yugoslav Republic of Macedonia”),
Rait Maruste (Estonian),
Javier Borrego Borrego (Spanish),
Renate Jaeger (German), judges,
and also Claudia Westerdiek, Section Registrar.

3. Summary of the judgment

Complaints

The full texts of the Court's judgments are accessible on its website (<http://www.hudoc.echr.coe.int>)

Relying in particular on Article 5 § 1 (a) (right to liberty and security) and Article 6 § 1 (right to a fair trial), Mr Jorgic alleged that the German courts had not had jurisdiction to convict him. Moreover, he complained that his conviction for genocide was in breach of Article 7 § 1 (no punishment without law) in particular because the national courts' wide interpretation of that crime had no basis in German or public international law.

Decision of the Court

Article 5 § 1 (a) and Article 6 § 1

The Court observed that the German courts' interpretation of Article VI of the Genocide Convention in the light of Article I of that Convention and their establishment of jurisdiction to try the applicant on charges of genocide was widely confirmed by the statutory provisions and case-law of numerous other Contracting States to the European Convention on Human Rights and by the Statute and case-law of the ICTY. Furthermore, Article 9 § 1 of the ICTY Statute confirmed the German courts' view, providing for concurrent jurisdiction of the ICTY and national courts, without any restriction to domestic courts of particular countries.

The Court further noted that the German courts' interpretation of the applicable provisions and rules of public international law was not arbitrary. They therefore had reasonable grounds for establishing their jurisdiction to try the applicant on charges of genocide. It followed that the applicant was heard by a tribunal established by law within the meaning of Article 6 § 1 of the Convention.

The Court therefore concluded that the applicant was lawfully detained after conviction "by a competent court" within the meaning of Article 5 § 1 (a) of the Convention.

Article 7

The Court considered that, while many authorities had favoured a narrow interpretation of the crime of genocide, there had already been several authorities which had interpreted the offence of genocide in a wider way, in common with the German courts. In those circumstances it found that the applicant, if need be with the assistance of a lawyer, could reasonably have foreseen that he risked being charged with and convicted of genocide for the acts he had committed. In that context the Court also noted that the applicant was found guilty of acts of a considerable severity and duration.

Those requirements having been met, it was for the German courts to decide which interpretation of the crime of genocide under domestic law they wished to adopt. Accordingly, the applicant's conviction for genocide was not in breach of Article 7 § 1 of the Convention.

28. Eur.Court HR, Hirschhorn v. Romania, Third Section Judgment of 26 July 2007, Application No. 29294/02, (Article 6-1, Right to a Fair Hearing within a Reasonable Time – Violation; Article 1 of Protocol No. 1, Protection of Property – Violation). The applicant, a French national who formerly owned a building in Bucharest which was nationalised by Romania and then leased to the United States of America, successfully claimed that his rights had been violated when the national authorities had failed to comply with a ruling restoring the building to his possession.

ECHR 536 (2007)

26.07.2007

Press release issued by the Registrar

The applicant, Carl Hirschhorn, is a French national who was born in 1925 and lives in Cannet (France).

In 1952, under nationalisation decree no. 52/1950, the State took possession of a building located in Bucharest which belonged to the applicant's parents. In a judgment of 24 June 1999, the domestic courts ordered the defendant parties to restore to the applicant the building and adjacent land. In November 2000 the applicant, accompanied by a bailiff, found that the building was occupied by the organisation "United States – Peace Corps", under a lease which the latter had contracted with the State company "Locato", which managed the buildings made available to diplomatic missions in Romania. In spite of numerous requests to the domestic courts, the applicant was unable to obtain restitution of the disputed building. The proceedings are still pending.

The applicant alleged that there had been a two-fold violation of Article 6 § 1 (right to a fair hearing). He complained firstly that the failure to execute the final decision of 24 June 1999 had restricted his right of access to a tribunal, and, secondly, he considered that the Civil Division of the Bucharest Court of Appeal had not been "an independent and impartial tribunal". Relying on Article 1 of Protocol No. 1 (protection of property), the applicant also complained that there had been a violation of his right to peaceful enjoyment of his possessions.

The Court considered that, in refusing to comply with the final judgment ordering that the building be restored to the applicant, the national authorities had deprived him of effective access to a tribunal. It also considered that the applicant's doubts concerning the appeal court's independence and impartiality could be regarded as objectively justified. It therefore concluded unanimously that there had been a violation of Article 6 § 1. In addition, noting in particular that the applicant had been deprived of all property rights over his building for several years, it concluded unanimously that there had been a violation of Article 1 of Protocol No. 1. It also held that the respondent State was to return the disputed building to the applicant and that, failing such restitution, it was to pay him EUR 1,900,000 for pecuniary damage. In any event, the Court awarded Mr Hirschhorn EUR 200,000 for pecuniary damage and EUR 10,000 for non-pecuniary damage. (The judgment is available only in French.)

29. Eur.Court HR, Stoll v. Switzerland, Grand Chamber Judgment of 10 December 2007, Application No. 69698/01, (Article 10, Freedom of Expression – No Violation). The applicant, a journalist responsible for having disclosed in the press a confidential report by the Swiss ambassador to the United States relating to the strategy to be adopted by the Swiss Government in the negotiations between, among others, the World Jewish Congress and Swiss banks on the subject of compensation due to Holocaust victims for unclaimed assets deposited in Swiss bank accounts, unsuccessfully claimed that his conviction for publishing “secret official deliberations” had infringed his right to freedom of expression.

ECHR 898 (2007)
10.12.2007

Press release issued by the Registrar

The European Court of Human Rights has today delivered at a public hearing its Grand Chamber judgment in the case of **Stoll v. Switzerland** (application no. 69698/01).

The Court held, by twelve votes to five, that there had been **no violation of Article 10** (freedom of expression) of the European Convention on Human Rights in respect of the applicant’s conviction for publishing “secret official deliberations” concerning compensation due to Holocaust victims for unclaimed assets. (The judgment is available in English and French.)

1. Principal facts

Martin Stoll, a Swiss national who lives in Zürich (Switzerland), is a journalist.

The case concerns the sentencing of the applicant to payment of a fine for having disclosed in the press a confidential report by the Swiss ambassador to the United States relating to the strategy to be adopted by the Swiss Government in the negotiations between, among others, the World Jewish Congress and Swiss banks on the subject of compensation due to Holocaust victims for unclaimed assets deposited in Swiss bank accounts.

In December 1996 Carlo Jagmetti, who was then Swiss ambassador to the United States, drew up a “strategy paper”, classified as “confidential”, in the course of negotiations between, among others, the World Jewish Congress and Swiss banks concerning compensation due to Holocaust victims for unclaimed assets deposited in Swiss bank accounts.

The strategy paper was sent to the person in charge of the matter at the Federal Department of Foreign Affairs in Berne. Copies were sent to 19 other persons in the Swiss Government and the federal authorities and to the Swiss diplomatic missions in Tel Aviv, New York, London, Paris and Bonn. The applicant obtained a copy, probably as a result of a breach of official secrecy by a person whose identity remains unknown.

On 26 January 1997 the Zürich Sunday newspaper the *Sonntags-Zeitung* published, among other things, two articles by the applicant under the headings “Ambassador Jagmetti insults the Jews” and “The ambassador in bathrobe and climbing boots puts his foot in it”. The next day the Zürich daily the *Tages-Anzeiger* reproduced extensive extracts from the strategy paper; subsequently, the newspaper the *Nouveau Quotidien* also published extracts from the report.

The full texts of the Court’s judgments are accessible on its website (<http://www.hudoc.echr.coe.int>)

On 22 January 1999 the Zürich District Court sentenced the applicant to a fine of 800 Swiss francs (approximately 476 euros) for publishing “secret official deliberations” within the meaning of Article 293 of the Criminal Code. The appeals lodged by the applicant were dismissed at final instance by the Federal Court on 5 December 2000.

The Swiss Press Council, to which the case had been referred in the meantime by the Swiss Federal Council, accepted that publication had been legitimate given the importance of the public debate concerning the assets of Holocaust victims. However, in an opinion dated 4 March 1997, it found that by thus shortening the analysis and failing to place the report sufficiently in context, the applicant had irresponsibly made the ambassador’s remarks appear sensational and shocking.

2. Procedure and composition of the Court

The application was lodged with the European Court of Human Rights on 14 May 2001 and declared admissible on 3 May 2005.

In its Chamber judgment of 25 April 2006 (press release No. 234, 2006) the Court held, by four votes to three, that there had been a violation of Article 10. At the request of the Swiss Government, the case was referred to the Grand Chamber under Article 43 (referral to the Grand Chamber).

The Court granted the French and Slovakian Governments leave to take part in the proceedings as third-party interveners, in accordance with Article 36 § 2 of the Convention (third party intervention) and Rule 61 § 3 of the Rules of Court.

A public hearing was held on 7 February 2007.

Judgment was given by the Grand Chamber of 17 judges, composed as follows:

Jean-Paul Costa (French), President,
 Luzius Wildhaber (Swiss),
 Boštjan M. Zupančič (Slovenian),
 Peer Lorenzen (Danish),
 Riza Türmen (Turkish),
 Margarita Tsatsa-Nikolovska (citizen of “the former Yugoslav Republic of Macedonia”),
 András Baka (Hungarian)
 Mindia Ugrekhelidze (Georgian),
 Anatoli Kovler (Russian),
 Vladimiro Zagrebelsky (Italian),
 Antonella Mularoni (San Marinese),
 Elisabet Fura-Sandström (Swedish),
 Renate Jaeger (German),
 Egbert Myjer (Dutch),
 Dragoljub Popović (Serbian),
 Ineta Ziemele (Latvian),
 Isabelle Berro-Lefèvre (Monegasque), judges,
 and also Vincent Berger, Jurisconsult.

3. Summary of the judgment

Complaint

The applicant submitted that his conviction for publishing “secret official deliberations” had infringed his right to freedom of expression.

The full texts of the Court’s judgments are accessible on its website (<http://www.hudoc.echr.coe.int>)

Decision of the Court

Article 10

The Court considered that the applicant's conviction amounted to "interference" with the exercise of his right to freedom of expression. The interference was provided for by the Swiss Criminal Code and had pursued the legitimate aim of preventing the "disclosure of information received in confidence".

The main question to be examined by the Court, therefore, was whether the interference in question had been "necessary in a democratic society". In that connection the Court reiterated at the outset that Article 10 was applicable to the dissemination by journalists of confidential or secret information.

The Court noted that the issue of unclaimed assets had not only involved substantial financial interests, but had also had a significant moral dimension which meant that it was of interest even to the wider international community. Consequently, in assessing whether the measure taken by the Swiss authorities had been necessary, the Court would take account of how the public interests at stake had been weighed up: the interest of readers in being informed on a topical issue and the interest of the authorities in ensuring a positive and satisfactory outcome to the diplomatic negotiations being conducted.

The Court took the view that the applicant's articles had been capable of contributing to the public debate on the unclaimed assets, which were the subject of lively discussion in Switzerland at the time. The public therefore had an interest in publication of the articles.

As to the interests which the Swiss authorities sought to protect, the Court considered that it was vital to diplomatic services and the smooth functioning of international relations for diplomats to be able to exchange confidential or secret information. However, the confidentiality of diplomatic reports could not be protected at any price; in that connection, the content of the report and the potential threat posed by its publication had to be taken into account.

In the applicant's case the Court considered that the disclosure at that point in time of the extracts from the ambassador's report had been liable to have negative repercussions on the smooth progress of the negotiations in which Switzerland was engaged, on account not just of the ambassador's remarks themselves but of the way in which they had been presented by the applicant. Hence the disclosure – albeit partial – of the ambassador's report had been capable of undermining the climate of discretion necessary to the successful conduct of diplomatic relations in general and of having negative repercussions on the negotiations being conducted by Switzerland in particular. The Court therefore concluded that, given that they had been published at a particularly delicate juncture, Mr Stoll's articles had been liable to cause considerable damage to the interests of the Swiss authorities.

As to the applicant's conduct, the Court took the view that, as a journalist, he could not have been unaware that disclosure of the report was punishable under the Criminal Code. It further considered that the content of the applicant's articles had been clearly reductive and truncated and the vocabulary used had tended to suggest that the ambassador's remarks had been anti-Semitic. Hence, the applicant had, in capricious fashion, started a rumour which had undoubtedly contributed to the ambassador's resignation and which related directly to one of the very phenomena at the root of the unclaimed assets issue, namely the atrocities committed against the Jewish community during the Second World War. The Court reiterated the need to deal firmly with allegations and/or insinuations of that nature.

The Court noted that the way in which the impugned articles had been edited, with sensationalist headings, seemed hardly fitting for a subject as important and serious as that of the unclaimed funds. It also observed the inaccurate nature of the articles, which were liable to mislead readers.

In these circumstances, and bearing in mind that one of the articles had been placed on the front page of a Swiss weekly newspaper with a large circulation, the Court shared the opinion of the Swiss Government and the Press Council that the applicant's chief intention had not been to inform the public on a topic of general interest but to make Ambassador Jagmetti's report the subject of needless scandal. The Court took the view that the truncated and reductive form of the articles in question, which was liable to mislead the reader as to the ambassador's personality and abilities, had considerably detracted from the importance of their contribution to the public debate protected by Article 10. Lastly, the Court considered that the fine imposed on the applicant had not been disproportionate to the aim pursued.

Accordingly, the Court held that there had been no violation of Article 10.

Judge Ziemele expressed a concurring opinion and Judge Zagrebelsky, joined by Judges Lorenzen, Fura-Sandström, Jaeger and Popović, expressed a dissenting opinion. Both are annexed to the judgment.

30. Eur.Court HR, Islamic Republic of Iran Shipping Lines v. Turkey, Third Section Judgment of 13 December 2007, Application No. 40998/98, (Article 1 Protocol No. 1, Protection of Property – Violation; Article 34, Individual Applications - Inadmissible). The applicant, an Iranian shipping company registered in Teheran, successfully complained that the seizure by Turkish authorities of one of its vessels and its cargo had amounted to an unjustified control of property.

Information Note on the Court's case-law No. 103

December 2007

Judgment 13.12.2007 [Section III]

Article 34

Victim

State-owned company operating with legal and financial independence: *victim status upheld*

Article 1 of Protocol No. 1

Article 1 para. 2 of Protocol No. 1

Control of the use of property

Arbitrary seizure for over a year of a ship and its cargo on suspicion of arms smuggling: *violation*

Facts: In October 1991 the Turkish authorities seized a Cypriot-owned vessel chartered by the applicant as they suspected that the weapons it was transporting were intended for smuggling. Criminal proceedings were brought against several of the ship's crew. In December 1991, following an investigation into the matter, the Turkish Ministry of Foreign Affairs confirmed that the cargo transported by the applicant belonged to Iran and that its seizure could not be justified by the alleged "state of war" between Turkey and Cyprus. The Turkish courts eventually acquitted the crew members and in December 1992 released the vessel. In subsequent civil proceedings, the applicant was unable to obtain any compensation for the damage incurred to it through the seizure of the vessel.

Law: Article 34 – The Government firstly objected that the applicant had no locus standi since it was a state-owned corporation, and that it could therefore not be distinct from the Government of the Islamic Republic of Iran. The Court found, however, that since the applicant company was governed essentially by company law and was legally and financially independent of the State, there was nothing to suggest that the application had effectively been brought by the State of the Islamic Republic of Iran.

Article 1 of Protocol No. 1 – The seizure of the vessel amounted to control of use of property within the meaning of the second paragraph of Article 1 of Protocol No. 1. The parties agreed that the interference had a legal basis, whilst disagreeing on the scope and the meaning of the applicable law. Despite the authorities having been made aware only two months following the seizure that the cargo was not being smuggled and did not pose a threat to Turkish national security, the situation continued for another year. The Court considered that the vessel should have been released at the latest in March 1992, when the first-instance court gave its decision to that effect. The detention of the vessel following that date was arbitrary since there was no basis for suspecting an offence of arms smuggling or any general power to seize the ship due to a state of war between Turkey and Cyprus. Moreover,

The full texts of the Court's judgments are accessible on its website (<http://www.hudoc.echr.coe.int>)

given the courts' refusal of the applicant's compensation claim, the interference with the applicant's property rights had been disproportionate.

Conclusion: violation (unanimously).

31. Eur.Court HR, Saadi v. Italy, Grand Chamber Judgment of 28 February 2008, Application No. 37201/06, (Article 3, Prohibition of Torture – Violation). The applicant, a Tunisian national living in Italy, successfully claimed that the enforcement of his deportation order to Tunisia would expose him to the risk of being subjected to torture or inhuman and degrading treatment.

ECHR 142 (2008)
28.02.2008

Press release issued by the Registrar

The European Court of Human Rights has today delivered at a public hearing its Grand Chamber judgment in the case of *Saadi v. Italy* (application no. [37201/06](#)).

The Court held unanimously that if the decision to deport the applicant to Tunisia were to be enforced, there would be a **violation of Article 3** of the European Convention on Human Rights (prohibition of torture and inhuman or degrading treatment).

Under Article 41 of the Convention (just satisfaction), the Court held unanimously that the finding of a violation constituted in itself sufficient just satisfaction for the non-pecuniary damage sustained by the applicant, and awarded him 8,000 euros (EUR) for costs and expenses. (The judgment is available in English and French.)

1. Principal facts

The applicant, Nassim Saadi, is a Tunisian national who was born in 1974 and lives in Milan (Italy). He is the father of an eight-year-old child whose mother is an Italian national.

The application concerns the possible deportation of the applicant to Tunisia, where he claims to have been sentenced in 2005, in his absence, to 20 years' imprisonment for membership of a terrorist organisation acting abroad in peacetime and for incitement to terrorism.

In December 2001 the applicant was issued with an Italian residence permit, valid until October 2002, "for family reasons".

In October 2002 Mr Saadi, who was suspected, among other things, of international terrorism, was arrested and placed in pre-trial detention. He was accused of conspiracy to commit acts of violence (including attacks with explosive devices) in States other than Italy with the intention of arousing widespread terror; he was also accused of falsifying documents and receiving stolen goods.

On 9 May 2005 Milan Assize Court reclassified the offence of international terrorism, amending it to criminal conspiracy. It found Mr Saadi guilty of that offence and of forgery and receiving, and sentenced him to four years and six months' imprisonment. It acquitted the applicant of aiding and abetting clandestine immigration. Both the prosecution and the applicant appealed. On the date of the adoption of the Grand Chamber's judgment the proceedings were pending in the Italian courts.

On 11 May 2005 a military court in Tunis sentenced the applicant in his absence to 20 years' imprisonment for membership of a terrorist organisation acting abroad in peacetime and for incitement to terrorism.

The full texts of the Court's judgments are accessible on its website (<http://www.hudoc.echr.coe.int>)

Mr Saadi was released on 4 August 2006. On 8 August 2006, however, the Minister of the Interior ordered him to be deported to Tunisia, applying the provisions of the Law of 27 July 2005 on “urgent measures to combat international terrorism”. The Minister observed that “it was apparent from the documents in the file” that the applicant had played an “active role” in an organisation responsible for providing logistical and financial support to persons belonging to fundamentalist Islamist cells in Italy and abroad. The applicant was therefore placed in the Milan temporary holding centre pending his deportation.

Mr Saadi made a request for political asylum, which was rejected on 14 September 2006. On the same day he lodged an application with the European Court of Human Rights. Under Rule 39 of the Rules of Court (interim measures), the Court asked the Italian Government to stay the applicant’s expulsion until further notice.

The maximum time allowed for the applicant’s detention with a view to expulsion expired on 7 October 2006 and he was released on that date. However, on 6 October 2006 a new deportation order had been issued against him to France (the country from which he had arrived in Italy), with the result that he was immediately taken back to the Milan temporary holding centre. The applicant applied for a residence permit and requested refugee status, without success.

On 3 November 2006 the applicant was released, as fresh information made it clear that it would not be possible to deport him to France.

On 29 May 2007 the Italian embassy in Tunis asked the Tunisian Government to provide a copy of the alleged judgment convicting the applicant in Tunisia, as well as diplomatic assurances that, if the applicant were to be deported to Tunisia, he would not be subjected to treatment contrary to Article 3 of the European Convention on Human Rights, that he would have the right to have the proceedings reopened and that he would receive a fair trial. In reply, the Tunisian Minister of Foreign Affairs twice sent a note verbale to the Italian Embassy in July 2007 stating that he “accepted the transfer to Tunisia of Tunisians imprisoned abroad once their identity had been confirmed”, that Tunisian legislation guaranteed prisoners’ rights and that Tunisia had acceded to “the relevant international treaties and conventions”.

2. Procedure and composition of the Court

The application was lodged with the European Court of Human Rights on 14 September 2006.

On 29 March 2007 the Chamber to which the case had been allocated relinquished jurisdiction in favour of the Grand Chamber, under Article 30 of the Convention.

The President granted leave to the United Kingdom Government to intervene in the proceedings as a third party.

A hearing took place in public in the Human Rights Building, Strasbourg, on 11 July 2007.

Judgment was given by the Grand Chamber of 17 judges, composed as follows:

Jean-Paul **Costa** (French), *President*,
 Christos **Rozakis** (Greek),
 Nicolas **Bratza** (British),
 Boštjan M. **Zupančič** (Slovenian),
 Peer **Lorenzen** (Danish),
 Françoise **Tulkens** (Belgian),
 Loukis **Loucaides** (Cypriot)

The full texts of the Court’s judgments are accessible on its website (<http://www.hudoc.echr.coe.int>)

Corneliu **Bîrsan** (Romanian),
 Nina **Vajić** (Croatian),
 Vladimiro **Zagrebelsky** (Italian),
 Alvina **Gyulumyan** (Armenian),
 Khanlar **Hajiyev** (Azerbaijani),
 Dean **Spielmann** (Luxemburger),
 Egbert **Myjer** (Dutch),
 Sverre Erik **Jebens** (Norwegian),
 Ineta **Ziemele** (Latvian),
 Isabelle **Berro-Lefèvre** (Monegasque), *judges*,

and also Vincent **Berger**, *Jurisconsult*.

3. Summary of the judgment

Complaints

The applicant alleged that enforcement of his deportation to Tunisia would expose him to the risk of being subjected to torture or inhuman and degrading treatment contrary to Article 3 of the Convention (prohibition of torture and inhuman or degrading treatment). Relying on Article 6 (right to a fair trial), he further complained of a flagrant denial of justice he had allegedly suffered in Tunisia on account of being convicted in his absence and by a military court. Under Article 8 (right to respect for private and family life), he alleged that his deportation to Tunisia would deprive his partner and his son of his presence and support. Lastly, relying on Article 1 of Protocol No. 7 (procedural safeguards relating to expulsion of aliens), he complained that his expulsion was neither necessary to protect public order nor grounded on reasons of national security.

Decision of the Court

Article 3

The Court observed that it could not underestimate the danger of terrorism and noted that States were facing considerable difficulties in protecting their communities from terrorist violence. However, that should not call into question the absolute nature of Article 3.

Contrary to the argument of the United Kingdom as third-party intervener, supported by the Italian Government, the Court considered that it was not possible to weigh the risk that a person might be subjected to ill-treatment against his dangerousness to the community if not sent back. The prospect that he might pose a serious threat to the community did not diminish in any way the risk that he might suffer harm if deported.

As regards the arguments that such a risk had to be established by solid evidence where an individual was a threat to national security, the Court observed that such an approach was not compatible with the absolute nature of Article 3. It amounted to asserting that, in the absence of evidence meeting a higher standard, protection of national security justified accepting more readily a risk of ill-treatment for the individual. The Court reaffirmed that for a forcible expulsion to be in breach of the Convention it was necessary – and sufficient – for substantial grounds to have been shown for believing that there was a risk that the applicant would be subjected to ill-treatment in the receiving country.

The Court referred to reports by Amnesty International and Human Rights Watch which described a disturbing situation in Tunisia and which were corroborated by a report from the US State Department. These reports mentioned numerous and regular cases of torture inflicted on persons accused under the 2003 Prevention of Terrorism Act. The practices reported – said to be often

The full texts of the Court's judgments are accessible on its website (<http://www.hudoc.echr.coe.int>)

inflicted on persons in police custody – included hanging from the ceiling, threats of rape, administration of electric shocks, and immersion of the head in water, beatings and cigarette burns. It was reported that allegations of torture and ill-treatment were not investigated by the competent Tunisian authorities, that they refused to follow up complaints and that they regularly used confessions obtained under duress to secure convictions. The Court did not doubt the reliability of those reports and noted that the Italian Government had not adduced any evidence capable of rebutting such assertions.

The Court noted that in Italy Mr Saadi had been accused of international terrorism and that his conviction in Tunisia had been confirmed by an Amnesty International statement in June 2007. The applicant therefore belonged to the group at risk of ill-treatment. That being so, the Court considered that there were substantial grounds for believing that there was a real risk that the applicant would be subjected to treatment contrary to Article 3 if he were to be deported to Tunisia.

The Court further noted that the Tunisian authorities had not provided the diplomatic assurances requested by the Italian Government in May 2007. Referring to the notes verbales from the Tunisian Ministry of Foreign Affairs, the Court emphasised that the existence of domestic laws and accession to treaties were not sufficient to ensure adequate protection against the risk of ill-treatment where, as in the applicant's case, reliable sources had reported practices manifestly contrary to the principles of the Convention. Furthermore, even if the Tunisian authorities had given the diplomatic assurances that would not have absolved the Court from the obligation to examine whether such assurances provided a sufficient guarantee that the applicant would be protected against the risk of treatment.

Consequently, the Court found that the decision to deport Mr Saadi to Tunisia would breach Article 3 if it were enforced.

Article 6, Article 8 and Article 1 of Protocol No. 7

Recalling its finding concerning Article 3 and having no reason to doubt that the Italian Government would comply with its Grand Chamber judgment, the Court considered that it was not necessary to decide the question whether, in the event of expulsion to Tunisia, there would also be violations of Article 6, Article 8 and Article 1 of Protocol No. 7.

Judge Zupančič expressed a concurring opinion, as did Judge Myjer, joined by Judge Zagrebelsky. The texts are annexed to the judgment.

32. Eur.Court HR, Korbely v. Hungary, Grand Chamber Judgment of 19 September 2008, Application No. 9174/02, (Article 7, No Punishment without Law – Violation). The applicant successfully claimed that he had been convicted for crimes against humanity, based on common Article 3 of the 1949 Geneva Conventions, in respect of an act which had not constituted a criminal offence at the time it was committed.

ECHR 643 (2008)
19.09.2008

Press release issued by the Registrar

The European Court of Human Rights has today delivered at a public hearing its Grand Chamber judgment in the case of **Korbely v. Hungary** (application no. 9174/02).

The Court held:

- by eleven votes to six, that there had been a **violation of Article 7** (no punishment without law) of the European Convention on Human Rights; and,
- by twelve votes to five, that it was not necessary to examine separately the applicant's complaint under Article 6 § 1 (right to a fair trial) of the Convention concerning the alleged unfairness of the proceedings.

The applicant made no claim under Article 41 (just satisfaction) of the Convention. (The judgment is available in English and French.)

1. Principal facts

The case concerned an application brought by a Hungarian national, János Korbely, who was born in 1929 and lives in Szentendre (Hungary). The applicant is a retired military officer who was serving a sentence in Budapest Prison when the application was lodged.

In 1994 the Budapest Military Public Prosecutor's Office indicted the applicant for his participation in the quelling of a riot in Tata during the 1956 revolution. He was charged with having commanded, as captain, a 15-strong squad in an assignment, on 26 October 1956, to regain control of the Tata Police Department building, which had been taken over by insurgents, and with having shot, and ordered his men to shoot, at civilians. Several people died or were injured in the incident.

On 29 May 1995 the Military Bench of the Budapest Regional Court discontinued the criminal proceedings against the applicant, holding that the offences with which he was charged constituted homicide and incitement to homicide, rather than crimes against humanity, and that such offences, even if proven, were statute-barred. The prosecution appealed against that decision, which was quashed by the Supreme Court's appeal bench.

On 7 May 1998 the Military Bench of the Budapest Regional Court, after examining the case afresh, discontinued the criminal proceedings in a decision that was upheld by the Supreme Court's appeal bench on 5 November 1998. Those decisions were quashed following a review.

The applicant was eventually convicted of multiple homicide constituting a crime against humanity and was sentenced to five years' imprisonment. The judges relied on Article 3(1) of the Geneva Convention of 1949. Mr Korbely began serving his sentence on 24 March 2003 and on 31 May 2005 he was conditionally released.

The full texts of the Court's judgments are accessible on its website (<http://www.hudoc.echr.coe.int>)

2. Procedure and composition of the Court

The application was lodged with the European Court of Human Rights on 20 January 2002. On 3 May 2007 the Chamber to which the case had been allocated relinquished jurisdiction in favour of the Grand Chamber, under Article 30 of the Convention.

A hearing took place in public in the Human Rights Building, Strasbourg, on 4 July 2007.

Judgment was given by the Grand Chamber of 17 judges, composed as follows:

Jean-Paul **Costa** (French), President,
 Christos **Rozakis** (Greek),
 Nicolas **Bratza** (British),
 Peer **Lorenzen** (Danish),
 Françoise **Tulkens** (Belgian),
 Loukis **Loucaides** (Cypriot),
 Ireneu **Cabral Barreto** (Portuguese)
 Karel **Jungwiert** (Czech),
 Volodymyr **Butkevych** (Ukrainian),
 András **Baka** (Hungarian),
 Vladimiro **Zagrebelky** (Italian),
 Antonella **Mularoni** (San Marinese),
 Elisabet **Fura-Sandström** (Swedish),
 Renate **Jaeger** (German),
 Sverre Erik **Jebens** (Norwegian),
 Dragoljub **Popović** (Serbian),
 Mark **Villiger** (Swiss), judges,

and also Michael **O'Boyle**, **Deputy Registrar**.

3. Summary of the judgment

Complaints

Relying in particular on Article 7 (no punishment without law), the applicant submitted that he had been convicted in respect of an act which had not constituted a criminal offence at the time it was committed.

Decision of the Court

Article 7

Observing that the applicant's act, at the time it was committed, had constituted an offence defined with sufficient accessibility, the Court examined whether it had been foreseeable that the act in respect of which he had been convicted would be classified as a crime against humanity. It noted that in finding the applicant guilty, the Hungarian courts had essentially relied on common Article 3 of the Geneva Conventions, which – in the view of the Hungarian Constitutional Court – characterised the conduct referred to in that provision as “crimes against humanity”.

The Court noted that murder within the meaning of common Article 3 could have provided a basis for a conviction for crimes against humanity committed in 1956. However, other elements also needed to be present for that classification to apply. Such additional requirements derived not from common Article 3 but from the international-law elements inherent in the notion of crime against humanity at

The full texts of the Court's judgments are accessible on its website (<http://www.hudoc.echr.coe.int>)

that time. The Court observed that the domestic courts had not determined whether the killing had met the additional criteria without which it could not be characterised as a crime against humanity. It thus concluded that it was open to question whether the constituent elements of a crime against humanity had been satisfied in the applicant's case.

In convicting the applicant, the Hungarian courts had found that Tamás Kaszás, who was killed in the incident in question, had been a non-combatant for the purposes of common Article 3, the protection of which extended notably to "persons taking no active part in the hostilities, including members of armed forces who have laid down their arms".

Tamás Kaszás had been the leader of an armed group of insurgents who, after committing other violent acts, had taken control of the police building and seized the police officers' weapons. He had therefore taken an active part in the hostilities. The Court found it to be crucial that, according to the Hungarian courts' findings, Tamás Kaszás had been secretly carrying a handgun, a fact which he had not revealed when confronted with the applicant. Once it had become known that he was armed, he had not clearly signalled his intention to surrender. Instead, he had embarked on an animated quarrel with the applicant, and had then drawn his gun with unknown intentions. It was precisely in the course of that act that he had been shot. In the light of the commonly accepted international-law standards applicable at the time, the Court was not satisfied that Tamás Kaszás could be said to have laid down his arms within the meaning of common Article 3. Lastly, the Court did not accept the Government's argument that the applicant's conviction had not been primarily based on his reaction to Tamás Kaszás's drawing his handgun, but on his having shot, and ordered others to shoot, at a group of civilians.

The Court therefore considered that Tamás Kaszás had not fallen within any of the categories of non-combatants protected by common Article 3. Consequently, that provision could not reasonably have formed a basis for a conviction for crimes against humanity in the applicant's case in the light of the relevant international-law standards at the time. The Court concluded that there had been a violation of Article 7.

Article 6

In the light of its finding of a violation of Article 7, the Court did not consider it necessary to examine the applicant's complaint that the proceedings in his case had been unfair.

Judges Lorenzen, Tulkens, Zagrebelsky, Fura-Sandström and Popović expressed a joint dissenting opinion and Judge Loucaides a dissenting opinion. The opinions are annexed to the judgment.

33. Eur.Court HR, *Demir and Baykara v. Turkey*, Grand Chamber Judgment of 12 November 2008, Application No. 34503/97, (Article 11, Freedom of Assembly and Association – Violation, on account of interference with the exercise by the applicants, municipal civil servants, of their right to form trade unions; Article 11, Freedom of Assembly and Association – Violation, on account of the annulment, with retrospective effect, of a collective agreements between the trade union Tüm Bel sen and the employing authority that had been the result of collective bargaining). The case concerned a successful challenge to the failure by the Turkish Court of Cassation in 1995 to recognise the applicants' right, as municipal civil servants, to form trade unions, despite the existence of and reference to international treaties and conventions of the International Labour Organisation (ILO), and the annulment of a collective agreement between their union and the employing authority.

**ECHR 797 (2008)
12.11.2008**

Press release issued by the Registrar

The European Court of Human Rights has today delivered at a public hearing its Grand Chamber judgment in the case of *Demir and Baykara v. Turkey* (application no.34503/97).

The Court held unanimously that:

- there had been a **violation of Article 11** (freedom of assembly and association) of the European Convention on Human Rights on account of interference with the exercise by the applicants, municipal civil servants, of their right to form trade unions; and,
- there had been a further **violation of Article 11** of the Convention on account of the annulment, with retrospective effect, of a collective agreement between the trade union Tüm Bel Sen and the employing authority that had been the result of collective bargaining.

Under Article 41 (just satisfaction), the Court awarded Ms Vicdan Baykara, legal representative of the trade union Tüm Bel Sen, in respect of non-pecuniary damage, 20,000 euros (EUR) to be transferred by her to the union, and Mr Kemal Demir EUR 500 for all heads of damage combined. (The judgment is available in English and French.)

1. Principal facts

Kemal Demir and Vicdan Baykara are Turkish nationals who were born in 1951 and 1958 respectively. Mr Demir lives in Gaziantep and Ms Baykara in Istanbul. At the relevant time, Ms Baykara was the president of the Tüm Bel Sen trade union and Mr Demir one of its members.

The case concerned the failure by the Court of Cassation in 1995 to recognise the applicants' right, as municipal civil servants, to form trade unions, and the annulment of a collective agreement between their union and the employing authority.

The trade union Tüm Bel Sen was founded in 1990 by civil servants from various municipalities, its registered objective being to promote democratic trade unionism and thereby assist its members in their aspirations and claims.

The full texts of the Court's judgments are accessible on its website (<http://www.hudoc.echr.coe.int>)

In 1993 the trade union entered into a collective agreement with Gaziantep Municipal Council regulating all aspects of the working conditions of the Council's employees, including salaries, benefits and welfare services. The trade union, considering that the Council had failed to fulfil certain of its obligations – in particular financial – under the agreement, brought proceedings against it in the Turkish civil courts. It won its case in the Gaziantep District Court, which found in particular that although there were no express statutory provisions recognising a right for trade unions formed by civil servants to enter into collective agreements, this lacuna had to be filled by reference to international treaties such as the conventions of the International Labour Organisation (ILO) which had already been ratified by Turkey and which, by virtue of the Constitution, were directly applicable in domestic law.

However, on 6 December 1995 the Court of Cassation ruled that in the absence of specific legislation, the freedom to join a trade union and to bargain collectively could not be exercised. It indicated that, at the time the union was founded, the Turkish legislation in force did not permit civil servants to form trade unions. It concluded that *Tüm Bel Senhad* never enjoyed legal personality, since its foundation, and therefore did not have the capacity to take or defend court proceedings.

Following an audit of the Gaziantep Municipal Council's accounts by the Audit Court, the members of *Tüm Bel Sen* were obliged to reimburse the additional income they had received as a result of the defunct collective agreement.

2. Procedure and composition of the Court

The application was lodged with the European Commission of Human Rights on 8 October 1996. It was transferred to the Court on 1 November 1998 and declared partly admissible on 23 September 2004. In its Chamber judgment of 21 November 2006, the Court held unanimously that there had been a violation of Article 11 of the Convention.

On 21 February 2007 the Government requested that the case be referred to the Grand Chamber under Article 43 of the Convention and on 23 May 2007 the panel of the Grand Chamber accepted that request.

A Grand Chamber public hearing took place in the Human Rights Building, Strasbourg, on 16 January 2008. Judgment was given by the Grand Chamber of 17 judges, composed as follows:

Christos **Rozakis** (Greek), *President*,
 Nicolas **Bratza** (British),
 Françoise **Tulkens** (Belgian),
 Josep **Casadevall** (Andorran),
 Giovanni **Bonello** (Maltese),
 Rıza **Türmen** (Turkish),
 Kristaq **Traja** (Albanian),
 Boštjan M. **Zupančič** (Slovenian),
 Vladimiro **Zagrebelsky** (Italian),
 Stanislav **Pavlovski** (Moldovan),
 Lech **Garlicki** (Polish),
 Alvina **Gyulumyan** (Armenian),
 Ljiljana **Mijović** (citizen of Bosnia and Herzegovina),
 Dean **Spielmann** (Luxemburger),
 Ján **Šikuta** (Slovak),
 Mark **Villiger** (Swiss),
 Päivi **Hirvelä** (Finnish), *judges*,

The full texts of the Court's judgments are accessible on its website (<http://www.hudoc.echr.coe.int>)

and also Michael O'Boyle, *Deputy Registrar*.

3. Summary of the judgment

Complaints

The applicants complained under Articles 11 (freedom of assembly and association) and 14 (prohibition of discrimination) that the Turkish courts had denied them the right to form a trade union and to enter into collective agreements.

Decision of the Court

Article 11

The applicants' right, as municipal civil servants, to form trade unions

The Court considered that the restrictions imposed on the three groups mentioned in Article 11, namely members of the armed forces, of the police or of the administration of the State, were to be construed strictly and therefore confined to the "exercise" of the rights in question. Such restrictions could not impair the very essence of the right to organise. It was moreover incumbent on the State concerned to show the legitimacy of any restrictions. In addition, municipal civil servants, who are not engaged in the administration of the State as such, could not in principle be treated as "members of the administration of the State" and, accordingly, be subjected on that basis to a limitation of their right to organise and to form trade unions.

The Court observed that those considerations found support in the majority of the relevant international instruments and in the practice of European States. The Court concluded that "members of the administration of the State" could not be excluded from the scope of Article 11. At most the national authorities were entitled to impose "lawful restrictions" on them, in accordance with Article 11 § 2. In the present case, however, the Government had failed to show how the nature of the duties performed by the applicants required them to be regarded as "members of the administration of the State" subject to such restrictions. The applicants could therefore legitimately rely on Article 11.

In the Court's view it had not been shown that the absolute prohibition on forming trade unions imposed on civil servants by Turkish law, as it applied at the relevant time, met a pressing social need. At that time, the right of civil servants to form and join trade unions was already recognised by instruments of international law, both universal and regional. Their right of association was also generally recognised in all member States of the Council of Europe. ILO Convention No. 87, the fundamental text securing, internationally, the right of public officials to form trade unions, was already, by virtue of the Turkish Constitution, directly applicable in domestic law, and the State had confirmed by its subsequent practice (amending of Constitution and judicial decisions) its willingness to recognise the right to organise of civil servants. Turkey had also, in 2000, signed the two United Nations instruments recognising this right.

The Court observed, however, that in spite of these developments in international law, the Turkish authorities had not been able, at the relevant time, to secure to the applicants the right to form a trade union, mainly for two reasons. First, the Turkish legislature, after the ratification in 1993 of ILO Convention No. 87 by Turkey, did not enact legislation to govern the practical application of that right until 2001. Secondly, during the transitional period, the Court of Cassation refused to follow the solution proposed by the Gaziantep District Court, which had been guided by developments in international law, and adopted a restrictive and formalistic interpretation of the domestic legislation concerning the forming of legal entities.

The full texts of the Court's judgments are accessible on its website (<http://www.hudoc.echr.coe.int>)

The Court thus considered that the combined effect of the restrictive interpretation by the Court of Cassation and the legislature's inactivity between 1993 and 2001 had prevented the Turkish Government from fulfilling its obligation to secure to the applicants the enjoyment of their trade-union rights and that this was not "necessary in a democratic society". Accordingly, there had been a violation of Article 11 on account of the failure to recognise the applicants' right, as municipal civil servants, to form a trade union.

Annulment of a collective agreement which had been applied for the previous two years

The Court pointed out that the development of its case-law as to the substance of the right of association enshrined in Article 11 was marked by two guiding principles: firstly, the Court took into consideration the totality of the measures taken by the State concerned in order to secure trade-union freedom, allowing for its margin of appreciation; secondly, the Court did not accept restrictions that affected the essential elements of trade-union freedom, without which that freedom would become devoid of substance. These two principles were not contradictory but were correlated. This correlation implied that the Contracting State in question, whilst in principle being free to decide what measures it wished to take in order to ensure compliance with Article 11, was under an obligation to take account of the elements regarded as essential by the Court's case-law.

The Court explained that, from the case-law as it stood, the following essential elements of the right of association could be established: the right to form and join a trade union, the prohibition of closed-shop agreements and the right for a trade union to seek to persuade the employer to hear what it had to say on behalf of its members. This list was not finite. On the contrary, it was subject to evolution depending on particular developments in labour relations. Limitations to rights thus had to be construed restrictively, in a manner which gave practical and effective protection to human rights.

Concerning the right to bargain collectively, the Court, reconsidering its case-law, found, having regard to developments in labour law, both international and national, and to the practice of Contracting States in this area, that the right to bargain collectively with an employer had, in principle, become one of the essential elements of the "right to form and to join trade unions for the protection of [one's] interests" set forth in Article 11 of the Convention, it being understood that States remained free to organise their system so as, if appropriate, to grant special status to representative trade unions. Like other workers, civil servants, except in very specific cases, should enjoy such rights, but without prejudice to the effects of any "lawful restrictions" that may have to be imposed on "members of the administration of the State", a category to which the applicants in the present case did not, however, belong.

The Court considered that the trade union *Tüm Bel Sen* had, already at the relevant time, enjoyed the right to engage in collective bargaining with the employing authority. This right constituted one of the inherent elements in the right to engage in trade-union activities, as secured to that union by Article 11 of the Convention. The collective bargaining and the resulting collective agreement, which for a period of two years had governed all labour relations within Gaziantep Municipal Council except for certain financial matters, had constituted, for the trade union concerned, an essential means to promote and secure the interests of its members. The absence of the legislation necessary to give effect to the provisions of the international labour conventions already ratified by Turkey, and the Court of Cassation's judgment of 6 December 1995 based on that absence, with the resulting *de facto* retroactive annulment of the collective agreement, constituted interference with the applicants' trade-union freedom.

In the Court's view, at the relevant time a number of elements showed that the refusal to accept that the applicants, as municipal civil servants, enjoyed the right to bargain collectively and thus to persuade the authority to enter into a collective agreement, had not corresponded to a "pressing social need".

The full texts of the Court's judgments are accessible on its website (<http://www.hudoc.echr.coe.int>)

The right for civil servants to be able, in principle, to bargain collectively, was recognised by international legal instruments, both universal and regional, and by a majority of member States of the Council of Europe. In addition, Turkey had ratified ILO Convention No. 98, the principal instrument protecting, internationally, the right for workers to bargain collectively and enter into collective agreements – a right that was applicable to the applicants’ trade union.

The Court concluded that the annulment of the collective agreement was not “necessary in a democratic society” and that there had therefore been a violation of Article 11 on that point also, in respect of both the applicants’ trade union and the applicants themselves.

Article 14

In view of its findings under Article 11, the Court did not consider it necessary to examine this complaint separately.

Judge Spielmann expressed a concurring opinion joined by Judges Bratza, Casadevall and Villiger. Judge Zagrebelsky expressed a separate opinion.

34. Eur.Court HR, Andrejeva v. Latvia, Grand Chamber Judgment of 18 February 2009, Application No. 55707/00, (Article 14, Prohibition of Discrimination, in conjunction with Article 1 of Protocol No. 1, Protection of Property – Violation; Article 6-1, Right to a Fair Trial – Violation). The applicant, now retired, was employed at the Olaine chemical complex, formerly a public body under the authority of the Union of Soviet Socialist Republics (USSR) Ministry of Chemical Industry, situated in what was USSR territory and is now Latvian territory following the restoration in August 1991 of Latvian independence. She successfully complained that the application of the transitional provisions of the Latvian State Pensions Act in her case had deprived her of pension entitlements in respect of 17 years of employment.

ECHR 122 (2009)

18.02.2009

Press release issued by the Registrar

The European Court of Human Rights has today delivered at a public hearing its Grand Chamber judgment in the case of *Andrejeva v. Latvia* (application no. 55707/00).

The Court held:

- by 16 votes to one, that there had been a **violation of Article 14** (prohibition of discrimination) of the European Convention on Human Rights **in conjunction with Article 1 of Protocol No. 1** (protection of property) to the Convention on account of the Latvian courts' refusal to grant the applicant a retirement pension in respect of her years of employment in the former Soviet Union prior to 1991 on the ground that she did not have Latvian citizenship; and
- unanimously, that there had been a **violation of Article 6 § 1** (right to a fair hearing) of the Convention.

Under Article 41 (just satisfaction), the Court awarded the applicant 5,000 euros (EUR) in respect of all damage sustained and EUR 1,500 for costs and expenses. (The judgment is available in English and French.)

1. Principal facts

The applicant, Natālija Andrejeva, was born in 1942 and lives in Riga (Latvia). She has lived in Latvia for 54 years and, having previously been a national of the former USSR, currently has the status of a permanently resident non-citizen (*nepilsons*) of Latvia. Now retired, she was employed at a recycling plant at the Olaine chemical complex, formerly a public body under the authority of the USSR Ministry of Chemical Industry. The complex is situated in what was USSR territory and is now Latvian territory following the restoration in August 1991 of Latvian independence.

The case concerned, in particular, the applicant's complaint that the application of the transitional provisions of the Latvian State Pensions Act in her case had deprived her of pension entitlements in respect of 17 years of employment.

The applicant first entered Latvian territory in 1954, at the age of 12, at a time when it was part of the Soviet Union. She has been permanently resident there ever since. She started her job at the Olaine chemical complex in 1966. In 1973 she was assigned to the regional division of the Environmental

The full texts of the Court's judgments are accessible on its website (<http://www.hudoc.echr.coe.int>)

Protection Monitoring Department of the USSR Ministry of Chemical Industry. Until 1981 she was under the authority of a State enterprise with its head office in Kiev. She was subsequently placed under the authority of a subdivision of the same enterprise, which was subordinate to a division with its head office in Moscow. Although the applicant's salary was paid by post-office giro transfer, initially from Kiev and then from Moscow, her successive reassignments did not entail any significant change in her working conditions, as she continued her duties at the Olaine recycling plant.

Following the declaration of Latvia's independence, on 21 November 1990 the Environmental Protection Monitoring Department was abolished and the applicant came under the direct authority of the plant's management.

On retiring in 1997 the applicant asked her local Social Insurance Board to calculate her retirement pension. She was informed that, in accordance with paragraph 1 of the transitional provisions of the State Pensions Act, only periods of work in Latvia could be taken into account in calculating the pensions of foreign nationals or stateless persons who had been resident in Latvia on 1 January 1991. As the applicant had been employed from 1 January 1973 to 21 November 1990 by entities based in Kiev and Moscow, the Board calculated her pension solely in respect of the time she had worked before and after that period. As a result, she was awarded a monthly pension of 20 Latvian lati (approximately EUR 35).

The applicant brought administrative and judicial proceedings, without success. Ultimately, the applicant's appeal on points of law to the Senate of the Supreme Court, examined at a public hearing on 6 October 1999, was dismissed. The Senate upheld the district and regional courts' findings that the period during which the applicant had been employed by Ukrainian and Russian enterprises could not be taken into account in calculating her pension. Furthermore, as those employers were not taxpayers in Latvia, there was no reason for the applicant to be covered by the Latvian mandatory social-insurance scheme.

The applicant requested the re-examination of her case because she had been unable to take part in the hearing of 6 October 1999 as it had started earlier than scheduled. That request was also dismissed.

In February 2000 the applicant was informed that, on the basis of an agreement reached between Latvia and Ukraine, her pension had been recalculated, with effect from 1 November 1999, to take account of the years she had worked for her Ukrainian-based employers.

2. Procedure and composition of the Court

The application was lodged with the European Court of Human Rights on 27 February 2000 and declared partly admissible on 11 July 2006. On 11 December 2007 the Chamber to which the case was assigned decided to relinquish jurisdiction in favour of the Grand Chamber under Article 30[2]. The Grand Chamber held a public hearing in the case on 25 June 2008.

Judgment was given by the Grand Chamber of 17 judges, composed as follows:

Jean-Paul **Costa** (France), *President*,
 Christos **Rozakis** (Greece),
 Nicolas **Bratza** (the United Kingdom),
 Peer **Lorenzen** (Denmark),
 Françoise **Tulkens** (Belgium),
 Josep **Casadevall** (Andorra),
 Ireneu **Cabral Barreto** (Portugal)
 Corneliu **Bîrsan** (Romania),
 Nina **Vajić** (Croatia),

The full texts of the Court's judgments are accessible on its website (<http://www.hudoc.echr.coe.int>)

Alvina **Gyulumyan** (Armenia),
 Dean **Spielmann** (Luxemburg),
 David Thór **Björgvinsson** (Iceland),
 Ján **Šikuta** (Slovakia),
 Ineta **Ziemele** (Latvia),
 Mark **Villiger** (Liechtenstein),
 Isabelle **Berro-Lefèvre** (Monaco),
 Zdravka **Kalaydjieva** (Bulgaria), *judges*,

and also Michael **O'Boyle**, *Deputy Registrar*.

3. Summary of the judgment

Complaints

Relying on Article 14 taken in conjunction with Article 1 of Protocol No. 1, the applicant alleged, in particular, that by refusing to grant her a State pension in respect of her employment in the former Soviet Union prior to 1991 on the ground that she did not have Latvian citizenship, the Latvian authorities had discriminated against her in the exercise of her pecuniary rights. She also complained, under Article 6 § 1 (right to a fair hearing), that the hearing of 6 October 1999 had taken place earlier than scheduled, which had prevented her from taking part in the examination of her appeal on points of law.

Decision of the Court

Article 14 taken in conjunction with Article 1 of Protocol No. 1

The Court reiterated that once an applicant had established the existence of a difference in treatment, it was for the Government to show that the difference was justified.

In the present case the Court noted, firstly, that in the judgments they had delivered in 1999 the Latvian courts had found that the fact of having worked for an entity established outside Latvia despite having been physically in Latvian territory did not constitute “employment within the territory of Latvia” within the meaning of the State Pensions Act. The parties disagreed as to whether at that time such an interpretation could have appeared reasonable or whether it was manifestly arbitrary. The Court did not consider it necessary to determine that issue separately.

The Court accepted that the difference in treatment complained of pursued at least one legitimate aim that was broadly compatible with the general objectives of the Convention, namely the protection of the country’s economic system.

The parties agreed that if the applicant became a naturalised Latvian citizen she would automatically receive the pension in respect of her entire working life. However, the Court had held that very weighty reasons would have to be put forward before it could regard a difference of treatment based exclusively on the ground of nationality as compatible with the Convention; it could not discern any such reasons in the present case. Firstly, it had not been established, or even alleged, that the applicant had not satisfied the other statutory conditions entitling her to a pension in respect of all her years of employment. She was therefore in a similar situation to persons who had had an identical or similar career but who, after 1991, had been recognised as Latvian citizens. Secondly, there was no evidence that during the Soviet era there had been any difference in treatment between nationals of the former USSR as regards pensions. Thirdly, the Court observed that the applicant was not currently a national of any State. She had the status of a “permanently resident non-citizen” of Latvia, the only State with

which she had any stable legal ties and thus the only State which, objectively, could assume responsibility for her in terms of social security.

In those circumstances, the arguments submitted by the Latvian Government were not sufficient to satisfy the Court that there was a “reasonable relationship of proportionality” between the legitimate aim pursued and the means employed.

The Government took the view that the reckoning of periods of employment was essentially a matter to be addressed through bilateral inter-State agreements on social security. The Court was fully aware of the importance of such agreements but nevertheless reiterated that by ratifying the Convention, Latvia had undertaken to secure “to everyone within [its] jurisdiction” the rights and freedoms guaranteed therein. Accordingly, the Latvian State could not be absolved of its responsibility under Article 14 on the ground that it was not or had not been bound by inter-State agreements on social security with Ukraine and Russia. Nor could the Court accept the Government’s argument that it would be sufficient for the applicant to become a naturalised Latvian citizen in order to receive the full amount of her pension. The prohibition of discrimination in Article 14 was meaningful only if an applicant’s personal situation was taken into account exactly as it stood. The Court therefore found a violation of Article 14 taken in conjunction with Article 1 of Protocol No. 1.

Article 6 § 1

The Court noted, among other things, that the appeal on points of law had been lodged not by the applicant herself or her lawyer but by the public prosecutor attached to the Riga Regional Court. The Government argued that the favourable position adopted by the public prosecutor had dispensed the Senate from having to afford the applicant the opportunity to attend the hearing herself. The Court was not persuaded by that argument and observed, in particular, that it did not appear that under Latvian law, a public prosecutor could represent one of the parties or replace that party at the hearing. Ms Andrejeva had been a party to administrative proceedings governed at the time by the Civil Procedure Act and instituted at her request. Accordingly, as the main protagonist in those proceedings she should have been afforded the full range of safeguards deriving from the adversarial principle.

The Court concluded that the fact that the appeal on points of law had been lodged by the prosecution service had in no way curtailed the applicant’s right to be present at the hearing of her case, a right she had been unable to exercise despite having wished to do so. There had therefore been a violation of Article 6 § 1.

Judge Ziemele expressed a partly dissenting opinion, which is annexed to the judgment.

35. Eur.Court HR, Varnava and Others v. Turkey, Grand Chamber Judgment of 18 September 2009, Application Nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 & 16073/90, (Article 2, Right to Life – Violation; Article 3, Prohibition of Torture – Violation; Article 5, Right to Liberty and Security – Violation). The applicants, relatives of 18 Cypriot nationals, nine of whom had disappeared during military operations carried out by the Turkish army in Northern Cyprus in July and August 1974, successfully claimed that their disappeared relatives had prior to their disappearance been detained by Turkish military forces and that the Turkish authorities had not accounted for them since.

ECHR 668 (2009)
18.09.2009

Press release issued by the Registrar

Under Article 41 (just satisfaction) of the Convention, the Court awarded the applicants 12,000 euros (EUR) per application in respect of non-pecuniary damage and EUR 8,000 for costs and expenses. (The judgment is available in English and French.)

Principal facts

The applications were introduced before the Court in the name and on behalf of 18 Cypriot nationals, nine of whom had disappeared during military operations carried out by the Turkish Army in northern Cyprus in July and August 1974. The nine other applicants are or were relatives of the men who disappeared.

Among the nine people who disappeared, eight were members of the Greek-Cypriot forces that had attempted to oppose the advance of the Turkish army. According to a number of witness statements, they had been among prisoners of war captured by the Turkish military. The ninth person, Mr Hadjipanteli, a bank employee, was taken for questioning by Turkish soldiers on 18 August 1974. His body, which bore several bullet marks, was found in 2007 in the course of a mission carried out by the United Nations Committee of Missing Persons (CMP).

The Turkish Government disputed that these men had been taken into captivity by the Turkish Army. They submitted that the first eight were military personnel who had died in action and that the name of the ninth one did not appear on the list of Greek-Cypriot prisoners held at the stated place of detention, inspected by the International Red Cross. The Cypriot Government stated, however, that the nine men had gone missing in areas under the control of the Turkish forces.

Complaints, procedure and composition of the Court

The applicants alleged that their relatives had disappeared after being detained by Turkish military forces in 1974 and that the Turkish authorities had not accounted for them since. They relied on Articles 2 (right to life), 3 (prohibition of inhuman or degrading treatment), 4 (prohibition of forced labour), 5 (right to liberty and security), 6 (right to a fair trial), 8 (right to respect for private and family life), 10 (freedom of expression), 12 (right to marry), 13 (right to an effective remedy) and 14 (prohibition of discrimination).

The full texts of the Court's judgments are accessible on its website (<http://www.hudoc.echr.coe.int>)

The applications were lodged with the European Commission of Human Rights on 25 January 1990. They were joined by the Commission on 2 July 1991, and declared admissible on 14 April 1998. They were transmitted to the Court on 1 November 1998.

In its judgment of 10 January 2008 (“the Chamber judgment”), the Chamber held unanimously that there had been violations of Articles 2, 3 and 5 of the Convention and that no separate issues arose under Articles 4, 6, 8, 10, 12, 13 and 14 of the Convention. It also held that the finding of a violation constituted in itself sufficient just satisfaction for the non-pecuniary damage sustained by the applicants.

On 7 July 2008, under Article 43 of the Convention the case was referred to the Grand Chamber at the Turkish Government’s request. The Cypriot Government submitted written observations and so did the organisation REDRESS which, in September 2008, was granted leave to intervene in the written procedure. A public hearing took place at the European Court of Human Rights in Strasbourg, on 19 November 2008.

The Government challenged the Court’s jurisdiction to examine the case on several counts. First, they submitted, among other things, that there was no legal interest in determining these applications given that the Court had already decided on the question of the disappearances of all missing Greek Cypriots in the fourth inter-State case. Secondly, the applications fell outside of the Court’s temporal jurisdiction given that they all related to facts which had occurred before Turkey’s acceptance of the right of individual petition on 28 January 1987. Lastly, too much time had lapsed between the facts and the introduction of the applications which had to be declared inadmissible for not being taken before the Court within six months after Turkey’s acceptance of the right to individual petition.

Judgment was given by a Grand Chamber of seventeen judges composed as follows:

Jean-Paul **Costa** (France), **President**,
 Françoise **Tulkens** (Belgium),
 Josep **Casadevall** (Andorra),
 Anatoly **Kovler** (Russia),
 Vladimiro **Zagrebelky** (Italy),
 Lech **Garlicki** (Poland),
 Dean **Spielmann** (Luxembourg),
 Sverre Erik **Jebens** (Norway),
 Ineta **Ziemele** (Latvia),
 Mark **Villiger** (Liechtenstein),
 Päivi **Hirvelä** (Finland),
 Luis **López Guerra** (Spain),
 Mirjana Lazarova **Trajkovska** (“the former Yugoslav Republic of Macedonia”),
 Nona **Tsotsoria** (Georgia),
 Ann **Power** (Ireland),
 Zdravka **Kalaydjieva** (Bulgaria), **judges**,
 Gönül **Erönen** (Turkey), **ad hoc judge**,
 and Erik **Fribergh**, **Registrar**.

Decision of the Court

Preliminary objections by the Government

Legal interest

The full texts of the Court’s judgments are accessible on its website (<http://www.hudoc.echr.coe.int>)

The Court first noted that for an application to be substantially the same as another which it had already examined it had to concern substantially not only the same facts and complaints but be introduced by the same persons. While the fourth inter-State case had indeed found a violation in respect of all missing persons, the individual applications allowed the Court to grant just satisfaction awards for pecuniary and non-pecuniary damage suffered by individual applicants, and to indicate any general or individual measures that might be taken. Satisfied that a legal interest remained in pursuing the examination of these applications, the Court rejected the Government's objection.

Temporal jurisdiction

The Court noted that the applicants had specified that their claims related only to the situation pertaining after 28 January 1987 (namely the date of Turkey's acceptance of the right of individual petition). The Court held that obligation to account for the fate of the missing men by conducting an effective investigation was of a continuing nature and even though the men had been missing for over 34 years without any news, this obligation could persist for as long as the fate of the missing persons was unaccounted for. Accordingly, the Court dismissed the Government's objection on this count.

Late submission to the Court

The Court noted that the applicants had introduced their applications some 15 years after their relatives went missing in 1974 and that it had not been possible for them to do so before 1987. Having regard to the exceptional situation brought about by the international conflict, the Court was satisfied that the applicants had acted with reasonable expedition, even though they had brought their complaints about three years after Turkey had accepted the right to individual petition. The Court therefore rejected this objection too.

Article 2

The Court noted that the Turkish Government had not put forward any concrete information to show that any of the missing men had been found dead or had been killed in the conflict zone under their control. Nor had there been any other convincing explanation as to what might have happened to them that could counter the applicants' claims that the men had disappeared in areas under the Turkish Government's exclusive control. In light of the findings in the fourth inter-State case, which had not been refuted, these disappearances had occurred in life-threatening circumstances where the conduct of military operations had been accompanied by widespread arrests and killings.

The Court fully acknowledged the importance of the CMP's ongoing exhumations and identifications of remains and gave full credit to the work being done in providing information and returning remains to relatives. It noted, however, that while its work was an important first step in the investigative process, it was not sufficient to meet the Government's obligation under Article 2 to carry out effective investigations. In particular, the CMP was not determining the facts surrounding the deaths of the missing persons who had been identified, nor was it collecting or assessing evidence with a view to holding any perpetrators of unlawful violence to account in a criminal prosecution. No other body or authority had taken on that role either. The Court did not doubt that many years after the events there would be considerable difficulty in assembling eye-witness evidence or in identifying and mounting a case against any alleged perpetrators. However, recalling its established case-law on the clear obligation of States to investigate effectively, the Court found that the Turkish Government had to make the necessary efforts in that direction. The Court concluded therefore that there had been a continuing violation of Article 2 on account of Turkey's failure to effectively investigate the fate of the nine men who disappeared in 1974.

Article 3

The full texts of the Court's judgments are accessible on its website (<http://www.hudoc.echr.coe.int>)

The Court recalled its finding in the fourth inter-State case that in the context of the disappearances in 1974, where the military operation had resulted in considerable loss of life and large-scale detentions, the relatives of the missing men had suffered the agony of not knowing whether their family members had been killed or taken into detention. Furthermore, due to the continuing division of Cyprus, the relatives had been faced with very serious obstacles in their search for information. The Turkish authorities' silence in the face of those real concerns could only be categorised as inhuman treatment.

The Court found no reason to differ from the above finding. The length of time over which the ordeal of the relatives had been dragged out and the attitude of official indifference in the face of their acute anxiety to know the fate of their close family members had resulted in a breach of Article 3 in respect of the applicants.

Article 5

The Court found that there was an arguable case that two of the missing men, Eleftherios Thoma and Savvas Hadjipanteli, both of whom had been included on ICRC lists as detainees, had been seen last in circumstances falling within the control of the Turkish or Turkish Cypriot forces. However, the Turkish authorities had not acknowledged their detention, nor had they provided any documentary evidence giving official trace of their movements. While there had been no evidence that any of the missing persons had been in detention in the period under the Court's consideration, the Turkish Government had to show that they had carried out an effective investigation into the arguable claim that the two missing men had been taken into custody and not seen subsequently. The Court's findings above in relation to Article 2 left no doubt that the authorities had also failed to conduct the necessary investigation in that regard. There had therefore been a continuing violation of Article 5 in respect of Eleftherios Thoma and Savvas Hadjipanteli.

Given that there had been no sufficient evidence showing that the other seven men had been last seen under Turkish control, there had been no violation of Article 5 in respect of them.

Other Articles

Having had regard to the facts of the case, the submissions of the parties and its findings under Articles 2, 3 and 5 of the Convention, the Court concluded that it had examined the main legal questions raised in the present application and that it was not necessary to give a separate ruling on the applicants' remaining complaints.

Judges Kalaydjieva, Power, Spielmann, Villiger and Ziemele expressed concurring opinions, and Judge Erönen expressed a dissenting opinion. All opinions are annexed to the judgment.

36. Eur.Court HR, *Al-Saadoon and Mufdhi v. the United Kingdom, Fourth Section Judgment of 2 March 2010, Application No. 61498/08, (Article 3, Prohibition of Torture – Violation; Article 6, Right to a Fair Trial – No Violation; Article 13, Right to an Effective Remedy – Violation; Article 34, Individual Applications – Violation).* The applicants, two Iraqi nationals and former senior officials of the Ba’ath party accused of involvement in the murder of two British soldiers shortly after the invasion of Iraq in 2003, successfully complained that their transfer by the British authorities into Iraqi custody had put them at real risk of execution by hanging.

ECHR 174 (2010)
02.03.2010

Press release issued by the Registrar

Principal facts

The case concerned the complaint by the applicants, accused of involvement in the murder of two British soldiers shortly after the invasion of Iraq in 2003, that their transfer by the British authorities into Iraqi custody put them at real risk of execution by hanging.

The applicants, Faisal Attiyah Nassar Khalaf Hussain Al-Saadoon and Khalef Hussain Mufdhi, are Iraqi nationals who were born in 1952 and 1950. They are Sunni Muslims from southern Iraq and former senior officials of the Ba’ath party. They are currently detained in Rusafa Prison, near Baghdad.

Following the invasion of Iraq by an international coalition of armed forces on 20 March 2003, the applicants were arrested by British forces and detained in British-run detention facilities as they were suspected, among other things, of having orchestrated violence against the coalition forces. In October 2004 the UK’s Royal Military Police concluded that applicants had been involved in the deaths of two British soldiers, Staff Sergeant Cullingworth and Sapper Allsopp, ambushed and murdered in southern Iraq on 23 March 2003.

In August 2004 the Iraqi National Assembly reintroduced the death penalty to the Iraqi Penal Code in respect of certain violent crimes, including murder and certain war crimes.

In December 2005 the British authorities decided to refer the murder case against the applicants to the Iraqi criminal courts. In May 2006 the applicants appeared before the Basra Criminal Court on charges of murder and war crimes. The Basra Criminal Court issued arrest warrants against them and made an order authorising their continued detention by the British Army in Basra. Subsequently, the Basra Criminal Court decided that the allegations against the applicants constituted war crimes and therefore fell within the jurisdiction of the Iraqi High Tribunal (“IHT”: a court set up under Iraqi national law, to try Iraqi nationals or residents accused of genocide, crimes against humanity and war crimes allegedly committed during the period 17 July 1968 to 1 May 2003). The case was transferred to the IHT which, on 27 December 2007, formally requested the British forces to transfer the applicants into its custody; repeated requests were made to that effect until May 2008.

On 12 June 2008, the applicants brought judicial review proceedings in England challenging, among other things, the legality of their transfer. The case was heard by the English Divisional Court which, on 19 December 2008, declared the proposed transfer lawful. The court found that since the applicants were held in a British military detention facility, they were within the jurisdiction of the UK as

The full texts of the Court’s judgments are accessible on its website (<http://www.hudoc.echr.coe.int>)

provided by Article 1 (obligation to respect human rights) of the European Convention of Human Rights. Nonetheless, the court held that under public international law the UK was obliged to surrender the applicants unless there was clear evidence that the receiving State intended to subject them to treatment so harsh as to constitute a crime against humanity. It found no substantial grounds for believing there to be a real risk that, on being transferred, a trial against the applicants would be flagrantly unfair or that they would face torture and/or inhuman and degrading treatment. While, on the other hand there was a real risk that the death penalty would be applied if the applicants were surrendered to the Iraqi authorities, the death penalty in itself was not prohibited by international law.

The applicants' appeal was refused by the Court of Appeal on 30 December 2008. The Court of Appeal found that there was a real risk that the applicants would be executed if transferred. It concluded, however, that the UK was not exercising jurisdiction because it was detaining the applicants on Iraqi territory and on the orders of the Iraqi courts. The Convention did not, therefore, apply and the UK had to respect Iraqi sovereignty and transfer the applicants.

Immediately after that decision, the applicants applied to the European Court of Human Rights for an interim measure under Rule 39 of its Rules of Court to prevent the British authorities making the transfer. On 30 December 2008 the Court indicated to the UK Government that the applicants should not be removed or transferred from their custody until further notice. The following day the UK Government informed the Court that, principally because the UN Mandate, which authorised the role of British forces in arrest, detention and imprisonment tasks in Iraq, was due to expire at midnight on 31 December 2008, exceptionally they could not comply with the measure indicated by the Court and that they had transferred the applicants to Iraqi custody earlier that day.

On 16 February 2009 the applicants were refused leave to appeal by the House of Lords.

The applicants' trial before the IHT started in May 2009 and ended in September 2009 with a verdict cancelling the charges against them and ordering their immediate release. Upon an appeal by the prosecutor, the Iraqi Court of Cassation remitted the case for further investigation by the Iraqi authorities and for a retrial. The applicants remain in custody.

Complaints, procedure and composition of the Court

The applicants complained about their transfer to Iraqi custody. They relied on Article 2 (right to life), Article 3 (prohibition of torture and or inhuman and degrading treatment), Article 6 (right to a fair trial) and Article 1 of Protocol No. 13 (abolition of the death penalty). They also complained about the fact that they were transferred to the Iraqi authorities despite the Court's indication under Rule 39 of its Rules of Court, in breach of Articles 13 (right to an effective remedy) and 34 (right of individual petition).

The application was lodged with the European Court of Human Rights on 22 December 2008.

Judgment was given by a Chamber of seven judges, composed as follows:

Lech **Garlicki** (Poland), **President**,
 Nicolas **Bratza** (the United Kingdom),
 Giovanni **Bonello** (Malta),
 Ljiljana **Mijović** (Bosnia and Herzegovina)
 Ján **Šikuta** (Slovakia),
 Mihai **Poalelungi** (Moldova),
 Nebojša **Vučinić** (Montenegro), **Judges**,

and Lawrence **Early**, **Section Registrar**.

The full texts of the Court's judgments are accessible on its website (<http://www.hudoc.echr.coe.int>)

Decision of the Court

Jurisdiction

The Court adopted on 30 July 2009 a decision on the admissibility of the applicants' complaints in which it considered that the United Kingdom authorities had had total and exclusive control, first through the exercise of military force and then by law, over the detention facilities in which the applicants were held. The Court found that the applicants had been within the UK's jurisdiction and had remained so until their physical transfer to the custody of the Iraqi authorities on 31 December 2008.

The death penalty as inhuman and degrading treatment

The Court emphasised that 60 years ago, when the Convention was drafted, the death penalty had not been considered to violate international standards. However, there had been a subsequent evolution towards its complete abolition, in law and in practice, within all the Member States of the Council of Europe. Two Protocols to the Convention had thus entered into force, abolishing the death penalty in time of peace (Protocol 6) and in all circumstances (Protocol 13), and the United Kingdom had ratified them both.[2] All but two Member States had signed Protocol 13 and all but three States which had signed it had ratified it. This demonstrated that Article 2 of the Convention had been amended so as to prohibit the death penalty in all circumstances. The Court concluded therefore that the death penalty, which involved the deliberate and premeditated destruction of a human being by the State authorities, causing physical pain and intense psychological suffering as a result of the foreknowledge of death, could be considered inhuman and degrading and, as such, contrary to Article 3 of the Convention.

The Court accepted the findings of the national courts which had concluded, shortly before the physical transfer took place, that there were substantial grounds for believing there to be a real risk of the applicants' being condemned to the death penalty and executed. It further observed that the Iraqi authorities had still not given any binding assurance that they would not execute the applicants. Moreover, while it was impossible to predict the outcome of the new investigation and trial ordered by the Iraqi courts, there were still substantial grounds for believing that the applicants would run a real risk of being sentenced to death if tried and convicted by an Iraqi court.

The death penalty had been reintroduced in Iraq in August 2004. Nonetheless, and without obtaining any assurance from the Iraqi authorities, the UK authorities had decided in December 2005 to refer the applicants' case to the Iraqi courts and in May 2006 proceedings commenced in the Basra Criminal Court. The Court considered that from that date at least the applicants had been subjected to a well-founded fear of execution, giving rise to a significant degree of mental suffering, which must have intensified and continued from the date they were physically transferred into Iraqi custody.

The Government had argued that they had no option but to respect Iraqi sovereignty and transfer the applicants, who were Iraqi nationals held on Iraqi territory, to the custody of the Iraqi courts when so requested. However, the Court was not satisfied that the need to secure the applicants' rights under the Convention inevitably required a breach of Iraqi sovereignty. It did not appear that any real attempt was made to negotiate with the Iraqi authorities to prevent the risk of the death penalty. Moreover, the evidence showed that the Iraqi prosecutors initially had "cold feet" about bringing the case themselves, because the matter was "so high profile". This could have provided an opportunity to seek the consent of the Iraqi Government to an alternative arrangement involving, for example, the applicants being tried by a UK court, either in Iraq or in the UK. It does not appear that any such solution was ever sought.

The full texts of the Court's judgments are accessible on its website (<http://www.hudoc.echr.coe.int>)

Consequently, in view of the above, the Court concluded that the applicants had been subjected to inhuman and degrading treatment, in violation of Article 3.

Fair trial

The Court accepted the national courts' finding that, at the date of transfer, it had not been established that the applicants risked a flagrantly unfair trial before the IHT. Now that the trial had taken place, there was no evidence before the Court to cast doubt on that assessment. It followed that there had been no violation of Article 6.

Right to individual petition and to an effective remedy

The Government had not satisfied the Court that they had taken all reasonable steps, or indeed any steps, to seek to comply with the Court's Rule 39 indication not to transfer the applicants to Iraqi custody. They had not informed the Court, for example, of any attempt made after the Court's indication and before the transfer took place to explain the situation to the Iraqi authorities or to reach a temporary solution which would have safeguarded the applicants' rights until the Court had completed its examination of the case. The failure to comply with the Court's indication and the transfer of the applicants out of the United Kingdom's jurisdiction had exposed them to a serious risk of grave and irreparable harm and had unjustifiably nullified the effectiveness of any appeal to the House of Lords. The Court therefore found violations of Articles 13 and 34 of the Convention.

Just satisfaction

Under Article 41 (just satisfaction) of the Convention, the Court held that the finding of a violation constituted sufficient just satisfaction for the non-pecuniary damage suffered by the applicants and awarded the applicants jointly 40,000 euros (EUR) for costs and expenses.

Judge Bratza expressed a partly dissenting opinion, which is annexed to the judgment.

37. Eur.Court HR, Čudak v. Lithuania, Grand Chamber Judgment of 23 March 2010, Application No. 15869/02, (Article 6-1, Right to a Fair Hearing within a Reasonable Time – Violation). The applicant, a Lithuanian employee of the Polish embassy in Lithuania, was denied a hearing for alleged sexual harassment in the workplace after the embassy invoked its immunity but successfully argued that her denial of a hearing had amounted to a violation of her Convention rights.

ECHR 241 (2010)
23.03.2010

Press release issued by the Registrar

Principal facts

The case concerned an application brought by a Lithuanian national, Alicija Čudak, who was born in 1961 and lives in Vilnius.

In November 1997, Ms Čudak was hired as a secretary and switchboard operator by the Embassy of the Republic of Poland in Vilnius. Her duties corresponded to those habitually expected of such a post, and were stipulated in her employment contract.

In 1999, Ms Čudak complained to the Lithuanian Equal Opportunities Ombudsperson that she was being sexually harassed by one of her male colleagues as a result of which she had fallen ill. The Ombudsperson held an inquiry and recognised that she was indeed a victim of sexual harassment.

Ms Čudak, on sick leave for two months, was not allowed to enter the building upon her return on 29 October 1999, and on two other occasions in the weeks that followed. She complained in writing to the ambassador and a few days later, on 2 December 1999, was informed that she had been dismissed for failure to come to work during the last week of November 1999. She brought an action for unfair dismissal before the civil courts, which declined jurisdiction on the basis of the doctrine of State immunity from jurisdiction, invoked by the Polish Ministry of Foreign Affairs, and according to which one State could not be subject to the jurisdiction of another. The Lithuanian Supreme Court found in particular that Ms Čudak had exercised a public-service function during her employment with the Polish Embassy in Vilnius and established that, merely from the title of her position, it could be concluded that her duties facilitated the exercise by the Republic of Poland of its sovereign functions and, therefore, justified the application of the State immunity rule.

Ms Čudak lodged her application with the European Court of Human Rights on 4 December 2001 and it was declared admissible on 2 March 2006. On 27 January 2009 the Chamber to which the case had been allocated relinquished jurisdiction in favour of the Grand Chamber, under Article 301 of the Convention.

Complaints, procedure and composition of the Court

Relying on Article 6, the applicant alleged that she was denied access to a court.

Judgment was given by the Grand Chamber of 17 judges, composed as follows:

The full texts of the Court's judgments are accessible on its website (<http://www.hudoc.echr.coe.int>)

Jean-Paul **Costa** (France), **President**,
 Christos **Rozakis** (Greece),
 Nicolas **Bratza** (United-Kingdom),
 Peer **Lorenzen** (Denmark),
 Françoise **Tulkens** (Belgium),
 Josep **Casadevall** (Andorra),
 Ireneu Cabral **Barreto** (Portugal),
 Corneliu **Bîrsan** (Romania),
 Vladimiro **Zagrebelsky** (Italy),
 David Thór **Björgvinsson** (Iceland),
 Dragoljub **Popović** (Serbia),
 Ineta **Ziemele** (Latvia),
 Mark **Villiger** (Liechtenstein),
 Giorgio **Malinverni** (Switzerland),
 András **Sajó** (Hungary),
 Nona **Tsotsoria** (Georgia),
 Işıl **Karakaş** (Turkey), **Judges**,

and Johan **Callewaert**, **Deputy Grand Chamber Registrar**.

Decision of the Court

The court first noted that there was a trend in international law, confirmed with the adoption at the United Nations level of two international legal documents – the 1991 Draft Articles and the 2004 Convention on Jurisdictional Immunities of States and their Property – towards limiting the application of State immunity, notably by exempting contracts of staff employed in a State’s diplomatic missions abroad from the immunity rule. Immunity still applied, however, to diplomatic and consular staff in cases where the subject of the dispute was the recruitment, renewal of employment or reinstatement of an individual, or where the employee was a national of the employer State, or there was a written agreement to that effect between the employer and the employee.

Ms Čudak had not been covered by any of those exceptions. She had not performed any particular functions closely related to the exercise of governmental authority. She had not been a diplomatic agent or consular officer, nor a national of the employer State, and, lastly, the subject matter of the dispute had had to do with the applicant’s dismissal. In addition, it did not appear from the file that Ms Čudak had performed in reality any functions related to the exercise of sovereignty by the Polish State and neither the Lithuanian Supreme Court nor the Government had shown how her ordinary duties could have objectively related to the sovereign interests of the Polish State.

The mere allegation that Ms Čudak could have had access to certain documents or could have been privy to confidential telephone conversations in the course of her duties was not sufficient. Her dismissal and the ensuing legal proceedings had arisen originally from acts of sexual harassment that had been established by the Lithuanian Equal Opportunities Ombudsperson. Such acts could hardly be regarded as undermining Poland’s security interests.

Consequently, by declining jurisdiction to hear the applicant’s claim and accepting the Polish Government argument of State immunity, the Lithuanian courts’ decisions had impaired the very essence of Ms Čudak’s right of access to a court. Accordingly, there had been a violation of Article 6 § 1.

The full texts of the Court’s judgments are accessible on its website (<http://www.hudoc.echr.coe.int>)

Under Article 41 (just satisfaction), the Court held that Lithuania is to pay to the applicant 10,000 euros (EUR) in respect of pecuniary and non-pecuniary damage.

38. Eur.Court HR, *Medvedyev and Others v. France*, Grand Chamber Judgment of 29 March 2010, Application No. 3394/03, (Article 5-1, Right to Liberty and Security – Violation; Article 5-3, Right to Judicial Review of Detention – No Violation). The applicants, crew members of a Cambodian-registered cargo vessel ‘Winner’ which was intercepted by the French Navy on suspicion of trafficking narcotics for distribution in Europe, successfully claimed that there had been no legal basis in public international law for their confinement by the French Navy prior to conviction.

ECHR 259 (2010)

29.03.2010

**Press release issued by the Registrar
Grand Chamber judgment**

Medvedyev and Others v. France (n° 3394/03)

**Violation of Article 5 § 1
No violation of Article 5 § 3
(right to liberty and security)**

of the European Convention on Human Rights

Principal facts

The nine applicants are Oleksandr Medvedyev and Borys Bilenikin, Ukrainian nationals, Nicolae Balaban, Puiu Dodica, Nicu Stelian Manolache and Viorel Petcu, Romanian nationals, Georgios Boreas, a Greek national, and Sergio Cabrera Leon and Guillermo Luis Eduar Sage Martinez, Chilean nationals. They were crew-members of a cargo vessel named the Winner.

In June 2002 the French authorities requested authorisation to intercept the Winner, which was registered in Cambodia, as it was suspected of carrying significant quantities of narcotics for distribution in Europe. In a diplomatic note dated 7 June 2002 Cambodia consented to the intervention of the French authorities. On an order from the Maritime Prefect and at the request of the Brest public prosecutor a tug was sent out from Brest to take control of the Winner and reroute it to Brest harbour. The French Navy apprehended the vessel off the shores of Cap Verde and the crew were confined to their quarters on board under French military guard.

On their arrival in Brest on 26 June 2002, 13 days later, the applicants were taken into police custody and were brought before investigating judges the same day. On 28 and 29 June they were charged and remanded in custody.

On conclusion of the criminal proceedings against the applicants, three of them were found guilty of conspiracy to illegally attempt to import narcotics and received sentences ranging from three to 20 years’ imprisonment. The other six applicants were acquitted.

Complaints, procedure and composition of the Court

Relying on Article 5 § 1, the applicants complained that they had been deprived of their liberty unlawfully, particularly in the light of international law, as the French authorities had not had jurisdiction in that regard. Under Article 5 § 3, they complained that it had taken too long to bring

them before “a judge or other officer authorised by law to exercise judicial power” within the meaning of that provision.

The application was lodged with the European Court of Human Rights on 19 December 2002.

In a judgment of 10 July 2008 the Court held unanimously that there had been a violation of Article 5 § 1, taking the view that the applicants had not been deprived of their liberty in accordance with a procedure prescribed by law. It further held, by four votes to three, that there had been no violation of Article 5 § 3, taking into consideration the “wholly exceptional circumstances”, in particular the inevitable delay entailed by having the Winner tugged to France.

On 1 December 2008 the case was referred to the Grand Chamber under Article 43 of the Convention at the request of the Government and the applicants. On 6 May 2009 a hearing was held in public in the Human Rights Building in Strasbourg.

Judgment was given by the Grand Chamber of 17 judges, composed as follows:

Nicolas **Bratza** (United Kingdom), **President**,
 Jean-Paul **Costa** (France),
 Françoise **Tulkens** (Belgium),
 Josep **Casadevall** (Andorra),
 Giovanni **Bonello** (Malta),
 Corneliu **Bîrsan** (Romania),
 Boštjan M. **Zupančič** (Slovenia),
 Lech **Garlicki** (Poland),
 Elisabet **Fura** (Sweden),
 Khanlar **Hajiyev** (Azerbaijan),
 Dean **Spielmann** (Luxembourg),
 Sverre Erik **Jebens** (Norway),
 Ján **Šikuta** (Slovakian Republic),
 George **Nicolaou** (Cyprus),
 Nona **Tsotsoria** (Georgia),
 Ann **Power** (Ireland),
 Mihai **Poalelungi** (Moldova), **Judges**,

And also Michael **O’Boyle**, **Deputy Registrar**.

Decision of the Court

Article 1

The Court had established in its case-law that the responsibility of a State Party to the European Convention on Human Rights could arise in an area outside its national territory when as a consequence of military action it exercised effective control of that area, or in cases involving the activities of its diplomatic or consular agents abroad and on board aircraft and ships registered in, or flying the flag of, the State concerned.

France had exercised full and exclusive control over the Winner and its crew, at least de facto, from the time of its interception, in a continuous and uninterrupted manner. Besides the interception of the Winner by the French Navy, its rerouting had been ordered by the French authorities, and the crew had remained under the control of the French military throughout the voyage to Brest. Accordingly, the applicants had been effectively within France’s jurisdiction for the purposes of Article 1.

The full texts of the Court’s judgments are accessible on its website (<http://www.hudoc.echr.coe.int>)

Article 5 § 1

The applicants had been under the control of the special military forces and deprived of their liberty throughout the voyage, as the ship's course had been imposed by the French military. The Court therefore considered that their situation after the ship was boarded had amounted to a deprivation of liberty within the meaning of Article 5.

The Court was fully aware of the need to combat international drug trafficking and could see why States were so firm in that regard. However, while noting the special nature of the maritime environment, it took the view that this could not justify the creation of an area outside the law.

It was not disputed that the purpose of the deprivation of liberty to which the applicants were subjected while the vessel was being escorted to France had been to bring them "before the competent legal authority" within the meaning of Article 5 § 1 (c). However, the intervention of the French authorities could not, as the Government contended, be justified on the basis of the Montego Bay Convention or under international customary law. Nor were there grounds for French law to be applied, as Cambodia was not a party to the conventions transposed into domestic law, in particular the Vienna Convention, and the Winner had not been flying the French flag.

Cambodia nevertheless had the right to engage in cooperation with other countries outside the framework of the international conventions; the diplomatic note issued by the Cambodian authorities on 7 June 2002 constituted an ad hoc agreement authorising the interception of the Winner, but not the detention of the crew members and their transfer to France, which were not covered by the note. The fact that the French authorities had intervened on the basis of this exceptional cooperation measure – added to the fact that Cambodia had not ratified the relevant conventions and that no current and long-standing practice existed between Cambodia and France in the battle against drug trafficking at sea – meant that their intervention could not be said to have been "clearly defined" and foreseeable.

It was regrettable that the international effort to combat drug trafficking on the high seas was not better coordinated, bearing in mind the increasingly global dimension of the problem. For States that were not parties to the Montego Bay and Vienna Conventions one solution might be to conclude bilateral or multilateral agreements, like the San José agreement of 2003, with other States. Developments in public international law which embraced the principle that all States had jurisdiction whatever the flag State, in line with what already existed in respect of piracy, would be a significant step forward.

Accordingly, the deprivation of liberty to which the applicants had been subjected between the boarding of their ship and its arrival in Brest had not been "lawful", for lack of a legal basis of the requisite quality to satisfy the general principle of legal certainty. The Court therefore held by ten votes to seven that there had been a violation of Article 5 § 1.

Article 5 § 3

The Court reiterated that Article 5 was in the first rank of the fundamental rights that protected the physical security of an individual, and that three strands in particular could be identified as running through the Court's case-law: strict interpretation of the exceptions, the lawfulness of the detention and the promptness or speediness of the judicial controls, which must be automatic and must be carried out by a judicial officer offering the requisite guarantees of independence from the executive and the parties and with the power to order release after reviewing whether or not the detention was justified.

While the Court had already noted that terrorist offences presented the authorities with special problems, that did not give them carte blanche to place suspects in police custody, free from effective control. The same applied to the fight against drug trafficking on the high seas.

In this case the applicants had been brought before the investigating judges – who could certainly be described as “judge[s] or other officer[s] authorised by law to exercise judicial power” within the meaning of Article 5 § 3 – 13 days after their arrest on the high seas (the Court regretted the fact that the Government had not submitted substantiated information concerning the presentation of the applicants to the investigating judges until the Grand Chamber stage).

At the time of its interception the Winner had been off the coast of the Cape Verde islands, and therefore a long way from the French coast. There was nothing to indicate that it had taken any longer than necessary to escort it to France, particularly in view of the weather conditions and the poor state of repair of the vessel, which made it impossible for it to travel any faster. In view of these “wholly exceptional circumstances”, it had been materially impossible to bring the applicants before the investigating judges any sooner, bearing in mind that they had been brought before them eight or nine hours after their arrival, a period which was compatible with the requirements of Article 5 § 3.

The Court therefore held by nine votes to eight that there had been no violation of Article 5 § 3.

Article 41 (just satisfaction)

The Court held by 13 votes to four that France was to pay 5,000 euros (EUR) to each of the applicants in respect of non-pecuniary damage and EUR 10,000 to the applicants jointly for costs and expenses.

Judges Costa, Casadevall, Bîrsan, Garlicki, Hajiyeu, Šikuta and Nicolaou expressed a joint partly dissenting opinion, as did Judges Tulkens, Bonello, Zupančič, Fura, Spielmann, Tsotsoria, Power and Poalelungi. Both separate opinions are annexed to the judgment.

39. Eur.Court HR, Kononov v. Latvia, Grand Chamber Judgment 17 May 2010, Application No. 36376/04, (Article 7-1, No Punishment without Law – No Violation).

The applicant, a former member of a Soviet guerrilla militia in 1944 and convicted of war crimes by a Latvian court having allegedly executed several civilians, unsuccessfully complained that this conviction was not foreseeable since the acts of which he had been accused of had not, at the time of their commission, constituted an offence under either domestic or public international law.

ECHR 390 (2010)

17.05.2010

Press release issued by the Registrar

**Grand Chamber Judgment
Kononov v. Latvia (Application n° 36376/04)**

Principal facts

Vasilij Kononov was born in Latvia in 1923. He was a Latvian national until 12 April 2000, when he was granted Russian nationality. In 1942 he was called up as a soldier in the Soviet Army. In 1943 he was dropped into Belarus territory (under German occupation at the time) near the Latvian border, where he joined a Soviet commando unit composed of members of the “Red Partisans”.

According to the facts as established by the competent Latvian courts, on 27 May 1944 the applicant led a unit of Red Partisans wearing German uniforms on an expedition on the village of Mazie Bati, certain of whose inhabitants were suspected of having betrayed to the Germans another group of Red Partisans. The applicant’s unit searched six farm buildings in the village. After finding rifles and grenades supplied by the Germans in each of the houses, the Partisans shot the six heads of family concerned. They also wounded two women. They then set fire to two houses and four people (three of whom were women) perished in the flames. In all, nine villagers were killed: six men – five executed and one killed in the burning buildings – and three women – one in the final stages of pregnancy. The villagers killed were unarmed; none attempted to escape or offered any form of resistance.

According to the applicant, the victims of the attack were collaborators who had delivered a group of 12 Partisans into the hands of the Germans some three months earlier. The applicant said that his unit had been instructed to capture those responsible so that they could be brought to trial. He further claimed that he had not personally led the operation or entered the village.

In July 1998 the Centre for the Documentation of the Consequences of Totalitarianism (Totalitārisma seku dokumentēšanas centrs), based in Latvia, forwarded an investigation file concerning the events of 27 May 1944 to the Latvian Principal Public Prosecutor. Subsequently, Mr Kononov was charged with war crimes.

On 30 April 2004 the Criminal Affairs Division of the Supreme Court ultimately found the applicant guilty of war crimes under Article 68-3 of the 1961 Criminal Code of the Soviet Socialist Republic of Latvia (the “1961 Latvian Criminal Code”)[2]. Relying mainly on the provisions of the Geneva Convention relative to the Protection of Civilian Persons in Time of War (“Geneva Convention (IV) 1949”), it convicted the applicant for the ill-treatment, wounding and killing of the villagers, finding in particular that burning a pregnant woman to death violated the special protection afforded to women during war. Furthermore, the applicant and his unit had violated Article 25 of the Hague

The full texts of the Court’s judgments are accessible on its website (<http://www.hudoc.echr.coe.int>)

Regulations 1907 which forbade attacks against undefended localities, such as the villagers' farm buildings. Under Article 23(b) of the same Regulations, the applicant was also convicted separately of treacherous wounding and killing, as he and his unit had worn German uniforms during the Mazie Bati operation. Noting that he was aged, infirm and harmless, the Latvian courts imposed an immediate custodial sentence of one year and eight months.

The applicant lodged an unsuccessful appeal on points of law.

Complaints, procedure and composition of the Court

The applicant complained, in particular, that the acts of which he had been accused had not, at the time of their commission, constituted an offence under either domestic or international law. He maintained that, in 1944 as a young soldier in a combat situation behind enemy lines, he could not have foreseen that those acts could have constituted war crimes, or have anticipated that he would subsequently be prosecuted. He also argued that his conviction following the independence of Latvia in 1991 had been a political exercise by the Latvian State rather than any real wish to fulfil international obligations to prosecute war criminals. He relied on Article 7 § 1 (no punishment without law) of the European Convention.

The application was lodged with the European Court of Human Rights on 27 August 2004.

In a judgment of 24 July 2008 the Court held, by four votes to three, that there had been a violation of Article 7 and, under Article 41 (just satisfaction), awarded the applicant 30,000 euros (EUR) in respect of non-pecuniary damage.

On 6 January 2009 the case was referred to the Grand Chamber under Article 43 at the Government's request.

Third-party comments were received from the Government of the Russian Federation and from the Lithuanian Government.

On 20 May 2009 a hearing was held in public in the Human Rights Building in Strasbourg.

Judgment was given by the Grand Chamber of 17, composed as follows:

Jean-Paul **Costa** (France), **President**,
 Christos **Rozakis** (Greece),
 Nicolas **Bratza** (the United Kingdom),
 Peer **Lorenzen** (Denmark),
 Françoise **Tulkens** (Belgium),
 Josep **Casadevall** (Andorra),
 Ireneu **Cabral Barreto** (Portugal)
 Dean **Spielmann** (Luxembourg),
 Renate **Jaeger** (Germany),
 Sverre Erik **Jebens** (Norway),
 Dragoljub **Popović** (Serbia),
 Päivi **Hirvelä** (Finland),
 Ledi **Bianku** (Albania),
 Zdravka **Kalaydjieva** (Bulgaria),
 Mihai **Poalelungi** (Moldova),
 Nebojša **Vučinić** (Montenegro), **judges**,
 Alan Vaughan **Lowe** (Latvia), **ad hoc judge**,

The full texts of the Court's judgments are accessible on its website (<http://www.hudoc.echr.coe.int>)

and also Michael O'Boyle, Deputy Registrar

Decision of the Court

Had there been a sufficiently clear legal basis in 1944 for the crimes of which the applicant had been convicted?

Mr Kononov had been convicted under Article 68-3 of the 1961 Latvian Criminal Code, a provision introduced by the Supreme Council on 6 April 1993, which used the “relevant legal conventions” (such as the Geneva Convention (IV) 1949) as the basis for a precise definition of war crimes. The Latvian courts’ conviction of the applicant had, therefore, been based on international rather than domestic law.

By May 1944 the prevailing definition of a war crime had been an act contrary to the laws and customs of war; and international law had defined the basic principles underlying those crimes. States had been permitted (if not required) to take steps to punish individuals for such crimes, including on the basis of command responsibility. Consequently, during and after the Second World War, international and national tribunals had prosecuted soldiers for war crimes committed during the Second World War.

As to whether there had been a sufficiently clear and contemporary legal basis for the specific war crimes for which the applicant had been convicted, the Court began its assessment on the basis of a hypothesis that the deceased villagers could be considered to be “combatants” or “civilians who had participated in hostilities” (rather than “civilians”). The Court also recalled the “two cardinal principles” relied on by the International Court of Justice as applicable to armed conflict which constituted “the fabric of humanitarian law”, namely “protection of the civilian population and objects” and “the obligation to avoid unnecessary suffering to combatants”.

In that connection, and having regard notably to Article 23(c) of the Hague Regulations 1907, the villagers’ murder and ill-treatment had violated a fundamental rule of the laws and customs of war by which an enemy rendered hors combat – in this case not carrying arms – was protected. Nor was a person required to have a particular legal status or to formally surrender. As combatants, the villagers would also have been entitled to protection as prisoners of war under the control of the applicant and his unit and their subsequent ill-treatment and summary execution would have been contrary to the numerous rules and customs of war protecting prisoners of war. Therefore, like the Latvian courts, the Court considered that the ill-treatment, wounding and killing of the villagers had constituted a war crime.

Furthermore, the domestic courts had reasonably relied on Article 23(b) of the Hague Regulations 1907 to separately convict Mr Kononov of treacherous wounding and killing. At the relevant time wounding or killing had been considered treacherous if it had been carried out while unlawfully inducing the enemy to believe they had not been under threat of attack by, for example, making improper use of an enemy uniform, which the applicant and his unit indeed had done. Equally, there was a plausible legal basis for convicting Mr Kononov of a separate war crime as regards the burning to death of the expectant mother, given the special protection for women during war established well before 1944 (ie Lieber Code 1863) in the laws and customs of war and confirmed immediately after the Second World War by numerous specific and special protections in the Geneva Conventions. Nor had there been evidence domestically, and it had not been argued before the Court, that it had been “imperatively demanded by the necessities of war” to burn down the farm buildings in Mazie Bati, the only exception under the Hague Regulations 1907 for the destruction of private property.

The full texts of the Court’s judgments are accessible on its website (<http://www.hudoc.echr.coe.int>)

Indeed, the applicant had himself described in his version of events what he ought to have done namely, to have arrested the villagers for trial. Even if a partisan trial had taken place, it would not qualify as fair if it had been carried out without the knowledge or participation of the accused villagers, followed by their execution. Mr Kononov, having organised and been in control of the partisan unit which had been intent on killing the villagers and destroying their farms, had command responsibility for those acts.

In conclusion, even assuming as the applicant maintained that the deceased villagers could be considered to have been “civilians who had participated in hostilities” or “combatants”, there had been a sufficiently clear legal basis, having regard to the state of international law in 1944, for the applicant’s conviction and punishment for war crimes as the commander of the unit responsible for the attack on Mazie Bati on 27 May 1944. The Court added that, if the villagers were to be considered “civilians”, it followed that they would have been entitled to even greater protection.

Had the crimes been statute-barred?

The Court noted that the prescription provisions in domestic law were not applicable: the applicant’s prosecution required reference to international law both as regards the definition of such crimes and determination of any limitation period. The essential question was therefore whether, at any point prior to Mr Kononov’s prosecution, such action had become statute-barred by international law. The Court found that the charges had never been prescribed under international law either in 1944 or in developments in international law since. It therefore concluded that the prosecution of the applicant had not become statute-barred.

Could the applicant have foreseen that the relevant acts had constituted war crimes and that he would be prosecuted?

As to whether the qualification of the acts as war crimes, based as it was on international law only, could be considered to be sufficiently accessible and foreseeable to the applicant in 1944, the Court recalled that it had previously found that the individual criminal responsibility of a private soldier (a border guard) was defined with sufficient accessibility and foreseeability by a requirement to comply with international fundamental human rights instruments, which instruments did not, of themselves, give rise to individual criminal responsibility. While the 1926 Criminal Code did not contain a reference to the international laws and customs of war, this was not decisive since international laws and customs of war were in 1944 sufficient, of themselves, to found individual criminal responsibility.

The Court found that the laws and customs of war constituted particular and detailed regulations fixing the parameters of criminal conduct in a time of war, primarily addressed to armed forces and, especially, commanders. Given his position as a commanding military officer, the Court was of the view that Mr Kononov could have been reasonably expected to take special care in assessing the risks that the operation in Mazie Bati had entailed. Even the most cursory reflection by Mr Kononov, would have indicated that the acts, flagrantly unlawful ill-treatment and killing, had risked not only being counter to the laws and customs of war as understood at that time but also constituting war crimes for which, as commander, he could be held individually and criminally accountable.

As to the applicant’s submission that it had been politically unforeseeable that he would be prosecuted, the Court recalled its prior jurisprudence to the effect that it was legitimate and foreseeable for a successor State to bring criminal proceedings against persons who had committed crimes under a former regime. Successor courts could not be criticised for applying and interpreting the legal provisions in force at the relevant time during the former regime, in the light of the principles governing a State subject to the rule of law and having regard to the core principles (such as the right to life) on which the European Convention system is built. Those principles were found to be

applicable to a change of regime of the nature which took place in Latvia following the Declarations of Independence of 1990 and 1991.

Accordingly, the Latvian courts' prosecution and conviction of Mr Kononov, based on international law in force at the time of the acts he stood accused of, could not be considered unforeseeable. In conclusion, at the time when they were committed, the applicant's acts had constituted offences defined with sufficient accessibility and foreseeability by the laws and customs of war.

The Court therefore concluded, by 14 votes to three, that there had been no violation of Article 7.

Judge Rozakis expressed a concurring opinion, joined by Judges Tulkens, Spielmann and Jebens. Judge Costa expressed a dissenting opinion, joined by Judges Kalaydjieva and Poalelungi. The texts of these separate opinions are annexed to the judgment.

40. Eur.Court HR, Van Anraat v. Netherlands, Third Section Decision of 6 July 2010, Application No. 65389/09, (Article 7-1, No Punishment without Law – Inadmissible).

The applicant, convicted of war crimes by a domestic court for supplying chemicals to Iraq to be used in the production of chemical weapons, submitted that his conviction had been unforeseeable since there was no norm of international law at that time which prohibited the committed acts. The Court, noting that the prohibition of the use of chemical weapons had at the time of the commission of the acts already existed as a norm of customary international law and that the 1925 Geneva Gas Protocols as well as the United Nations General Assembly had horribly condemned their usage, declared the application inadmissible.

Information Note on the Court's case-law No. 132

July 2010

Decision 6.7.2010 [Section III]

Article 7

Article 7-1

Nullum crimen sine lege

Conviction for supplying Iraqi authorities with chemical substance used to produce poisonous gas: *inadmissible*

Facts – Between 1984 and 1988 the applicant supplied the Iraqi Government with a chemical substance used to produce the highly poisonous “mustard gas” which was then used in the Iran-Iraq war as well as in Iraqi attacks on the Kurdish population in northern Iraq. In 2005 the applicant was convicted in the Netherlands under section 8 of the War Crimes Act for aiding and abetting violations of laws and customs of war committed by Saddam Hussein and his collaborators in gas attacks on both locations.

Law – Article 6 § 1: The applicant firstly complained about the Supreme Court's failure to reply to all the arguments he had raised before it, in particular an argument concerning his protection by the foreign sovereign immunity enjoyed by the perpetrators of the crimes he had allegedly aided and abetted. However, the Court noted that the applicant had raised this issue only in his reply to the Prosecutor General's advisory opinion, that is, at the final stage of the proceedings before the Supreme Court. While Article 6 guaranteed the right of defendants in criminal proceedings to reply to the Prosecutor General's opinion, it did not allow defendants to submit fresh arguments that had no bearing on any point contained in that opinion itself. The Supreme Court had a long-standing jurisprudence concerning the universal jurisdiction of the Netherlands criminal courts over crimes set out in section 8 of the War Crimes Act and, had the applicant wished to request it to change that approach, there had been nothing to prevent him from submitting his arguments at an earlier stage of the proceedings. In conclusion, Article 6 did not compel the Supreme Court to provide a reasoned response on this point.

Conclusion: inadmissible (manifestly ill-founded).

Article 7: The applicant further complained that section 8 of the War Crimes Act lacked foreseeability in so far as it relied for its substantive application on standards of general international law. However, given the general purpose of laws, it was logical that the wording of statutes could not always be precise; one of the standard techniques of regulation by rules was using general categorisations as opposed to exhaustive lists and, since the choice of legislative technique was reserved for the domestic legislature, in principle it escaped the Court's scrutiny. Further, as to the applicant's argument concerning the lack of precision of the applicable rules of international law, the Court concluded that during the period in which the applicant had supplied the Iraqi Government with the chemical substance in question, a norm of customary international law was in existence that prohibited the use of mustard gas as a weapon of war in international conflict, not least because of the 1925 Geneva Gas Protocol and the repeated condemnations throughout the Iran-Iraq war by the UN General Assembly of the use of chemical weapons. In so far as the applicant sought to challenge the domestic courts' findings of fact, the Court recalled that domestic courts were better placed to assess the credibility and relevance of evidence. In conclusion, it could not be maintained that, at the time when the applicant was committing the acts which led to his conviction, there was anything unclear about the criminal nature of the use of mustard gas either in an international conflict or against a civilian population. The applicant could therefore reasonably have been expected to be aware of the state of the law and to take appropriate legal advice (if necessary).

Conclusion: inadmissible (manifestly ill-founded).

41. Eur.Court HR, Al-Jedda v. the United Kingdom, Grand Chamber Judgment of 7 July 2011, Application No. 27021/08, (Article 5-1, Right to Liberty and Security – Violation). The applicant, a former Iraqi national who had been detained for three years in a detention centre run by British forces in Iraq and stripped of his British nationality, successfully claimed that the Government had been responsible for his detention notwithstanding a related United Nations Security Council Resolution which the Government claimed passed responsibility to the United Nations.

ECHR 100 (2011)

07.07.2011

Press release issued by the Registrar

In today's Grand Chamber judgment in the case **Al-Jedda v. the UK** (application no. 27021/08), which is final, the European Court of Human Rights held, by a majority of sixteen to one, that there had been:

a violation of Article 5 § 1 (right to liberty and security) of the European Convention on Human Rights.

The case concerned the internment of an Iraqi civilian for more than three years (2004-2007) in a detention centre in Basrah, Iraq, run by British forces.

The judgment was delivered today at a public hearing at the European Court of Human Rights, Strasbourg, shortly after 11 a.m.(local time).

Principal facts

The applicant, Hilal Abdul-Razzaq Ali Al-Jedda, born in Iraq in 1957, is an Iraqi national who is currently living in Istanbul, Turkey.

Mr Al-Jedda played for the Iraqi basketball team until, following his refusal to join the ruling Ba'ath Party, he left Iraq in 1978 and lived in the United Arab Emirates and Pakistan. He moved to the United Kingdom (UK) in 1992, where he made a claim for asylum and was granted indefinite leave to remain. He was granted British nationality in June 2000.

In September 2004 Mr Al-Jedda and his four eldest children travelled from London to Iraq, via Dubai, where he was arrested and questioned by United Arab Emirates intelligence officers. He was released after 12 hours, permitting him and his children to continue their journey to Iraq, where they arrived on 28 September 2004. On 10 October 2004 United States (US) soldiers, apparently acting on information provided by the British intelligence services, arrested Mr Al-Jedda at his sister's house in Baghdad.

He was taken to Basrah in a British military aircraft and then to the Sha'aibah Divisional Temporary Detention Facility in Basrah City, a detention centre run by British forces. He was interned there for over three years until 30 December 2007.

At that time, the Iraqi Interim Government was in power and the Multi-National Force, including British forces, remained in Iraq at the request of the Government and with the United Nations Security Council's (UNSC) authorisation.

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Mr Al-Jedda's internment was maintained by the British authorities as being necessary for imperative reasons of security in Iraq. He was believed to have been personally responsible for: recruiting terrorists outside Iraq to commit atrocities there; helping an identified terrorist explosives expert travel into Iraq; conspiring with that explosives expert to conduct attacks with improvised explosive devices against coalition forces near Fallujah and Baghdad; and conspiring with the explosives expert and members of an Islamist terrorist cell in the Gulf to smuggle high-tech detonation equipment into Iraq for use in attacks against coalition forces. The intelligence evidence supporting those allegations was not disclosed to him and no criminal charges were brought against him.

On 8 June 2005 Mr Al-Jedda brought a judicial review claim in the UK challenging the lawfulness of his continued detention and also the refusal of the UK Government to return him to the UK. The Government accepted that Mr Al-Jedda's detention did not fall within any of the permitted cases set out in Article 5 § 1 of the Convention. However, he contended that Article 5 § 1 did not apply, because the detention was authorised by UNSC Resolution 1546 and that, as a matter of international law, the effect of the Resolution was to displace Article 5.

The case was eventually decided by the House of Lords on 17 December 2007. The House of Lords, by a majority, rejected the UK Government's argument that the UN, and not the UK, was responsible for the internment under international law. The House of Lords also held, unanimously, that UNSC Resolution 1546 placed the UK under an obligation to intern individuals considered to threaten the security of Iraq and that, in accordance with Article 103 of the UN Charter, that obligation to the UNSC had to take primacy over the UK's obligation under the European Convention on Human Rights not to hold anyone in internment without charge.

On 14 December 2007 the Home Secretary signed an order depriving Mr Al-Jedda of British citizenship, claiming, among other things, that he had connections with violent Islamist groups, in Iraq and elsewhere, and had been responsible for recruiting terrorists outside Iraq and facilitating their travel and the smuggling of bomb parts into Iraq.

Mr Al-Jedda was released on 30 December 2007 and travelled to Turkey. He appealed unsuccessfully against the loss of his British citizenship. The Special Immigration Appeals Commission accepted on the basis of undisclosed evidence that he had helped a terrorist explosives expert travel to Iraq and conspired with him to smuggle explosives into Iraq and to attack coalition forces around Fallujah and Baghdad.

Complaints, procedure and composition of the Court

The applicant complained that he was interned by UK armed forces in Iraq between 10 October 2004 and 30 December 2007, in breach of Article 5 § 1. The application was lodged with the European Court of Human Rights on 3 June 2008. On 19 January 2010 the Chamber dealing with the case relinquished jurisdiction in favour of the Grand Chamber, and on 9 June 2010 a public hearing was held in the Human Rights building in Strasbourg (webcast available).

Judgment was given by the Grand Chamber of 17, composed as follows:

Jean-Paul **Costa** (France), President,
Christos **Rozakis** (Greece),
Nicolas **Bratza** (the UK),
Françoise **Tulkens** (Belgium),
Josep **Casadevall** (Andorra),
Dean **Spielmann** (Luxembourg),
Giovanni **Bonello** (Malta),
Elisabeth **Steiner** (Austria),

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Lech **Garlicki** (Poland),
 Ljiljana **Mijović** (Bosnia and Herzegovina),
 David Thór **Björgvinsson** (Iceland),
 Isabelle **Berro-Lefèvre** (Monaco),
 George **Nicolaou** (Cyprus),
 Luis **López Guerra** (Spain),
 Ledi **Bianku** (Albania),
 Ann **Power** (Ireland),
 Mihai **Poalelungi** (Moldova), Judges,

and also Michael **O'Boyle**, Deputy Registrar.

Decision of the Court

Article 5 § 1

The Court referred to its well-established case-law that Article 5 § 1 contained a list of situations in which it might be justifiable to deprive a person of her or his liberty and that the list did not include internment or preventive detention where there was no intention to bring criminal charges within a reasonable time. Indeed, the UK Government did not claim that Mr Al-Jedda's internment was compatible with Article 5 § 1.

The Government maintained that his internment was attributable to the UN and not to the UK. The Court unanimously rejected that argument. It noted that, at the time of the invasion in March 2003, there was no UNSC resolution providing for the allocation of roles in Iraq if the existing regime was displaced. In May 2003 the US and the UK, having displaced the previous regime, assumed control over the provision of security in Iraq; the UN was allocated a role in providing humanitarian relief, supporting the reconstruction of Iraq and helping in the formation of an Iraqi interim government, but had no role as regards security. The Court did not consider that subsequent UNSC Resolutions altered that position. As the UNSC had neither effective control nor ultimate authority and control over the acts and omissions of troops within the Multi-National Force, Mr Al-Jedda's internment was not attributable to the UN. It took place within a detention facility in Basrah City, controlled exclusively by British forces. Mr Al-Jedda was therefore within the authority and control of the UK throughout. The Court therefore agreed with the majority of the House of Lords that Mr Al-Jedda's internment was attributable to the UK and that, while interned, he fell within the jurisdiction of the UK for the purposes of Article 1 of the Convention.

The Government's second argument was that UNSC Resolution 1546 created an obligation on the UK to use internment in Iraq and that, under Article 103 of the UN Charter,³ that prevailed over the obligation not to use internment in Article 5 § 1.

However, the Court noted that the UN was created, not just to maintain international peace and security, but also to "achieve international cooperation in ... promoting and encouraging respect for human rights and fundamental freedoms". Article 24(2) of the Charter required the Security Council, in discharging its duties with respect to its primary responsibility for the maintenance of international peace and security, to "act in accordance with the Purposes and Principles of the United Nations". Against that background, the Court considered that, in interpreting the Security Council's resolutions, there had to be a presumption that the Security Council did not intend to impose any obligation on Member States to breach fundamental principles of human rights. In the event of any ambiguity in the terms of a UNSC Resolution, the Court had therefore to choose the interpretation which was most in harmony with the requirements of the European Convention on Human Rights and which avoided any conflict of obligations. In the light of the UN's important role in promoting and encouraging respect for human rights, the Court considered that it was to be expected that clear and explicit language

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would be used were the Security Council to intend States to take particular measures which would conflict with their obligations under international human rights law.

The Court noted that internment was not explicitly referred to in Resolution 1546, which authorised the Multi-National Force “to take all necessary measures to contribute to the maintenance of security and stability in Iraq”. Internment was listed in a letter from United States Secretary of State Colin Powell annexed to the resolution, as an example of the “broad range of tasks” which the Multi-National Force was ready to undertake. In the Court’s view, the terminology of the Resolution left open to the Member States within the Multi-National Force the choice of the means to be used to contribute to the maintenance of security and stability in Iraq. Moreover, in the Preamble to the Resolution, the commitment of all forces to act in accordance with international law was noted, and the Convention was part of international law. In the absence of clear provision to the contrary, the presumption had to be that the Security Council intended States within the Multi-National Force to contribute to the maintenance of security in Iraq while complying with their obligations under international human rights law.

Furthermore, it was difficult to reconcile the argument that Resolution 1546 placed an obligation on Member States to use internment with the objections repeatedly made by the UN Secretary General and the UN Assistance Mission for Iraq (UNAMI) to the use of internment by the Multi-National Force. Under Resolution 1546 the UNSC mandated both the Secretary General, through his Special Representative, and the UNAMI to “promote the protection of human rights ... in Iraq”. In his quarterly reports throughout the period of Mr Al-Jedda’s internment, the UN Secretary General repeatedly described the extent to which security internment was being used by the Multi-National Force as “a pressing human rights concern”. UNAMI reported on the human rights situation every few months during the same period. It also repeatedly expressed concern at the large number of people being held in indefinite internment without judicial oversight.

In conclusion, the Court considered that UNSC Resolution 1546 authorised the UK to take measures to contribute to the maintenance of security and stability in Iraq.

However, neither Resolution 1546 nor any other UNSC Resolution explicitly or implicitly required the UK to place an individual whom its authorities considered to constitute a risk to the security of Iraq into indefinite detention without charge. In those circumstances, in the absence of a binding obligation to use internment, there was no conflict between the UK’s obligations under the UN Charter and its obligations under Article 5 § 1. Given that the provisions of Article 5 § 1 were not displaced and none of the grounds for detention set out in Article 5 § 1 applied, Mr Al-Jedda’s detention was in violation of Article 5 § 1.

Article 41

Under Article 41 (just satisfaction), the Court held that the UK was to pay the applicant 25,000 euros (EUR) in respect of non-pecuniary damage and EUR 40,000 in respect of costs and expenses.

Separate opinion

Judge Poalelungi expressed a dissenting opinion which is annexed to the judgment.

42. Eur.Court HR, *Al-Skeini and Others v. the United Kingdom*, Grand Chamber Judgment of 7 July 2011, Application No. 55721/07, (Article 1, Obligation to Respect Human Rights – Jurisdiction Found; Article 2, Right to Life – Violation). The applicants, whose relatives had been killed by British forces in Basrah in 2003, successfully claimed that the United Kingdom Government was bound by the Convention in military operations abroad, and that a proper investigation into their relatives' deaths had not been carried out.

ECHR 095 (2011)

07.07.2011

Press release issued by the Registrar

In today's Grand Chamber judgment in the case ***Al-Skeini and Others v. the United Kingdom*** (application no. 55721/07), which is final, the European Court of Human Rights held, unanimously, that:

in the exceptional circumstances deriving from the United Kingdom's assumption of authority for the maintenance of security in South East Iraq from 1 May 2003 to 28 June 2004, the UK had jurisdiction under **Article 1 (obligation to respect human rights)** of the European Convention on Human Rights in respect of civilians killed during security operations carried out by UK soldiers in Basrah;

and, that there had been a failure to conduct an independent and effective investigation into the deaths of the relatives of five of the six applicants, in **violation of Article 2 (right to life)** of the Convention.

The case concerned the deaths of the applicants' six close relatives in Basrah in 2003 while the UK was an occupying power: three of the victims were shot dead or shot and fatally wounded by British soldiers; one was shot and fatally wounded during an exchange of fire between a British patrol and unknown gunmen; one was beaten by British soldiers and then forced into a river, where he drowned; and one died at a British military base, with 93 injuries identified on his body.

The judgment was delivered today at a public hearing at the European Court of Human Rights, Strasbourg, at 11 a.m. (local time).

Principal facts

Background

On 20 March 2003, the United States of America, the United Kingdom and their coalition partners, through their armed forces, entered Iraq with the aim of displacing the Ba'ath regime then in power. On 1 May 2003 major combat operations were declared to be complete and the US and the UK became occupying powers. They created the Coalition Provisional Authority (CPA) "to exercise powers of government temporarily". One of the powers of government exercised by the CPA was the provision of security in Iraq. The security role assumed by the occupying powers was recognised by the United Nations Security Council in Resolution 1483, adopted on 22 May 2003, which called upon them "to promote the welfare of the Iraqi people through the effective administration of the territory, including in particular working towards the restoration of conditions of security and stability ...". The occupation came to an end on 28 June 2004, when full authority for governing Iraq passed to the Interim Iraqi Government from the CPA, which then ceased to exist.

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During the period of the occupation, the UK had command of the military division - Multinational Division (South East) - which included the province of Al-Basrah, where the applicants' relatives died. From 1 May 2003 onwards the British forces in Al-Basrah took responsibility for maintaining security and supporting the civil administration. Among the UK's security tasks were: patrols, arrests, anti-terrorist operations, policing of civil demonstrations, protection of essential utilities and infrastructure and protecting police stations.

Individual cases

The applicants, six Iraqi nationals, are: Mazin Jum'Aa Gatteh Al-Skeini, Fattema Zabun Dahesh, Hameed Abdul Rida Awaid Kareem, Fadil Fayay Muzban, Jabbar Kareem Ali and Colonel Daoud Mousa.

1) **Mazin Jum'Aa Gatteh Al-Skeini** is Hazim Jum'aa Gatteh Al-Skeini's brother (Hazim Al-Skeini), who was 23 when he died. Hazim Al-Skeini was shot dead in the Al-Majidiyah area of Basrah just before midnight on 4 August 2003 by a soldier in command of a British patrol.

In his witness statement, Mr Al-Skeini explained that, on 4 August 2003, members of his family had been in the village of Al-Majidiyah for a funeral ceremony; in Iraq it is customary for guns to be discharged at a funeral. He stated that he saw soldiers shoot and kill his brother and another man - both unarmed and only about ten metres away from the soldiers - for no apparent reason.

According to the British account of the incident, the patrol, approaching on foot and on a very dark night, heard heavy gunfire in Al-Majidiyah. They saw two Iraqi men in a street in the village, one of whom was about five metres from Sergeant A, who was leading the patrol. Sergeant A saw that he was armed and pointing a gun in his direction. In the dark, it was impossible to tell the position of the second man. Believing that his life and those of the other soldiers in the patrol were at immediate risk, Sergeant A opened fire on the two men without giving any verbal warning.

A charitable donation of 2,500 dollars (USD) from the British Army Goodwill Payment Committee was given to the tribe to which the two victims belonged, together with a letter explaining the circumstances of their deaths and acknowledging that they had not intended to attack anyone. It was decided by UK commanding officers that the incident fell within the applicable Rules of Engagement². As a result, it was also decided that no further investigation was required.

2) **Fattema Zabun Dahesh**, who has three young children and an elderly mother-in-law to support, is the widow of Muhammad Salim, who was shot and fatally wounded by a British soldier shortly after midnight on 6 November 2003.

Basing her evidence on eye-witness accounts, Ms Dahesh stated that, on 5 November 2003, during Ramadan, Mr Salim went to visit his brother-in-law at his home in Basrah.

At about 11.30 p.m. British soldiers raided the house. They broke down the front door. One of the British soldiers came face-to-face with Mr Salim in the hall of the house and fired a shot at him, hitting him in the stomach. The British soldiers took him to the Czech military hospital, where he died on 7 November 2003.

According to the British account of the incident, the patrol had received information through one of their interpreters that a group of heavily-armed men had been seen entering the house. The order was given for a quick search-and-arrest operation. After the patrol failed to gain entry by knocking, the door was broken down. Sergeant C heard automatic gunfire from within the house. Two men armed with long barrelled weapons rushed down the stairs towards him. There was no time to give a verbal warning.

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Sergeant C believed that his life was in immediate danger. He fired one shot at the leading man, Mr Salim, and hit him in the stomach.

The applicant's family subsequently informed the patrol that they were lawyers and were in dispute with another family of lawyers over the ownership of office premises, which had led to their being subjected to two armed attacks, one only 30 minutes before the patrol's forced entry. The commanding officer produced a report which concluded that the patrol had deliberately been provided with false intelligence by the other side in the feud.

Ms Dahesh received USD 2,000 from the British Army Goodwill Payment Committee, together with a letter setting out the circumstances of the killing.

It was decided that the incident fell within the Rules of Engagement and that no further investigation was required.

3) **Hameed Abdul Rida Awaid Kareem** is the widower of Hannan Mahaibas Sadde Shmailawi, who was shot and fatally wounded on 10 November 2003 at the Institute of Education in the Al-Maaqal area of Basrah, where he worked as a night porter and lived with his wife and family.

In his witness statement, Mr Kareem claimed that, at about 8 p.m. on 10 November 2003, he and his family were sitting round the dinner table when there was a sudden burst of machine-gunfire from outside the building. Bullets struck his wife in the head and ankles and one of his children on the arm. They were taken to hospital, where his child recovered, but his wife died.

According to the British account of the incident, Ms Shmailawi was shot during a firefight between a British patrol and a number of unknown gunmen. When the area was illuminated by parachute flares, at least three men with long-barrelled weapons were seen in open ground, two of whom were firing directly at the British soldiers.

It was decided that the incident fell within the Rules of Engagement and that no further investigation was required.

4) **Fadil Fayay Muzban** is the brother of Waleed Sayay Muzban, aged 43, who was shot and fatally injured on the night of 24 August 2003 by a British soldier in the Al-Maaqal area of Basrah.

Basing his evidence on eye-witness accounts, Mr Muzban stated that his brother was driving a minibus at about 8.30 p.m. on 24 August 2003 when it "came under a barrage of bullets", leaving his brother mortally wounded in the chest and stomach.

Lance Corporal S stated that he had ordered the driver of a suspicious-looking minibus - with curtains over its windows, being driven towards his patrol at slow speed with its headlights dipped - to stop. The driver (Mr Muzban) punched him in the chest and tried to grab his weapon, before accelerating away, swerving in the direction of members of the patrol. Lance Corporal S fired at the vehicle's tyres and it stopped about 100 metres from the patrol. The driver appeared to be reaching for a weapon. Lance Corporal S believed that his team was about to be fired on. He therefore fired a number of shots.

The driver got out and was ordered to lie on the ground. The patrol checked the minibus for other armed men; it was empty. The driver had three bullet wounds in his back and hip. He was given first aid and then taken to the Czech military hospital where he died.

The Royal Military Police Special Investigation Branch (SIB) started an investigation on 29 August 2003. Material was collected from the scene of the shooting and statements were taken from the

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soldiers present, except Lance Corporal S, who had shot Mr Muzban. The commanding officers concluded that the case fell within the Rules of Engagement and successfully requested that the SIB investigation be terminated. The deceased's family received USD 1,400 from the British Army Goodwill Payment Committee and a further USD 3,000 in compensation for the minibus.

Following Mr Muzban's application for judicial review (see below), the investigation was re-opened some nine months later, and forensic tests were carried out. Prosecutors took depositions from the soldiers, including Lance Corporal S. The investigation was completed on 3 December 2004. An independent senior lawyer advised that there was no realistic prospect of establishing that Lance Corporal S had not fired in self-defence.

The file was sent to the Attorney General, who decided not to exercise his jurisdiction to order a criminal prosecution.

5) **Jabbar Kareem Ali** is the father of Ahmed Jabbar Kareem Ali, who died on 8 May 2003, aged 15.

According to statements he made in the UK courts, Mr Ali searched for his son on 8 May 2003 when he did not return home at 1.30 p.m. as expected. He was told that his son and three other Iraqi youths had been arrested by British soldiers that morning, in the context of a crack-down on looting. They were allegedly beaten and forced into the Shatt Al-Arab river. His son could not swim and his body was found in the water on 10 May 2003.

The SIB opened an investigation. Four soldiers were tried for manslaughter at a court martial held between September 2005 and May 2006, but by that time another three soldiers suspected of involvement had gone absent without leave. It was the prosecution case that the soldiers had driven the four youths to the river and forced them in at gunpoint "to teach them a lesson" because they were suspected of looting. The soldiers were acquitted when the key prosecution witness, one of the other Iraqi youths forced into the water at the same time as Ahmed, was unable to identify them.

Mr Ali brought civil proceedings against the Ministry of Defence for damages in respect of his son's death. He received 115,000 pounds sterling (GBP) on 15 December 2008 and a formal apology from the British Army.

6) **Colonel Daoud Mousa** was a colonel in the Basrah police force. His son, Baha Mousa, was aged 26 when he died in the custody of the British Army, three days after having been arrested by soldiers on 14 September 2003.

According to Colonel Mousa, early in the morning of 14 September 2003, he went to pick his son up from work at the Ibn Al-Haitham Hotel in Basrah. He found his son and six other hotel employees lying on the floor of the hotel lobby with their hands behind their heads. He was told it was a routine investigation that would be over in a couple of hours.

On the third day after his son had been detained, members of the Royal Military Police informed Colonel Mousa that his son had been killed in custody at a British military base in Basrah. He was asked to identify the corpse. Baha Mousa's body and face were covered in blood and bruises; his nose was broken and part of the skin of his face had been torn away.

A hotel employee, who was arrested on 14 September 2003, testified that Iraqi detainees were hooded, forced to maintain stress positions, denied food and water and kicked and beaten in detention and that Baha Mousa was taken into another room, where he was heard screaming and moaning.

The SIB was immediately called in to investigate the death of Baha Mousa, who was found to have 93 identifiable injuries on his body and to have died of asphyxiation.

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Colonel Mousa brought civil proceedings against the Ministry of Defence, which concluded in July 2008 with a formal and public acknowledgement of liability and the payment of GBP 575,000 in compensation. In a written statement given in Parliament on 14 May 2008, the Secretary of State for Defence announced that there would be a public inquiry into the death of Baha Mousa. It has yet to deliver its report.

Legal proceedings

On 26 March 2004, the Secretary of State for Defence decided, in connection with the deaths of the relatives of all six applicants (among others): not to conduct independent inquiries into the deaths; not to accept liability for the deaths; and, not to pay just satisfaction. The applicants applied for judicial review.

On 14 December 2004 the Divisional Court accepted only Colonel Mousa's claim and rejected the claims of the first four applicants; the claim of the fifth was stayed. The court held that the State was normally only required to apply the Convention within its own territory. There were some exceptions to that rule, and the fact that Baha Mousa had been killed on a British military base brought him within such an exception.

However, the United Kingdom was not required to apply the Convention in respect of the other applicants' relatives. The court found that there had been a breach of the investigative duty under Articles 2 and 3 of the Convention concerning Baha Mousa since, by July 2004, some 10 months after the killing, the results of the investigation were unknown and inconclusive.

All appeals to the Court of Appeal were dismissed on 21 December 2005, because the Court of Appeal did not find that the deaths, except that of Baha Mousa, fell within United Kingdom jurisdiction. The Court of Appeal commented, however, that, if international standards were to be observed, the Royal Military Police, including the SIB, had to be made fully operationally independent from the military chain of command when investigating the alleged killing of civilians by British forces.

On 13 June 2007 the majority of the House of Lords found that, except in respect of Baha Mousa, the United Kingdom did not have jurisdiction over the victims' deaths. The Secretary of State had already accepted that Baha Mousa's death fell within the United Kingdom's jurisdiction under the Convention.

On 25 January 2008 the Ministry of Defence published the Aitken Report concerning six cases of alleged deliberate abuse and killing of Iraqi civilians, including the deaths of the fifth and sixth applicants' sons. The report criticised the lack of a more immediate, effective system for referring important information to those with the capacity to analyse it and delays in the time it had taken to resolve some of the cases.

Complaints, procedure and composition of the Court

The applicants alleged that their relatives were within the jurisdiction of the United Kingdom under Article 1 (obligation to respect human rights) of the Convention when they were killed through the acts of the British armed forces. They complained under Article 2 (right to life) and, in the case of the sixth applicant Article 3 (prohibition of inhuman and or degrading treatment), about the failure to carry out a full and independent investigation into the circumstances of each death.

The application was lodged with the Court on 11 December 2007. On 19 January 2010 the Chamber relinquished jurisdiction in favour of the Grand Chamber, and on 9 June 2010 a public hearing was held in the Human Rights building in Strasbourg (webcast available).

The full texts of the Court's judgments are accessible on its website (<http://www.hudoc.echr.coe.int>)

Judgment was given by the Grand Chamber of 17, composed as follows:

Jean-Paul **Costa** (France), President,
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Isabelle **Berro-Lefèvre** (Monaco),
George **Nicolaou** (Cyprus),
Luis **López Guerra** (Spain),
Ledi **Bianku** (Albania),
Ann **Power** (Ireland),
Mihai **Poalelungi** (Moldova), Judges,

and also Michael **O'Boyle**, Deputy Registrar.

Decision of the Court

Article 1

The principal issue in the case was whether the European Convention on Human Rights applied in respect of the killing of Iraqi civilians in Iraq by British soldiers between May and November 2003. The Court had to decide whether the applicants' relatives fell within the "jurisdiction" of the United Kingdom within the meaning of Article 1 of the Convention.

The Court referred to its previous case-law in which it held that a State is normally required to apply the Convention only within its own territory. An extra-territorial act would fall within the State's jurisdiction under the Convention only in exceptional circumstances. One such exception established in the Court's case-law was when a State bound by the Convention exercised public powers on the territory of another State.

In today's case, following the removal from power of the Ba'ath regime and until the accession of the Iraqi Interim Government, the United Kingdom (together with the United States) assumed in Iraq the exercise of some of the public powers normally to be exercised by a sovereign government. In particular, the United Kingdom assumed authority and responsibility for the maintenance of security in South East Iraq. In those exceptional circumstances, a jurisdictional link existed between the United Kingdom and individuals killed in the course of security operations carried out by British soldiers during the period May 2003 to June 2004. Since the applicants' relatives were killed in the course of United Kingdom security operations during that period, the United Kingdom was required to carry out an investigation into their deaths.

Article 2 (effective investigation)

The applicants complained that the UK Government had not fulfilled its duty to carry out an effective investigation into their relatives' deaths.

The full texts of the Court's judgments are accessible on its website (<http://www.hudoc.echr.coe.int>)

The Court referred to its previous case law that the obligation to protect life required that there should be an effective official investigation when individuals had been killed as a result of the use of force by State agents.

The Court took into account the practical problems caused to the investigatory authorities by the fact that the United Kingdom was an occupying power in a foreign and hostile region in the immediate aftermath of invasion and war. Those practical problems included a breakdown in the civil infrastructure, leading to shortages of local pathologists and facilities for autopsies; the scope for linguistic and cultural misunderstandings between the occupiers and the local population; and the danger inherent in any activity in Iraq at that time. In those circumstances the procedural duty under Article 2 had to be applied realistically, to take account of specific problems faced by investigators.

Nonetheless, the fact that the United Kingdom was in occupation also entailed that, if any investigation into acts allegedly committed by British soldiers was to be effective, it was particularly important that the investigating authority was, and was seen to be, operationally independent of the military chain of command.

It was not at issue in the first, second and fourth applicants' cases that their relatives were shot by British soldiers, whose identities were known. The question was whether in each case the soldier fired in conformity with the Rules of Engagement. In respect of the third applicant, Article 2 required an investigation to determine the circumstances of the shooting, including whether appropriate steps were taken to safeguard civilians in the vicinity. As regards the fifth applicant's son, it needed to be determined whether British soldiers had, as alleged, beaten the boy and forced him into the river. In each case eyewitness testimony was crucial. It was therefore essential that, as quickly after the event as possible, the military witnesses, and in particular the alleged perpetrators, should have been questioned by an expert and fully independent investigator. Similarly, every effort should have been taken to identify Iraqi eye witnesses and to persuade them that they would not place themselves at risk by coming forward and giving information and that their evidence would be treated seriously and acted upon without delay.

It was clear that the investigations into the shooting of the first, second and third applicants' relatives failed to meet the requirements of Article 2, since the investigation process remained entirely within the military chain of command and was limited to taking statements from the soldiers involved.

As regards the other applicants, although there was an SIB investigation into the death of the fourth applicant's brother and the fifth applicant's son, the Court did not consider that that was sufficient to comply with the requirements of Article 2, since (as the Court of Appeal also found) the SIB was not, during the relevant period, operationally independent from the military chain of command.

In contrast, a full, public inquiry was nearing completion into the circumstances of Baha Mousa's death. In the light of that inquiry, the sixth applicant was no longer a victim of any breach of the procedural obligation under Article 2.

In conclusion, the Court found a violation of Article 2 concerning the lack of an effective investigation into the deaths of the relatives of the first, second, third, fourth and fifth applicants.

Article 41

Under Article 41 (just satisfaction), the Court held that the United Kingdom was to pay the first five applicants 17,000 euros (EUR), each, in respect of non-pecuniary damage and EUR 50,000, jointly, in respect of costs and expenses.

Separate opinion

The full texts of the Court's judgments are accessible on its website (<http://www.hudoc.echr.coe.int>)

Judges Rozakis and Bonello expressed concurring opinions which are annexed to the judgment.

43. Eur.Court HR, Mangouras v. Spain, Grand Chamber Judgment of 28 September 2010, Application No. 12050/04, (Article 5-3, Right to be Brought Promptly before a Judge – No Violation). The applicant, the captain of a ship that had discharged 70,000 tonnes of fuel oil into the Atlantic Ocean and had thus caused a major environmental disaster and, unsuccessfully complained that the sum set for bail in his case had been excessive and had been fixed without his personal circumstances being taken into consideration. The Court however acknowledged that new realities had to be taken into consideration in interpreting the requirements of the Convention namely the growing and legitimate concern both in Europe and internationally in relation to environmental offences and the tendency to use criminal law as a means of enforcing the environmental obligations imposed by European and international law.

ECHR 698 (2010)
28.09.2010

**Press release issued by the Registrar
 Grand Chamber judgment**

Mangouras v. Spain (application no. 12050/04)

By a majority:

No violation of Article 5 § 3 (right to liberty and security)
 of the European Convention on Human Rights

Principal facts

Apostolos Ioannis Mangouras was formerly the captain of the ship *Prestige*, which in November 2002, while sailing off the Spanish coast, discharged the 70,000 tonnes of fuel oil it was carrying into the Atlantic Ocean when its hull sprang a leak.

The oil spill caused an ecological disaster whose effects on marine flora and fauna lasted for several months and spread as far as the French coast.

A criminal investigation was opened and the applicant was remanded in custody with the possibility of release on bail of three million euros (EUR).

Mr Mangouras was detained for 83 days and granted provisional release when his bail was paid by the shipowner's insurers.

The Spanish authorities later authorised the applicant's return to Greece, on condition that the Greek authorities enforced compliance with the periodic supervision to which he had been subject in Spain. As a result, he must report every two weeks to a police station. The criminal proceedings against him are still pending.

Complaints, procedure and composition of the Court

Relying on Article 5 § 3 (right to liberty and security) of the European Convention on Human Rights, the applicant alleged, in particular, that the sum set for bail in his case had been excessive and had been fixed without his personal circumstances being taken into consideration.

The full texts of the Court's judgments are accessible on its website (<http://www.hudoc.echr.coe.int>)

The application was lodged with the European Court of Human Rights on 25 March 2004. In a judgment of 8 January 2009, the Court held unanimously that there had been no violation of Article 5 § 3. On 5 June 2009 the case was referred to the Grand Chamber at the applicant's request.

A Grand Chamber hearing took place in the Human Rights Building in Strasbourg on 23 September 2009.

Decision of the Court

The Court reiterated that under Article 5 § 3, bail could only be required as long as reasons justifying detention prevailed, and that the authorities had to take as much care in fixing appropriate bail as in deciding whether or not the accused's continued detention was indispensable.

Furthermore, while the amount of bail had to be assessed principally by reference to the accused and his assets it was not unreasonable, in certain circumstances, to take into account also the amount of the loss imputed to him.

Mr Mangouras had been deprived of his liberty for 83 days and had been released following the lodging of a bank guarantee of EUR 3,000,000. In fixing bail the Spanish courts had taken into consideration the risk that the applicant might abscond, taking the view that it was essential to ensure his appearance in court. In addition to the applicant's personal circumstances, they had also had regard to the seriousness of the offence of which he stood accused, the impact of the disaster on public opinion and the applicant's "professional environment", namely the maritime transport of petrochemicals.

New realities had to be taken into consideration in interpreting the requirements of Article 5 § 3, namely the growing and legitimate concern both in Europe and internationally in relation to environmental offences and the tendency to use criminal law as a means of enforcing the environmental obligations imposed by European and international law. The Court was of the view that the increasingly high standard being required in the area of human rights protection correspondingly required greater firmness in assessing breaches of the fundamental values of democratic societies. Hence, it could not be ruled out that the professional environment which formed the setting for the activity in question should be taken into consideration in determining the amount of bail, in order to ensure that the measure was effective.

Given the exceptional nature of the applicant's case and the huge environmental damage caused by the marine pollution, which had seldom been seen on such a scale, it was hardly surprising that the judicial authorities should have adjusted the amount required by way of bail in line with the level of liability incurred, so as to ensure that those responsible had no incentive to evade justice and forfeit the security. It was not certain that a level of bail set solely by reference to the applicant's assets would have been sufficient to ensure his attendance at the hearing.

In addition, the very fact that payment had been made by the shipowner's insurer appeared to confirm that the Spanish courts, when they had referred to the applicant's "professional environment", had been correct in finding – implicitly – that a relationship existed between Mr Mangouras and the persons who were to provide the security.

The Spanish courts had therefore taken sufficient account of the applicant's personal situation, and in particular his status as an employee of the ship's owner, his professional relationship with the persons who were to provide the security, his nationality and place of permanent residence and also his lack of ties in Spain and his age. In view of the particular context of the case and the disastrous environmental and economic consequences, the authorities had been justified in taking into account the seriousness of the offences in question and the amount of the loss imputed to the applicant.

The full texts of the Court's judgments are accessible on its website (<http://www.hudoc.echr.coe.int>)

Accordingly, the Court held, by ten votes to seven, that there had been no violation of Article 5 § 3.

Separate opinions

Judges Rozakis, Bratza, Bonello, Cabral Barreto, David Thór Björgvinsson, Nicolaou and Bianku expressed a joint dissenting opinion, which is annexed to the judgment

44. Eur.Court HR, Zylkov v. Russia, First Section Judgment of 21 June 2011, Application No. 5613/04, (Article 6-1, Right to a Fair Hearing within a Reasonable Time – Violation). The Court, in response to a claim from the applicant, a Russian national with permanent residence in Lithuania, who had applied at the Russian Embassy in Vilnius (Lithuania) for a child allowance payable by the Russian Federation to parents with minors but had had this request refused and was arguing against the decision, referred to the failure of the Russian courts to comply with the principles of international law on State immunity.

Information Note on the Court's case-law No. 142

June 2011

Judgment 21.6.2011 [Section I]

Article 6

Civil proceedings

Article 6-1

Access to court

Refusal of Russian courts to examine a claim against Russian authorities concerning the interpretation of Russian law:

Violation

Facts – The applicant was a Russian national with permanent residence in Vilnius, Lithuania. In 2003 he applied for a child allowance payable by the Russian Federation to parents with minor children. He lodged his claim with the social-security division of the Russian Embassy in Vilnius, but it was refused on the grounds that he was ineligible for the allowance. The applicant sought to challenge that decision before a district court in Moscow, but that court declared his claim inadmissible, finding that he should have lodged his claim with a court in Lithuania.

Law – Article 6 § 1: The district court had refused to consider the claim lodged by the applicant, a Russian national, against a Russian State authority, incorporated under the laws of Russia, suggesting that the matter was subject to the jurisdiction of a court in Lithuania. The Government had supported that view. The Court, however, was not convinced by that line of reasoning, in particular since the Russian courts had failed to refer to any law binding on the Lithuanian courts that made them competent to resolve the matter or to explain how their view that the matter was to be considered by a foreign court complied with the principles of international law on State immunity. Moreover, the Russian authorities had advised the applicant to apply to a foreign court without even considering whether such an act would be feasible in view of the relevant provisions of the Vienna Convention on Diplomatic Relations or the existing agreement between Russia and Lithuania. The Court concluded that such a situation amounted to a denial of justice, which impaired the very essence of the applicant's right of access to a court.

The full texts of the Court's judgments are accessible on its website (<http://www.hudoc.echr.coe.int>)

Conclusion: violation (unanimously).

45. Eur.Court HR, Sabeh El Leil v. France, Grand Chamber Judgment of 29 June 2011, Application No. 34869/05, (Article 6, Right to a Fair Trial – Violation). The applicant, a former employee of the Kuwaiti embassy in Paris, successfully argued that he had been deprived of his right of access to a court as a result of the French courts' finding that his employer enjoyed jurisdictional immunity from the applicant's suit following his dismissal from his job in 2000.

ECHR 078 (2011)

29.06.2011

Press release issued by the Registrar

In today's Grand Chamber judgment in the case Sabeh El Leil v. France (application no. 34869/05), which is final, the European Court of Human Rights held, unanimously, that there had been:

A violation of Article 6 § 1 (right of access to a court) of the European Convention on Human Rights.

The case concerned the complaint of an ex-employee of the Kuwaiti embassy in Paris, that he had been deprived of access to a court to sue his employer for having dismissed him from his job in 2000.

Principal facts

The applicant, Farouk Sabeh El Leil, is a French national. He was employed as an accountant in the Kuwaiti embassy in Paris (the Embassy) as of 25 August 1980 and for an indefinite duration. He was promoted to head accountant in 1985.

In March 2000, the Embassy terminated Mr Sabeh El Leil's contract on economic grounds, citing in particular the restructuring of all Embassy's departments. Mr Sabeh El Leil appealed before the Paris Employment Tribunal, which awarded him, in a November 2000 judgment, damages equivalent to 82,224.60 Euros (EUR). Disagreeing with the amount of the award, Mr Sabeh El Leil appealed. The Paris Court of Appeals set aside the judgment awarding compensation. In particular, it found Mr Sabeh El Leil's claim inadmissible because the State of Kuwait enjoyed jurisdictional immunity on the basis of which it was not subject to court actions against it in France.

Complaints, procedure and composition of the Court

Mr Sabeh El Leil complained that he had been deprived of his right of access to a court in violation of Article 6 § 1 of the Convention, as a result of the French courts' finding that his employer enjoyed jurisdictional immunity.

The application was lodged with the European Court of Human Rights on 23 September 2005 and declared admissible on 21 October 2008. On 9 December 2008, the Court's Chamber relinquished jurisdiction in favour of the Grand Chamber, neither of the parties having objected.

Judgment was given by the Grand Chamber of 17, composed as follows:

Nicolas **Bratza** (the United Kingdom), President,
Jean-Paul **Costa** (France),
Christos **Rozakis** (Greece),

The full texts of the Court's judgments are accessible on its website (<http://www.hudoc.echr.coe.int>)

Peer **Lorenzen** (Denmark),
 Françoise **Tulkens** (Belgium),
 Corneliu **Bîrsan** (Romania),
 Karel **Jungwiert** (the Czech Republic),
 Lech **Garlicki** (Poland),
 David Thór **Björgvinsson** (Iceland),
 Mark **Villiger** (Liechtenstein),
 Isabelle **Berro-Lefèvre** (Monaco),
 George **Nicolaou** (Cyprus),
 Ann **Power** (Ireland),
 Zdravka **Kalaydjieva** (Bulgaria),
 Mihai **Poalelungi** (Moldova),
 Angelika **Nußberger** (Germany),
 Julia **Laffranque** (Estonia), Judges,

and also Vincent **Berger**, Jurisconsult.

Decision of the Court

Admissibility

The Court recalled that States had to be given an opportunity to redress human rights breaches at home before having to defend their position before an international court. Mr Sabeh El Leil had argued before the French courts that the jurisdictional immunity of the State of Kuwait could not be triggered, because he had not officially acted on behalf of the State of Kuwait or exercised a function in the interest of the public diplomatic service. Consequently, Mr Sabeh El Leil had raised before the domestic courts the substance of his complaint about not having had access to a court, and therefore that complaint was admissible before the Court too.

Access to a court (Article 6 § 1)

Referring to its previous case-law, the Court noted that Mr Sabeh El Leil had also requested compensation for dismissal without genuine or serious cause and that his duties in the embassy could not justify restrictions on his access to a court based on objective grounds in the State's interest. Article 6 § 1 was thus applicable in his case.

The Court then observed that the concept of State immunity stemmed from international law which aimed at promoting good relations between States through respect of the other State's sovereignty. However, the application of absolute State immunity had been clearly weakened for a number of years, in particular with the adoption of the 2004 UN Convention on Jurisdictional Immunities of States and their Property. That convention had created a significant exception in respect of State immunity through the introduction of the principle that immunity did not apply to employment contracts between States and staff of its diplomatic missions abroad, except in a limited number of situations to which the case of Mr Sabeh El Leil did not belong. The applicant, who had not been a diplomatic or consular agent of Kuwait, nor a national of that State, had not been covered by any of the exceptions enumerated in the 2004 Convention. In particular, he had not been employed to officially act on behalf of the State of Kuwait, and it had not been established that there was any risk of interference with the security interests of the State of Kuwait.

The Court further noted that, while France had not yet ratified the Convention on Jurisdictional Immunities of States and their Property, it had signed that convention in 2007 and ratification was pending before the French Parliament. In addition, the Court emphasised that the 2004 Convention

was part of customary law, and as such it applied even to countries which had not ratified it, including France.

On the other hand, Mr Sabeh El Leil had been hired and worked as an accountant until his dismissal in 2000 on economic grounds. Two documents issued concerning him, an official note of 1985 promoting him to head accountant and a certificate of 2000, only referred to him as an accountant, without mentioning any other role or function that might have been assigned to him. While the domestic courts had referred to certain additional responsibilities that Mr Sabeh El Leil had supposedly assumed, they had not specified why they had found that, through those activities, he was officially acting on behalf of the State of Kuwait.

The Court concluded that the French courts had dismissed the complaint of Mr Sabeh El Leil without giving relevant and sufficient reasons, thus impairing the very essence of his right of access to a court, in violation of Article 6 § 1.

Just satisfaction (Article 41)

The Court held, by sixteen votes to one, that France was to pay Mr Sabeh El Leil 60,000 euros (EUR) in respect of all kind of damage and EUR 16,768 for costs and expenses.

46. Eur.Court HR, *Ahorugeze v. Sweden, Fifth Section Judgment of 27 October 2011, Application No. 27075/09, (Article 3, Prohibition of Torture – No Violation; Article 6, Right to a Fair Trial – No Violation)*. The applicant, a Rwandan national and genocide suspect, unsuccessfully argued that his extradition from Sweden to Rwanda would put him at risk of ill-treatment and would amount to a flagrant denial of justice.

**ECHR 216 (2011)
27.10.2011**

Press release issued by the Registrar

In today's Chamber judgment in the case **Ahorugeze v. Sweden** (application no. 37075/09), which is not final¹, the European Court of Human Rights held, unanimously, that there would be:

No violation of Article 3 (prohibition of inhuman or degrading treatment or punishment), and

No violation of Article 6 (right to a fair trial) of the European Convention on Human Rights, if the applicant were extradited to Rwanda.

The case concerned the complaints by the applicant, a genocide suspect, that, if extradited from Sweden to Rwanda, he risked ill-treatment and a flagrant denial of justice.

Principal facts

The applicant, Sylvere Ahorugeze, is a Rwandan national of Hutu ethnicity who was born in 1956 and lives in Denmark.

He used to be the head of the Rwandan Civil Aviation Authority. In 2001, he moved to Denmark where he was granted refugee status.

Some time after September 2007, the Rwandan authorities requested his extradition from Denmark on suspicion of involvement in genocide and crimes against humanity. As no evidence was presented in support, however, the Danish authorities did not respond to that request.

In July 2008, the Swedish police were informed by the Rwandan Embassy in Stockholm that Mr Ahorugeze had visited Sweden and that the Rwandan authorities were seeking his arrest. As a result, Sweden arrested him in compliance with an international alert and warrant of arrest.

In August 2008, the Rwandan prosecution service formally requested Mr Ahorugeze's extradition so that he could be prosecuted for genocide, murder, extermination and involvement with a criminal gang. They also presented assurances that he would be treated humanely, in accordance with internationally accepted standards.

A Swedish court authorised Mr Ahorugeze's detention on suspicion of genocide. Following the prosecutor's opinion favouring extradition, the Supreme Court concluded that there was no general legal obstacle to sending Mr Ahorugeze to Rwanda to stand trial on charges of genocide and crimes against humanity. The Supreme Court added that it assumed the Swedish Government would consider further information before it took its final decision whether to extradite.

In July 2009, the Swedish Government decided to extradite Mr Ahorugeze to Rwanda to be tried for genocide and crimes against humanity. It noted that the death penalty and life imprisonment in

The full texts of the Court's judgments are accessible on its website (<http://www.hudoc.echr.coe.int>)

isolation had been abolished in 2007 and 2008 respectively. The prison conditions were acceptable, and Rwanda did not practice torture or other forms of ill-treatment. The Rwandan judicial system had improved over the last couple of years, including its witness protection programme and the possibility to interview witnesses living abroad.

On 15 July 2009, upon Mr Ahorugeze's request, the Court – applying the rule on interim measures of the Rules of Court - indicated to Sweden that his extradition should be suspended. Following the Court's request, the Swedish Government presented the assurances it had received from the Rwandan Minister of Justice confirming that Mr Ahorugeze would be tried fairly and treated correctly.

The Swedish Supreme Court released Mr Ahorugeze from detention on 27 July 2011.

Complaints, procedure and composition of the Court

Relying on Article 3, Mr Ahorugeze complained that if extradited to Rwanda he would risk being tortured or otherwise ill-treated. He further argued that would not be able to get heart surgery in Rwanda and risked persecution because he was a Hutu. Under Article 6, he alleged that he would not get a fair trial in Rwanda.

The application was lodged with the European Court of Human Rights on 15 July 2009.

Judgment was given by a Chamber of seven, composed as follows:

Dean **Spielmann** (Luxembourg), PRESIDENT,
 Elisabet **Fura** (Sweden),
 Karel **Jungwiert** (the Czech Republic),
 Boštjan M. **Zupančič** (Slovenia),
 Isabelle **Berro-Lefèvre** (Monaco),
 Ganna **Yudkivska** (Ukraine),
 Angelika **Nußberger** (Germany), JUDGES,

and also Claudia **Westerdiek**, SECTION REGISTRAR.

Decision of the Court

Ill-treatment (Article 3)

While it appeared that Mr Ahorugeze had had a heart surgery earlier, there had been no medical certificates suggesting that he would need another operation in the future. In any event, Mr Ahorugeze's condition was not so serious as to raise an issue on medical grounds under Article 3.

As to his claim that he risked persecution because he was a Hutu, there had been no information leading to the conclusion that Hutus generally were persecuted or ill-treated in Rwanda. Likewise, Mr Ahorugeze had not described any personal circumstances because of which he risked persecution as a Hutu.

The conditions in the prison in which he would be detained and, if convicted, would serve his sentence were satisfactory. In particular, the International Criminal Tribunal for Rwanda (in a case before it), the Netherlands Government (in its observations as a third party in the present case) and the Oslo District Court (in a case allowing the extradition to Rwanda in July 2011 of another genocide suspect) had confirmed that. The Special Court for Sierra Leone too had sent several convicted persons to serve their sentences in the same Rwandan prison which was to host Mr Ahorugeze.

The full texts of the Court's judgments are accessible on its website (<http://www.hudoc.echr.coe.int>)

Finally, there was nothing to suggest that he would be ill-treated in Rwanda. As of 2008, people transferred by other States to Rwanda to stand trial could not be sentenced to life imprisonment in isolation.

Consequently, Sweden would not breach the prohibition of ill-treatment under Article 3 of the Convention, if it extradited Mr Ahorugeze to Rwanda.

Fair trial (Article 6)

It was true that in 2008 and 2009 the International Criminal Tribunal for Rwanda (ICTR) and several countries had refused to transfer genocide suspects to Rwanda due to concerns that the suspects would not receive a fair trial. However, since then, the Rwandan laws had been changed and legal practice had improved.

The central question therefore was whether Mr Ahorugeze would be able to call witnesses and have the Rwandan courts examine their testimony respecting the principle of equality of arms between defence and prosecution. Considering in detail the changes in legislation and practice, the Court concluded that the Rwandan courts were expected to act in a manner compatible with the Convention requirements for fair trial.

In addition, Mr Ahorugeze would be able to appoint a lawyer of his choice; he could also benefit from a lawyer paid by the State, and many Rwandan lawyers had accumulated professional experience longer than five years.

Referring to experience gathered by Dutch investigative teams and the Norwegian police during missions to Rwanda, the Court concluded that the Rwandan judiciary could not be considered to lack independence and impartiality.

Further, Mr Ahorugeze had not showed that he would be tried unfairly because he had testified for the defence in genocide trials in the past. Extradited genocide suspects were tried by the Rwandan High Court and Supreme Court, and not by the community-based *gacaca* tribunals set up in 2002 to deal with the enormous amount of cases by bringing genocide participants to trial and promoting national unity.

Finally, the ICTR had decided, for the first time in June 2011, to transfer an indicted genocide suspect – Uwinkindi - for trial in Rwanda. It had found that the issues, on the basis of which it had refused to transfer genocide suspects to Rwanda in 2008, had been resolved to a degree which made it confident that the accused would receive a fair trial in Rwanda in line with international human rights standards.

Consequently, if extradited to stand trial in Rwanda, Mr Ahorugeze would not risk a flagrant denial of justice. There would, therefore, be no violation of Article 6 in that event.

The Court indicated to the Swedish Government not to extradite Mr Ahorugeze until this judgment became final.

47. Eur.Court HR, Othman (Abu Qatada) v. the United Kingdom, Fourth Section Judgment of 17 January 2012, Application No. 8139/09, (Article 3, Prohibition of Torture – No Violation; Article 5, Right to Liberty and Security – No Violation; Article 6, Right to a Fair Trial – Violation; Article 13, Right to an Effective Remedy – No Violation). The applicant, a Jordanian national suspected of having links to al-Qaeda and wanted for terrorism charges in Jordan, unsuccessfully claimed that his planned deportation from the United Kingdom to Jordan would put him at a real risk of ill-treatment and would amount to a grossly unfair trial.

ECHR 022 (2011)
17.01.2012

Press release issued by the Registrar

Today's Chamber judgment in the case **Othman (Abu Qatada) v. the United Kingdom** (application no. 8139/09), which is not final, concerned whether Omar Othman (also known as Abu Qatada) would be at real risk of ill-treatment or a grossly unfair trial if deported to Jordan, where he is wanted on terrorism charges.

The European Court of Human Rights held, unanimously, that, if Mr Othman were deported to Jordan:

There would be **no violation of Article 3 (prohibition of torture or inhuman or degrading treatment)** of the European Convention on Human Rights;

There would be **no violation of Article 5 (right to liberty and security)** of the Convention; but that

There would be **a violation of Article 6 (right to a fair trial)**, given the real risk of the admission of evidence obtained by torture at his retrial.

The Court also held, unanimously, that there had been **no violation of Article 13 (right to an effective remedy)**.

This is the first time that the Court has found that an expulsion would be in violation of Article 6, which reflects the international consensus that the use of evidence obtained through torture makes a fair trial impossible.

Principal facts

The applicant, Omar Othman (Abu Qatada), is a Jordanian national who was born in 1960 near Bethlehem, then part of Jordan. He is currently detained in Long Lartin prison, Worcestershire, England. He is suspected of having links with al-Qaeda.

Mr Othman arrived in the United Kingdom in September 1993 and made a successful application for asylum, in particular on the basis that he had been detained and tortured by the Jordanian authorities in 1988 and 1990-1. He was recognised as a refugee in 1994, being granted leave to remain until June 1998.

While his subsequent application for indefinite leave to remain was pending, he was detained in October 2002 under the Anti-Terrorism, Crime and Security Act. When that Act was repealed in

The full texts of the Court's judgments are accessible on its website (<http://www.hudoc.echr.coe.int>)

March 2005, he was released on bail and made subject to a control order under the Prevention of Terrorism Act. While his appeal against the control order was still pending, in August 2005 he was served with a notice of intention to deport him to Jordan.

Mr Othman appealed against that decision. He had been convicted in Jordan, in his absence, of involvement in two terrorist conspiracies in 1999 and 2000. It was alleged by the Jordanian authorities that Mr Othman had sent encouragement from the UK to his followers in Jordan and that that had incited them to plant the bombs. Mr Othman claimed that, if deported, he would be retried, which would put him at risk of torture, lengthy pre-trial detention and a grossly unfair trial based on evidence obtained by the torture of his co-defendants.

The UK Special Immigration Appeals Commission (SIAC) dismissed his appeal, holding in particular that Mr Othman would be protected against torture and ill-treatment by the agreement negotiated between the UK and Jordan, which set out a detailed series of assurances. SIAC also found that the retrial would not be in total denial of his right to a fair trial.

The Court of Appeal partially granted Mr Othman's appeal. It found that there was a risk that torture evidence would be used against him if he were returned to Jordan and that that would violate the international prohibition on torture and would result in a flagrant denial of justice in breach of Article 6 of the European Convention on Human Rights.

On 18 February 2009 the House of Lords upheld SIAC's findings. They found that the diplomatic assurances would protect Mr Othman from being tortured. They also found that the risk that evidence obtained by torture would be used in the criminal proceedings in Jordan would not amount to a flagrant denial of justice.

Complaints, procedure and composition of the Court

The applicant alleged, in particular, that he would be at real risk of ill-treatment and a flagrant denial of justice if deported to Jordan. He relied on Articles 3, 5, 6 and 13.

The application was lodged with the European Court of Human Rights on 11 February 2009. On 19 February 2009 an interim measure under Rule 39 of the Rules of Court was granted to the effect that Mr Othman should not be removed to Jordan pending the European Court's decision. A hearing took place in public in the Human Rights Building, Strasbourg, on 14 December 2010.

Third-party comments were received from the human rights organisations Amnesty International, Human Rights Watch and JUSTICE.

Judgment was given by a Chamber of seven, composed as follows:

Lech **Garlicki** (Poland), President,
 Nicolas **Bratza** (the United Kingdom),
 Ljiljana **Mijović** (Bosnia and Herzegovina),
 David Thór **Björgvinsson** (Iceland),
 Ledi **Bianku** (Albania),
 Mihai **Poalelungi** (Moldova),
 Vincent A. **de Gaetano** (Malta), Judges,
 and also Lawrence **Early**, Section Registrar.

Decision of the Court

Article 3

The full texts of the Court's judgments are accessible on its website (<http://www.hudoc.echr.coe.int>)

The Court noted that, in accordance with its well-established case-law, Mr Othman could not be deported to Jordan if there were a real risk that he would be tortured or subjected to inhuman or degrading treatment.

The reports of United Nations bodies and human rights organisations showed that the Jordanian General Intelligence Directorate (GID) routinely used torture against suspected Islamist terrorists and that no protection against that was provided by the courts or any other body in Jordan. As a high-profile Islamist, Mr Othman belonged to a category of prisoners at risk of ill-treatment and he claimed already to have been tortured when he lived in Jordan.

The Court therefore had to decide whether the diplomatic assurances obtained by the UK Government from the Jordanian Government were sufficient to protect Mr Othman.

It found that the agreement between the two Governments was specific and comprehensive. The assurances were given in good faith by a Government whose bilateral relations with the United Kingdom had, historically, been strong. They had been approved at the highest levels of the Jordanian Government, with the express approval and support of the King himself. They also had the approval and support of senior GID officials. Mr Othman's high profile would make the Jordanian authorities careful to ensure he was properly treated; any ill-treatment would have serious consequences for Jordan's relationship with the UK. In addition, the assurances would be monitored by an independent human rights organisation in Jordan, which would have full access to Mr Othman in prison.

There would therefore be no risk of ill-treatment, and no violation of Article 3, if Mr Othman were deported to Jordan.

Article 13

The Court considered that SIAC's procedures satisfied the requirements of Article 13. There had therefore been no violation of Article 13.

Article 5

The Court noted that Jordan clearly intended to bring Mr Othman to trial and had to do so within 50 days of his detention. The Court held that 50 days' detention fell far short of the length of detention required for a flagrant breach of Article 5 and, consequently, that there would be no violation of Article 5 if he were deported to Jordan.

Article 6

The European Court agreed with the English Court of Appeal that the use of evidence obtained by torture during a criminal trial would amount to a flagrant denial of justice.

Torture and the use of torture evidence were banned under international law. Allowing a criminal court to rely on torture evidence would legitimise the torture of witnesses and suspects pre-trial. Moreover, torture evidence was unreliable, because a person being tortured would say anything to make it stop.

The Court found that torture was widespread in Jordan, as was the use of torture evidence by the Jordanian courts. The Court also found that, in relation to each of the two terrorist conspiracies charged against Mr Othman, the evidence of his involvement had been obtained by torturing one of his co-defendants. When those two co-defendants stood trial, the Jordanian courts had not taken any action in relation to their complaints of torture. The Court agreed with SIAC that there was a high

probability that the incriminating evidence would be admitted at Mr Othman's retrial and that it would be of considerable, perhaps decisive, importance.

In the absence of any assurance by Jordan that the torture evidence would not be used against Mr Othman, the Court therefore concluded that his deportation to Jordan to be retried would give rise to a flagrant denial of justice in violation of Article 6.

The Court did not consider it necessary to consider his other complaints under Article 6.

Article 41

The applicant did not submit a claim for just satisfaction.

48. Eur.Court HR, *Hirsi Jamaa and Others v. Italy*, Grand Chamber Judgment of 23 February 2012, Application No. 27765/09, (Article 1, Obligation to Respect Human Rights – Jurisdiction Found; Article 3, Prohibition of Torture – Violation; Article 4 of Protocol No. 4, Prohibition of Collective Expulsions of Aliens – Violation; Article 13, Right to an Effective Remedy – Violation). The applicants, 11 Somali and 13 Eritrean migrants intercepted by the Italian Navy at sea, successfully claimed that they were under Italian jurisdiction upon interception, and would be put at real risk of ill-treatment if sent back to Libya.

**ECHR 075 (2012)
23.02.2012**

Press release issued by the Registrar

In today's Grand Chamber judgment in the case of *Hirsi Jamaa and Others v. Italy* (application no. 27765/09), which is final, the European Court of Human Rights held, unanimously, that:

The applicants fell **within the jurisdiction of Italy for the purposes of Article 1** of the European Convention on Human Rights;

There had been **two violations of Article 3** (prohibition of inhuman or degrading treatment) of the Convention because the applicants had been exposed to the risk of ill-treatment in Libya and of repatriation to Somalia or Eritrea;

There had been a **violation of Article 4 of Protocol No. 4** (prohibition of collective expulsions);

There had been a **violation of Article 13 (right to an effective remedy) taken in conjunction with Article 3 and with Article 4 of Protocol No.4.**

The case concerned Somalian and Eritrean migrants travelling from Libya who had been intercepted at sea by the Italian authorities and sent back to Libya.

Principal facts

The applicants are 11 Somalian and 13 Eritrean nationals. They were part of a group of about 200 people who left Libya in 2009 on board three boats bound for Italy. On 6 May 2009, when the boats were 35 miles south of Lampedusa (Agrigento), within the maritime search and rescue region under the responsibility of Malta, they were intercepted by Italian Customs and Coastguard vessels. The passengers were transferred to the Italian military vessels and taken to Tripoli. The applicants say that during the journey the Italian authorities did not tell them where they were being taken, or check their identity. Once in Tripoli, after a 10-hour voyage, they were handed over to the Libyan authorities. At a press conference on 7 May 2009 the Italian Minister of the Interior said that the interception of the vessels on the high seas and the return of the migrants to Libya was in accordance with the bilateral agreements with Libya that had come into force on 4 February 2009, marking an important turning point in the fight against illegal immigration.

In a speech to the Senate on 25 May 2009 the Minister stated that between 6 and 10 May 2009 more than 471 clandestine migrants had been intercepted on the high seas and transferred to Libya in accordance with those bilateral agreements. In his view, that pushback policy discouraged criminal gangs involved in people smuggling and trafficking, helped save lives at sea and substantially reduced

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landings of clandestine migrants along the Italian coast. During the course of 2009 Italy conducted nine operations on the high seas to intercept clandestine migrants, in conformity with the bilateral agreements concluded with Libya. On 26 February 2011 the Italian Defence Minister declared that the bilateral agreements with Libya were suspended following the events in Libya.

According to information submitted to the Court by the applicants' representatives, two of the applicants had died in unknown circumstances. Between June and October 2009 fourteen of the applicants had been granted refugee status by the office of the UN High Commissioner for Refugees (UNHCR) in Tripoli. Following the revolution in Libya in February 2011 the quality of contact between the applicants and their representatives deteriorated. The lawyers are currently in contact with six of the applicants, four of whom live in Benin, Malta or Switzerland and some of whom are awaiting a response to their request for international protection. One of the applicants is in a refugee camp in Tunisia and is planning to return to Italy. In June 2011 refugee status was granted to one of the applicants in Italy after he had clandestinely returned there.

Complaints, procedure and composition of the Court

Relying on Article 3, the applicants submitted that the decision of the Italian authorities to send them back to Libya had exposed them to the risk of ill-treatment there, as well as to the risk of ill-treatment if they were sent back to their countries of origin (Somalia and Eritrea). They also complained that they had been subjected to collective expulsion prohibited by Article 4 of Protocol No. 4. Relying, lastly, on Article 13, they complained that they had had no effective remedy in Italy against the alleged violations of Article 3 and of Article 4 of Protocol No. 4.

The application was lodged with the European Court of Human Rights on 26 May 2009. On 15 February 2011 the Chamber to which the case had been allocated relinquished jurisdiction in favour of the Grand Chamber. A hearing took place in the Human Rights Building, Strasbourg, on 22 June 2011.

The following organisations were authorised to intervene as third parties (under Article 36 § 2 of the Convention): the Office of the United Nations High Commissioner for Refugees; the Office of the United Nations High Commissioner for Human Rights; the non-governmental organisations Aire Center, Amnesty International and International Federation for Human Rights (FIDH); the non-governmental organisation Human Rights Watch; and the Columbia Law School Human Rights Clinic.

Judgment was given by the Grand Chamber of 17 judges, composed as follows:

Nicolas **Bratza** (the United Kingdom), President,
 Jean-Paul **Costa** (France),
 Françoise **Tulkens** (Belgium),
 Josep **Casadevall** (Andorra),
 Nina **Vajić** (Croatia),
 Dean **Spielmann** (Luxembourg),
 Peer **Lorenzen** (Denmark),
 Ljiljana **Mijović** (Bosnia and Herzegovina),
 Dragoljub **Popović** (Serbia),
 Giorgio **Malinverni** (Switzerland),
 Mirjana **Lazarova Trajkovska** ("the Former Yugoslav Republic of Macedonia"),
 Nona **Tsotsoria** (Georgia),
 Işıl **Karakaş** (Turkey),
 Kristina **Pardalos** (San Marino),
 Guido **Raimondi** (Italy),

The full texts of the Court's judgments are accessible on its website (<http://www.hudoc.echr.coe.int>)

Vincent A. **de Gaetano** (Malta),
Paulo **Pinto de Albuquerque** (Portugal), Judges,

and also Michael **O'Boyle**, Deputy Registrar.

Decision of the Court

The question of jurisdiction under Article 1

Only in exceptional cases did the Court accept that acts of the member States performed, or producing effects, outside their territories could constitute an exercise of jurisdiction by them.

Whenever the State, through its agents operating outside its territory, exercised control and authority over an individual, and thus its jurisdiction, the State was under an obligation to secure the rights under the Convention to that individual.

Italy did not dispute that the ships onto which the applicants had been embarked had been fully within Italian jurisdiction. The Court reiterated the principle of international law, enshrined in the Italian Navigation Code, that a vessel sailing on the high seas was subject to the exclusive jurisdiction of the State of the flag it was flying. The Court could not accept the Government's description of the operation as a "rescue operation on the high seas" or that Italy had exercised allegedly minimal control over the applicants. The events had taken place entirely on board ships of the Italian armed forces, the crews of which had been composed exclusively of Italian military personnel. In the period between boarding the ships and being handed over to the Libyan authorities, the applicants had been under the continuous and exclusive de jure and de facto control of the Italian authorities. Accordingly, the events giving rise to the alleged violations had fallen within Italy's jurisdiction within the meaning of Article 1.

Article 3

Risk of suffering ill-treatment in Libya

The Court was aware of the pressure on States resulting from the increasing influx of migrants, which was a particularly complex phenomenon when occurring by sea, but observed that this could not absolve a State of its obligation not to remove any person who would run the risk of being subjected to treatment prohibited under Article 3 in the receiving country. Noting that the situation in Libya had deteriorated after April 2010, the Court decided to confine its examination of the case to the situation prevailing in Libya at the material time. It noted that the disturbing conclusions of numerous organisations² regarding the treatment of clandestine immigrants were corroborated by the report of the Committee for the Prevention of Torture (CPT) of 2010³.

Irregular migrants and asylum seekers, between whom no distinction was made, had been systematically arrested and detained in conditions described as inhuman by observers, who reported cases of torture among others. Clandestine migrants had been at risk of being returned to their countries of origin at any time and, if they managed to regain their freedom, had been subjected to particularly precarious living conditions and exposed to racist acts. The Italian Government had maintained that Libya was a safe destination for migrants and that Libya complied with its international commitments as regards asylum and the protection of refugees. The Court observed that the existence of domestic laws and the ratification of international treaties guaranteeing respect for fundamental rights were not in themselves sufficient to ensure adequate protection against the risk of ill-treatment where reliable sources had reported practices contrary to the principles of the Convention. Furthermore, Italy could not evade its responsibility under the Convention by referring to its subsequent obligations arising out of bilateral agreements with Libya. The Court noted, further,

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that the Office of the UNHCR in Tripoli had never been recognised by the Libyan Government. That situation had been well-known and easy to verify at the relevant time. The Court therefore considered that when the applicants had been removed, the Italian authorities had known or should have known that they would be exposed to treatment in breach of the Convention.

Furthermore, the fact the applicants had not expressly applied for asylum had not exempted Italy from its responsibility. The Court reiterated the obligations on States arising out of international refugee law, including the “non-refoulement principle” also enshrined in the Charter of Fundamental Rights of the European Union. The Court attached particular weight in this regard to a letter of 15 May 2009 from Mr Jacques Barrot, Vice-President of the European Commission, in which he reiterated the importance of that principle.

The Court, considering that the fact that a large number of irregular immigrants in Libya had found themselves in the same situation as the applicants did not make the risk concerned any less individual, concluded that by transferring the applicants to Libya the Italian authorities had, in full knowledge of the facts, exposed them to treatment proscribed by the Convention. The Court thus concluded that there had been a violation of Article 3.

Risk of suffering ill-treatment in the applicants’ country of origin

The indirect removal of an alien left the State’s responsibility intact, and that State was required to ensure that the intermediary country offered sufficient guarantees against arbitrary refoulement particularly where that State was not a party to the Convention. The Court would determine whether there had been such guarantees in this case. All the information in the Court’s possession showed prima facie that there was widespread insecurity in Somalia – see the Court’s conclusions in the case of *Sufi and Elmi v. the United Kingdom* – and in Eritrea – individuals faced being tortured and detained in inhuman conditions merely for having left the country irregularly. The applicants could therefore arguably claim that their repatriation would breach Article 3 of the Convention. The Court observed that Libya had not ratified the Geneva Convention and noted the absence of any form of asylum and protection procedure for refugees in the country. The Court could not therefore subscribe to the Government’s argument that the UNHCR’s activities in Tripoli represented a guarantee against arbitrary repatriation. Moreover, Human Rights Watch and the UNHCR had denounced several forced returns of asylum seekers and refugees to highrisk countries. Thus, the fact that some of the applicants had obtained refugee status in Libya, far from being reassuring, might actually have increased their vulnerability.

The Court concluded that when the applicants were transferred to Libya, the Italian authorities had known or should have known that there were insufficient guarantees protecting them from the risk of being arbitrarily returned to their countries of origin. That transfer accordingly violated Article 3.

Article 4 of Protocol No.4

Admissibility of the complaint

The Court was required, for the first time, to examine whether Article 4 of Protocol No. 4 applied to a case involving the removal of aliens to a third State carried out outside national territory. It had to ascertain whether the transfer of the applicants to Libya constituted a collective expulsion within the meaning of Article 4 of Protocol No. 4. The Court observed that neither the text nor the travaux préparatoires of the Convention precluded the extraterritorial application of that provision. Furthermore, were Article 4 of Protocol No. 4 to apply only to collective expulsions from the national territory of the member States, a significant component of contemporary migratory patterns would not fall within the ambit of that provision and migrants having taken to the sea, often risking their lives, and not having managed to reach the borders of a State, would not be entitled to an examination of

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their personal circumstances before being expelled, unlike those travelling by land. The notion of expulsion, like the concept of “jurisdiction”, was clearly principally territorial. Where, however, the Court found that a State had, exceptionally, exercised its jurisdiction outside its national territory, it could accept that the exercise of extraterritorial jurisdiction by that State had taken the form of collective expulsion. The Court also reiterated that the special nature of the maritime environment did not make it an area outside the law. It concluded that the complaint was admissible.

Merits of the complaint

The Court observed that, to date, the *Čonka v. Belgium*⁷ case was the only one in which it had found a violation of Article 4 of Protocol No. 4. It reiterated that the fact that a number of aliens were subject to similar decisions did not in itself lead to the conclusion that there was a collective expulsion if the case of each person concerned had been duly examined. In the present case the transfer of the applicants to Libya had been carried out without any examination of each individual situation. No identification procedure had been carried out by the Italian authorities, which had merely embarked the applicants and then disembarked them in Libya. The Court concluded that the removal of the applicants had been of a collective nature, in breach of Article 4 of Protocol No. 4.

Article 13 taken in conjunction with Article 3 and with Article 4 of Protocol No.4

The Italian Government acknowledged it had not been possible to assess the applicants’ personal circumstances on board the military ships. The applicants alleged that they had been given no information by the Italian military personnel, who had led them to believe that they were being taken to Italy and had not informed them as to the procedure to be followed to avoid being returned to Libya. That version of events, though disputed by the Government, was corroborated by a large number of witness statements gathered by the UNHCR, the CPT and Human Rights Watch. The applicants had thus been unable to lodge their complaints under Article 3 of the Convention and Article 4 of Protocol No. 4 with a competent authority and to obtain a thorough and rigorous assessment of their requests before the removal measure was enforced.

Even if a remedy under the criminal law against the military personnel on board the ship were accessible in practice, this did not satisfy the criterion of suspensive effect. The Court reiterated the requirement flowing from Article 13 that execution of a measure be stayed where the measure was contrary to the Convention and had potentially irreversible effects. Having regard to the irreversible consequences if the risk of torture or ill-treatment materialised, the suspensive effect of an appeal should apply where an alien was returned to a State where there were serious grounds for believing that he or she faced a risk of that nature. The Court concluded that there had been a violation of Article 13 taken in conjunction with Article 3 and Article 4 of Protocol No. 4.

Article 41

Under Article 41 (just satisfaction), the Court held that Italy was to pay each applicant 15,000 euros (EUR) in respect of non-pecuniary damage and EUR 1,575.74 to the applicants jointly in respect of costs and expenses.

Separate opinion

Judge Pinto de Albuquerque has expressed a concurring opinion, which is annexed to the judgment.

49. Eur.Court HR, Toniolo v. San Marino and Italy, Third Section Judgment of 26 June 2012, Application No. 44853/10, (Article 5-1, Right to Liberty and Security – Violation). The applicant, an Italian national living in San Marino who was arrested in San Marino following criminal proceedings brought against him in Italy, successfully argued that his preventive detention and subsequent extradition to Italy were unlawful.

Information Note on the Court’s case-law No. 153

June 2012

Judgment 26.6.2012 [Section III]

Article 5

Article 5-1

Lawful arrest or detention

Procedure prescribed by law

Article 5-1-f

Extradition

Lack of a sufficiently accessible, precise and foreseeable procedure under San Marino law to avoid arbitrary detention pending extradition: violation

Facts – In August 2009 the Italian authorities sought the applicant’s extradition from San Marino, inter alia, on suspicion of money laundering. The applicant was arrested and placed in preventive detention on the basis of the bilateral Convention on Friendship and Good Neighbourhood between Italy and San Marino of 1939. The Italian Embassy subsequently informed the San Marino authorities that they would follow the procedure laid down by the European Convention on Extradition of 1957, which San Marino had also ratified. The applicant sought to have the arrest warrant set aside on the grounds that there had been no urgent reasons, as required by the 1939 Convention, to justify his preventive detention. The appeal judge dismissed that complaint, finding that the 1957 Convention prevailed over the 1939 Convention under which the extradition process had started. In September 2009 the applicant requested his release because the thirty days stipulated by the 1939 Convention had expired, but his request was rejected, again on the grounds that it was the 1957 Convention which prevailed. An order for the applicant’s extradition was made in September 2009 and he was later extradited to and detained in Italy before being released in February 2010.

Law – Article 5 § 1 (f)

(a) *Complaint against San Marino* – The applicant’s detention amounted to detention with a view to extradition and therefore fell under Article 5 § 1 (f). Both the 1939 Convention and the 1957 Convention were applied at different stages of the extradition procedure, without any clear indication as to which applied to the applicant’s case, that question being left to the discretion of the authorities and to the subsequent, first-time, interpretation of the domestic courts. The uncertainty as to which of the two conventions was applicable made it difficult to accept that the legal system provided a precise and foreseeable application of the law. Moreover, the 1957 Convention on which the Government had relied referred back to domestic law in relation to the rules regulating the extradition procedure and

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did not itself lay down a comprehensive procedure offering safeguards against arbitrariness in the requested State. The San Marino legislation did not provide such a procedure either. In sum, the domestic law did not lay down a procedure that was sufficiently accessible, precise and foreseeable in its application to avoid the risk of arbitrary detention pending extradition. Accordingly, the applicant's detention as a result of the extradition order had not complied with a procedure prescribed by law.

Conclusion: violation (unanimously).

(b) *Complaints against Italy*

(i) *Detention in Italy:* In so far as the applicant had complained that his detention following his transfer to the Italian authorities was unlawful, the Court noted that his detention in Italy had its basis in the order of an Italian court and had the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence (Article 5 § 1 (c)).

Conclusion: inadmissible (manifestly ill-founded).

(ii) *Detention in San Marino:* The Court reiterated that an act instigated by a requesting country on the basis of its own domestic law and followed-up by the requested country in response to its treaty obligations could be attributed to the requesting country. It followed that, as the requesting country, Italy had been under an obligation to ensure that the arrest warrant and extradition request were valid as a matter of Italian law. However, the unlawfulness in the present case had arisen not from a failure to comply with Italian domestic legal requirements, but from the (lack of) quality of San Marino law on the matter. Consequently Italy's responsibility could not be engaged.

Conclusion: inadmissible (incompatible *ratione materiae*).

Article 41: No claim made in respect of damage.

50. Eur.Court HR, Wallishauser v. Austria, First Section Judgment of 17 July 2012, Application No. 156/04, (Article 6-1, Right to a Fair Hearing within a Reasonable Time - Violation). The applicant, a former employee of the United States embassy in Vienna who was owed salary payments from September 1996 after her unlawful dismissal, successfully argued that she had been denied access to a court when the United States' authorities had invoked its immunity and had refused to be served with summons to a hearing.

Information Note on the Court's case-law No. 154

July 2012

Judgment 17.7.2012 [Section I]

Article 6

Civil proceedings

Article 6-1

Access to court

Refusal by domestic courts to acknowledge deemed service against foreign State made in accordance with rules of customary international law: violation

Facts – In 1998 the applicant, who had worked as a photographer for the American Embassy in Vienna, brought an action for unpaid wages against the United States. A staff member of the Austrian Embassy in Washington attempted service by handing the documents over to the United States Department of State, but these were returned with a note to the Austrian Ministry of Foreign Affairs stating that the United States wished to assert its immunity in any case brought by the applicant. The applicant then applied to the Austrian courts for judgment in default, but his application was dismissed on the grounds that the summons had not been duly served. A subsequent application by the applicant for deemed service, by publication or service on a court-appointed representative, was also refused on the grounds that domestic law required service through the Ministry of Foreign Affairs.

Law – Article 6 § 1: It was undisputed that the United States could not validly rely on jurisdictional immunity in the proceedings. However, unlike the position in *Cudak v. Lithuania* and *Sabeh El Leil v. France*,* each of which had concerned a decision by the respective domestic authorities to uphold an objection to jurisdiction based on State immunity, the issue in the instant case concerned the Austrian courts' acceptance of the United States' refusal to accept the summons that had been served on them. That acceptance was based on the Austrian courts' view that the service of a summons in a civil action against a foreign State was in itself a sovereign act that had to be accepted irrespective of the nature of the underlying claim. The Court considered, however, that the rule that the service of documents instituting proceedings against a State was deemed to have been effected on their receipt by the Ministry of Foreign Affairs of the State concerned applied to Austria as a rule of customary international law.** The Austrian courts had not examined that eventuality. Instead, they had confined themselves to noting that no treaty regulating the issue had been adopted, and that there was no provision under domestic law for service to be effected on the foreign ministry of another State. Accordingly, by accepting the United States' refusal to serve the summons in the applicant's case as a

sovereign act and by refusing to proceed with the applicant's case, the Austrian courts had impaired the very essence of the applicant's right of access to court.

Conclusion: violation (unanimously).

Article 41: EUR 12,000 in respect of non-pecuniary damage.

* *Cudak v. Lithuania* [GC], no. 15869/02, 23 March 2010, Information Note no. 128; *Sabeh El Leil v. France* [GC], no. 34869/05, 29 June 2011, Information Note no. 142.

** In the absence of any objection by Austria to Article 20 of the International Law Commission's 1991 Draft Articles, which embodied the rule, or to a similar provision in the 2004 United Nations Convention on Jurisdictional Immunities of States and their Property.

51. Eur.Court HR, *Nada v. Switzerland*, Grand Chamber Judgment of 12 September 2012, Application No. 10593/08, (Article 5, Right to Liberty and Security – No Violation; Article 8, Right to Respect for Private and Family Life – Violation; Article 13, Right to an Effective Remedy – Violation). The applicant, an Italian and Egyptian national living in an Italian enclave inside the Swiss Canton of Ticino and whose name was added to a list annexed to a federal Ordinance in the context of the implementation by Switzerland of the United Nations Security Council counter-terrorism resolutions, successfully argued that the ban imposed on him, preventing him from entering or transiting through Switzerland, breached his Convention rights.

**ECHR 337 (2012)
12.09.2012**

Press release issued by the Registrar

In today's Grand Chamber judgment in the case of **Nada v. Switzerland** (application no. 10593/08), which is final, the European Court of Human Rights held, unanimously, that there had been:

a violation of Article 8 (right to respect for private and family life) of the European Convention on Human Rights, and

a violation of Article 8 taken together with Article 13 (right to an effective remedy) of the Convention.

The case concerns the restricting of the applicant's cross-border movement and the addition of his name to a list annexed to a federal Ordinance, in the context of the implementation by Switzerland of United Nations Security Council counter-terrorism resolutions.

The Court observed that Switzerland could not simply rely on the binding nature of the Security Council resolutions, but should have taken all possible measures, within the latitude available to it, to adapt the sanctions regime to the applicant's individual situation. As Switzerland had failed to harmonise the international obligations that appeared contradictory, the Court found that there had been a violation of Article 8.

Principal facts

The applicant, Youssef Moustafa Nada, is an Italian and Egyptian national who was born in 1931 and has lived since 1970 in Campione d'Italia, an Italian enclave of about 1.6 sq. km inside the Swiss Canton of Ticino, separated from the rest of Italy by Lake Lugano.

On 15 October 1999, in response to attacks by Osama bin Laden and his network, the UN Security Council adopted Resolution 1267 (1999) imposing sanctions on the Taliban and creating a committee to monitor the sanctions. On 2 October 2000 the Swiss Federal Council adopted an Ordinance instituting measures against the Taliban ("the Taliban Ordinance").

By Resolution 1333 (2000) the Security Council extended the sanctions regime, requesting the UN Sanctions Committee to draw up a list of persons and organisations associated with Osama bin Laden and al-Qaeda. The Taliban Ordinance was amended accordingly by the Swiss Government.

The full texts of the Court's judgments are accessible on its website (<http://www.hudoc.echr.coe.int>)

On 24 October 2001 the Swiss Federal Prosecutor opened an investigation into Mr Nada's activities. In November 2001 the applicant and a number of organisations associated with him were added to the Sanctions Committee's list, then to the list in the Annex to the Taliban Ordinance. In January 2002 the Security Council adopted Resolution 1390 (2002) introducing a travel ban for all individuals, groups, undertakings and associated entities on the sanctions list. The Swiss Taliban Ordinance was amended accordingly, so that all persons listed in Annex 2, including the applicant, were banned from entering or transiting through Switzerland.

When he visited London in November 2002, the applicant was arrested and deported back to Italy, his money also being seized. In October 2003 the Canton of Ticino revoked the applicant's special border-crossing permit and in November the Swiss Federal Office for Immigration, Integration and Emigration (the "IMES") informed him that he was no longer authorised to cross the border. In March 2004 Mr Nada lodged a request with the IMES for leave to enter or transit through Switzerland for the purposes of medical treatment in that country and legal proceedings in both Switzerland and Italy, but the request was dismissed as ill-founded.

In May 2005 the Swiss Federal Prosecutor closed the investigation concerning the applicant, finding that the accusations against him were unfounded. The applicant then asked the Federal Council to delete his name and those of the organisations associated with him from the Annex to the Taliban Ordinance. His request was rejected on the grounds that Switzerland could not delete names from its national list while they still appeared on the UN Sanctions Committee's list.

Mr Nada unsuccessfully lodged an administrative appeal with the Federal Department for Economic Affairs then appealed to the Federal Council, which referred his case to the Federal Court. That court dismissed his appeal on the merits, finding that, under Article 25 of the United Nations Charter, the UN member States had undertaken to accept and carry out the decisions of the Security Council.

On 22 February 2008, at a meeting between the applicant's lawyer and a representative of the Federal Department of Foreign Affairs, the latter indicated that Mr Nada could ask the Sanctions Committee for a more extensive exemption on account of his particular situation, also repeating that Switzerland could not itself apply for delisting. The Swiss Government would nevertheless be prepared to support him, in particular by providing him with an attestation confirming that the criminal proceedings against him had been discontinued. The representative lastly suggested that the lawyer contact the Italian Permanent Mission to the United Nations.

On 5 July 2008 the Italian Government submitted to the Sanctions Committee a request for the applicant's delisting on the ground that the case against him in Italy had been dismissed, but the Committee denied that request.

In August 2009, in accordance with the procedure laid down by Security Council Resolution 1730 (2006), the applicant submitted a request for the deletion of his name from the Sanctions Committee's list. On 23 September 2009 Mr Nada's name was finally deleted from the list annexed to the Security Council resolutions and on 29 September 2009 the Annex to the Taliban Ordinance was amended accordingly. By a motion introduced on 12 June 2009 by Dick Marty and passed on 1 March 2010 by the Swiss Parliament, the Foreign Policy Commission of the National Council requested the Federal Council to inform the UN Security Council that from the end of 2010 the sanctions prescribed against individuals under the counter-terrorism resolutions would no longer be applied.

Complaints, procedure and composition of the Court

Relying on Article 8 (right to respect for private and family life), the applicant argued that the ban imposed on him, preventing him from entering or transiting through Switzerland, had breached his right to respect for his private, professional and family life. As a result of the ban, he had been unable

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to see his doctors in Italy or in Switzerland or visit family and friends. The addition of his name to the list annexed to the Taliban Ordinance had damaged his honour and reputation. Relying on Article 13 (right to an effective remedy) he complained that there had been no effective remedy by which to have his complaints examined in the light of the Convention. Under Article 5 § 1 (right to liberty and security) the applicant argued that by preventing him from entering or transiting through Switzerland, because his name was on the UN Sanctions Committee's blacklist, the authorities had deprived him of his liberty. Lastly, under Article 5 § 4 (right to a prompt decision on the lawfulness of detention) he complained that the Swiss authorities had not reviewed the lawfulness of the restrictions on his freedom of movement.

The application was lodged with the European Court of Human Rights on 19 February 2008. On 30 September 2010 the Chamber relinquished jurisdiction in favour of the Grand Chamber.

Under Article 36 of the Convention, the President of the Grand Chamber authorised the French and United Kingdom Governments, together with the non-governmental organisation JUSTICE, to submit written comments as third parties, and the United Kingdom Government also took part in the hearing.

Judgment was given by the Grand Chamber of 17 judges, composed as follows:

Nicolas **Bratza** (the United Kingdom), President,
 Jean-Paul **Costa** (France),
 Françoise **Tulkens** (Belgium),
 Josep **Casadevall** (Andorra),
 Nina **Vajić** (Croatia),
 Dean **Spielmann** (Luxembourg),
 Christos **Rozakis** (Greece),
 Corneliu **Bîrsan** (Romania),
 Karel **Jungwiert** (the Czech Republic),
 Khanlar **Hajiyev** (Azerbaijan),
 Ján **Šikuta** (Slovakia),
 Isabelle **Berro-Lefèvre** (Monaco),
 Giorgio **Malinverni** (Switzerland),
 George **Nicolaou** (Cyprus),
 Mihai **Poalelungi** (the Republic of Moldova),
 Kristina **Pardalos** (San Marino),
 Ganna **Yudkivska** (Ukraine),

and also Michael **O'Boyle**, Deputy Registrar.

Decision of the Court

Article 8

The Court reiterated that a State was entitled, as a matter of well-established international law and subject to its treaty obligations, to control the entry of non-nationals into its territory. The Convention did not guarantee the right of an alien to enter a particular country.

However, the Federal Court itself had found that the measure in question constituted a significant restriction on Mr Nada's freedom, as he was in a very specific situation on account of the location of Campione d'Italia, an enclave surrounded by the Swiss Canton of Ticino. Agreeing with that opinion, the Court observed that the measure preventing Mr Nada from leaving the enclave for at least six years was likely to make it more difficult for him to exercise his right to maintain contact with other

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people living outside the enclave. There had thus been an interference with the applicant's right to respect for his private and family life.

The aim of the restrictions was to prevent crime and, as the relevant Security Council resolutions had been adopted to combat international terrorism under Chapter VII of the United Nations Charter, they could also contribute to Switzerland's national security and public safety.

As to the necessity of the measures, the Court was prepared to take account of the fact that the threat of terrorism was particularly serious at the time of the adoption of the resolutions imposing the sanctions. However, the maintaining or reinforcement of those measures had to be justified convincingly.

The investigations conducted by the Swiss and Italian authorities had concluded that the suspicions about the applicant were unfounded. The Swiss Federal Prosecutor had closed the relevant criminal investigation that had been started in October 2001, and in July 2008 the Italian Government had submitted to the UN Sanctions Committee a request for the applicant's delisting on the ground that the proceedings against him in Italy had been discontinued. The Court was surprised that the Swiss authorities had not informed the Sanctions Committee until September 2009 of the conclusions of investigations closed in May 2005. More prompt communication might have led to the deletion of the applicant's name from the United Nations list, and accordingly from the Swiss list, at an earlier stage. The Court further noted that the case had a medical aspect, because the applicant was elderly and had health problems: the IMES and the ODM had denied a number of requests for exemption from the entry and transit ban that had been submitted by the applicant for medical reasons, among others.

During the meeting of 22 February 2008 the representative of the Federal Department of Foreign Affairs had indicated that the applicant could ask the Sanctions Committee to grant a broader exemption in view of his particular situation. The applicant had not made any such request, but it did not appear that the Swiss authorities had offered him any assistance to that end.

It was established that the applicant's name had been added to the United Nations list on the initiative of the USA, not that of Switzerland. In any event, it was not for the Swiss authorities to approach the Sanctions Committee to trigger the delisting procedure, Switzerland not being the State of the applicant's nationality or residence.

However, it did not appear that Switzerland had ever sought to encourage Italy to undertake such action or to offer it assistance for that purpose. The Swiss authorities had merely suggested that the applicant contact the Italian Permanent Mission to the United Nations.

In conclusion, the Court considered that the Swiss authorities had not sufficiently taken into account the realities of the case, especially the geographical situation of the Campione d'Italia enclave, the duration of the measures imposed or the applicant's nationality, age and health. As it had been possible for Switzerland to decide how the Security Council resolutions were to be implemented in its legal order, it could have been less harsh in imposing the sanctions regime on the applicant.

The Court observed that Switzerland could not simply rely on the binding nature of the Security Council resolutions, but should have taken all possible measures, within the latitude available to it, to adapt the sanctions regime to the applicant's individual situation. As Switzerland had failed to harmonise the international obligations that appeared contradictory, the Court found that there had been a violation of Article 8.

Article 13

The full texts of the Court's judgments are accessible on its website (<http://www.hudoc.echr.coe.int>)

The Court observed that the applicant had been able to apply to the Swiss authorities to have his name deleted from the list annexed to the Taliban Ordinance. However, the Federal Court had taken the view that it could not by itself lift the sanctions, observing that the UN Sanctions Committee alone was competent to take such a decision. The Court thus concluded that the applicant did not have any effective means of obtaining the removal of his name and therefore no remedy in respect of the violations of his rights. It found that there had been a violation of Article 13 taken together with Article 8.

Article 5

The Court acknowledged that the restrictions had been imposed on Mr Nada for a considerable length of time, but found that they had not prevented him from freely living and moving within the territory of his permanent residence, which he had chosen of his own free will. Mr Nada had not been in a situation of detention, nor formally under house arrest: he had only been prohibited from entering or transiting through a given territory.

He had not been subjected to any surveillance by the Swiss authorities and had not been obliged to report regularly to the police. Nor did it appear that he had been restricted in his freedom to receive visitors. Lastly, the sanctions regime had permitted him to seek exemptions from the entry or transit ban and that when two such exemptions had been granted he had not made use of them.

The Court, like the Federal Court, thus found that the applicant had not been “deprived of his liberty” within the meaning of Article 5 § 1 by the measure prohibiting him from entering and transiting through Switzerland.

Just satisfaction (Article 41)

The Court held that Switzerland was to pay the applicant 30,000 euros in respect of costs and expenses.

Separate opinions

Judges Bratza, Nicolaou and Yudkivska expressed a joint concurring opinion; Judge Rozakis expressed a concurring opinion, joined by Judges Spielmann and Berro-Lefèvre; and Judge Malinverni also expressed a concurring opinion. These opinions are annexed to the judgment.

52. Eur.Court HR, Djokaba Lambi Longa v. the Netherlands, Third Section Decision of 9 October 2012, Application No. 33917/12, (Article 5, Right to Liberty and Security – Inadmissible; Article 13, Right to an Effective Remedy – Inadmissible). The applicant, a defence witness at the International Criminal Court, claimed that the Netherlands had been responsible for his on-going imprisonment by the ICC in The Hague since the Netherlands had agreed to review his application for asylum. The Court in its judgment dismissed the application, recalling that Contracting States had the right to control the entry, residence and expulsion of aliens, and that States were under no obligation to allow foreign nationals to await the outcome of immigration proceedings on their territory.

ECHR 413 (2012)

08.11.2012

Press release issued by the Registrar

In its decision in the case of **Djokaba Lambi Longa v. the Netherlands** (application no. 33917/12) the European Court of Human Rights has unanimously declared the application inadmissible. The decision is final.

The case concerned a Congolese national transferred to the International Criminal Court (ICC) to give evidence as a defence witness, who applied for asylum in the Netherlands after giving testimony.

Ruling for the first time on the issue of the power to keep individuals in custody of international criminal tribunals having their seat within the territory of a Contracting State, the Court concluded that the applicant, detained on the territory of a Contracting State (the Netherlands) by an international criminal tribunal (the ICC) under arrangements entered into with a State not party to the Convention (the Democratic Republic of the Congo) did not fall within the jurisdiction of the Netherlands.

Principal facts

The applicant, Bède Djokaba Lambi Longa, is a Congolese national who was born in 1966. He was at all relevant times detained in the United Nations Detention Unit within Scheveningen Prison, The Hague, Netherlands.

Mr Djokaba Lambi Longa was a prominent member of the Union of Congolese Patriots (Union des patriotes congolais, “UPC”), a political movement created in the Ituri region of the Democratic Republic of the Congo. The UPC’s military wing, the Forces Patriotiques pour la Libération du Congo (“FPLC”), was one of the armed factions active in that area in recent years.

On 19 March 2005 he was arrested in Kinshasa together with other members of UPC or FPLC including Thomas Lubanga Dyilo, the UPC’s president and the FPLC’s commander in chief. Mr Djokaba Lambi Longa was apparently charged with participation or complicity in the murder of nine Bangladeshi members of the United Nations Organization Mission in the Democratic Republic of the Congo (Mission de l’Organisation des Nations Unies en République démocratique du Congo, “MONUC”). Mr Djokaba Lambi Longa’s detention on remand was extended several times until 2 July 2007. He stated that no subsequent extension had ever been authorised and that he had been detained without title ever since.

The full texts of the Court’s judgments are accessible on its website (<http://www.hudoc.echr.coe.int>)

On 27 March 2011 Mr Djokaba Lambi Longa was transferred from detention in the Democratic Republic of the Congo to the custody of the International Criminal Court (ICC) in The Hague to give evidence at Mr Lubanga Dyilo's trial as a defence witness, which he did on various dates between 30 March and 7 April 2011.

On 1 June 2011 the applicant lodged an asylum request with the Netherlands authorities – he had declared that he feared reprisals upon his return to the Democratic Republic of the Congo. On the same day he asked the ICC to order a stay of his removal to this country. In its decision the ICC (Trial Chamber I) recognised that it had an obligation to return the applicant to his country once he had completed his evidence, which was the case. It further observed that it was for the Netherlands authorities, not for the ICC, to consider the applicant's asylum request and to decide whether it would take control of Mr Djokaba Lambi Longa during the proceedings. The Netherlands' position was that the applicant was to remain in custody of the ICC pending the consideration of his asylum application.

On 4 September 2012 Mr Djokaba Lambi Longa withdrew his asylum request.

Complaints, procedure and composition of the Court

Relying on Articles 5 (right to liberty and security) and 13 (right to an effective remedy), the applicant complained that he had been unlawfully held on Netherlands soil and denied an opportunity to seek his release.

The application was lodged with the European Court of Human Rights on 1 June 2012.

The decision was given by a Chamber of seven, composed as follows:

Josep Casadevall (Andorra), President,
 Egbert Myjer (the Netherlands),
 Corneliu Bîrsan (Romania),
 Alvina Gyulumyan (Armenia),
 Luis López Guerra (Spain),
 Nona Tsotsoria (Georgia),
 Kristina Pardalos (San Marino), Judges,
 and also Santiago Quesada, Section Registrar.

Decision of the Court

Preliminary observation

Although it was unclear whether the applicant wished the European Court of Human Rights to address the merits of his case, as he had withdrawn his asylum request, the Court observed that his application touched on essential aspects of the functioning of international criminal tribunals having their seat within the territory of a Contracting State and invested with the power to keep individuals in custody. The Court therefore decided not to strike this case out of its list.

Articles 5 and 13

The Court first recalled that Convention liability normally arose in respect of an individual who was "within the jurisdiction" of a Contracting State, in the sense of being physically present on its territory (Article 1 of the Convention), even if the Court had recognized exceptions in its case-law.

The Court, in its decisions in the cases of *Galić v. the Netherlands* and *Blagojević v. the Netherlands*, had concluded that it was not self-evident that a criminal trial engaged the responsibility under public international law of the State on whose territory it was held.

Moreover it would be unthinkable in the Court's view for any criminal tribunal, domestic or international, not to be invested with powers to secure the attendance of witnesses and to keep them in custody. The power to keep them in custody, either because they were unwilling to testify or because they were detained in a different connection, was a necessary corollary.

The applicant had been brought to the Netherlands as a defence witness in a criminal trial pending before the ICC. He was already detained in his country of origin and remained in the custody of the ICC. The fact that Mr Djokaba Lambi Longa was deprived of his liberty on Netherlands soil did not of itself suffice to bring questions touching on the lawfulness of his detention within the "jurisdiction" of the Netherlands as that expression is to be understood for purposes of Article 1 of the Convention. The Court concluded that there was no legal vacuum in this regard as the ICC was in fact waiting to comply with its obligation to return the applicant to the Democratic Republic of the Congo. As long as he was neither returned to this country nor handed over to the Netherlands authorities at their request, the legal ground of Mr Djokaba Lambi Longa's detention remained the arrangement entered into by the ICC and the authorities of the Democratic Republic of the Congo under the Statute of the ICC.

Turning to the question of the human rights guarantees offered by the ICC, the Court noted that the ICC had powers under its Rules of Procedure and Evidence to order protective measures, or other special measures, to ensure that the fundamental rights of witnesses were not violated. The ICC had in fact made use of these powers through its Victims and Witnesses Unit.

Finally, in view of its case-law, the Court could not agree with Mr Djokaba Lambi Longa's argument that since the Netherlands had agreed to examine his asylum request, this country had taken it upon itself to review the lawfulness of his detention on the premises of the ICC. The Court recalled in this regard that Contracting States had the right to control the entry, residence and expulsion of aliens, that the Convention did not guarantee a right to enter, reside or remain in a State of which one was not a national and that States were under no obligation to allow foreign nationals to await the outcome of immigration proceedings on their territory.

Consequently, the Court declared the application inadmissible as the alleged violation was not attributable to a Contracting State (incompatibility *ratione personae*).

53. Eur.Court HR, Catan and Others v. Moldova and Russia, Grand Chamber Judgment of 19 October 2012, Application Nos. 43370/04, 8252/05 & 18454/06, (Article 2 of Protocol No. 1, Right to Education – No Violation, in respect of the Republic of Moldova; Article 2 of Protocol No. 1, Right to Education – Violation, in respect of the Russian Federation). The applicants, children and parents from the Moldovan community in the unrecognised separatist entity Transnistria which split from Moldova in September 1990, successfully complained with respect to the Russian Federation about the forcible closure of their schools by the separatist regime in 2002 and 2004 and the measures taken by those authorities to harass and intimidate them because of their choice to pursue the childrens' education at Moldovan/Romanian language schools.

ECHR 385 (2012)
19.10.2012

Press release issued by the Registrar

In today's Grand Chamber judgment in the case of **Catan and Others v. the Republic of Moldova and Russia** (application nos. 43370/04, 8252/05 and 18454/06), which is final, the European Court of Human Rights held,

unanimously, that there had been **no violation of Article 2 of Protocol No. 1 (right to education)** to the European Convention on Human Rights in respect of the Republic of Moldova, and,

by 16 votes to one, that there had been **a violation of Article 2 of Protocol No. 1** in respect of the Russian Federation.

The case concerned the complaint by children and parents from the Moldovan community in Transdnistria about the effects of a language policy adopted in 1992 and 1994 by the separatist regime forbidding the use of the Latin alphabet in schools and the subsequent measures taken to enforce the policy. Those measures included the forcible eviction of pupils and teachers from Moldovan/Romanian-language schools as well as forcing the schools to close down and reopen in different premises.

The Court found that the separatist regime could not survive without Russia's continued military, economic and political support and that the closure of the schools therefore fell within Russia's jurisdiction under the Convention. The Republic of Moldova, on the other hand, had not only refrained from supporting the regime but had made considerable efforts to support the applicants themselves by paying for the rent and refurbishment of the new school premises as well as for all equipment, teachers' salaries and transport costs.

Principal facts

The applicants are 170 Moldovan nationals who live in the "Moldovan Republic of Transdnistria" ("MRT"), an unrecognised separatist entity which split from Moldova in September 1990.

In September 1992 the "MRT" adopted the "Law on languages", which stated that "Moldavian" – Moldovan/Romanian, one of the official languages within the "MRT" (the others being Russian and Ukrainian) - had to be written with the Cyrillic and not Latin alphabet. Failure to comply with that requirement was punishable as an administrative offence. In August 1994 the "MRT" authorities

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forbade the use of the Latin alphabet in schools and started requiring all schools to register and start using an “MRT”-approved curriculum and the Cyrillic alphabet.

The “MRT” authorities then began taking steps to close down all schools using the Latin alphabet. The applicants are among the children who were studying at such schools, 1 Grand Chamber judgments are final (Article 44 of the Convention). All final judgments are transmitted to the Committee of Ministers of the Council of Europe for supervision of their execution. Further information about the execution process can be found here: www.coe.int/t/dghl/monitoring/execution 2 notably Evrica School in Rîbnița, Alexandru cel Bun School in Tighina, Bender, and Ștefan cel Mare School in Grigoriopol, as well as their parents.

Thus, in August 2002 police forcibly evicted the pupils and teachers from the Ștefan cel Mare secondary school. It was not allowed to reopen in the same building and was subsequently transferred to premises some 20 kilometres away, in Moldovan-controlled territory. The children and staff were evicted from the Evrica School in July 2004. The same month the Alexandru cel Bun School was threatened with closure and disconnected from electricity and water supplies. Both schools were required to move to less convenient and less well equipped premises in their home towns at the start of the following academic year, relying on help from the Moldovan Government, which pays the teachers’ salaries and provides educational material as well as a school bus for the Alexandru cel Bun School which cannot be reached by public transport.

All the applicants alleged that those who persisted with an education in Moldovan/Romanian-language schools had to accept that the quality of education was affected by lack of adequate premises, long journeys to and from school (with bag searches, identity checks and harassment from “MRT” officials for those attending school in Moldovan-controlled territory), shortage of materials, no access to extracurricular activities as well as on-going harassment, vandalism of school premises, intimidation (such as parents being threatened with losing their jobs or parental rights) and verbal abuse. The alternative was for the children to attend a “Moldavian” language school, where teaching was carried out in the artificial combination of Romanian, written in Cyrillic. Since this language combination was not used or recognised anywhere else in the world, teaching materials dated back to Soviet times and children faced difficulties in pursuing higher education.

Between 2002 and 2009 the numbers of pupils in Evrica and Alexandru cel Bun schools virtually halved; and, between 2000 and 2009 the number of pupils in Ștefan cel Mare secondary school was reduced by three quarters.

The applicants and the Moldovan Government submitted that these events had to be seen in the context of the historical background of the region and notably the Transdnestrian conflict which, starting with a movement of resistance to Moldovan independence in 1989, had broken out in violent clashes between the Transdnestrian separatist forces and the Moldovan security forces in 1991. The Moldovan army was prevented from regaining control of Transdnestria by a number of military units, originally deployed from the Soviet armed forces and which had remained on Moldovan territory, joining the separatists and providing them with arms and ammunition, notably from an ammunition store based in Colbașna in Transdnestria (one of the largest in Europe). They further argued that, despite international agreements to remove the arms store, the Russian military and armaments presence in Transdnestria continued to block the efforts to resolve the conflict and helped keep the separatist regime in power. They also alleged that the separatist regime had only survived as a result of financial support from Russia, in the form of subsidised gas supplies and millions of United States dollars every year in the payment of old age pensions and financial assistance to schools, hospitals and prisons. They, on the other hand, had never supported or sustained it.

The Russian Government submitted that the facts concerning the armed conflict in Transdnestria were not relevant to the applicants’ case, and that there was no evidence of any direct Russian

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involvement in what had happened to the applicants' schools. Indeed, they had been involved in the schools' crisis in the role of mediator. It further emphasised that its military presence in Transnistria had been insignificant during the relevant period, comprising 1,000 servicemen to guard the arms store at Colbaşna and 1,125 soldiers as part of the internationally-agreed peace-keeping force. It denied providing any economic support to the "MRT" and argued that Russian assistance with 3 catering in schools, prisons and hospitals was fully transparent and could be compared with humanitarian aid.

Complaints, procedure and composition of the Court

Relying on Article 2 of Protocol No. 1 (right to education), Article 8 (right to respect for private and family life) and Article 14 (prohibition of discrimination), the applicants complained about the forcible closure of their schools by the separatist regime in 2002 and 2004 and the measures taken by those authorities to harass and intimidate them because of their choice to pursue the children's education at Moldovan/Romanian language schools.

The applications were lodged with the European Court of Human Rights on 20 December 2004, on 25 October 2004 and on 4 April 2006 respectively. A hearing was held in public on 9 June 2009 and a Chamber of seven judges declared the case partly admissible on 15 June 2010. On 14 December 2010 the Chamber to which the case had been allocated relinquished jurisdiction in favour of the Grand Chamber. A Grand Chamber hearing was held on 25 January 2012.

Judgment was given by the Grand Chamber of 17 judges, composed as follows:

Nicolas **Bratza** (the United Kingdom), President,
 Françoise **Tulkens** (Belgium),
 Josep **Casadevall** (Andorra),
 Nina **Vajić** (Croatia),
 Dean **Spielmann** (Luxembourg),
 Lech **Garlicki** (Poland),
 Karel **Jungwiert** (the Czech Republic),
 Anatoly **Kovler** (Russia),
 Egbert **Myjer** (the Netherlands),
 David Thór **Björgvinsson** (Iceland),
 Ján **Šikuta** (Slovakia),
 Mark **Villiger** (Liechtenstein),
 Isabelle **Berro-Lefèvre** (Monaco),
 Mirjana **Lazarova Trajkovska** ("the Former Yugoslav Republic of Macedonia"),
 Ledi **Bianku** (Albania),
 Mihai **Poalelungi** (the Republic of Moldova),
 Helen **Keller** (Switzerland),

and also Michael **O'Boyle**, Deputy Registrar.

Decision of the Court

Jurisdiction

The Republic of Moldova

As the Court has previously held (in the case *Ilascu and Others v. Moldova and Russia* of 20042), Transnistria was within Moldova's jurisdiction because Moldova was the territorial State. Therefore, although Moldova had no effective control over the acts of the "MRT" in Transnistria,

The full texts of the Court's judgments are accessible on its website (<http://www.hudoc.echr.coe.int>)

the fact that the region was recognised under public international law as part of Moldova's territory obliged it to use all legal and diplomatic means in its power to continue to guarantee the enjoyment of the rights and freedoms 2 Concerning the detention of four men in the "MRT" for terrorist activities allegedly committed during the Transdniestrian conflict of 1991-1992. 4 defined in the European Convention to those living there. The Court therefore held, unanimously, that the facts complained of by the applicants fell within the Republic of Moldova's jurisdiction.

Russia

The Court found that the historical background had a significant bearing on the applicants' case. The key events took place between 2002 and 2004, which fell within the same period of time considered by the Court in the Ilaşcu judgment. In that judgment the Court held that the applicants had come within the jurisdiction of Russia given the fact that the Russian authorities had not only contributed to establishing the separatist regime in Transdniestria but also to its survival through military, economic, financial and political support.

In the present case, the Russian Government had not provided the Court with any evidence to show that those findings had been unreliable. In particular, the fact that Russia had still not removed the arms store at Colbaşna, on Moldovan territory, despite the commitments it had made at international level, sent a signal – to the "MRT" leaders, the Moldovan Government and international observers – of its continued military support for the separatist regime.

In addition, the population of Transdniestria were dependent on free or highly subsidised gas supplies, pensions and other financial aid. In particular, the Russian Government had not denied that the Russian public corporation Gazprom had supplied gas to the region and that the "MRT" had paid for only a tiny fraction of the gas consumed, both by individual households and by the large industrial complexes established in Transdniestria, many of them found by the Court to be Russian-owned. Nor had the Russian Government disputed the statistic, supplied by the Moldovan Government, that only approximately 20% of the population of the "MRT" were economically active, which threw light on the importance for the local economy of Russian pensions and other aid.

Therefore, the Court maintained its findings in the Ilaşcu judgment that, during the period 2002-2004, the "MRT" had been able to survive only because of Russian military, economic and political support. Accordingly, the Court held, by 16 votes to one, that the facts complained of by the applicants in the present case fell within Russia's jurisdiction.

Right to education (Article 2 of Protocol No. 1)

The Court considered that the forced closure of the applicants' schools and the subsequent measures of harassment constituted interferences with their right of access to pre-existing educational institutions as well as their right to be educated in their national language. There was no evidence to suggest that those measures pursued a legitimate aim.

The Republic of Moldova's responsibility

As in the Ilaşcu judgment the Court found that the Moldovan Government had refrained from supporting the separatist regime and taken all the political and judicial measures at its disposal to re-establish control over the Transdniestrian territory. It also found that the Moldovan Government had made considerable efforts to support the applicants. In particular, following the requisitioning of the schools' former buildings by the "MRT", the Moldovan Government have paid for the rent and refurbishment of new premises as well as for all equipment, staff salaries and transport costs, thereby enabling the schools to continue operating and the children to continue learning in Moldovan/Romanian, albeit in far from ideal conditions. Therefore, the Court concluded that the

Republic of Moldova had taken appropriate and sufficient measures, on a general level, to re-establish its control over the Transdnestrian territory and, on an individual level, to ensure that the 5 applicants' right to education had been respected. There had therefore been no violation of Article 2 of Protocol No. 1 in respect of Moldova.

Russia's responsibility

The Court accepted that there was no evidence of any direct Russian involvement in or approbation of either the measures taken against the applicants and their schools or the language policy in general. Nonetheless, in accordance with previously-developed principles from its case-law, the Court having already established that Russia exercised effective control over the "MRT" during the period in question, it was not necessary to determine whether it exercised detailed control over the policies and actions of the subordinate local administration. Russia was in effect responsible for the violation of the applicants' right to education as the "MRT" could not survive without Russia's continued military, economic and political support. There had therefore been a violation of Article 2 Protocol No. 1 in respect of the Russian Federation.

Other articles

Given the conclusions under Article 2 of Protocol No. 1, the Court held that it was not necessary to examine separately the applicants' complaints under Article 8 (12 votes to five) or under Article 14 in conjunction with either Article 2 of Protocol No. 1 or Article 8 (11 votes to six).

Just satisfaction (Article 41)

The Court held, by 16 votes to one, that Russia was to pay each applicant 6,000 euros (EUR) in respect of non-pecuniary damage and EUR 50,000 for costs and expenses to all the applicants, jointly.

Separate opinions

Judges Tulkens, Vajić, Berro-Lefèvre, Bianku, Poalelungi and Keller expressed a joint partly dissenting opinion. Judge Kovler also expressed a partly dissenting opinion. These opinions are annexed to the judgment.

54. Eur.Court HR, *El-Masri v. The Former Yugoslav Republic of Macedonia*, Grand Chamber Judgment of 13 December 2012, Application No. 39630/09, (Article 3, Prohibition of Torture – Violation, on account of the inhuman and degrading treatment to which Mr El-Masri was subjected while being held in a hotel in Skopje, on account of his treatment at Skopje Airport, which amounted to torture, and on account of his transfer into the custody of the United States authorities, thus exposing him to the risk of further treatment contrary to Article 3; Article 3, Prohibition of Torture – Violation, on account of the failure of “the former Yugoslav Republic of Macedonia” to carry out an effective investigation into Mr El-Masri’s allegations of ill-treatment; Article 5, Right to Liberty and Security – Violation; Article 8, Right to Respect for Private and Family Life – Violation; Article 13, Right to an Effective Remedy – Violation). The applicant, a German national of Lebanese origin, complained that he had been a victim of a secret “rendition” operation during which he had been arrested, held in isolation, questioned and ill-treated in a Skopje hotel for 23 days, transferred to Central Intelligence Agency agents who had brought him to a secret detention facility in Afghanistan, where he further suffered ill-treatment for more than four months, and successfully argued that all these extrajudicial abductions and arbitrary detentions had violated his Convention rights.

**ECHR 453 (2012)
13.12.2012**

Press release issued by the Registrar

In today’s Grand Chamber judgment in the case of **El-Masri v. “the former Yugoslav Republic of Macedonia”** (application no. 39630/09), which is final, the European Court of Human Rights held, unanimously, that there had been:

a violation of Article 3 (prohibition of torture and inhuman or degrading treatment) of the European Convention on Human Rights on account of the inhuman and degrading treatment to which Mr El-Masri was subjected while being held in a hotel in Skopje, on account of his treatment at Skopje Airport, which amounted to torture, and on account of his transfer into the custody of the United States authorities, thus exposing him to the risk of further treatment contrary to Article 3; a violation of **Article 3** on account of the failure of “the former Yugoslav Republic of Macedonia” to carry out an effective investigation into Mr El-Masri’s allegations of ill-treatment;

violations of Article 5 (right to liberty and security) on account of his detention in the hotel in Skopje for 23 days and of his subsequent captivity in Afghanistan, as well as on account of the failure to carry out an effective investigation into his allegations of arbitrary detention;

a violation of Article 8 (right to respect for private and family life); and,

a violation of Article 13 (right to an effective remedy).

The case concerned the complaints of a German national of Lebanese origin that he had been a victim of a secret “rendition” operation during which he was arrested, held in isolation, questioned and ill-treated in a Skopje hotel for 23 days, then transferred to CIA agents who brought him to a secret detention facility in Afghanistan, where he was further ill-treated for over four months.

The Court found Mr El-Masri's account to be established beyond reasonable doubt and held that "the former Yugoslav Republic of Macedonia" had been responsible for his torture and ill-treatment both in the country itself and after his transfer to the US authorities in the context of an extra-judicial "rendition".

Principal facts

The applicant, Khaled El-Masri, a German national of Lebanese origin, was born in 1963 and lives in Ulm (Germany). According to his submissions, having arrived in "the former Yugoslav Republic of Macedonia" by bus on 31 December 2003, he was arrested at the border crossing by the Macedonian police. They took him to a hotel in Skopje, where he was kept locked in a room for 23 days and questioned in English, despite his limited proficiency in that language, about his alleged ties with terrorist organisations. His requests to contact the German embassy were refused. At one point, when he stated that he intended to leave, he was threatened with being shot.

On 23 January 2004, Mr El-Masri, handcuffed and blindfolded, was taken to Skopje Airport, where he was severely beaten by disguised men. He was stripped of his clothes, then sodomised with an object and later placed in a nappy and dressed in a tracksuit.

Shackled and hooded, and subjected to total sensory deprivation, he was forcibly taken to an aircraft, which was surrounded by Macedonian security agents. When on the plane, he was thrown to the floor, chained down and forcibly tranquilised. According to Mr El-Masri, his treatment before the flight at Skopje Airport, most likely at the hands of a rendition team of the CIA, was remarkably consistent with a subsequently disclosed CIA document describing so-called "capture shock" treatment.

Mr El-Masri was flown to another country, where it was warmer outside than in Skopje, which was sufficient for him to conclude that that he had not been returned to Germany, as he had been told. He later deduced that he was in Afghanistan. According to his submissions, he was kept for over four months in a small, dirty, dark concrete cell in a brick factory near Kabul, where he was repeatedly interrogated and was beaten, kicked and threatened. His repeated requests to meet with a representative of the German Government were ignored. During his confinement, in March 2004, Mr El-Masri started a hunger strike to protest about being kept in detention without charges. In April, 37 days into his hunger strike, he claims that he was force-fed through a tube, which made him severely ill and bedridden for several days. In May 2004, he allegedly started a second hunger strike.

On 28 May 2004, he was taken, blindfolded and handcuffed, by plane to Albania and subsequently to Germany. Mr El-Masri then weighed about 18 kilos less than a few months earlier when he had left Germany. Immediately after his return to Germany, he contacted a lawyer and has brought several legal actions since. In 2004, an investigation was opened in Germany into his allegations that he had been unlawfully abducted, detained and abused. In January 2007, the Munich public prosecutor issued arrest warrants for a number of CIA agents, whose names were not disclosed, on account of their involvement in Mr El-Masri's alleged rendition.

A claim filed in the United States in December 2005 by the American Civil Liberties Union on Mr El-Masri's behalf against the former CIA director and certain unknown CIA agents was dismissed. The court decision, which became final with the US Supreme Court's refusal to review the case in October 2007, stated in particular that the State's interest in preserving State secrets outweighed Mr El-Masri's individual interest in justice.

A criminal complaint lodged by Mr El-Masri's representative in October 2008 in "the former Yugoslav Republic of Macedonia" against unidentified law-enforcement officials on account of his unlawful detention and abduction was dismissed by the Skopje public prosecutor in December 2008.

The full texts of the Court's judgments are accessible on its website (<http://www.hudoc.echr.coe.int>)

The position of the Government of “the former Yugoslav Republic of Macedonia” has been that Mr El-Masri had entered the country on 31 December 2003, had been interviewed by the police as suspected of travelling with false documents, had been allowed entry into the country and then had left over the border crossing into Kosovo.

There have been a number of international inquiries into allegations of “extraordinary renditions” in Europe and the involvement of European Governments, which have referred to Mr El-Masri’s case. In particular, in 2006 and 2007, the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly of the Council of Europe, under the rapporteurship of Senator Dick Marty of Switzerland, investigated those allegations.

The 2007 Marty Report concluded that Mr El-Masri’s case was “a case of documented rendition” and that the Macedonian Government’s version of events was “utterly untenable”. The report relied in particular on the following evidence:

Aviation logs confirming that a business jet registered by the US Federal Aviation Administration had landed at Skopje Airport on 23 January 2004 and had left Skopje on the same evening for Kabul via Baghdad; flight logs confirming that a CIA-chartered aircraft had taken off from Kabul on 28 May 2004 and landed at a military airbase in Albania; scientific testing of Mr El-Masri’s hair follicles, conducted in the framework of the German criminal investigation, confirming that he had spent time in a South Asian country and had been deprived of food for an extended period of time; geological records that confirmed Mr El-Masri’s recollection of minor earthquakes in Afghanistan which had happened during his alleged detention; and, sketches that he had drawn of the Afghan prison, which had immediately been recognisable to another rendition victim who had been detained by US officials in Afghanistan.

In April 2006, the German Bundestag appointed a parliamentary inquiry committee to review the activities of the secret services, in the context of which Mr El-Masri was heard. Its 2009 report concluded in particular that his account of his imprisonment in “the former Yugoslav Republic of Macedonia” and in Afghanistan was credible.

In the proceedings before the European Court of Human Rights, H.K., who was at the time of Mr El-Masri’s captivity Minister of the Interior of “the former Yugoslav Republic of Macedonia”, submitted a written statement in March 2010. He confirmed, in particular, that the Macedonian law-enforcement authorities, acting upon a valid international arrest warrant issued by the US authorities, had detained Mr El-Masri and kept him incommunicado in Skopje under the constant supervision of agents of the State Intelligence Service. He had later been handed over to the custody of a CIA “rendition team” at Skopje Airport and had been flown out of the country on a CIA-operated aircraft.

Complaints, procedure and composition of the Court

Relying on Article 3, Mr El-Masri complained of being ill-treated while kept in the hotel in Skopje, subjected to a “capture shock” by a CIA rendition team at the Skopje airport and ill-treated while in Afghanistan, and that there had been no effective investigation into those complaints. Relying on Article 5, he complained that he had been detained unlawfully and kept incommunicado, without any arrest warrant having been issued, that he had never been brought before a judge, that “the former Yugoslav Republic of Macedonia” was responsible for his entire period of captivity until his transport to Albania in May 2004, and that there had been no prompt and effective investigation into his complaints. He further alleged, in particular, that his secret and extrajudicial abduction and arbitrary detention had violated his right to respect for private life under Article 8, and that he had had no effective remedy in respect of his complaints under Articles 3, 5 and 8, in breach of Article 13.

The full texts of the Court’s judgments are accessible on its website (<http://www.hudoc.echr.coe.int>)

The application was lodged with the Court on 20 July 2009. On 24 January 2012, the Chamber to which the case had been allocated relinquished jurisdiction in favour of the Grand Chamber. The following organisations made written submissions as third parties: United Nations High Commissioner for Human Rights, Interights, Redress, Amnesty International and the International Commission of Jurists. A Grand Chamber hearing was held on 16 May 2012.

Judgment was given by the Grand Chamber of 17 judges, composed as follows:

Nicolas **Bratza** (United Kingdom), President,
 Françoise **Tulkens** (Belgium),
 Josep **Casadevall** (Andorra),
 Dean **Spielmann** (Luxembourg),
 Nina **Vajić** (Croatia),
 Peer **Lorenzen** (Denmark),
 Karel **Jungwiert** (Czech Republic),
 Khanlar **Hajiyev** (Azerbaijan),
 Isabelle **Berro-Lefèvre** (Monaco),
 Luis **López Guerra** (Spain),
 Ledi **Bianku** (Albania),
 Işıl **Karakaş** (Turkey),
 Vincent A. **de Gaetano** (Malta),
 Julia **Laffranque** (Estonia),
 Linos-Alexandre **Sicilianos** (Greece),
 Erik **Møse** (Norway),
 Helen **Keller** (Switzerland),
 and also Michael **O’Boyle**, Deputy Registrar.

Decision of the Court

As to the facts of the case, the Court noted that Mr El-Masri’s account, contested by the Government, had been very detailed, specific and consistent throughout the whole period following his return to Germany. His account was furthermore supported by a large amount of indirect evidence obtained during the international inquiries and the investigation by the German authorities, on the basis of which the Marty Report had concluded that there had been a “documented rendition” and that the Government’s version of events was untenable. Finally, the statement by the former Macedonian Minister of the Interior submitted to the Court was confirmation of the facts established in the course of the other investigations and of Mr El-Masri’s consistent and coherent description of events.

In view of that evidence, the burden of proof was shifted to the Government. However, they had failed to demonstrate conclusively why that evidence could not serve to corroborate Mr El-Masri’s allegations nor had they presented the Court with any reason to cast doubt on the former Minister’s credibility. The Court therefore considered that it could draw inferences from the available material and the authorities’ conduct and found Mr El-Masri’s allegations sufficiently convincing and established beyond reasonable doubt

Article 3

While Mr El-Masri was kept in the hotel, no physical force had been used against him.

However, his solitary incarceration there as part of a secret operation – in a permanent state of anxiety due to the uncertainty about his fate during the interrogations, being kept incommunicado for 23 days – had to have caused him emotional and psychological distress. Such treatment had been intentionally used with the aim of extracting information about his alleged ties with terrorist organisations.

The full texts of the Court’s judgments are accessible on its website (<http://www.hudoc.echr.coe.int>)

Furthermore, the threat that he would be shot if he left the hotel room had been real and immediate. In that light, the Court concluded that Mr El-Masri's treatment in the hotel amounted on various counts to inhuman and degrading treatment in violation of Article 3.

Mr El-Masri's treatment at Skopje Airport at the hands of the CIA rendition team – being severely beaten, sodomised, shackled and hooded, and subjected to total sensory deprivation – had been carried out in the presence of State officials of “the former Yugoslav Republic of Macedonia” and within its jurisdiction. Its Government was consequently responsible for those acts performed by foreign officials. It had failed to submit any arguments explaining or justifying the degree of force used or the necessity of the invasive and potentially debasing measures. Those measures had been used with premeditation, the aim being to cause Mr El-Masri severe pain or suffering in order to obtain information. In the Court's view, such treatment had amounted to torture, in violation of Article 3.

Finally, the Court found that the Government of “the former Yugoslav Republic of

Macedonia” was responsible for exposing Mr El-Masri to the risk of further treatment in violation of Article 3 by having transferred him into the custody of the US authorities. The Court noted that there was no evidence that the transfer had been pursuant to a legitimate request for his extradition. As was evident from the aviation records, the Macedonian authorities had had knowledge of the destination of the flight.

Furthermore, reports about the practices used by the US authorities on those suspected of involvement in terrorism, which were manifestly contrary to the principles of the Convention, had previously been made public. The Macedonian authorities therefore knew or ought to have known that there was a real risk Mr El-Masri would be exposed to treatment contrary to Article 3, but had not sought any assurances from the US authorities to avert this risk. His transfer had constituted an “extraordinary rendition”.

The Court observed that Mr El-Masri had brought his allegations of ill-treatment to the attention of the Macedonian public prosecutor, supported by evidence which had emerged from the international and other foreign investigations. The State had therefore been under an obligation to carry out an effective investigation. However, other than contacting the Ministry of the Interior for information, the public prosecutor had not undertaken any investigative measure to examine those allegations before rejecting the complaint for lack of evidence. In particular, she had not interviewed Mr El-Masri or the personnel working in the hotel in Skopje at the time of his alleged captivity there. Nor had any steps been taken to establish why the aircraft suspected of having been used to transfer Mr El-Masri to Afghanistan had landed or to investigate the identity of the passenger who had boarded it that night. The public prosecutor's relying exclusively on the report of the Ministry – whose officials were suspected of having been involved in Mr El-Masri's alleged treatment – fell short of what could have been expected of an independent authority. In its submissions before the Court, the Government had also conceded that the investigation had not been effective, but had alleged that this was due to the late submission of the complaint and the fact that it had been filed against an unidentified perpetrator.

The Court underlined that the case was important not only for Mr El-Masri, but also for other victims of similar crimes and for the general public, who had the right to know what had happened. It concluded that the summary investigation that had been carried out could not be regarded as an effective one capable of leading to the identification and punishment of those responsible for the alleged events and of establishing the truth.

There had accordingly been a further violation of Article 3 as concerned the lack of an effective investigation into Mr El-Masri's allegations.

Article 5

The full texts of the Court's judgments are accessible on its website (<http://www.hudoc.echr.coe.int>)

The Court found that the Government of “the former Yugoslav Republic of Macedonia” was responsible for violating Mr El-Masri’s rights under Article 5 during the entire period of his captivity. There had been no court order for his detention, as required under national law, and no custody records of his confinement in the hotel, a detention place outside any judicial framework. He had been deprived of any possibility of being brought before a court to test the lawfulness of his detention, having been left entirely at the mercy of the officials holding him. Furthermore, by handing Mr El-Masri over to the US authorities, it should have been clear to the Macedonian authorities that he faced a real risk of a flagrant violation of his rights under Article 5. Finally, having regard to its finding that there had been no effective investigation into his complaints of ill-treatment, the Court held that, for the same reasons, there had been no meaningful investigation into his allegations of arbitrary detention, in further violation of Article 5.

Article 8

Having regard to its conclusions concerning the responsibility of “the former Yugoslav Republic of Macedonia” under Articles 3 and 5, the Court considered that the State was also responsible for the interference with Mr El-Masri’s right to respect for private and family life. In view of the established evidence, the Court considered that that interference had been unlawful and thus in violation of Article 8.

Article 13

Mr El-Masri’s arguable complaints under Articles 3, 5 and 8 had never been the subject of any serious investigation. The ineffectiveness of the criminal investigation had moreover undermined the effectiveness of any other remedy, including a civil action for damages. He had therefore been denied the right to an effective remedy, in violation of Article 13.

Just satisfaction (Article 41)

The Court held that “the former Yugoslav Republic of Macedonia” was to pay Mr El-Masri 60,000 euros (EUR) in respect of non-pecuniary damage.

Separate opinions

Judges Tulkens, Spielmann, Sicilianos and Keller expressed a joint concurring opinion. Judges Casadevall and López Guerra expressed a separate joint concurring opinion. These opinions are annexed to the judgment.

55. Eur.Court HR, Chapman v. Belgium, Fifth Section Decision of 5 March 2013, Application No. 39619/06, (Article 6-1, Access to a Court – Inadmissible). The applicant, a former employee of the North Atlantic Treaty Organization who was denied a judgment in his favour at the Brussels Employment Tribunal after the North Atlantic Treaty Organisation (NATO) invoked its jurisdictional immunity, claimed that this violated his right to access to a court. The Court declared the application inadmissible since the applicant would have had an effective internal procedure before the NATO Appeals Board if he had made use of that remedy.

ECHR 094 (2013)
28.03.2013

Press release issued by the Registrar

In its decision in the case of **Chapman v. Belgium** (application no. 39619/06) the European Court of Human Rights has unanimously declared the application inadmissible. The decision is final.

The case concerned a dispute between NATO and one of its former staff members concerning his contract of employment.

The Court, relying on its previous case-law, took the view that the recognition by the domestic courts of NATO's jurisdictional immunity was compatible with Article 6 § 1 of the European Convention on Human Rights.

In the present case, the international organisation's internal procedure would have given sufficient safeguards for the applicant to have his complaints examined.

Principal facts

The applicant, Richard Chapman, is a United States national who was born in 1943 and lives in Novato (USA). He was employed under fixed-term contracts from 1988 to 2001 by the North Atlantic Treaty Organisation (NATO) and by the NATO Air Command and Control System Management Agency (NACMA).

In 2001 the applicant brought proceedings complaining that his successive employment contracts should be reclassified as a permanent contract. The Brussels Employment Tribunal declared his application admissible and, on 28 May 2002, ordered NATO and the NACMA to pay him various sums by way of compensation in respect of his former employment.

The two organisations and the Belgian State appealed against the judgment, invoking NATO's immunity before the Belgian courts. They argued that the applicant could have taken his case to the NATO Appeals Board in accordance with the Regulations of the organisation.

The Brussels Employment Appeal Tribunal upheld their objection in a judgment of 2005. It took the view that jurisdictional immunity was compatible with Article 6 § 1 of the European Convention in accordance with the Court's case-law. It found that the internal procedure afforded sufficient safeguards, in the light of the Convention, and the applicant should have used that remedy. In 2006, after a lawyer at the Court of Cassation had given a negative opinion as to the chances of successfully lodging an appeal on points of law, Mr Chapman decided not to proceed further.

The full texts of the Court's judgments are accessible on its website (<http://www.hudoc.echr.coe.int>)

Complaints, procedure and composition of the Court

The application was lodged with the European Court of Human Rights on 18 September 2006.

Relying on Article 6 § 1 of the Convention (right of access to a court), Mr Chapman complained of a violation of his right of access to a court, on the ground that he had not been able to obtain a meaningful determination of his dispute before the Belgian courts.

The decision was given by a Chamber of seven, composed as follows:

Mark **Villiger** (Liechtenstein), President,
Ann **Power-Forde** (Ireland),
Ganna **Yudkivska** (Ukraine),
André **Potocki** (France),
Paul **Lemmens** (Belgium),
Helena **Jäderblom** (Sweden),
Aleš **Pejchal** (the Czech Republic), Judges,

and also Claudia **Westerdiek**, Section Registrar.

Decision of the Court

Article 6 § 1

In a preliminary finding, the Court was of the view that Mr Chapman had done all that could be reasonably expected of him to exhaust domestic remedies. For the purposes of calculating the six-month time-limit, it was appropriate to take into consideration not the date of the Employment Appeal Tribunal's judgment, which had become the final domestic decision, but that of the opinion given by the lawyer at the Court of Cassation informing Mr Chapman that an appeal on points of law would have no chance of success.

The Court observed that Mr Chapman had had access, in accordance with Article 6 § 1 of the Convention, to the Brussels Employment Tribunal and on appeal to the Employment Appeal Tribunal. Before both of those courts he had been given the opportunity to express himself and submit his arguments. Mr Chapman's complaint was mainly that his right of access to a court had been hindered by the decision of the Employment Appeal Tribunal to uphold, in his view unduly, the jurisdictional immunity of NATO.

In line with its case-law from *Waite and Kennedy v. Germany* [GC] (no. 26083/94), the Court observed that the rule in question, creating an exception from ordinary law, pursued a legitimate aim in that it facilitated the functioning of international organisations. The Court reiterated, however, that the transfer of powers to international organisations could not absolve States from their responsibility. Restrictions to the right of access to a court would be possible and compatible with Article 6 § 1 of the Convention provided they remained proportionate.

In the Court's view, the Employment Appeal Tribunal's finding that Mr Chapman would have had an effective internal procedure before the NATO Appeals Board was not arbitrary. It agreed that Mr Chapman had thus failed to use an available remedy. In addition, the Court observed that, as he had not taken his case to the Appeals Board, Mr Chapman was unable to show how the failings he attributed to that procedure had deprived him of the safeguards required by Article 6 § 1. Consequently, the Court rejected his complaint as manifestly ill-founded.

The full texts of the Court's judgments are accessible on its website (<http://www.hudoc.echr.coe.int>)

56. Eur.Court HR, Oleynikov v. Russia, First Section Judgment of 14 March 2013, Application No. 36703/04, (Article 6, Right to a Fair Trial – Violation). The applicant, a Russian national who had lent money to the Khabarovsk Office of the Trade Counsellor of the Democratic People’s Republic of Korea (DPRK), sought repayment of the sum of money and successfully argued that both the Russian courts’ refusal to examine his claim as well as the DPRK’s failure to waive its immunity and give its consent to the examination of the claim by the Russian authorities, had constituted a violation of his Convention rights.

ECHR 079 (2013)

14.03.2013

Press release issued by the Registrar

In today’s Chamber judgment in the case of **Oleynikov v. Russia** (application no. 36703/04), which is not final, the European Court of Human Rights held, unanimously, that there had been:

a violation of Article 6 (access to court) of the European Convention on Human Rights

The case concerned a Russian national who complained about the refusal by the Russian courts to examine his claim concerning the repayment of a loan to the Trade representation of North Korea.

The Court held that the limitation of Mr Oleynikov’s right of access to court had pursued the legitimate aim of promoting good relations between States through the respect of national sovereignty. However, it concluded that the Russian courts had failed to examine whether the nature of the transaction underlying the claim was of a private law nature and to take into account the provisions of international law in favour of restrictive immunity.

Principal facts

The applicant, Vladimir Borisovich Oleynikov, is a Russian national who was born in 1946 and lives in Khabarovsk (Russia).

In May 1997, Mr Oleynikov lent USD 1,500 to the Khabarovsk Office of the Trade Counsellor of the Democratic People’s Republic of Korea (the DPRK Trade Counsellor) on the understanding that it would be paid back. After the DPRK Trade Counsellor had failed to repay its debt, Mr Oleynikov and his counsel sent several letters of claim which remained unanswered. Mr Oleynikov’s counsel subsequently wrote to the Russian Ministry of External Affairs, which considered that the DPRK Trade Counsellor had acted on the DPRK’s behalf and therefore enjoyed immunity from a lawsuit. It advised Mr Oleynikov to obtain the consent of a competent North Korean authority before lodging a claim against the DPRK Trade Counsellor with the Russian courts. As the DPRK refused to answer, Mr Oleynikov lodged a claim against it with the Khabarovsk District Court in February 2004. The claim was returned without examination on the grounds that the Code of Civil Procedure provided for absolute immunity of a foreign State before the Russian courts. In March 2004, the Khabarovsk Regional Court upheld the decision on appeal.

Complaints, procedure and composition of the Court

Relying in particular on Article 6, Mr Oleynikov complained that both the Russian courts’ refusal to examine his claim and the DPRK’s failure to give its consent to the examination of the claim by the

The full texts of the Court’s judgments are accessible on its website (<http://www.hudoc.echr.coe.int>)

Russian authorities had constituted a violation of his right to a fair hearing. He also alleged a violation of Article 1 of Protocol 1 (protection of property).

The application was lodged with the European Court of Human Rights on 2 September 2004.

Judgment was given by a Chamber of seven judges, composed as follows:

Isabelle **Berro-Lefèvre** (Monaco), President,
 Mirjana Lazarova **Trajkovska** (“the Former Yugoslav Republic of Macedonia”),
 Julia **Laffranque** (Estonia),
 Linos-Alexandre **Sicilianos** (Greece),
 Erik **Møse** (Norway),
 Ksenija **Turković** (Croatia),
 Dmitry **Dedov** (Russia),

and also Søren **Nielsen**, Section Registrar.

Decision of the Court

Article 6

The Court reiterated that it could not examine the part of the application directed against the DPRK since it was not a party to the European Convention. It further considered that the right of access to court could be subject to some restrictions, such as those generally accepted as part of the rule of State immunity. However, it would not be consistent with Article 6 if a State could arbitrarily remove from the jurisdiction of the courts a wide range of civil claims or confer immunities from civil liability on categories of persons. Therefore, the Court had to determine whether the restriction on the right of access to court of Mr Oleynikov had been justified by the circumstances of the case.

The Court held that the limitation had pursued the legitimate aim of complying with international law in order to promote comity and good relations between States through the respect of national sovereignty. Nevertheless, the Court reiterated that Russia had signed the 2004 Convention on Jurisdictional Immunities of States and their Property, which endorsed the principle of restricted immunity when a State engages in a commercial transaction with a foreign natural person. Moreover, the President of Russia and the Supreme Commercial Court had both acknowledged that restrictive immunity had become a principle of customary law. Finally, the new Code of Commercial Procedure adopted in 2002 provided for restrictive immunity and the 1960 Treaty on Trade and navigation between the USSR and the DPRK provided for a waiver of immunity in respect of foreign trade transactions.

Despite the above-mentioned provisions, the Khabarovsk Regional Court had rejected Mr Oleynikov’s claim without examination. Indeed, it had applied absolute State immunity from jurisdiction without trying to establish whether the claim had related to acts of the DPRK performed in the exercise of its sovereign authority or as a party to a transaction of a private law nature. Therefore, the Court concluded that the rejection by the Russian courts of Mr Oleynikov’s claim concerning the repayment of his loan had been disproportionate and had impaired the very essence of his right of access to a court, in violation of Article 6 § 1.

Article 1 of Protocol 1

The Court considered that Mr Oleynikov’s other complaint under Articles 1 of Protocol 1 was manifestly ill-founded and had to be rejected.

The full texts of the Court’s judgments are accessible on its website (<http://www.hudoc.echr.coe.int>)

Just satisfaction (Article 41)

The applicant neither made claim for compensation of non-pecuniary damage nor for costs and expenses. Accordingly, the Court made no such award.

57. Eur.Court HR, *Stichting Mothers of Srebrenica and Others v. the Netherlands, Third Section Decision of 11 June 2013, Application No. 65542/12, (Article 6, Right to a Fair Trial – Inadmissible)*. The applicant, a foundation under Dutch law created to bring proceedings on behalf of relatives of victims of the 1995 Srebrenica massacre as well as ten nationals of Bosnia and Herzegovina who are surviving relatives of the people killed in the massacre, argued that the Netherlands courts' decision to declare their case against the United Nations (UN) inadmissible on the ground that the UN enjoyed immunity from national courts' jurisdiction violated their right of access to a court. The Court declared the application inadmissible since it found that the granting of immunity to the UN had served a legitimate purpose and was and had not been disproportionate.

ECHR 194 (2013)

27.06.2013

Press release issued by the Registrar

In its decision in the case of **Stichting Mothers of Srebrenica and Others v. the Netherlands** (application no. 65542/12) the European Court of Human Rights has unanimously declared the application inadmissible. The decision is final.

The case concerned the complaint by relatives of victims of the 1995 Srebrenica massacre, and by an NGO representing victims' relatives, of the Netherlands courts' decision to declare their case against the United Nations (UN) inadmissible on the ground that the UN enjoyed immunity from national courts' jurisdiction. The applicants alleged in particular that their right of access to court had been violated by that decision.

The Court found that the NGO had not itself been affected by the matters complained of and could thus not claim to be a "victim" of a violation of the Convention.

As regards the individual applicants, the Court rejected the complaint as manifestly illfounded, as the granting of immunity to the UN served a legitimate purpose. It held in particular: that bringing military operations under Chapter VII of the Charter of the UN within the scope of national jurisdiction would mean allowing States to interfere with the key mission of the UN to secure international peace and security; that a civil claim did not override immunity for the sole reason that it was based on an allegation of a particularly grave violation of international law, even genocide; and, that in the circumstances the absence of alternative access to a jurisdiction did not oblige the national courts to step in.

Principal facts

The applicants are Stichting Mothers of Srebrenica, a foundation under Netherlands law created to bring proceedings on behalf of relatives of victims of the 1995 Srebrenica massacre, and ten nationals of Bosnia and Herzegovina who are surviving relatives of people killed in the massacre.

During the 1992-95 war in Bosnia and Herzegovina, the town of Srebrenica in Eastern Bosnia and its surroundings were declared a "safe area" – safe, that is, from armed attack – by a UN Security Council resolution adopted in April 1993. On 10 July 1995, the area, which by then had become an enclave mostly populated by Bosniac (Bosnian Muslim) civilians surrounded by territory held by the Bosnian Serb Army (VRS), came under VRS attack. During the following days, Bosniac men who had fallen into the hands of the VRS were separated from the women and children and put to death;

The full texts of the Court's judgments are accessible on its website (<http://www.hudoc.echr.coe.int>)

others were killed while trying to escape to safety. In total more than 7,000 Bosniac men and boys died in the operation, which has become known as the Srebrenica massacre.

A battalion of the UN Protection Force (UNPROFOR), made up of lightly-armed Netherlands soldiers, was present in the enclave during the massacre. Under-strength and under-equipped, they were unable to stop the VRS from taking control of the enclave. Despite a request from the battalion's commander for air support, the UN made no decisive use of air power.

A report by a research institute in the Netherlands, which gave a detailed account of the relevant political decision-making processes and of the events in Srebrenica themselves, led the Netherlands Government to step down in April 2002.

The applicants brought a civil case against the Netherlands State and the UN before the Regional Court of the Hague in June 2007. They complained that, by not having protected the civilians in the Srebrenica enclave, both were responsible for mass murder and genocide and had thus, under civil law, failed to fulfil their duty to provide protection in exchange for the disarming of the (predominantly Bosniac) Republic of Bosnia and Herzegovina army (ARBH) units present in the enclave. According to the applicants, that failure was attributable to both the Netherlands State and the UN under international law.

In July 2008, the regional court gave judgment on the preliminary point whether the Netherlands courts had jurisdiction over the UN. It held in particular that there was no obligation on the Netherlands Government under international law to enforce the prohibition of genocide through its civil law; the court further declined jurisdiction as regards the UN, confirming its claim that it enjoyed immunity.

In March 2010, the Court of Appeal allowed the Netherlands State to join the proceedings as a defendant and otherwise confirmed the Regional Court's judgment.

On 13 April 2012, the Supreme Court confirmed that under the applicable provisions, in particular of the UN Charter and of the Convention on the Privileges and Immunities of the United Nations, the UN was granted far-reaching immunity and could not be summoned before the national courts of the countries that were parties to the latter Convention. The Supreme Court underlined in particular that the UN's immunity, which was absolute, was intended to ensure its functioning in complete independence and thus served a legitimate purpose. Furthermore, the Supreme Court saw no need to ask the Court of Justice of the European Union for a preliminary ruling, as had been requested by the applicants.

After the Supreme Court's judgment, the main proceedings against the Netherlands State were resumed. They are currently still pending.

Complaints, procedure and composition of the Court

The application was lodged with the European Court of Human Rights on 8 October 2012.

Relying on Article 6 (right to a fair trial), the applicants maintained that the granting of immunity to the UN had violated their right of access to court and they complained that the Supreme Court of the Netherlands had rejected in a summary reasoning their request for a preliminary ruling to be sought from the Court of Justice of the European Union. Relying on Article 13 (right to an effective remedy), they further complained that the granting of immunity to the UN would allow the Netherlands State to evade its liability.

The decision was given by a Chamber of seven, composed as follows:

The full texts of the Court's judgments are accessible on its website (<http://www.hudoc.echr.coe.int>)

Josep **Casadevall** (Andorra), President,
Alvina **Gyulumyan** (Armenia),
Corneliu **Bîrsan** (Romania),
Ján **Šikuta** (Slovakia),
Luis **López Guerra** (Spain),
Nona **Tsotsoria** (Georgia),
Johannes **Silvis** (the Netherlands), Judges,

and also Santiago **Quesada**, Section Registrar.

Decision of the Court

The Court first pointed out that the foundation Stichting Mothers of Srebrenica, while having been set up for the purpose of promoting the interests of surviving relatives of victims of the Srebrenica massacre, had not itself been affected by the matters complained of under Articles 6 and 13. It could therefore not claim to be a “victim” of a violation of those Articles for the purpose of Article 34 (individual applications) of the Convention. The application was therefore inadmissible in so far as the foundation was concerned.

Article 6

The Court underlined that the scope of the case before it was limited to the question of whether the remaining applicants’ right of access to a court under Article 6 had been violated by the Netherlands courts’ decisions. The attribution of responsibility for the Srebrenica massacre or its consequences did not fall within the scope of the application.

As to the nature of the immunity enjoyed by the UN, the Court noted that it was not its role to seek to define authoritatively the meaning of provisions of the UN Charter and other international instruments. It nevertheless had to examine whether there had been a plausible basis in those instruments for the matters complained of. The Court found that since operations established by UN Security Council Resolutions under Chapter VII of the UN Charter were fundamental to the mission of the UN to secure international peace and security, the Convention could not be interpreted in a manner which would subject the acts and omissions of the Security Council to jurisdiction of national courts without the accord of the UN. To bring such operations within the scope of national jurisdiction would mean to allow individual States, through their courts, to interfere with the fulfilment of the key mission of the UN in this field, including with the effective conduct of its operations.

Concerning the applicants’ argument that, since their claim was based on an act of genocide for which they held the UN (and the Netherlands) accountable, the immunity protecting the United Nations should be lifted, the Court found that international law did not support the position that a civil claim should override immunity from suit for the sole reason that it was based on an allegation of a particularly grave violation of a norm of international law. The International Court of Justice (ICJ) had clearly stated this in respect of the sovereign immunity of foreign States in a recent case. In the Court’s opinion this also held true as regards the immunity enjoyed by the UN.

As regards the argument that there was no alternative jurisdiction competent to entertain the applicants’ claim against the UN, the Court agreed that no such alternative means existed either under Netherlands national law or under the law of the UN.

However, it did not follow that in the absence of an alternative remedy the recognition of immunity in itself constituted a violation of the right of access to a court. The fact that the UN had so far not made available any modes of settlement of claims relating to the acts and omissions of UNPROFOR was

The full texts of the Court’s judgments are accessible on its website (<http://www.hudoc.echr.coe.int>)

not imputable to the Netherlands and the nature of the applicants' claims did not require the Netherlands to step in.

Finally, the Court considered it more appropriate to examine the applicants' complaint that the State of the Netherlands was seeking to impute responsibility for the failure to prevent the Srebrenica massacre entirely to the UN, thereby attempting to evade its accountability, under Article 6 rather than under Article 13. The Court could not find it established that the applicants' claims against the Netherlands State – the relevant proceedings being still pending – would necessarily fail.

In conclusion, the Court found that the granting of immunity to the UN had served a legitimate purpose and was not disproportionate. Consequently that part of the application was manifestly ill-founded and had to be rejected as inadmissible.

The Court also rejected as manifestly ill-founded the applicants' complaint that the Supreme Court of the Netherlands had dismissed on summary reasoning their request for a preliminary ruling to be sought from the Court of Justice of the European Union. The Court found in particular that having already found that the UN enjoyed immunity from national jurisdiction under international law, the Supreme Court had been entitled to consider a request for a preliminary ruling redundant without going further into the matter.

58. Eur.Court HR, Wallishauser v. Austria (No. 2), First Section Judgment of 20 June 2013, Application No. 14497/06, (Article 1 of Protocol No. 1, Protection of Property – No Violation; Article 14, Prohibition of Discrimination – No Violation). The applicant, an Austrian national formerly employed by the United States of America embassy in Vienna and ruled by an Austrian court to have been unfairly dismissed, unsuccessfully alleged that the extraterritorial nature of her employer was not a sufficient justification to require her to pay social security contributions and that it further imposed a disproportionate burden on her.

**ECHR 182 (2013)
20.06.2013**

Press release issued by the Registrar

The applicant, Roswitha Wallishauser, is an Austrian national who was born in 1941 and lives in Vienna. She was employed by the United States embassy in Vienna as a photographer from 1978 until her dismissal in 1987 following a work-related accident. She later obtained payment of salary arrears from the United States for the period from September 1988 to June 1995 in proceedings before the Austrian courts, which had declared her dismissal unlawful. Relying in particular on Article 1 of Protocol No. 1 (protection of property) to the European Convention on Human Rights, Ms Wallishauser complained that, in subsequent proceedings, she had been ordered to pay the entire social security contributions – the employee's and the employer's share – for the salary payments which she had successfully claimed from the United States. She maintained that the relevant provision, under which an employer enjoying extraterritorial status could not be forced to pay social security contributions, imposed a disproportionate burden on her. She further relied on Article 14 (prohibition of discrimination) of the Convention taken in conjunction with Article 1 of Protocol No. 1 or with Article 6 (right to a fair trial).

No violation of Article 1 of Protocol No. 1

No violation of Article 14 taken in conjunction with Article 1 of Protocol No. 1 or Article 6

59. Eur. Court HR, Maktouf and Damjanović v. Bosnia and Herzegovina, Grand Chamber Judgment of 18 July 2013, Application Nos. 2312/08 & 34179/08, (Article 7, No Punishment without law – Violation). The applicants, two men convicted by the Court of Bosnia and Herzegovina of war crimes, successfully argued that the more stringent criminal law, namely the 2003 Criminal Code of Bosnia and Herzegovina, had been applied to them retroactively instead of the criminal law which had actually been applicable at the time they had committed the offences in 1992 and 1993.

ECHR 226 (2013)

18.07.2013

Press release issued by the Registrar

In today's Grand Chamber judgment in the case of **Maktouf and Damjanović v. Bosnia and Herzegovina** (application nos. 2312/08 and 34179/08), which is final, the European Court of Human Rights held, unanimously, that there had been:

a violation of Article 7 (no punishment without law) of the European Convention on Human Rights.

The case concerned complaints by two men convicted by the Court of Bosnia and Herzegovina of war crimes about the proceedings before that court. They complained in particular that a more stringent criminal law, namely the 2003 Criminal Code of Bosnia and Herzegovina, had been applied to them retroactively than that which had been applicable at the time they committed the offences – in 1992 and 1993 respectively – namely the 1976 Criminal Code of the Socialist Federal Republic of Yugoslavia.

Given the type of offences of which the applicants had been convicted (war crimes as opposed to crimes against humanity) and the degree of seriousness (neither of the applicants had been held criminally liable for any loss of life), the Court found that the applicants could have received lower sentences had the 1976 Code been applied. Since there was a real possibility that the retroactive application of the 2003 Code operated to the applicants' disadvantage in the special circumstances of this case, it held that they had not been afforded effective safeguards against the imposition of a heavier penalty.

Principal facts

The applicants are Abduladhim Maktouf and Goran Damjanović, an Iraqi national and a national of Bosnia and Herzegovina, respectively. Mr Maktouf was born in 1959; he lives in Malaysia. Mr Damjanović was born in 1966; he is serving his prison sentence in Bosnia and Herzegovina.

Both applicants were convicted by the Court of Bosnia and Herzegovina ("the State Court") of war crimes committed against civilians during the 1992-1995 war. War crimes chambers were set up within the State Court in early 2005 as part of the International Criminal Tribunal for the former Yugoslavia's completion strategy. The State Court can decide to take over war crime cases because of their sensitivity or complexity, and it can transfer less sensitive and complex cases to the competent Entity court. In an agreement of December 2004 between the High Representative (an international administrator for Bosnia and Herzegovina, a position established with the authorization of the United Nations Security Council) and the Bosnia and Herzegovina authorities, international judges can be

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appointed to the State Court. Between 2004 and 2006, the High Representative appointed more than 20 international judges to the State Court for a renewable period of two years.

Mr Maktouf had helped to abduct two civilians in 1993 in Travnik in order to exchange them for members of the ARBH forces (mostly made up of Bosniacs) who had been captured by the HVO forces (mostly made up of Croats). In July 2005, a trial chamber of the State Court convicted him of aiding and abetting the taking of hostages as a war crime and sentenced him to five years' imprisonment under the 2003 Criminal Code of Bosnia and Herzegovina ("the 2003 Criminal Code"). In April 2006, an appeals chamber of the court confirmed the conviction and the sentence after a fresh hearing with the participation of two international judges.

Mr Damjanović had taken a prominent part in the beating of captured Bosniacs in Sarajevo in 1992 to punish them for resisting a Serb attack. In June 2007, a trial chamber of the State Court convicted him of torture as a war crime and sentenced him to 11 years' imprisonment under the 2003 Criminal Code. An appeals chamber of the same court upheld that judgment in November 2007.

Both men's constitutional complaints were ultimately rejected. Mr Damjanović's complaint was dismissed as out of time in April 2009. Mr Maktouf's case resulted in a leading decision in June 2007 by the Constitutional Court, which found in particular that none of Mr Maktouf's rights under the European Convention of Human Rights had been breached.

Complaints, procedure and composition of the Court

Relying on Article 6 § 1 (right to a fair trial), Mr Maktouf alleged that the proceedings against him had been unfair, notably because the international judges who decided on his case on appeal had not been independent. Relying on Article 7 (no punishment without law), both applicants complained that the State Court had retroactively applied to them a more stringent criminal law, the 2003 Criminal Code, than that which had been applicable at the time of their commission of the criminal offences, namely the 1976 Criminal Code of the Socialist Federal Republic of Yugoslavia ("the 1976 Criminal Code"). Relying on Article 14 (prohibition of discrimination) and Article 1 of Protocol No. 12 (general prohibition of discrimination), they also complained that they had been treated differently from those who were tried before the Entity courts, which normally applied the 1976 Criminal Code in war crime cases and imposed on average lighter sentences than the State Court.

The applications were lodged with the European Court of Human Rights on 17 December 2007 and 20 June 2008, respectively. On 10 July 2012 the Chamber to which the case had been allocated relinquished jurisdiction in favour of the Grand Chamber. A Grand Chamber hearing was held on 12 December 2012.

Judgment was given by the Grand Chamber of 17 judges, composed as follows:

Dean **Spielmann** (Luxembourg), President,
 Josep **Casadevall** (Andorra),
 Guido **Raimondi** (Italy),
 Ineta **Ziemele** (Latvia),
 Mark **Villiger** (Liechtenstein),
 Isabelle **Berro-Lefèvre** (Monaco),
 David Thór **Björgvinsson** (Iceland),
 Päivi **Hirvelä** (Finland),
 George **Nicolaou** (Cyprus),
 Mirjana Lazarova **Trajkovska** ("The former Yugoslav Republic of Macedonia"),
 Nona **Tsotsoria** (Georgia),
 Zdravka **Kalaydjieva** (Bulgaria),

The full texts of the Court's judgments are accessible on its website (<http://www.hudoc.echr.coe.int>)

Nebojša **Vučinić** (Montenegro),
Kristina **Pardalos** (San Marino),
Angelika **Nußberger** (Germany),
Paulo **Pinto de Albuquerque** (Portugal),
Johannes **Silvis** (the Netherlands),

and also Michael **O'Boyle**, Deputy Registrar.

Decision of the Court

Article 7

At the outset, the Court made a distinction between two categories of serious violations of international humanitarian law falling under the State Court's jurisdiction. As to crimes against humanity which were introduced into national law in 2003, the Court noted that the State Court and the Entity courts had no other option but to apply the 2003 Criminal Code. It confirmed its finding in the case of *Šimšić v. Bosnia and Herzegovina* (no. 51552/10), decision of 10 April 2012, that the fact that crimes against humanity had not been criminal offences under national law during the 1992-95 war was irrelevant, since they had clearly constituted criminal offences under international law at that time. In contrast, the war crimes committed by the present applicants constituted criminal offences under national law at the time when they were committed. Accordingly, the case of *Maktouf and Damjanović* raised entirely different questions to those in the *Šimšić* case.

The Court reiterated that it was not its task to review in abstract terms whether the retroactive application of the 2003 Criminal Code in war crimes cases was, *per se*, incompatible with Article 7 of the Convention. This matter had to be assessed on a case by case basis, taking into consideration the specific circumstances of each case and, notably, whether the domestic courts had applied the law whose provisions were most favourable to the defendant concerned.

The Court noted that the definition of war crimes was the same in the 1976 Criminal Code, which had been applicable at the time the offences were committed, and in the 2003 Criminal Code, which had been applied retroactively in the applicants' case. The applicants had not disputed that their acts constituted criminal offences defined with sufficient accessibility and foreseeability at the time when they were committed. What was at issue was therefore not the lawfulness of their convictions but the different sentencing frameworks regarding war crimes for which the two Criminal Codes provided.

While pursuant to the 1976 Code war crimes were punishable by imprisonment for a term of five to 15 years, or, for the most serious cases, the death penalty or 20 years' imprisonment, pursuant to the 2003 Code war crimes attracted imprisonment for a term of ten to 20 years or, for the most serious cases, long-term imprisonment for a term of 20-45 years. Under the 1976 Code, aiders and abettors of war crimes, like Mr Maktouf, were to be punished as if they themselves had committed the crimes, but their punishment could be reduced to one year's imprisonment. Under the 2003 Code, they were also to be punished as if they themselves had committed the crimes, and their punishment could be reduced to five years' imprisonment.

The State Court had sentenced Mr Maktouf to five years' imprisonment, the lowest possible sentence under the 2003 Code. In contrast, under the 1976 Code, he could have been sentenced to one year's imprisonment. Mr Damjanović had been sentenced to 11 years' imprisonment, slightly above the minimum of ten years. Under the 1976 Code, it would have been possible to impose a sentence of only five years.

As regards the Government's argument that the 2003 Code was more lenient to the applicants than the 1976 Code, given the absence of the death penalty, the Court noted that only the most serious

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instances of war crimes were punishable by the death penalty pursuant to the 1976 Code. As neither of the applicants had been held criminally liable for any loss of life, the crimes of which they were convicted clearly did not belong to that category.

It was of particular relevance that the 1976 Code was more lenient in respect of the minimum sentence, as Mr Maktouf had received the lowest sentence provided for and Mr Damjanović had received a sentence which was only slightly above the lowest sentence provided for. The Court granted that the applicants' sentences were within the latitude of both the 1976 Criminal Code and the 2003 Criminal Code. It thus could not be said with any certainty that either applicant would have received lower sentences had the former Code been applied. What was crucial, however, was that the applicants could have received lower sentences had the 1976 Code been applied. Accordingly, since there was a real possibility that the retroactive application of the 2003 Code operated to the applicants' disadvantage as concerned the sentencing, it could not be said that they had been afforded effective safeguards against the imposition of a heavier penalty, in breach of Article 7.

Furthermore, the Court was unable to agree with the Government's argument that if an act was criminal under "the general principles of law recognised by civilised nations" within the meaning of Article 7 § 2 of the Convention at the time when it was committed then the rule of non-retroactivity of crimes and punishments did not apply. It considered this argument to be inconsistent with the intention of the drafters of the Convention that Article 7 § 1 contained the general rule of non-retroactivity and that Article 7 § 2 was only a contextual clarification, which had been included so as to ensure that there was no doubt about the validity of prosecutions after the Second World War in respect of the crimes committed during that war. It was clear in the Court's opinion that the drafters of the Convention had not intended to allow for any general exception to the rule of non-retroactivity.

With regard to the Government's argument that a duty under international humanitarian law to adequately punish war crimes required that the rule of non-retroactivity be set aside in the case, the Court noted that that rule also appeared in the Geneva Conventions and their Additional Protocols. Moreover, as the applicants' sentences were within the compass of both the 1976 and 2003 Criminal Codes, the Government's argument that the applicants could not have been adequately punished under the former Code was clearly unfounded.

Accordingly, there had been a violation of Article 7 in both applicants' cases. However, the Court emphasised that that conclusion did not indicate that lower sentences ought to have been imposed, but simply that the sentencing provisions of the 1976 Code should have been applied.

Other articles

The Court declared inadmissible Mr Maktouf's complaint under Article 6 and both applicants' complaints under Article 14 and Article 1 of Protocol No. 12. It found in particular that there were no reasons to doubt that the international judges of the State Court were independent of the political organs of Bosnia and Herzegovina, of the parties to the case and of the institution of the High Representative. The international judges' appointment had precisely been motivated by a desire to reinforce the independence of the State Court's war crime chambers and to restore public confidence in the judicial system. Moreover, the fact that the judges in question had been seconded from amongst professional judges in their respective countries represented an additional guarantee against outside pressure. Admittedly, their term of office was relatively short, but this was understandable given the provisional nature of the international presence at the State Court and the mechanics of international secondments.

As regards the discrimination complaint, the Court first noted that given the large number of war crime cases in post-war Bosnia and Herzegovina, it was inevitable that the burden had to be shared between the State Court and the Entity courts. If not, the respondent State would not be able to honour

its Convention obligation to bring to justice those responsible for serious violations of international humanitarian law in a timely manner. The Court was aware that the Entity courts imposed in general lighter sentences than the State Court at the time. However, that treatment was not to be explained in terms of personal characteristics (such as nationality, religion or ethnic origin) and therefore it did not amount to discriminatory treatment. Whether a case was to be heard before the State Court or before an Entity court was a matter decided on a case-by-case basis by the State Court itself with reference to objective and reasonable criteria.

Article 41 (just satisfaction)

Since it was not certain that the applicants would indeed have received lower sentences had the 1976 Code been applied, the Court held that the finding of a violation of the Convention constituted in itself sufficient just satisfaction for any non-pecuniary damage suffered. The Court further held that Bosnia and Herzegovina was to pay each applicant 10,000 euros (EUR) in respect of costs and expenses.

Separate opinions

Judges Ziemele, Kalaydjieva, Vučinić and Pinto de Albuquerque expressed concurring opinions, which are annexed to the judgment.

60. Eur.Court HR, Janowiec and Others v. Russia, Grand Chamber Judgment of 21 October 2013, Application Nos. 55508/07 & 29520/09, (Article 2, Right to Life – No Competence to Examine; Article 3, Prohibition of Torture – Violation; Article 38, Examination of the Case – Failure to Comply). The applicants, 15 Polish nationals who are relatives of 12 victims of the Katyń massacre, successfully complained that an effective investigation had not been carried out into the deaths of their relatives, who at the time were prisoners of war following the Red Army's invasion of the Republic of Poland, in 1940 as an instance of war crimes.

ECHR 306 (2013)
21.10.2013

Press release issued by the Registrar

In today's Grand Chamber judgment in the case of **Janowiec and Others v. Russia** (application nos. 55508/07 and 29520/09), which is final, the European Court of Human Rights held:

By a majority, that it had no competence to examine the complaints under Article 2 (right to life) of the European Convention on Human Rights;

By a majority, that there had been no violation of Article 3 (prohibition of inhuman or degrading treatment) of the Convention; and,

Unanimously, that Russia had failed to comply with its obligations under Article 38 (obligation to furnish necessary facilities for examination of the case) of the Convention.

The case concerned complaints by relatives of victims of the 1940 Katyń massacre – the killing of several thousands of Polish prisoners of war by the Soviet secret police (NKVD) – that the Russian authorities' investigation into the massacre had been inadequate.

The Court found that it was not competent to examine the adequacy of an investigation into the events that had occurred before the adoption of the Convention in 1950. Furthermore, by the time the Convention entered into force in Russia, the death of the Polish prisoners of war had become established as a historical fact and no lingering uncertainty as to their fate – which might have given rise to a breach of Article 3 in respect of the applicants – had remained.

The Court underlined that Member States were obliged to comply with its requests for evidence and found that Russia, in refusing to submit a key procedural decision which remained classified, had failed to comply with that obligation. The Russian courts had not conducted a substantive analysis of the reasons for maintaining the classified status.

Principal facts

The applicants are 15 Polish nationals who are relatives of 12 victims of the Katyń massacre. The victims were police and army officers, an army doctor and a primary school headmaster. Following the Red Army's invasion of the Republic of Poland in September 1939, they were taken to Soviet camps or prisons and were later killed, along with more than 20,000 other prisoners of war, on order of the highest officials of the USSR, without trial in April and May 1940. They were buried in mass graves in the Katyń forest near Smolensk, and also in the Pyatikhatki and Mednoye villages.

The full texts of the Court's judgments are accessible on its website (<http://www.hudoc.echr.coe.int>)

After railroad workers, and then the German army, had discovered mass graves near the Katyń forest, an international commission conducted an exhumation in 1943, during which three of the applicants' family members were identified. The remains of the others have not been recovered or identified, but their names were mentioned on lists of Polish prisoners of war on the basis of which the lists for the 1940 execution was drawn up. The families stopped receiving correspondence from the prisoners in 1940 and have not had any news from them.

In 1990 the USSR officially acknowledged the responsibility of the Soviet leaders for the killing of Polish prisoners of war and a criminal investigation into the mass murders was started. The proceedings lasted until September 2004 when the Russian Chief Military Prosecutor's Office decided to discontinue it. In December 2004, 36 out of a total of 183 volumes of files from the investigation were classified as "top secret". The text of the decision to discontinue the Katyń criminal investigation was also classified.

The applicants' requests to be provided with copies of that decision and of documents relating to their relatives were rejected by the military prosecutor's office. The Russian courts confirmed those decisions in judgments eventually upheld by the Supreme Court in May 2007 (as regards the applicants in the first case) and January 2009 (as regards the applicants in the second case). The courts found in particular that, being foreign nationals, the applicants had no right to access classified materials. An application by the Russian non-governmental organisation Memorial seeking to have the decision of September 2004, to discontinue the Katyń investigation, declassified was likewise rejected by the courts.

On 26 November 2010, the Russian Duma adopted a statement about the "Katyń tragedy", in which it reiterated that the "mass extermination of Polish citizens on USSR territory during the Second World War" had been carried out on Stalin's orders and that it was necessary to continue "verifying the lists of victims, restoring the good names of those who perished in Katyń and other places, and uncovering the circumstances of the tragedy...".

Complaints, procedure and composition of the Court

Relying in particular on Articles 2 (right to life) and 3 (prohibition of inhuman or degrading treatment) of the Convention, the applicants complained that the Russian authorities had not carried out an effective investigation into the death of their relatives and had displayed a dismissive attitude to all their requests for information about their relatives' fate.

The applications were lodged with the Court on 19 November 2007 and 24 May 2009 respectively. They were communicated to the Russian authorities respectively in October 2008 and November 2009. The Court declared admissible, on 5 July 2011, the applicants' complaint under Article 2, namely that the Russian authorities failed to carry out an adequate criminal investigation into the circumstances surrounding the deaths of their relatives. At the same time, the Court joined to its examination of the merits of the complaint the issue of its temporal jurisdiction, in other words, whether the Court could examine the adequacy of an investigation into the events which had occurred before Russia ratified the Convention. In the same decision, the Court also declared admissible the applicants' complaint under Article 3.

A Chamber hearing was held on 6 October 2011. On 16 April 2012, the Court delivered its Chamber judgment in the case. It held, by a majority, that there had been a violation of Article 3 in respect of ten of the applicants and no violation of Article 3 in respect of the remaining five applicants; and a breach of Russia's obligation to cooperate with the Court under Article 38 (obligation to furnish necessary facilities for examination of the case). The Court also found that it could not examine the merits of the complaint under Article 2.

The full texts of the Court's judgments are accessible on its website (<http://www.hudoc.echr.coe.int>)

The case was referred to the Grand Chamber of the Court under Article 43 (referral to the Grand Chamber) on 24 September 2012 at the request of the applicants. A Grand Chamber hearing was held on 13 February 2013.

The Polish Government intervened in the proceedings both before the Chamber and the Grand Chamber as a third party in accordance with Article 36 of the Convention (third party interventions).

Furthermore, the following organisations were granted leave to submit written comments as third parties in the proceedings before the Grand Chamber: Open Society Justice Initiative; Amnesty International; the Public International Law and Policy Group; Memorial; the European Human Rights Advocacy Centre; and, the Transitional Justice Network.

Judgment was given by the Grand Chamber of 17 judges, composed as follows:

Josep **Casadevall** (Andorra), President,
 Guido **Raimondi** (Italy),
 Ineta **Ziemele** (Latvia),
 Isabelle **Berro-Lefèvre** (Monaco),
 Corneliu **Bîrsan** (Romania),
 Peer **Lorenzen** (Denmark),
 Alvina **Gyulumyan** (Armenia),
 Khanlar **Hajiyev** (Azerbaijan),
 Dragoljub **Popović** (Serbia),
 Luis **López Guerra** (Spain),
 Kristina **Pardalos** (San Marino),
 Vincent A. **de Gaetano** (Malta),
 Julia **Laffranque** (Estonia),
 Helen **Keller** (Switzerland),
 Helena **Jäderblom** (Sweden),
 Krzysztof **Wojtyczek** (Poland),
 Dmitry **Dedov** (Russia),

and also Erik **Fribergh**, Registrar.

Decision of the Court

Article 2

As regards the question of whether it could examine the adequacy of an investigation into events which had occurred before Russia ratified the European Convention on Human Rights, the Court held that there had to be a “genuine connection” between the event concerned and the entry into force of the Convention and that that connection had to be determined by the following criteria: firstly, the period of time between the event and the entry into force of the Convention had to have been reasonably short and not exceeding in any event ten years, and secondly, a major part of the investigation ought to have been carried out after the entry into force.

The Court considered that the applicants’ relatives had to be presumed to have been executed by the Soviet authorities in 1940. It was undisputed that the applicants’ family members had been in custody in 1939 and 1940 under full control of the Soviet authorities. Their names were on lists of Polish prisoners of war liable to execution without exception and the families had not heard from their relatives since 1940. However, given that Russia had ratified the Convention in May 1998, thus 58 years after the execution of the applicants’ relatives, the Court found – endorsing the Chamber judgment of April 2012 – that that period of time was too long in absolute terms for a “genuine

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connection” to be established between their death and the entry into force of the Convention in Russia.

The investigation into the origin of the mass burials had only been formally terminated in 2004, thus after the entry into force of the Convention in Russia. A number of key investigative steps – in particular excavations, forensic studies, interviews with potential witnesses to the killings – had been taken in the early 1990s. However, the Court observed, on the basis of the information available in the case file and in the parties’ submissions, that no real investigative steps had been taken after May 1998. No relevant piece of evidence had come to light since that date. The Court concluded that neither criterion to find a “genuine connection” between the events in question and the entry into force of the Convention had been fulfilled.

The Court also reiterated that there might be extraordinary situations which did not satisfy the “genuine connection” standard, but where the need to ensure the real and effective protection of the guarantees and the underlying values of the Convention could constitute a sufficient basis for recognising the existence of a connection. This might be the situation of serious crimes under international law, such as war crimes, genocide or crimes against humanity. However, even in those cases the “Convention values” clause could not be applied to events which had occurred prior to the adoption of the Convention, on 4 November 1950, for it was only then that the Convention began its existence as an international human rights treaty. The Grand Chamber therefore upheld the Chamber’s finding that in the circumstances of the present case there were no elements capable of providing a bridge from the distant past into the recent post-entry-into-force period. Accordingly, the Court had no temporal jurisdiction to examine the complaint under Article 2.

Article 3

In its case-law, the Court had accepted that the suffering of family members of a “disappeared person”, who had gone through a long period of alternating hope and despair, might justify finding a violation of Article 3 on account of the indifferent attitude of the authorities towards their quests for information. However, in the applicants’ case, the Court’s jurisdiction only extended to the period starting in May 1998, the date of the entry into force of the Convention in Russia. After that date, no lingering uncertainty as to the fate of Polish prisoners of war had remained. Even though not all of the bodies had been recovered, their death had been publicly acknowledged by the Soviet and Russian authorities and had become an established historical fact. It necessarily followed that what could initially have been a “disappearance” case had to be considered a “confirmed death” case.

The magnitude of the crime committed in 1940 by the Soviet authorities was a powerful emotional factor. However, from a purely legal point of view, the Court could not accept it as a reason for departing from its case-law on the status of family members of “disappeared persons” and conferring that status on the applicants, for whom the death of their relatives was a certainty. The Court therefore considered that their suffering had not reached a dimension and character distinct from the emotional distress inevitably caused to relatives of victims of a serious human rights violation. The Court accordingly found no violation of Article 3.

Article 38

In the proceedings before the Chamber, the Russian Government had not complied with the Court’s request to provide it with a copy of the decision of September 2004 to discontinue the Katyn investigation, referring to its top-secret classification. In the proceedings before the Grand Chamber, the Government had submitted a number of additional documents, which did not, however, include the September 2004 decision.

The Court underlined that only the Court itself could decide what kind of evidence the parties were required to produce for the due examination of a case and that the parties were obliged to comply with its requests for that evidence. The Russian Government had referred to the fact that the decision had been classified at national level and that national laws prevented it from communicating classified material to international organisations in the absence of guarantees as to its confidentiality. However, the Court found that a mere reference to a deficiency of national law which made it impossible to communicate sensitive documents to international bodies was an insufficient explanation to justify the withholding of information requested by it.

While the Court was not well equipped to challenge the judgment by national authorities that security considerations were involved, the concept of the rule of law required that measures affecting fundamental human rights had to be subject to some form of adversarial proceedings before an independent body competent to review the reasons for such a decision. However, the Russian courts' judgments in the declassification proceedings did not contain a substantive analysis of the reasons for maintaining the classified status. The courts had referred to an expert report issued by the Russian Federal Security Service which had found that the decision terminating the criminal proceedings included material which had not been declassified, but they had not scrutinized the assertion that that material should be kept secret more than 70 years after the events. Moreover, the courts had not addressed in substance Memorial's argument that the decision brought to an end the investigation into a mass murder of unarmed prisoners, one of the most serious violations of human rights committed on orders from the highest-ranking Soviet officials. Finally, they had not performed a balancing exercise between the alleged need to protect the information held by the Federal Security Service (a successor to the Soviet KGB which had carried out the execution of the Polish prisoners of war), on the one hand, and the public interest in a transparent investigation into the crimes of the previous totalitarian regime, on the other hand.

Given the restricted scope of the judicial review by the Russian courts, the Court was unable to accept that the submission of a copy of the September 2004 decision could have affected Russia's national security. Lastly, the Russian Government could have asked for appropriate procedural arrangements to accommodate the security concerns, such as the holding of a hearing behind closed doors, but they had not done so.

The Court concluded that Russia had failed to comply with its obligations under Article 38.

Just satisfaction (Article 41)

The Court, by a majority, dismissed the applicants' claim for just satisfaction.

Separate opinions

Judges Gyulumyan and Dedov each expressed a concurring opinion. Judge Wojtyczek expressed a partly concurring and partly dissenting opinion. Judges Ziemele, de Gaetano, Laffranque and Keller expressed a joint partly dissenting opinion. These opinions are annexed to the judgment.

61. Eur.Court HR, *Al-Dulimi and Montana Management Inc. v. Switzerland*, Second Section judgment of 26 November 2013, Application No. 5809/08, (Article 6, Right to a Fair Trial – Violation). The applicants, an Iraqi national living in Jordan and a Panama-based company of which the first applicant was the managing director, successfully claimed that Switzerland’s enforcement of the United Nations Security Council resolutions mandating the confiscation of the applicants’ assets violated their Convention rights, especially in the absence of any procedure compatible with the Convention to challenge the asset freeze.

ECHR 346 (2013)

26.11.2013

Press release issued by the Registrar

In today’s Chamber judgment in the case of **Al-Dulimi and Montana Management Inc. v. Switzerland** (application no. 5809/08), which is not final, the European Court of Human Rights held, by a majority, that there had been:

a violation of Article 6 (right to a fair hearing) of the European Convention on Human Rights.

The case concerned the freezing in Switzerland of assets belonging to Mr Al-Dulimi and to the company of which he was managing director following the United Nations Security Council’s adoption of two resolutions inviting UN member and non-member States to impose a general embargo on Iraq after it invaded Kuwait in 1990.

The Court reiterated - in line with the criterion of equivalent protection, well-established in the Court’s case-law - that it was presumed that States did not depart from the requirements of the Convention when they did no more than implement legal obligations flowing from their membership of an organisation which provided equivalent protection to the Convention. It noted that the presumption of equivalent protection was not applicable in this case.

The applicants’ assets were frozen in 1990. Without having to rule on the merits of the measures, the Court considered that the applicants had been entitled to have them examined by a national court. Notably, as long as there was no effective and independent judicial review at United Nations level of the legitimacy of including persons and entities on the UN’s list, it was essential that those persons and entities could ask national courts to examine any measure taken in application of the sanctions regime.

Principal facts

The applicant Khalaf M. Al-Dulimi is an Iraqi national who was born in 1941 and lives in Amman (Jordan). According to the Security Council of the United Nations, he was finance manager for the Iraqi secret services under Saddam Hussein. The other applicant, Montana Management Inc., is a Panama-based company, of which the first applicant was managing director. After Iraq invaded Kuwait in August 1990, the United Nations Security Council adopted two Resolutions inviting UN member and non-member States to impose a general embargo on Iraq. On 7 August 1990 the Swiss Federal Council issued “the Iraq order”, implementing economic measures against Iraq.

In May 2003 the UN Security Council adopted Resolution 1483 (2003) and the Iraq order was amended accordingly. In May 2004 the applicants were included on the list of persons and groups

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targeted by the envisaged measures and the Federal Council issued an order on the confiscation of the frozen Iraqi assets and economic resources and their transfer to the Development Fund for Iraq.

Mr Al-Dulimi, who wished to submit a request for de-listing to the UN Sanctions Committee, asked the Federal Department for Economic Affairs to suspend the confiscation proceedings. The Swiss Government accepted that measure.

On 16 November 2006, following a breakdown in negotiations between the applicant and the Sanctions Committee, the Federal Department for Economic Affairs ordered the confiscation of the applicants' assets, setting out the arrangements for the sums in question to be transferred to the bank account of the Development Fund for Iraq. It noted that the applicants' names appeared on the list of persons and entities drawn up by the Sanctions Committee, that Switzerland was obliged to apply the Security Council's resolutions and that it could remove a name from the appendix to the Iraq order only after a decision by that committee. It indicated that an administrative-law appeal against its decision lay with the Federal Court.

The Security Council adopted Resolution 1730 (2006), which created a de-listing procedure. The applicants submitted three administrative-law appeals to the Federal Court. In those appeals the applicants asked that the decision issued by Federal Department for Economic Affairs on 16 November 2006 be set aside.

On 23 January 2008 the Federal Court dismissed the applicants' appeals on the merits. On 13 June 2008 they submitted a de-listing request in line with the procedure provided for by Resolution 1730 (2006). That request was rejected on 6 January 2009.

In March 2009 the Swiss authorities decided to stay enforcement of the confiscation orders pending the judgment by the European Court of Human Rights and the Federal Court's judgment on the domestic revision request should the Court find a violation of the Convention.

In February 2013 the assets had still not been confiscated, since the Government had stayed enforcement of the confiscation orders.

Complaints, procedure and composition of the Court

Relying on Article 6 § 1 (right to a fair trial), the applicants complained that the confiscation of their assets had been ordered in the absence of any procedure compatible with Article 6 § 1 of the Convention.

The application was lodged with the European Court of Human Rights on 1 February 2008.

Judgment was given by a Chamber of seven judges, composed as follows:

Guido **Raimondi** (Italy), President,
 Danutė **Jočienė** (),
 Peer **Lorenzen** (Denmark),
 András **Sajó** (Hungary),
 Işıl **Karakaş** (Turkey),
 Nebojša **Vučinić** (Montenegro),
 Helen **Keller** (Switzerland),

and also Stanley **Naismith**, Section Registrar.

Decision of the Court

The full texts of the Court's judgments are accessible on its website (<http://www.hudoc.echr.coe.int>)

Article 6 § 1

The Court considered, firstly, that the measures in issue had been taken in the exercise by Switzerland of its “jurisdiction” within the meaning of Article 1 of the Convention (obligation to respect human rights). The impugned acts and omissions were thus capable of engaging Switzerland’s responsibility under the Convention. The Court then reiterated that Article 1 made no distinction as to the type of rule or measure concerned. Moreover, the Convention could not be interpreted in a vacuum but had to be interpreted in harmony with the general principles of international law.

The Convention did not prevent the Contracting Parties from transferring sovereign powers to an international organisation for the purposes of cooperation in certain fields of activity. The States nevertheless remained responsible under the Convention for all actions and omissions of their bodies under their domestic law or under their international legal obligations.

State action taken in compliance with such legal obligations was justified as long as the relevant organisation was considered to protect fundamental rights in a manner which could be considered at least equivalent to that provided for under the Convention. The Court considered that the presumption of equivalent protection was intended, in particular, to ensure that a State Party was not faced with a dilemma when it was obliged to rely on the legal obligations incumbent on it as a result of its membership of an international organisation which was not party to the Convention.

With regard to the protection provided in the present case, the Court noted that the Government themselves acknowledged that the system in place did not provide equivalent protection to that required by the Convention. Indeed, the UN’s Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism confirmed this conclusion, when he stated that the sanctions regime against Al-Qaida, set up by Resolution 1267 (1989) – and even as improved by the subsequent Resolutions – did not always guarantee respect for international standards². The presumption of equivalent protection was not therefore applicable in this case.

According to the Government, the restriction on the applicants’ right of access to a court pursued a legitimate aim, namely the maintenance of international peace and security. Security Council Resolution 1483 (2003) had the aim of imposing on the member States a series of measures intended to ensure the stabilisation and development of Iraq. In particular, it was intended to guarantee that the assets and property of high-ranking officials in the former Iraqi Government were transferred to the Development Fund for Iraq and returned to the Iraqi people, for their benefit. The Court accepted the Government’s argument that the domestic courts’ refusal to examine the merits of the applicants’ complaints had been motivated by their wish to ensure effective implementation of the obligations arising from the Security Council’s Resolution. As regards the relationship between the means employed and the objective aimed at, the Court observed that the Federal Court had set out, in very detailed judgments, the grounds on which it found that it did not have jurisdiction to examine the applicants’ requests to have the confiscation set aside.

However, the Court considered that the adoption of Resolution 1483 (2003) had not been intended to respond to an imminent threat of terrorism, but to reaffirm the autonomy and sovereignty of the Iraqi Government and to guarantee to the Iraqi people the right to determine their political future and to control their natural resources. It seemed that more varied and targeted measures would have been more easily compatible with effective implementation of the resolutions.

The applicants’ assets had been frozen in 1990 and their confiscation had been ordered in November 2006. Although the confiscation decision had not yet been implemented, the applicants had been deprived of their assets for a considerable period of time. Without having to rule on the merits of the measures, the Court considered that the applicants had been entitled to have them examined by a

national court. The fact that it had been impossible to challenge the confiscation over a period of many years was barely conceivable in a democratic society.

The Court considered that so long as there was no effective and independent judicial review at United Nations level of the legitimacy of including persons and entities on the UN's list, it was essential that the targeted persons and entities could ask national courts to examine any measure taken in application of the sanctions regime. As no such examination had been available to the applicants, it followed that their very right of access to a court had been impaired. There had therefore been a violation of Article 6 § 1.

Just satisfaction (Article 41)

The assets in question had apparently not yet been physically confiscated. The applicants pointed out that at this stage they had not yet sustained pecuniary damage as a result of violations capable of giving rise to compensation by way of just satisfaction. The Court considered that there was no causal link between the finding of a violation of Article 6 § 1 and the allegation of pecuniary damage, the reality of which was, moreover, purely hypothetical for the time being. As the applicants had not requested compensation for non-pecuniary damage or reimbursement of their costs and expenses, the Court did not make any award under those heads.

Separate opinions

Judge Sajó expressed a partly dissenting opinion. Judges Lorenzen, Raimondi and Jočienė expressed a dissenting opinion. These opinions are annexed to the judgment.

62. *Eur.Court HR, Perinçek v. Switzerland, Second Section Judgment of 17 December 2013, Application No. 27510/08, (Article 10, Freedom of Expression – Violation).* The applicant successfully argued that he had been wrongfully convicted by the Swiss courts for having publicly described the Armenian genocide as an “international lie” at various conferences in Switzerland.

ECHR 370 (2013)

17.12.2013

Press release issued by the Registrar

In today’s Chamber judgment in the case of **Perinçek v. Switzerland** (application no. 27510/08), which is not final, the European Court of Human Rights held, by a majority, that there had been:

a violation of Article 10 (freedom of expression) of the European Convention on Human Rights

The case concerned the criminal conviction of Mr Perinçek for publicly challenging the existence of the Armenian genocide.

The Court found that Mr Perinçek, who during various conferences in Switzerland, had described the Armenian genocide as an “international lie”, had not committed an abuse of his rights within the meaning of Article 17 of the Convention.

The Court underlined that the free exercise of the right to openly discuss questions of a sensitive and controversial nature was one of the fundamental aspects of freedom of expression and distinguished a tolerant and pluralistic democratic society from a totalitarian or dictatorial regime.

The Court also pointed out that it was not called upon to rule on the legal characterisation of the Armenian genocide. The existence of a “genocide”, which was a precisely defined legal concept, was not easy to prove. The Court doubted that there could be a general consensus as to events such as those at issue, given that historical research was by definition open to discussion and a matter of debate, without necessarily giving rise to final conclusions or to the assertion of objective and absolute truths.

Lastly, the Court observed that those States which had officially recognised the Armenian genocide had not found it necessary to enact laws imposing criminal sanctions on individuals questioning the official view, being mindful that one of the main goals of freedom of expression was to protect minority views capable of contributing to a debate on questions of general interest which were not fully settled.

Principal facts

The applicant, Doğu Perinçek, is a Turkish national who was born in 1942 and lives in Ankara (Turkey). Being a doctor of laws and the Chairman of the Turkish Workers’ Party, Mr Perinçek participated in various conferences in Switzerland in May, July and September 2005, during which he publicly denied that the Ottoman Empire had perpetrated the crime of genocide against the Armenian people in 1915 and the following years. He described the idea of an Armenian genocide as an “international lie”.

The association “Switzerland-Armenia” filed a criminal complaint against him on 15 July 2005. On 9

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March 2007 the Lausanne Police Court found Mr Perinçek guilty of racial discrimination within the meaning of the Swiss Criminal Code, finding that his motives were of a racist tendency and did not contribute to the historical debate.

Mr Perinçek lodged an appeal that was dismissed by the Criminal Cassation Division of the Vaud Cantonal Court. In that court's view, the Armenian genocide, like the Jewish genocide, was a proven historical fact, recognised by the Swiss legislature on the date of the adoption of Article 261bis of the Criminal Code. The courts did not therefore need to refer to the work of historians in order to accept its existence. The Cassation Division emphasised that Mr Perinçek had only denied the characterisation as genocide without calling into question the existence of the massacres and deportations of Armenians.

The Federal Court dismissed a further appeal by Mr Perinçek in a judgment of 12 December 2007.

Complaints, procedure and composition of the Court

Relying on Article 10 (freedom of expression), Mr Perinçek complained that the Swiss courts had breached his freedom of expression. He argued, in particular, that Article 261bis, paragraph 4, of the Swiss Criminal Code was not sufficiently foreseeable in its effect, that his conviction had not been justified by the pursuit of a legitimate aim and that the alleged breach of his freedom of expression had not been "necessary in a democratic society".

The application was lodged with the European Court of Human Rights on 10 June 2008. The Turkish Government submitted written comments as a third party.

Judgment was given by a Chamber of seven judges, composed as follows:

Guido **Raimondi** (Italy), *President*,
Peer **Lorenzen** (Denmark),
Dragoljub **Popović** (Serbia),
András **Sajó** (Hungary),
Nebojša **Vučinić** (Montenegro),
Paulo **Pinto de Albuquerque** (Portugal),
Helen **Keller** (Switzerland),

and also Stanley **Naismith**, *Section Registrar*.

Decision of the Court

Article 17

The Court, in first examining whether Mr Perinçek's comments were to be excluded from the protection of freedom of expression on the basis of Article 17 (prohibition of abuse of rights), reiterated that ideas which offended, shocked or disturbed were also protected by Article 10. The Court found it necessary to point out that Mr Perinçek had never questioned the massacres and deportations perpetrated during the years in question but had denied the characterisation of those events as "genocide".

The limit beyond which comments may engage Article 17 lay in the question whether the aim of the speech was to incite hatred or violence. The rejection of the legal characterisation as "genocide" of the 1915 events was not such as to incite hatred against the Armenian people. Mr Perinçek had never in fact been prosecuted or convicted for inciting hatred. Nor had he expressed contempt for the victims of the events. The Court therefore found that Mr Perinçek had not abused his right to openly discuss

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such questions, however sensitive and controversial they might be, and had not used his right to freedom of expression for ends which were contrary to the text and spirit of the Convention.

Article 10

The Court took the view that the term “genocide” as used in the relevant Article of the Swiss Criminal Code was likely to raise doubts as to the precision required by Article 10 § 2 of the Convention. The Court nevertheless agreed with the Federal Court that Mr Perinçek could not have been unaware that by describing the Armenian genocide as an “international lie”, he was exposing himself on Swiss territory to a criminal sanction “prescribed by law”.

The Court found that the aim of the measure in issue was to protect the rights of others, namely the honour of the relatives of victims of the atrocities perpetrated by the Ottoman Empire against the Armenian people from 1915 onwards. However, it regarded as insufficiently substantiated the Government’s argument that Mr Perinçek’s comments posed a serious risk to public order.

The Court pointed out that it was not called upon to address either the veracity of the massacres and deportations perpetrated against the Armenian people by the Ottoman Empire from 1915 onwards, or the appropriateness of legally characterising those acts as “genocide”, within the meaning of the relevant Article of the Criminal Code. The Court had to weigh up, on the one hand, the requirements of protecting the rights of third parties, namely the honour of the relatives of the Armenian victims, and on the other, Mr Perinçek’s freedom of expression.

The question whether the events of 1915 and thereafter could be characterised as “genocide” was of great interest to the general public. The Court took the view that Mr Perinçek had engaged in speech of a historical, legal and political nature which was part of a heated debate. On account of the public interest of his comments, the Court found that the authorities’ margin of appreciation was limited.

The essential ground for Mr Perinçek’s conviction by the Swiss courts was the apparent existence of a general consensus, especially in the academic community, concerning the legal characterisation of the events in question. However, the Federal Court itself admitted that there was no unanimity in the community as a whole concerning the legal characterisation in question. According to Mr Perinçek and the Turkish Government, a third-party intervener in the case, it would be very difficult to identify a general consensus. The Court shared that opinion, pointing out that there were differing views among the Swiss political organs themselves. It appeared, moreover, that only about twenty States out of the 190 in the world had officially recognised the Armenian genocide. Such recognition had not necessarily come from the governments of those States – as was the case in Switzerland – but from Parliament or one of its chambers.

Agreeing with Mr Perinçek, the Court took the view that the notion of “genocide” was a precisely defined legal concept. According to the case-law of the International Court of Justice and the International Criminal Tribunal for Rwanda, for the crime of genocide to be made out, the acts must have been perpetrated with intent to destroy not only certain members of a particular group but all or part of the group itself. Genocide was a very narrow legal concept that was, moreover, difficult to substantiate. The Court was not convinced that the general consensus to which the courts referred in convicting Mr Perinçek could relate to such very specific points of law.

The Court thus doubted that there could be a general consensus as to events such as those in issue here, given that historical research was by definition open to discussion and a matter of debate, without necessarily giving rise to final conclusions or to the assertion of objective and absolute truths.

In this connection, the Court clearly distinguished the present case from those concerning the negation of the crimes of the Holocaust. In those cases, the applicants had denied the historical facts even though they were sometimes very concrete, such as the existence of the gas chambers. They had denied the crimes perpetrated by the Nazi regime for which there had been a clear legal basis. Lastly, the acts that they had called into question had been found by an international court to be clearly established.

The Court took the view that Switzerland had failed to show how there was a social need in that country to punish an individual for racial discrimination on the basis of declarations challenging the legal characterisation as “genocide” of acts perpetrated on the territory of the former Ottoman Empire in 1915 and the following years.

Two developments also had to be taken into account. Firstly, the Spanish Constitutional Court, in November 2007, had found unconstitutional the offence of negation and had taken the view that the mere negation of a crime of genocide did not constitute direct incitement to violence. Secondly, in February 2012, the French Constitutional Council had declared unconstitutional a law which made it a criminal offence to deny the existence of the genocides recognised by the law, finding it to be incompatible with freedom of expression and freedom of research. In the Court’s view, the decision of the French Constitutional Council showed that there was in principle no contradiction between the official recognition of certain events as genocide and the conclusion that it would be unconstitutional to impose criminal sanctions on persons who questioned the official view.

Lastly, the Court pointed out that the United Nations Human Rights Committee had expressed its conviction² that “[l]aws that penalize[d] the expression of opinions about historical facts [were] incompatible with the obligations that the Covenant [on Civil and Political Rights] impose[d] on States parties ...” and that the “Covenant [did] not permit general prohibition of expressions of an erroneous opinion or an incorrect interpretation of past events”.

In conclusion, the Court doubted that Mr Perinçek’s conviction had been dictated by a “pressing social need”. The Court pointed out that it had to ensure that the sanction did not constitute a kind of censorship which would lead people to refrain from expressing criticism. In a debate of general interest, such a sanction might dissuade contributions to the public discussion of questions which were of interest for the life of the community.

The Court found that the grounds given by the national authorities in order to justify Mr Perinçek’s conviction were insufficient. The domestic authorities had therefore overstepped the narrow margin of appreciation in this case in respect of a matter of debate of undeniable public interest.

There had accordingly been a violation of Article 10.

Just satisfaction (Article 41)

The Court held that the finding of a violation of Article 10 constituted in itself sufficient just satisfaction for any non-pecuniary damage sustained by Mr Perinçek.

Separate opinions

Judges Sajó and Raimondi expressed a joint concurring opinion and Judges Vučinić and Pinto de Albuquerque expressed a joint partly dissenting opinion. These opinions are annexed to the judgment.

63. Eur.Court HR, Jones and Others v. the United Kingdom, Fourth Section Judgment of 14 January 2014, Application Nos. 34356/06 & 40528/06, (Article 6-1, Right to a Fair Hearing within a Reasonable Time – No Violation). The applicants, four British nationals who had alleged that they had been tortured in Saudi Arabia by Saudi State officials, unsuccessfully complained about the United Kingdom courts' subsequent dismissal of suit for reasons of State immunity, the granting of which, according to the Court, had reflected generally recognised rules of public international law and had not amounted to an unjustified restriction on the applicants' access to court.

ECHR 011 (2014)
14.01.2014

Press release issued by the Registrar

In today's Chamber judgment in the case of **Jones and Others v. the United Kingdom** (application nos. 34356/06 and 40528/06), which is not final, the European Court of Human Rights held, by six votes to one, that there had been:

no violation of Article 6 § 1 (right of access to court) of the European Convention on Human Rights either as concerned Mr Jones' claim against the Kingdom of Saudi Arabia or as concerned all four applicants' claims against named Saudi Arabian officials.

The case concerned four British nationals who alleged that they had been tortured in Saudi Arabia by Saudi State officials. The applicants complained about the UK courts' subsequent dismissal for reasons of State immunity of their claims for compensation against Saudi Arabia and its officials.

The Court found that the granting of immunity to Saudi Arabia and its State officials in the applicants' civil cases had reflected generally recognised current rules of public international law and had not therefore amounted to an unjustified restriction on the applicants' access to court. In particular, while there was some emerging support at the international level in favour of a special rule or exception in public international law in cases concerning civil claims for torture lodged against foreign State officials, the weight of authority suggested that the State's right to immunity could not be circumvented by suing named officials instead. The House of Lords had considered the applicants' arguments in detail and dismissed them by reference to the relevant international law principles and case-law. However, in light of the current developments in this area of public international law, this was a matter which needed to be kept under review by Contracting States.

Principal facts

The applicants, Ronald Grant Jones, Alexander Hutton Johnston Mitchell, William James Sampson (now deceased), and Leslie Walker, are British nationals who were born in 1953, 1955, 1959 and 1946 respectively.

The applicants all claim that they were arrested in Riyadh in 2000 or 2001, and subjected to torture while in custody. Medical examinations carried out on returning to the United Kingdom all concluded that the applicants' injuries were consistent with their allegations.

In 2002 Mr Jones brought proceedings against Saudi Arabia's Ministry of Interior and the official who had allegedly tortured him claiming damages. His application was struck out in February 2003

The full texts of the Court's judgments are accessible on its website (<http://www.hudoc.echr.coe.int>)

on the grounds that Saudi Arabia and its officials were entitled to State immunity under the State Immunity Act 1978.

A claim by Mr Mitchell, Mr Sampson and Mr Walker against the four State officials that they considered to be responsible for their torture was struck out for the same reason in February 2004.

The applicants appealed the decisions, and their cases were joined. In October 2004 the UK Court of Appeal unanimously found that, though Mr Jones could not sue Saudi Arabia itself, the applicants could pursue their cases against the individually named defendants. However, this decision was overturned by the House of Lords in June 2006, which held that the applicants could not pursue any of their claims on the ground that all of the defendants were entitled to State immunity under international law, which was incorporated into domestic law by the 1978 Act.

Complaints, procedure and composition of the Court

Relying on Article 6 § 1 (access to court), the applicants complained that the UK courts' granting of immunity in their cases meant that they had been unable to pursue claims for torture either against Saudi Arabia or against named State officials. They alleged that this had amounted to a disproportionate violation of their right of access to court.

The applications were lodged with the European Court of Human Rights on 26 July 2006 and 22 September 2006, respectively.

The Redress Trust, Amnesty International, the International Centre for the Legal Protection of Human Rights and JUSTICE were given leave to submit written comments.

Judgment was given by a Chamber of seven judges, composed as follows:

Ineta **Ziemele** (Latvia), President,
 Päivi **Hirvelä** (Finland),
 George **Nicolaou** (Cyprus),
 Ledi **Bianku** (Albania),
 Zdravka **Kalaydjieva** (Bulgaria),
 Vincent A. **de Gaetano** (Malta),
 Paul **Mahoney** (the United Kingdom),

and also Françoise **Elens-Passos**, Section Registrar.

Decision of the Court

The Court recalled that everyone had the right under Article 6 § 1 to have any legal dispute relating to his or her civil rights and obligations brought before a court, but that this right of access to court was not absolute. States could impose restrictions on it. However, a restriction had to pursue a legitimate aim, and there had to be a reasonable relationship between the aim and the means employed to pursue it (the restriction must be proportionate).

As to the specific test in State immunity cases, the Court referred to its judgment of 2001 in the similar case of *Al-Adsani v. the United Kingdom* (no. 35763/97). There, the Grand Chamber had explained that sovereign immunity was a concept of international law under which one State should not be subjected to the jurisdiction of another State and that granting immunity in civil proceedings pursued the legitimate aim of complying with international law to promote comity and good relations between States through the respect of another State's sovereignty. That being the case, the decisive question when examining the proportionality of the measure was whether the immunity rule applied

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by the national court reflected generally recognised rules of public international law on State immunity. In *Al-Adsani*, which concerned the striking out of a torture claim against Kuwait, the Court had found it established that there was not, at the time of its judgment in that case, acceptance in international law of the proposition that States were not entitled to immunity in respect of civil claims for damages concerning alleged torture committed outside the State. There had therefore been no violation of Article 6 § 1.

In the applicants' case, the Court accepted that the restriction on access to court as regards the claims against Saudi Arabia and the State officials had pursued the legitimate aim of promoting good relations between nations. It therefore applied the approach to proportionality set out in *Al-Adsani*. The main issue of the applicants' case was therefore whether the restrictions on access to court arising from State immunity had been in conformity with generally recognised rules of public international law.

As concerned the **claim against the Kingdom of Saudi Arabia**, the Court had to decide whether it could be said that at the time Mr Jones' claim had been struck out (in 2006) there was, in public international law, an exception to the doctrine of State immunity in civil proceedings where allegations of torture had been made against that State. The Court considered whether there had been an evolution in accepted international standards on immunity in such torture claims lodged against a State since *Al-Adsani*. For the Court, the conclusive answer to that question was given by the judgment of the International Court of Justice (ICJ) in February 2012 in the case of *Germany v. Italy*, where the ICJ had rejected the argument that a torture exception to the doctrine of State immunity had by then emerged. The Court therefore concluded that the UK courts' reliance on State immunity to defeat Mr Jones' civil action against Saudi Arabia had not amounted to an unjustified restriction on his access to court. Therefore there had been no violation of Article 6 § 1 as concerned the striking out of Mr Jones' complaint against Saudi Arabia.

As concerned the **claims against the State officials**, again the sole matter for consideration was whether the grant of immunity to the State officials reflected generally recognised rules of public international law on State immunity. The Court was of the view, after an analysis of national and international case-law and materials, that State immunity in principle offered State officials protection in respect of acts undertaken on behalf of the State in the same way as it protected the State itself; otherwise, State immunity could be circumvented by the suing of named individuals. It then turned to consider whether there was an exception to this general rule in cases where torture was alleged. It reviewed the position in international law and examined international and national case-law. It noted that there was some emerging support at the international level in favour of a special rule or exception in public international law in cases concerning civil claims for torture lodged against foreign State officials. However, it concluded that the weight of authority was still to the effect that the State's right to immunity could not be circumvented by suing named officials instead, although it added that further developments could be expected. The House of Lords in the applicants' case had carefully examined all the arguments and the relevant international and comparative law materials and issued a comprehensive judgment with extensive references. That judgment had been found to be highly persuasive by the national courts of other States.

The Court was therefore satisfied that the granting of immunity to State Officials in the applicants' civil cases had reflected generally recognised current rules of public international law and had not therefore amounted to an unjustified restriction on their access to court. Accordingly, there had been no violation of Article 6 § 1 as regards the applicants' claims against named State officials.

However, in light of the developments underway in this area of public international law, it added that this was a matter which needed to be kept under review by Contracting States.

Separate opinions

Judge Kalaydjieva expressed a joint partly dissenting opinion and Judge Bianku expressed a concurring opinion. These opinions are annexed to the judgment.

64. Eur.Court HR, Cyprus v. Turkey, Grand Chamber Judgment of 12 May 2014, Application No. 25781/94, (Article 41, Just Satisfaction – Just Satisfaction Awarded).

The applicant successfully claimed that the passage of time since the original judgment did not preclude the Court from adjudicating its claim for just satisfaction, notwithstanding a State's obligation to act without undue delay in an inter-state dispute.

ECHR 131 (2014)

12.05.2014

Press release issued by the Registrar

In today's Grand Chamber judgment in the case of **Cyprus v. Turkey** (application no. 25781/94), which is final, the European Court of Human Rights ruled on the question of the application of Article 41 (just satisfaction).

The Court held, by a majority, that the passage of time since the delivery of the principal judgment on 10 May 2001 did not preclude it from examining the Cypriot Government's just satisfaction claims.

The Court held, by a majority, that Turkey was to pay Cyprus 30,000,000 euros (EUR) in respect of the non-pecuniary damage suffered by the relatives of the missing persons, and EUR 60,000,000 in respect of the non-pecuniary damage suffered by the enclaved Greek-Cypriot residents of the Karpas peninsula. These amounts are to be distributed by the Cypriot Government to the individual victims under the supervision of the Committee of Ministers.

Principal facts

The case concerned the situation in northern Cyprus since Turkey carried out military operations there in July and August 1974, and the continuing division of the territory of Cyprus since that time.

In its **Grand Chamber judgment** delivered on 10 May 2001 the Court found numerous violations of the Convention by Turkey, arising out of the military operations it had conducted in northern Cyprus in July and August 1974, the continuing division of the territory of Cyprus and the activities of the "Turkish Republic of Northern Cyprus" (the "TRNC"). Regarding the issue of just satisfaction, the Court held unanimously that it was not ready for decision and adjourned its consideration.

The procedure for execution of the principal judgment is currently pending before the Committee of Ministers.

On 31 August 2007 the Cypriot Government informed the Court that they intended to submit a request to the Grand Chamber for it to resume consideration of the question of just satisfaction. On 11 March 2010 the Cypriot Government submitted to the Court their claims for just satisfaction concerning the missing persons in respect of whom the Court had found a violation of Articles 2 (right to life), 3 (prohibition of torture and inhuman or degrading treatment) and 5 (right to liberty and security).

On 25 November 2011 the Cypriot Government sent the Court a document concerning the procedure before the Committee of Ministers for execution of the principal judgment, requesting the Court to take certain steps in order to facilitate the execution of that judgment. In response to some further questions and an invitation from the Court to submit a final version of their claims for just satisfaction, the Cypriot Government on 18 June 2012 submitted their claims under Article 41

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concerning the missing persons, and raised claims in respect of the violations committed against the enclaved Greek-Cypriot residents of the Karpas peninsula.

Procedure and composition of the Court

The present application had been introduced before the former European Commission of Human Rights in 1994. It was referred to the European Court of Human Rights by the Government of Cyprus on 30 August 1999 and by the European Commission on 11 September 1999. The Grand Chamber delivered a judgment on the merits on 10 May 2001.

Judgment was given by the Grand Chamber of 17 judges, composed as follows:

Josep **Casadevall** (Andorra), President,
 Françoise **Tulkens** (Belgium),
 Guido **Raimondi** (Italy),
 Nina **Vajić** (Croatia),
 Mark **Villiger** (Liechtenstein),
 Corneliu **Bîrsan** (Romania),
 Boštjan M. **Zupančič** (Slovenia),
 Alvina **Gyulumyan** (Armenia),
 David Thór **Björgvinsson** (Iceland),
 George **Nicolaou** (Cyprus),
 András **Sajó** (Hungary),
 Mirjana Lazarova **Trajkovska** (“the former Yugoslav Republic of Macedonia”),
 Ledi **Bianku** (Albania),
 Ann **Power-Forde** (Ireland),
 Işıl **Karakaş** (Turkey),
 Nebojša **Vučinić** (Montenegro),
 Paulo **Pinto de Albuquerque** (Portugal),

and also Michael **O’Boyle**, Deputy Registrar.

Decision of the Court

Admissibility of the Cypriot Government’s claims

The Court reiterated that the European Convention on Human Rights was an international treaty to be interpreted in accordance with the relevant norms and principles of public international law and, in particular, in the light of the Vienna Convention on the Law of Treaties of 23 May 1969. The Court had never considered the provisions of the Convention as the sole framework of reference for the interpretation of the rights and freedoms enshrined therein. On the contrary, it also had to take into account any relevant rules and principles of international law applicable in relations between the Contracting Parties.

The Court acknowledged that general international law, in principle, recognised the obligation of the applicant Government in an inter-State dispute to act without undue delay in order to uphold legal certainty and not to cause disproportionate harm to the legitimate interests of the respondent State (see *Nauru v. Australia*, International Court of Justice).

The Court observed that the present application had been introduced in 1994, before the former European Commission of Human Rights. Under the Rules of Procedure of the Commission then in force, neither applicant Governments nor individual applicants had been required to indicate their just satisfaction claims in their application form. The Court reiterated that in its letter of 29 November

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1999 sent to both Governments it had instructed the applicant Government not to submit any claim for just satisfaction at the stage of the examination of the case on the merits; it was thus understandable that they had not done so.

The Court had held in its judgment on the merits that the issue of the possible application of Article 41 was not ready for decision and had adjourned consideration thereof. No time-limits had been fixed for the parties to submit their just satisfaction claims. Accordingly, the Court considered that the fact that the Cypriot Government had not submitted their claims for just satisfaction until 11 March 2010 did not render the claims inadmissible, and it saw no reason to reject them as being out of time.

Applicability of Article 41 in inter-State cases

The Court observed that, until now, the only case where it had had to deal with the applicability of the just satisfaction rule in an inter-State case had been the case of *Ireland v. the United Kingdom*. The logic of the just satisfaction rule derived from the principles of public international law relating to State liability. The most important principle of international law relating to the violation by a State of a treaty obligation was that the breach of an engagement involved an obligation to make reparation in an adequate form. Bearing in mind the specific nature of Article 41 in relation to the general rules and principles of international law, the Court could not interpret that provision in such a narrow and restrictive way as to exclude inter-State applications from its scope. The overall logic of Article 41 of the Convention was not substantially different from the logic of reparations in public international law. Accordingly, the Court considered that Article 41 did, as such, apply to inter-State cases.

However, according to the very nature of the Convention, it was the individual and not the State who was directly or indirectly harmed and primarily “injured” by a violation of one or several Convention rights. If just satisfaction was afforded in an inter-State case, it always had to be done for the benefit of individual victims.

Just satisfaction award

The Court noted that the Cypriot Government had submitted just satisfaction claims in respect of violations committed against two precise and objectively identifiable groups of people, namely 1,456 missing persons and the enclaved Greek-Cypriot residents of the Karpas peninsula. Just satisfaction was not being sought with a view to compensating the Cypriot State for a violation of its rights but for the benefit of individual victims. Insofar as the missing persons and the Karpas residents were concerned, the Court considered that the Cypriot Government were entitled to make a claim under Article 41, and that granting just satisfaction in the present case would be justified.

In view of all the relevant circumstances of the case, the Court considered it reasonable to award the Cypriot Government aggregate sums of EUR 30,000,000 for the non-pecuniary damage suffered by the surviving relatives of the missing persons, and EUR 60,000,000 for the non-pecuniary damage suffered by the enclaved residents of the Karpas peninsula. Those sums were to be distributed by the Cypriot Government to the individual victims of the violations found in the principal judgment. The Court considered that it should be left to the Cypriot Government, under the supervision of the Committee of Ministers, to set up an effective mechanism to distribute the above-mentioned sums to the individual victims.

Cypriot Government’s request for a “declaratory judgment”

In their submission of 25 November 2011 the Cypriot Government requested the Court to adopt a “declaratory judgment”.

The Court observed that the respondent State was bound under Article 46 to comply with the principal judgment. It was not necessary to examine the question whether the Court had the competence under the Convention to make a “declaratory judgment” since it was clear that the respondent Government were, in any event, formally bound by the relevant terms of the main judgment.

The Court pointed out that it had found in the principal judgment a continuing violation of Article 1 of Protocol No. 1 by virtue of the fact that Greek-Cypriot owners of property in northern Cyprus were being denied access to and control, use and enjoyment of their property as well as any compensation for the interference with their property rights. It was for the Committee of Ministers to ensure that the findings of the principal judgment, which were binding and which had not yet been complied with, were given full effect by the Turkish Government. Such compliance was not consistent with any complicity in the unlawful sale or exploitation of Greek Cypriot homes and property in the northern part of Cyprus.

The Court’s decision in the case of *Demopoulos and Others v. Turkey*, to the effect that cases presented by individuals concerning violation of property complaints were to be rejected for nonexhaustion of domestic remedies, in no sense disposed of the question of Turkey’s compliance with the principal judgment in the present inter-State case.

Separate opinions

Judges Zupančič, Gyulumyan, David Thór Björgvinsson, Nicolaou, Sajó, Lazarova Trajkovska, Power-Forde, Vučinić and Pinto de Albuquerque expressed a joint concurring opinion. Judge Pinto de Albuquerque expressed a concurring opinion, joined by Judge Vučinić. Judges Tulkens, Vajić, Raimondi and Bianku expressed a partly concurring opinion, joined by Judge Karakaş. Judge Casadevall expressed a partly concurring and partly dissenting opinion. Judge Karakaş expressed a dissenting opinion. These opinions are annexed to the judgment.

65. *Eur.Court HR, Margus v. Croatia, Grand Chamber Judgment of 27 May 2014, Application No. 4455/10, (Article 6-1, Right to a Fair Trial – No Violation; Article 4 of Protocol No. 7, Right not to be Tried or Punished Twice – Not Applicable & Inadmissible)*. The applicant, a former commander of the Croatian army, unsuccessfully claimed that the fact that he had been tried and granted an amnesty for the war crimes committed against the civilian population in 1991, meant that his conviction for the same offences nine years later was contrary to his Convention rights.

ECHR 146 (2014)
27.05.2014

Press release issued by the Registrar

The case of **Marguš v. Croatia** (application no. 4455/10) concerned the conviction, in 2007, of a former commander of the Croatian army of war crimes against the civilian population committed in 1991. He complained in particular: that his right to be tried by an impartial tribunal and to defend himself in person had been violated; and, that the criminal offences of which he had been convicted were the same as those which had been the subject of proceedings against him terminated in 1997 in application of the General Amnesty Act.

In today's Grand Chamber judgment in the case, which is final, the European Court of Human Rights held:

unanimously, that there had been **no violation of Article 6 §§ 1 and 3 (c) (right to a fair trial)** of the European Convention on Human Rights, and

by a majority, that **Article 4 of Protocol No. 7 (right not to be tried or punished twice)** to the Convention was not applicable in respect of the charges relating to the offences which had been the subject of proceedings against Mr Marguš terminated in 1997 in application of the General Amnesty Act.

At the same time, the Court, *unanimously*, declared inadmissible the complaint under Article 4 of Protocol No. 7 to the Convention as regards Mr Marguš' right not to be tried or punished twice in respect of the charges dropped by the prosecutor in January 1996.

The Court held in particular that there was a growing tendency in international law to see the granting of amnesties in respect of grave breaches of human rights as unacceptable. It concluded that by bringing a new indictment against Mr Marguš and convicting him of war crimes against the civilian population, the Croatian authorities had acted in compliance with the requirements of Article 2 (right to life) and Article 3 (prohibition of torture and inhuman or degrading treatment) of the Convention and consistent with the recommendations of various international bodies.

Principal facts

The applicant, Fred Marguš, is a Croatian national who was born in 1961 and is currently serving a prison term in Lepoglava State Prison (Croatia).

A first set of criminal proceedings was brought against him in April 1993 by the Osijek Military Prosecutor on charges of a number of serious offences against civilians, including murder, allegedly committed in November and December 1991 as a member of the Croatian army. In January 1996, the

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Osijek Deputy Military Prosecutor dropped the charges concerning the alleged killing of two persons in December 1991 and added the charge of having seriously wounded a child in November 1991. In June 1997, the Osijek County Court terminated the proceedings in respect of the alleged killing of two persons in November 1991, and in respect of the serious wounding of the child, on the basis of the General Amnesty Act. The Act had entered into force in September 1996 and was to be applied to criminal offences committed during the war in Croatia between 1990 and 1996 except for acts amounting to the gravest breaches of humanitarian law or to war crimes.

On 19 September 2007, the Supreme Court, deciding on a request for the protection of legality lodged by the State Attorney, found the decision to terminate the proceedings to be in violation of the Amnesty Act. It held in particular that Mr Marguš had committed the alleged offences as a member of the reserve forces after his tour of duty had terminated. Accordingly, there had not been a significant link between the alleged offences and the war, as required by the Act, as otherwise the amnesty would encompass all offences committed by members of the Croatian army between August 1990 and August 1996, which had not been the legislature's intention.

In the meantime, in April 2006, Mr Marguš was indicted on charges of war crimes against the civilian population. The charges included the alleged acts of killing four persons in November and December 1991 and of seriously wounding a child in November 1991 which had been the subject of the first set of criminal proceedings against him.

The proceedings before the County Court were conducted by a three-judge panel, which included one judge, M.K., who had also presided over the panel that had terminated the earlier proceedings. During the closing arguments of the parties, Mr Marguš was removed from the courtroom, after having interrupted the Deputy State Attorney and having been warned twice. His lawyer remained in the courtroom.

In a judgment of 21 March 2007, the Osijek County Court convicted Mr Marguš of war crimes against the civilian population and sentenced him to 14 years' imprisonment. On appeal, the Supreme Court, on 19 September 2007, upheld the conviction and increased the sentence to 15 years' imprisonment. The Supreme Court found that while the offences of which he was convicted included the acts which had been the subject of the earlier proceedings against him, the factual background referred to in the second set of proceedings was significantly wider in scope. In the latter proceedings he had been charged with a violation of international law, in particular the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, in that he had killed and tortured Serbian civilians, had treated them in an inhuman manner, had unlawfully arrested them, had ordered the killing of a civilian and robbed the assets of the civilian population.

On 30 September 2009, Mr Marguš' constitutional complaint was dismissed.

Complaints, procedure and composition of the Court

Relying on Article 6 §§ 1 and 3 (c) (right to a fair trial by an independent and impartial tribunal), Mr Marguš complained that the same judge had participated in the proceedings terminated in 1997 and those in which he was later found guilty, and that he had been deprived of the right to give closing arguments. Relying on Article 4 of Protocol No. 7 (right not to be tried or punished twice), he complained that the criminal offences which had been the subject of the proceedings terminated in 1997 and those of which he had later been convicted were the same.

The application was lodged with the European Court of Human Rights on 31 December 2009. In its Chamber judgment of 13 November 2012, the Court unanimously held that there had been no violation of Article 6 §§ 1 and 3 (c) and no violation of Article 4 of Protocol No. 7. On 18 March 2013 the case was referred to the Grand Chamber at Mr Marguš' request. A Grand Chamber hearing

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took place in public in the Human Rights Building, Strasbourg, on 26 June 2013. Third-party comments were received from a group of academic experts associated with Middlesex University London, which had been granted leave by the President of the Grand Chamber to intervene in the written procedure.

Judgment was given by the Grand Chamber of 17 judges, composed as follows:

Dean Spielmann (Luxembourg), President,
 Josep **Casadevall** (Andorra),
 Guido **Raimondi** (Italy),
 Ineta **Ziemele** (Latvia),
 Mark Villiger (Liechtenstein),
 Isabelle **Berro-Lefèvre** (Monaco),
 Corneliu **Bîrsan** (Romania),
 Ján **Šikuta** (Slovakia),
 Ann **Power-Forde** (Ireland),
 Işıl **Karakaş** (Turkey),
 Nebojša **Vučinić** (Montenegro),
 Kristina **Pardalos** (San Marino),
 Angelika **Nußberger** (Germany),
 Helena **Jäderblom** (Sweden),
 Krzysztof **Wojtyczek** (Poland),
 Faris **Vehabović** (Bosnia and Herzegovina),
 Dmitry **Dedov** (Russia),

and also Lawrence **Early**, Deputy Grand Chamber Registrar.

Decision of the Court

Article 6 §§ 1 and 3

As regards the question of whether the trial court had been impartial for the purpose of Article 6 because judge M.K. had participated in both sets of criminal proceedings against Mr Marguš, the Court noted in particular that in the first set of proceedings the judge had not adopted a judgment and no evidence relevant for the question of determining his guilt had been examined. In those circumstances, there were no ascertainable facts to justify doubts as to the judge's impartiality.

There had accordingly been no violation of Article 6 § 1 in that respect. As regards Mr Marguš' removal from the courtroom, the Court fully endorsed the reasoning of the Chamber judgment in the case. It accepted that the closing arguments were an important stage of the trial. However, where the accused disturbed the order in the courtroom, the trial court could not be expected to remain passive and to allow such behaviour. Mr Marguš had been removed from the courtroom only after having twice been warned not to interrupt the closing arguments presented by the Deputy State Attorney. His defence lawyer had remained in the courtroom and had presented his closing arguments. Mr Marguš had therefore not been prevented from making use of the opportunity to have the final view of the case given by his defence and he had been legally represented throughout the proceedings. Against this background, and viewing the proceedings as a whole, the Court considered that his removal from the courtroom had not prejudiced his defence rights to a degree incompatible with Article 6 §§ 1 and 3 (c). There had accordingly been no violation of that provision in this regard.

Article 4 of Protocol No. 7

The Court acknowledged that in both sets of proceedings Mr Marguš had been prosecuted for the same offences, namely the killing of four persons and the alleged wounding of another person in November and December 1991.

The Court further noted that there were two distinct situations as regards the charges brought against Mr Marguš in the first set of proceedings which were also the subject of the second set of proceedings. First, in January 1996, the prosecutor had dropped the charges concerning the alleged killing of two persons in December 1991. Second, in June 1997, the trial court in the first set of proceedings had, on the basis of the General Amnesty Act, terminated the proceedings in respect of the alleged killing of two people and wounding another in November 1991.

In its case-law, the Court had already held that the discontinuance of criminal proceedings by a public prosecutor did not amount to either a conviction or an acquittal, and that therefore Article 4 of Protocol No. 7 did not find application in that situation. Accordingly, the discontinuance of the proceedings by the prosecutor concerning the killings in December 1991 did not fall under Article 4 of Protocol No. 7. It followed that Mr Marguš' complaint as regards his conviction of those offences was incompatible with the Convention and therefore inadmissible.

As regards his complaint concerning the remaining charges, the Court noted that Mr Marguš had been granted amnesty for acts which amounted to grave breaches of fundamental human rights, namely the intentional killing of civilians and inflicting grave bodily injury on a child. The allegations in the criminal proceedings against him had involved these civilians' right to life protected under Article 2 of the Convention and, arguably, their rights under Article 3 (prohibition of torture and inhuman or degrading treatment) of the Convention.

The Court underlined that Articles 2 and 3 ranked as the most fundamental provisions in the Convention. In its case-law the Court had held that where a State official was charged with crimes involving torture or ill-treatment, it was of key importance that criminal proceedings and sentencing were not time-barred and that the granting of an amnesty or pardon should not be permissible.

While Mr Marguš' case did not concern alleged violations of Articles 2 and 3 of the Convention, but of Article 4 of Protocol No. 7, the Court underlined that the Convention and its Protocols had to be read as a whole, and interpreted in such a way as to promote internal consistency and harmony between their various provisions.

Furthermore, the Court observed that there was a growing tendency in international law to see the granting of amnesties in respect of grave breaches of human rights as unacceptable. It was true that so far no international treaty explicitly prohibited the granting of such amnesties. However, the possibility for a State to grant an amnesty in respect of grave breaches of human rights might be circumscribed by treaties to which the State is a party. The Court noted, in particular, that the Inter-American Court of Human Rights had found that granting amnesties in respect of perpetrators of war crimes and crimes against humanity was incompatible with States' obligations under international law to investigate and prosecute war crimes. Several international conventions, in particular the Geneva Conventions of 1949 for the Protection of Victims of Armed Conflicts and their Additional Protocols, provided for a duty to prosecute such crimes.

Moreover, various international bodies, in particular the United Nations Commission on Human Rights and the Inter-American Commission on Human Rights, had issued resolutions, recommendations and comments concerning impunity and the granting of amnesty in respect of grave breaches of human rights, generally agreeing that amnesties should not be granted to those who had committed such violations of human rights and international humanitarian law.

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The Court therefore considered that by bringing a fresh indictment against Mr Margaš and convicting him of war crimes against the civilian population, the Croatian authorities had acted in compliance with the requirements of Articles 2 and 3 of the Convention and in a manner consistent with the requirements and recommendations of those international mechanisms and instruments.

Against that background, the Court concluded that Article 4 of Protocol No. 7 to the Convention was not applicable in the circumstances of the case.

Separate opinions

Judges Spielmann, Power-Forde and Nußberger expressed a joint concurring opinion; Judges Ziemele, Berro-Lefèvre and Karakaş expressed a joint concurring opinion; Judges Šikuta, Wojtyczek and Vehabović expressed a joint concurring opinion; Judge Vučinić expressed a concurring opinion; Judge Dedov expressed a partly dissenting opinion. These separate opinions are annexed to the judgment.

66. *Eur.Court HR, Jelić v. Croatia, First Section Judgment of 12 June 2014, Application No. 57856/11, (Article 2, Right to Life – Violation)*. The applicant, the wife of a Serbian man who had been arrested during the war in the Sisak area in Croatia in November 1991 and had been subsequently killed by the police in 1991, successfully complained that there had been no adequate investigation into his death.

ECHR 169 (2014)
12.06.2014

Press release issued by the Registrar

The case of **Jelić v. Croatia** (application no. 57856/11) concerned the complaint by a Croatian woman that her husband, who was of Serbian origin, had been arrested during the war in Croatia in November 1991 in the Sisak area and subsequently killed by the Croatian police, and that there had been no adequate investigation into his death.

In today's Chamber judgment in the case, which is not final, the European Court of Human Rights held, unanimously, that there had been:

a **violation of Article 2 (right to life)** of the European Convention on Human Rights as regards the authorities' procedural obligation to effectively investigate the death of Ms Jelić's husband.

The Court held in particular that the authorities had failed to follow up credible leads about the identities of those responsible for the killing. It acknowledged the difficulties in investigating the case: in particular, there were allegations of a large number of targeted disappearances and killings of civilians of Serbian origin in the Sisak area, and two men later identified as the main suspects had held senior positions in the regional police until 1999. However, the Court found that those circumstances could not relieve the authorities of their obligation to effectively prosecute the crime.

Principal facts

The applicant, Ana Jelić, is a Croatian national who was born in 1934 and lives in Sisak. According to her submissions, five armed men in camouflage uniforms and balaclavas came to the family home in Sisak in the evening of 15 November 1991 and took away her husband, Vaso Jelić, who was of Serbian origin. His body was found nearly three months later on the banks of the river Kupa in Sisak. An autopsy showed that he had been shot dead and a criminal complaint was lodged against a person or persons unknown on murder charges.

None of the ensuing investigative measures taken produced any tangible results until September 1999, when the police interviewed a man who had collected information about the arrests and killings of 83 civilians of Serbian origin and the disappearances of a further 500 civilians of Serbian origin in the Sisak area. He indicated that the head of the Sisak county police had been involved in those arrests and killings.

In December 2002 an investigating judge heard evidence from another witness, who said that at the time he had been a member of the reserve police and who named several persons allegedly involved in the killing of Serbs, including Mr Jelić, in the Sisak area in 1991. In March and May 2003 the police and the prosecuting authorities heard evidence from two anonymous witnesses, one of whom had been assigned, as a member of the Croatian Army, to the reserve units of the Sisak county police in 1991. Those witnesses described in detail how the arrests and killings of the Serbian civilians had

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been conducted and gave the names of several persons who had allegedly been directly involved, including the name of the person who allegedly shot and killed Mr Jelić.

In June 2011 criminal proceedings were brought against the former head of the Sisak police department, against the former deputy head of the Sisak police – both of whom had been in office until 1999 – and against a member of the Croatian army. The first of the three men died while the proceedings were pending. Ultimately the former deputy head of the Sisak police was convicted by a first-instance court in December 2013 of war crimes against the civilian population, for having allowed the killings and for failing to undertake adequate measures to prevent them, and sentenced to eight years' imprisonment. The third of the three men was acquitted.

In the meantime, Ms Jelić had brought civil proceedings seeking compensation for the death of her husband, which were dismissed. Her subsequent constitutional complaint was also rejected.

Complaints, procedure and composition of the Court

Relying in particular on Article 2 (right to life) Ms Jelić complained that the Croatian police had arrested and killed her husband and that the ensuing official investigation into his death had been inadequate. Further relying on Article 14 (prohibition of discrimination) in conjunction with Article 2, she alleged that her husband had been arrested and killed purely because of his Serbian ethnic origin, arguing that 130 civilians of Serbian origin had been killed in the Sisak area in 1991 and 1992 without a proper investigation being carried out. She also relied on Article 13 (right to an effective remedy), complaining that she did not have an effective remedy in respect of her complaints.

The application was lodged with the European Court of Human Rights on 30 August 2011.

Judgment was given by a Chamber of seven judges, composed as follows:

Isabelle **Berro-Lefèvre** (Monaco), President,
 Elisabeth **Steiner** (Austria),
 Khanlar **Hajiyev** (Azerbaijan),
 Mirjana Lazarova **Trajkovska** ("The former Yugoslav Republic of Macedonia"),
 Julia **Laffranque** (Estonia),
 Ksenija **Turković** (Croatia),
 Dmitry **Dedov** (Russia),

and also Søren **Nielsen**, Section Registrar.

Decision of the Court

Article 2

Noting that Ms Jelić's husband had been killed between November 1991 and February 1992, thus before the entry into force of the Convention in respect of Croatia on 5 November 1997, the Court found that the complaint about the killing – the *substantive complaint* under Article 2 – did not fall within its temporal jurisdiction. That part of the complaint was therefore inadmissible. However, the Court declared the complaint about the investigation admissible, considering that a significant part of it, as well as the criminal proceedings, had taken place after the entry into force of the Convention in respect of Croatia.

The Court accepted that the case was complex and that there were indications that the killing of Mr Jelić had taken place in the context of targeted killings of Serbian civilians by members of the Croatian police and army in the Sisak area in 1991 and 1992. It also observed that the authorities had

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faced a difficult situation during the war and post-war recovery, given in particular the high number of war crime cases overall to be prosecuted and the fact that as authorities of a newly- independent State they needed some time to organise themselves. Furthermore, the Court acknowledged that certain global measures had been taken, namely by the State Attorney's office, which had instructed the county State attorney offices, in 2005 and 2008 respectively, to concentrate their efforts on identifying the perpetrators of such crimes and to favour impartial investigation of all war crimes irrespective of the ethnicity of those involved. Moreover, investigations in respect of altogether 3,436 perpetrators of war crimes had been opened in Croatia by the end of 2012, which had led to 557 convictions.

The Court also accepted that the situation had been further complicated – as was argued by the Croatian Government – by the fact that the suspects of the crime committed against Mr Jelić were the same persons who, as high officials of the Sisak police until 1999, had been entrusted with the duty to protect citizens from such crimes and conduct preliminary enquiries. However, while this situation had certainly had an impact on the initial investigations, it could not justify subsequent shortcomings of the investigation after 1999.

Having regard to key witness statements, the authorities had been aware, at the latest since 2003, of some information which could have led to the identification of direct perpetrators and of those who had ordered the killing of Mr Jelić. They had thus been under an obligation to take further investigative measures. However, even though three witnesses had named the person who had allegedly shot Mr Jelić to death, no further steps, beyond a ballistic test, had been taken to verify this information. Overall, the investigation had been plagued by inexplicable delays and by long periods of inactivity without justification, which had to have had a negative effect on the prospects of establishing the truth.

Eventually one person – the former deputy head of the Sisak Police – had been convicted by a first-instance court of war crimes against the civilian population. However, in the context of war crimes the command responsibility of high officials was to be distinguished from the responsibility of their subordinates. The punishment of superiors for the failure to take necessary and reasonable measures to prevent or punish war crimes committed by their subordinates could not exonerate the latter from their own criminal responsibility.

In sum, the difficulties referred to by the Croatian Government could not by themselves justify the manner in which the investigation was conducted, in particular the fact that key leads given to the prosecuting authorities concerning the identification of direct perpetrators had not been thoroughly followed.

Accordingly, there had been a violation of Article 2 as regards the authorities' procedural obligation to effectively investigate the death of Mr Jelić.

Other articles

In view of these findings, the Court considered it unnecessary to examine separately Ms Jelić's complaints under Article 14 in conjunction with Article 2 or under Article 13.

Just satisfaction (Article 41)

The Court held that Croatia was to pay Ms Jelić 20,000 euros (EUR) in respect of non-pecuniary damage and EUR 1,000 in respect of costs and expenses.

67. Eur.Court HR, Georgia v. Russia (I), Grand Chamber Judgment of 3 July 2014, Application No. 13255/07, (Article 4 of Protocol No. 4, Prohibition of Collective Expulsion of Aliens – Violation; Article 5-1, Right to Liberty and Security – Violation; Article 5-4, Right to Judicial Review of Detention – Violation; Article 3, Prohibition of Torture – Violation; Article 13, Right to an Effective Remedy – Violation; Article 38, Obligation to Furnish All Necessary Facilities for the Effective Conduct of Investigation – Violation; Article 8, Right to Respect for Private and Family Life – No Violation; Article 1 of Protocol No. 7, Procedural Safeguards relating to Expulsion of Aliens – No Violation; Article 1 of Protocol No. 1, Protection of Property – No Violation; Article 2 of Protocol No. 1, Right to Education – No Violation). The applicant successfully claimed that Russia’s coordinated policy of detaining and expelling a large number of Georgian nationals amounted to an administrative practice contrary to the Convention, taken as reprisals following the arrest of four Russian officers in Tbilisi in September 2006.

**ECHR 196 (2014)
03.07.2014**

Press release issued by the Registrar

The case of Georgia v. Russia (I) (application no. 13255/07) essentially concerned the alleged existence of an administrative practice involving the arrest, detention and collective expulsion of Georgian nationals from the Russian Federation in the autumn of 2006.

In today’s Grand Chamber judgment in the case, which is final, the European Court of Human Rights held, by a majority, that there had been:

a violation of Article 4 of Protocol No. 4 (prohibition of collective expulsion of aliens) of the European Convention on Human Rights;

a violation of Article 5 § 1 (right to liberty and security);

a violation of Article 5 § 4 (right to judicial review of detention);

a violation of Article 3 (prohibition of inhuman or degrading treatment);

violations of Article 13 (right to an effective remedy) in conjunction with Article 5 § 1 and with Article 3; and

a violation of Article 38 (obligation to furnish all necessary facilities for the effective conduct of an investigation).

The Court found **no violation of Article 8 (right to respect for private and family life), no violation of Article 1 of Protocol No. 7 (procedural safeguards relating to expulsion of aliens) and no violation of Articles 1 and 2 of Protocol No. 1 (protection of property and right to education).**

Having regard to the parties submissions, the statements by 21 witnesses it had examined during a hearing in Strasbourg, and the reports from various international organisations, the Court found that in the autumn of 2006, a coordinated policy of arresting, detaining and expelling Georgian nationals had

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been followed by the Russian authorities, which had amounted to an administrative practice incompatible with the Convention.

Principal facts

The case concerned the arrest, detention and expulsion from Russia of large numbers of Georgian nationals from the end of September 2006 until the end of January 2007.

According to the Georgian Government, those measures were reprisals following the arrest of four Russian officers in Tbilisi on 27 September 2006, which marked a climax in the tensions between the two countries.

According to the Georgian Government's submissions, during that period more than 4,600 expulsion orders were issued by the Russian authorities against Georgian nationals, of whom more than 2,300 were detained and forcibly expelled, whereas the remaining persons concerned left the country by their own means. The Georgian Government maintained that the figures represented a sharp increase in the number of expulsions of Georgian nationals, which had risen from about 80 to 100 persons per month between July and September 2006 to about 700 to 800 per month between October 2006 and January 2007.

In support of their allegation that the increase in expulsions was the consequence of a policy specifically targeting Georgian nationals, the Georgian Government submitted a number of documents, issued in early and mid-October 2006 by internal affairs and police authorities in St Petersburg and by the Russian Federal Migration Service. These documents, which referred to two circulars issued by the Internal Affairs Directorate of St Petersburg and by the Russian Ministry of the Interior in late September 2006, ordered staff of those authorities in particular to take large-scale measures to identify as many Georgian citizens as possible who were unlawfully residing in Russia, with a view to placing them in a detention centre and deporting them. The Georgian Government also submitted two letters from the Directorate of Internal Affairs of two Moscow districts sent to schools in early October 2006, asking them to identify Georgian pupils with the aim, among other things, of "ensuring public order and respect for the law, preventing terrorist acts and tensions between children living in Moscow and children of Georgian nationality".

The Russian Government contested the Georgian Government's allegations. They submitted that they had not adopted any reprisal measures against Georgian nationals, but had merely continued to apply the provisions for the prevention of illegal immigration. As regards the number of expulsions, they submitted that they had only kept annual or half-yearly statistics, stating that in 2006 about 4,000 administrative expulsion orders had been issued against Georgian nationals and about 2,800 between 1 October 2006 and 1 April 2007. As to the documents referred to by the Georgian Government, the Russian Government maintained that the instructions had been falsified. While confirming the existence of the two circulars issued by the St Petersburg Internal Affairs Directorate and by the Ministry of the Interior, the Russian Government disputed their content.

However the Russian Government stated that the circulars could not be provided to the European Court of Human Rights, as they were classified "State secret". The Russian Government did not dispute that regional authorities had sent letters to schools in Moscow and elsewhere with the aim of identifying Georgian pupils, but denied that this had happened on the instructions of the Ministry of the Interior; instead the letters had been the act of over-zealous officials who had subsequently been reprimanded.

Various international governmental and non-governmental organisations (NGOs) – in particular the Monitoring Committee of the Parliamentary Assembly of the Council of Europe (PACE), Human Rights Watch, and the International Federation for Human Rights (FIDH) – reported, in 2007, on

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expulsions of Georgian nationals by Russia which had taken place in autumn of 2006. In their reports, they pointed to coordinated action between administrative and judicial authorities, referring to some of the same documents issued by the St Petersburg Internal Affairs Directorate quoted by the Georgian Government.

In the proceedings before the European Court of Human Rights, a witness hearing was held in Strasbourg from 31 January to 4 February 2011, during which 21 witnesses – nine proposed by Georgia, ten proposed by Russia and two chosen by the Court – were heard.

According to statements by Georgian witnesses, Georgian nationals had been arrested, following identity checks in the streets, on markets, at their workplaces and their homes. Several witnesses said that when they had asked why they were being arrested, they had been told that it was because they were Georgian and that there was an order from above to expel Georgian nationals. After a few hours or one or two days in police custody, they had been taken in groups by bus to courts which had summarily imposed administrative penalties on them and given decisions ordering their administrative expulsion from Russian territory. The procedure before the courts had taken about five minutes without a real examination of the facts and without the defendants being represented by a lawyer. Both judges and police officers had discouraged them from appealing against the decisions, informing them that there was an order to expel Georgian nationals. They had then spent between two days and two weeks in detention centres for foreigners, in overcrowded cells – making it necessary to take turns sleeping and in which a bucket had served as a toilet – before being taken to various Moscow airports, from where they had been flown to Georgia.

The Russian witnesses, officials of the Federal Migration Service and the Moscow Prosecutor's Office, stated in particular that the Georgian nationals had had the possibility to appeal against the court decisions and that there had been no instruction restricting the rights of Georgian nationals.

The Russian witnesses also denied that the conditions in the detention centres for foreigners had been inappropriate.

In their reports, the PACE Monitoring Committee and the international NGOs described the arrest, court procedures, detention conditions and expulsion of Georgian nationals in similar terms as the Georgian witnesses and reported on four Georgian nationals who had died in detention.

Complaints, procedure and composition of the Court

The Georgian Government alleged breaches of Article 3 (prohibition of torture, inhuman or degrading treatment), Article 5 (right to liberty and security), Article 8 (right to respect for private and family life), Article 13 (right to an effective remedy), Article 14 (prohibition of discrimination) and Article 18 (limitation on use of restrictions on rights) of the Convention, and of Articles 1 and 2 of Protocol No. 1 (protection of property and right to education) to the Convention, Article 4 of Protocol No. 4 (prohibition of collective expulsion of aliens) as well as of Article 1 of Protocol No. 7 (procedural safeguards relating to expulsion of aliens).

The application was lodged with the European Court of Human Rights on 26 March 2007 under Article 33 (Inter-State cases) of the Convention. Following a hearing on 16 April 2009, the application was declared admissible by a Chamber on 30 June 2009 and relinquished² to the Grand Chamber on 15 December 2009. From 31 January to 4 February 2011, a witness hearing was held in Strasbourg. A Grand Chamber hearing took place in public in the Human Rights Building, Strasbourg, on 13 June 2012.

Judgment was given by the Grand Chamber of 17 judges, composed as follows:

The full texts of the Court's judgments are accessible on its website (<http://www.hudoc.echr.coe.int>)

Josep **Casadevall** (Andorra), President,
 Nicolas **Bratza** (United Kingdom),
 Mark **Villiger** (Liechtenstein),
 Isabelle **Berro-Lefèvre** (Monaco),
 Corneliu **Bîrsan** (Romania),
 Peer **Lorenzen** (Denmark),
 Elisabeth **Steiner** (Austria),
 Khanlar **Hajiyev** (Azerbaijan),
 Päivi **Hirvelä** (Finland),
 Luis **López Guerra** (Spain),
 Mirjana Lazarova **Trajkovska** (“The former Yugoslav Republic of Macedonia”),
 Nona **Tsotsoria** (Georgia),
 Ann **Power-Forde** (Ireland),
 Zdravka **Kalaydjieva** (Bulgaria),
 Vincent A. **de Gaetano** (Malta),
 André **Potocki** (France),
 Dmitry **Dedov** (Russia), Judges,

and also Michael **O’Boyle**, Deputy Registrar.

Decision of the Court

Establishment of the facts

In order to establish the facts, the Court based itself on the parties’ observations, the many documents they had submitted and on the statements of the witnesses heard in Strasbourg. It also had regard to the reports by international governmental and non-governmental organisations.

Examination of Russia’s compliance with Article 38

Having regard to the Russian Government’s persistent refusal to provide the Court with copies of the two circulars issued by the Internal Affairs Directorate of St Petersburg and by the Russian Ministry of the Interior at the end of September 2006 – stating that they were “State secret” – the Court considered it appropriate to address the question of whether Russia had complied with its obligation under Article 38. Under that Article, States are obliged to furnish all necessary facilities for the effective conduct of an investigation which the Court shall undertake if need be.

Given that the Russian Government had exclusive access to these documents, capable of corroborating or refuting the allegations in question, their lack of cooperation enabled the Court to draw inferences as to the well-foundedness of those allegations. The Court had already found in other cases relating to documents classified “State secret” that the Government could not rely on provisions of national law to justify their refusal to comply with the Court’s request to provide evidence. Furthermore, the Russian Government had failed to give a specific explanation for the secrecy of the circulars. The Court thus found that Russia had fallen short of its obligation to furnish all necessary facilities to the Court in its task of establishing the facts of the case. There had accordingly been a violation of Article 38.

Administrative practice and exhaustion of legal remedies at national level

In order to determine whether or not there had been an administrative practice, within the meaning of its case-law – namely, a repetition of acts incompatible with the Convention and official tolerance by the State –, the Court assessed all the evidence available to it.

The full texts of the Court’s judgments are accessible on its website (<http://www.hudoc.echr.coe.int>)

As regards the number of expulsions of Georgian nationals during the period in question, the Court noted that the Russian Government had maintained, in response to the detailed figures indicated by the Georgian Government, that they had only annual or half-yearly statistics. However, they had submitted statistics for a period ranging from 1 October 2006 to 1 April 2007, which did not correspond to half a calendar year; this fact thus suggested that monthly statistics had in fact been collected. Having regard to the failure to communicate monthly statistics for the years 2006 and 2007, the Court could not accept that the number indicated by the Russian Government corresponded to the exact number of Georgian nationals expelled during the period in question.

There was therefore nothing to establish that the figures indicated by the Georgian Government were not credible.

Furthermore, in the light of all the material before it, the Court observed that the events in question – the issuing of the circulars and instructions, the mass arrests and expulsions of Georgian nationals, the flights with groups of Georgian nationals from Moscow to Tbilisi and the letters sent to schools by Russian officials with the aim of identifying Georgian pupils – had all occurred at the same time, namely, at the end of September or the beginning of October 2006. The concordance in the description of those events in the reports by the international governmental and non-governmental organisations was also significant in this regard.

The Court did not see any reason to question the reliability of these reports, given the thoroughness of the investigations on which they were based and the fact that their conclusions confirmed the statements of the Georgian witnesses. Moreover, the Court considered that following its finding of a violation of Article 38, there was a strong presumption that the Georgian Government's allegations regarding the content of the circulars ordering the expulsion specifically of Georgian nationals were credible. The same applied to the authenticity of the other documents submitted by the Georgian Government and the instructions given in them by the Russian authorities.

Concerning the availability of legal remedies at national level, the Court noted that the statements of the Georgian witnesses matched each other regarding the conditions of their arrest and the very summary procedures before the courts in Russia and were concordant with the reports of the international organisations. Having regard to all the material before it, the Court considered that during the period in question there had been real obstacles for the Georgian nationals in appealing to the Russian courts, both before and after their expulsion to Georgia. The Court therefore dismissed the Russian Government's objection that the legal remedies at national level had not been exhausted.

The Court accordingly concluded that, from October 2006, a coordinated policy of arresting, detaining and expelling Georgian nationals, amounting to an administrative practice, had been implemented in Russia.

Article 4 of Protocol No. 4

The Court pointed out that Article 4 of Protocol No. 4, prohibiting the collective expulsion of aliens, was applicable, irrespective of the question of whether the Georgian nationals in this case had been lawfully resident or not, given that that Article did not only refer to those lawfully residing within the territory of a State.

As regards the question of whether the expulsion measures had been taken following, and on the basis of, a reasonable and objective examination of the particular situation of each of the Georgian nationals, the Court took note of the concordant description given by the Georgian witnesses and international governmental and non-governmental organisations of the summary procedures conducted before the Russian courts. It observed in particular that, according to the PACE Monitoring Committee, the expulsions had followed a recurrent pattern all over the country and that in their

reports the international organisations had referred to coordination between the administrative and judicial authorities.

During the period in question the Russian courts had made thousands of expulsion orders expelling Georgian nationals. Even though, formally speaking, a court decision had been made in respect of each Georgian national, the Court considered that the conduct of the expulsion procedures during that period, after the circulars and instructions had been issued, and in view of the high number of Georgian nationals expelled – from October 2006 – had made it impossible to carry out a reasonable and objective examination of the particular case of each individual.

While every State had the right to establish their own immigration policy, it had to be underlined that problems with managing migration flows could not justify practices incompatible with the State's obligations under the Convention.

The Court concluded that the expulsions of Georgian nationals during the period in question amounted to an administrative practice in breach of Article 4 of Protocol No. 4.

Article 5 §§ 1 and 4

Having regard to its finding that there had been a coordinated policy of arresting, detaining and expelling Georgian nationals, and referring in particular to the concordant descriptions by the Georgian witnesses and international organisations of mass arrests preceding the expulsions, the Court considered that those arrests had been arbitrary. The arrests and detention of Georgian nationals in Russia during the period in questions had therefore amounted to an administrative practice in breach of Article 5 § 1.

Given its finding that no effective and accessible remedies had been available to the Georgian nationals against their arrest, detention and expulsion orders during the period in question, the Court considered that there had also been a breach of Article 5 § 4.

Article 3

As regards the detention conditions in which the Georgian nationals had been kept before their expulsion from Russia, the Court noted that, while some Georgian witnesses had made contradictory statements in particular regarding the size of the cells, the witnesses' description of the police detention and the detention centres for foreigners were generally consistent and corresponded to those made by the international organisations. All those reports had referred, in particular, to overcrowded cells, lack of food and water and lack of hygiene. Given the large number of Georgian nationals detained with a view to their detention during a short period of time, the Court found those reports more credible than those of the Russian officials who, in their witness statements, had described very good conditions of detention. Furthermore the Court reiterated that the inadequacy of the conditions of detention constituted a recurring problem in Russia which resulted from a dysfunctioning of the Russian prison system, as it had already noted in a large number of its judgments; the Court therefore did not see any reason to depart from that conclusion in the present case.

Having regard to all these factors, the Court concluded that the detention conditions had amounted to an administrative practice in breach of Article 3.

Other Articles

Furthermore, the Court found violations of Article 13 in conjunction with Article 5 § 1 and with Article 3, holding that the Georgian nationals concerned had had no effective and accessible remedies

The full texts of the Court's judgments are accessible on its website (<http://www.hudoc.echr.coe.int>)

at their disposal in respect of either their arrests, detentions and expulsion orders, or of their detention conditions.

The Court found no violation of Article 1 of Protocol No. 7 (procedural safeguards relating to expulsion of aliens), which expressly refers to “aliens lawfully resident in the territory of a State”.

The Court considered that it had not been established that during the period in question there had also been arrests and expulsions of Georgian nationals lawfully resident in the territory of the Russia.

It therefore considered that the complaint raised by the Georgian Government was not sufficiently substantiated and that the evidence was therefore insufficient to conclude that there had been a violation.

The Court also found no violation of Article 8 (right to respect for private and family life) and Articles 1 and 2 of Protocol No. 1 (protection of property and right to education). It considered that the complaints raised by the Georgian Government under these Articles were not sufficiently substantiated and that the evidence was therefore insufficient to conclude that there had been a violation.

Finally, the Court did not consider it necessary to examine separately the complaints raised: under Article 13 of the Convention taken in conjunction with Article 4 of Protocol No. 4 and Article 5 § 4; under Article 14 of the Convention taken in conjunction with Article 4 of Protocol No. 4, Article 5 §§ 1 and 4 and Article 3; and, under Article 18 of the Convention taken in conjunction with Article 4 of Protocol No. 4, Article 5 §§ 1 and 4 and Article 3 of the Convention.

Just satisfaction (Article 41)

The Court held that the question of the application of Article 41 of the Convention was not ready for decision and reserved it. It invited the parties to submit, within twelve months from the judgment, their observations on the matter and to notify the Court of any agreement that they may reach.

Separate opinions

Judge López Guerra, joined by Judges Bratza and Kalaydjieva, expressed a partly dissenting opinion; Judge Tsotsoria also expressed a partly dissenting opinion; Judge Dedov expressed a dissenting opinion. These opinions are annexed to the judgment.

68. Eur.Court HR, Ališić and Others v. Bosnia and Herzegovina, Croatia, Serbia, Slovenia and The former Yugoslav Republic of Macedonia, Grand Chamber Judgment of 16 July 2014, Application No. 60642/08, (With regard to Mr Šahdanović: Article 1 of Protocol No. 1, Protection of Property – Violation; Article 13, Right to an Effective Remedy – Violation by Serbia; With regard to Ms Ališić and Mr Sadžak: Article 1 of Protocol No. 1, Protection of Property – Violation; Article 13, Right to an Effective Remedy – Violation by Slovenia; With regard to the other respondent States: Article 1 of Protocol No. 1, Protection of Property – No Violation; Article 13, Right to an Effective Remedy – No Violation; Article 14, Prohibition of Discrimination, taken together with Article 13 and Article 1 of Protocol No. 1 – No Violation). The applicants, nationals of Bosnia and Herzegovina and having deposited money at national banks in the former Yugoslavia, were unable to retrieve that money after the dissolution of Yugoslavia and partially successfully claimed that the new States were responsible for the deposits made at national banks prior to dissolution.

ECHR 218 (2014)
16.07.2014

Press release issued by the Registrar

The case of **Ališić and Others v. Bosnia and Herzegovina, Croatia, Serbia, Slovenia and “The former Yugoslav Republic of Macedonia”** (application no. 60642/08) concerned the applicants’ inability to recover “old” foreign-currency savings – deposited with two banks in what is now Bosnia and Herzegovina – following the dissolution of the former Socialist Federal Republic of Yugoslavia (SFRY).

In today’s Grand Chamber judgment in the case, which is final, the European Court of Human Rights held:

With regard to Mr Šahdanović: unanimously, that there had been **a violation of Article 1 of Protocol No. 1 (protection of property)** to the European Convention on Human Rights and a violation of Article 13 (right to an effective remedy) of the Convention **by Serbia;**

With regard to Ms Ališić and Mr Sadžak: unanimously, that there had **been a violation of Article 1 of Protocol No. 1 and a violation of Article 13 by Slovenia;**

With regard to the other respondent States:

by a majority, that there had been **no violation of Article 1 of Protocol No.1 and no violation of Article 13,** and,

unanimously, that there had been **no violation of Article 14 taken together with Article 13 and Article 1 of Protocol No. 1.**

The Court confirmed that Slovenia and Serbia had been responsible for the debts owed to the applicants by the two banks, Ljubljanska banka Sarajevo and the Tuzla branch of the Investbanka, and held that there had been no good reason for the applicants to have been kept waiting for so many years for repayment of their savings. It pointed out that this was a special case, as it was not a standard case of rehabilitation of an insolvent private bank, the banks in question having always been either State- or socially-owned.

The full texts of the Court’s judgments are accessible on its website (<http://www.hudoc.echr.coe.int>)

The Court further held by a majority, that Serbia and Slovenia had to make all necessary arrangements, including legislative amendments, within one year and under the supervision of the Committee of Ministers, in order to allow Mr Šahdanović, Ms Ališić and Mr Sadžak, nationals of Bosnia and Herzegovina, as well as all others in their position, to recover their “old” foreign-currency savings under the same conditions as Serbian and Slovenian citizens who had such savings in domestic branches of Serbian and Slovenian banks. The Court unanimously decided to adjourn, for one year, examination of all similar cases against Serbia and Slovenia.

Principal facts

The applicants, Emina Ališić, Aziz Sadžak, and Sakib Šahdanović, are nationals of Bosnia and Herzegovina who were born in 1976, 1949 and 1952, respectively, and live in Germany. Emina Ališić is also a German national.

They complain that they were unable to withdraw their foreign-currency savings deposited before the dissolution of the Socialist Federal Republic of Yugoslavia with the Ljubljanska banka Sarajevo and the Tuzla branch of the Investbanka.

Until 1989/90, the former Socialist Federal Republic of Yugoslavia (SFRY) made it attractive for its citizens to deposit foreign currency with its banks. They earned high interest and a State guarantee was to be activated at the request of the bank in case of bankruptcy or “manifest insolvency”. The depositors were also entitled to collect their savings from the banks at any time, with accrued interest.

With the 1989/90 reforms, Ljubljanska Banka Sarajevo became a branch of Ljubljanska Banka Ljubljana (a Slovenian-based bank) and the latter took over the former’s rights, assets and liabilities. Investbanka became an independent bank with its headquarters in Serbia and a number of branches in Bosnia and Herzegovina, including the Tuzla branch.

After the disintegration of the SFRY in 1991/92, foreign currency deposited beforehand was customarily referred to as “old” or “frozen” foreign-currency savings in the successor States. After the savings remained frozen for various periods of time after the disintegration of the SFRY, the successor States agreed to repay some of them. However, the applicants’ savings have remained frozen.

In the framework of the negotiations for the Agreement on Succession Issues, four rounds of negotiations regarding the distribution of the SFRY’s guarantees of “old” foreign-currency savings were held in 2001 and 2002. As the successor States could not reach an agreement, in September 2002 the Bank for International Settlements (“the BIS”) informed them that it would not be further involved in the matter.

Complaints, procedure and composition of the Court

Relying on Article 1 of Protocol No. 1 (protection of property), the applicants alleged that they had not been able to withdraw their “old” foreign-currency savings deposited with two banks (the Sarajevo branch of Ljubljanska Banka Ljubljana and the Tuzla branch of Investbanka) since the dissolution of the former Socialist Federal Republic of Yugoslavia (SFRY). Relying on Article 13 (right to an effective remedy) and Article 14 (prohibition of discrimination), they complained that they had not had at their disposal an effective remedy for their complaints.

The application was lodged with the European Court of Human Rights on 30 July 2005. On 17 October 2011, the Court declared the application admissible. In its Chamber judgment of 6 November 2012, the Court unanimously held that there had been a violation of Article 1 of Protocol No. 1 and a violation of Article 13 by Serbia with regard to Mr Šahdanović. It also held, by a majority, that there

The full texts of the Court’s judgments are accessible on its website (<http://www.hudoc.echr.coe.int>)

had been a violation of Article 1 of Protocol No. 1 and a violation of Article 13 by Slovenia with regard to Ms Ališić and Mr Sadžak. On 18 March 2013, the case was referred to the Grand Chamber at the Serbian and Slovenian governments' request². A Grand Chamber hearing took place in public in the Human Rights Building, Strasbourg, on 10 July 2013.

Judgment was given by the Grand Chamber of 17 judges, composed as follows:

Dean **Spielmann** (Luxembourg), President,
 Josep **Casadevall** (Andorra),
 Guido **Raimondi** (Italy),
 Ineta **Ziemele** (Latvia),
 Mark **Villiger** (Liechtenstein),
 Isabelle **Berro-Lefèvre** (Monaco),
 David Thór **Björgvinsson** (Iceland),
 Danutė **Jočienė** (Lithuania),
 Dragoljub **Popović** (Serbia),
 Päivi **Hirvelä** (Finland),
 Mirjana **Lazarova Trajkovska** ("The former Yugoslav Republic of Macedonia"),
 Ganna **Yudkivska** (Ukraine),
 Angelika **Nußberger** (Germany),
 Linos-Alexandre **Sicilianos** (Greece),
 André **Potocki** (France),
 Faris **Vehabović** (Bosnia and Herzegovina),
 Ksenija **Turković** (Croatia),

and also Michael **O'Boyle**, Deputy Registrar.

Decision of the Court

Preliminary objections on admissibility

The Grand Chamber agreed with the Chamber's decision to dismiss the preliminary objections raised by the Governments concerning the compatibility of the case *ratione personae*³. As to the objection that the applicants' claim did not relate to any "possessions" within the meaning of Article 1 of Protocol No. 1, the Grand Chamber noted in particular that it had been demonstrated beyond reasonable doubt that the applicants had had "old" foreign-currency savings and that these deposits had constituted "possessions".

Article 1 of Protocol No.1

It was not disputed that the applicants' inability to withdraw their savings, at least since the dissolution of the SFRY, had a legal basis in domestic law. The Court accepted that the aim pursued by the Governments in this regard had been legitimate, as they had to take measures to protect their respective banking systems following the dissolution of the SFRY.

The Court then examined whether the authorities had struck a fair balance between the general interest of the community and the protection of the applicants' property rights.

The Grand Chamber first agreed with the Chamber's finding that Ljubljanska Banka Ljubljana and Investbanka had remained liable for the "old" foreign-currency savings in all their branches until the dissolution of the SFRY and that they had remained liable for these deposits in their Bosnian-Herzegovinian branches since the dissolution of the SFRY. The Grand Chamber therefore confirmed that there had been sufficient grounds to deem Slovenia and Serbia respectively responsible for

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Ljubljanska Banka Ljubljana's debt to Ms Ališić and Mr Sadžak and for Investbanka's debt to Mr Šahdanović. Indeed, the Governments had disposed of these banks' assets as they had seen fit.

These conclusions were limited to the circumstances of the Ališić and Others case. They did not imply that no State would ever be able to rehabilitate a failed bank without incurring direct responsibility under Article 1 of Protocol No. 1 for the bank's debt. Nor did that provision require that foreign branches of domestic banks always be included in domestic deposit-guarantee schemes.

The Court indeed considered the present case to be special as the branches in question were not foreign branches when the applicants had deposited their money, and because it was different from a standard case of rehabilitation of an insolvent private bank (the banks in question had always been either State- or socially-owned).

The Grand Chamber finally examined whether there had been any good reason for the failure of the Governments to repay the applicants for so many years. The States' response on this point was that the international law on State succession required only negotiation in good faith, without any timelimits.

However, the succession negotiations had not prevented the States from adopting measures at national level to protect the interests of savers, and that solutions had indeed been found in Slovenia and Serbia as regards some categories of "old" foreign-currency savers in the branches in question. Whereas some delays might be justified in exceptional circumstances, the applicants had been kept waiting too long and, notwithstanding Governments' room for manoeuvre in social and economic policy making, Slovenia and Serbia had not struck a fair balance between the general interest of the community and the property rights of the applicants, who had borne a disproportionate burden. There had therefore been a violation of Article 1 of Protocol No. 1 by Slovenia in respect of Ms Ališić and Mr Sadžak and a violation of that provision by Serbia in respect of Mr Šahdanović. The Court further concluded that there had been no breach of Article 1 of Protocol No. 1 by any of the other States.

Article 13

Concerning the remedies available to the applicants for their claims, the Grand Chamber noted that the Slovenian Government had failed to demonstrate that at least one of the numerous decisions ordering the old Ljubljanska Banka to pay "old" foreign-currency savings in its Sarajevo branch had been enforced. As regards a civil action against that bank in the Croatian courts, it offered the applicants no reasonable prospects of success, as the old Ljubljanska Banka no longer had any assets in Croatia. The Court underlined that the applicants were not asking for a remedy to challenge laws before national authorities but to obtain the repayment of their savings in one way or another. In the absence of remedies available to them to complain about the States' failure to ensure such repayment, there had been a breach of Article 13 by Slovenia in respect of Ms Ališić and Mr Sadžak and by Serbia in respect of Mr Šahdanović. The Court further concluded that there had been no breach of Article 13 by any of the other States.

Article 14

The Court held that there was no need to examine the complaint of the applicants under Article 14 as regards Serbia and Slovenia. It further held that there had been no violation of that Article as regards the other States.

Article 46

The Chamber had decided in its judgment of 6 November 2012 to apply the pilot-judgment procedure in the present case and had indicated general measures to Slovenia and Serbia (see Factsheet on Pilot

judgment procedure). The Grand Chamber agreed with the Chamber that it was appropriate to apply such a procedure, as there were more than 1,850 similar applications pending before it, introduced on behalf of more than 8,000 applicants. In view of the systemic situation identified, the Court considered that general measures at national level were undoubtedly called for in the implementation of its Grand Chamber judgment. Serbia and Slovenia must thus make all necessary arrangements, including legislative amendments, within one year and under the supervision of the Committee of Ministers, in order to allow Mr Šahdanović, Ms Ališić and Mr Sadžak and all others in their position to recover their “old” foreign-currency savings under the same conditions as Serbian and Slovenian citizens who had such savings in domestic branches of Serbian and Slovenian banks. Persons who had already been paid their “old” foreign-currency savings should be excluded from the repayment schemes; however where only a part of the savings had been repaid, Serbia and Slovenia were now responsible for the rest, regardless of the citizenship of the depositor and of the branch’s location. The applicants must collaborate with any verification procedures to be set up by the States but their claim should not be rejected on the sole account of missing bank documents. Furthermore, all verification decisions must be judicially reviewed.

While all persons affected by the inability to freely dispose of their “old” foreign-currency savings for more than 20 years undoubtedly suffered distress and frustration, the Court did not indicate that they should get redress from Serbia and Slovenia as a general measure. It might however reconsider this issue in an appropriate future case if Serbia or Slovenia fails to apply the general measures indicated by the Court.

Lastly, the Court adjourned its examination of similar cases against Serbia and Slovenia for one year. This decision was without prejudice to the Court’s power at any moment to declare inadmissible any such case or to strike it out of its list in accordance with the Convention.

Article 41 (just satisfaction)

The Court held that Serbia was to pay Mr Šahdanović EUR 4,000 in respect of non-pecuniary damage, and that Slovenia was to pay Ms Ališić and Mr Sadžak EUR 4,000 each in respect of nonpecuniary damage.

Separate opinions

Separate opinions of Judges Nußberger, Popović and Ziemele are annexed to the judgment.

69. Eur.Court HR, *Al Nashiri v. Poland & Husayn (Abu Zubaydah) v. Poland, Former Fourth Section Judgments of 24 July 2014, Application Nos. 28761/11 & 7511/13, (Article 3, Prohibition of Torture – Violation; Article 5, Right to Liberty and Security – Violation; Article 8, Right to Respect for Private and Family Life – Violation; Article 13, Right to an Effective Remedy – Violation; Article 6-1, Right to a Fair Hearing within a Reasonable Time – Violation)*. The applicants, a Saudi Arabian national of Yemeni descent and a stateless Palestinian, both suspected of terrorist acts, successfully challenged their extraordinary rendition to a secret Central Intelligence Agency facility in Poland and later Guantanamo Bay, alleging torture and ill-treatment, and failure to carry out a subsequent investigation.

ECHR 231 (2014)
24.07.2014

Press release issued by the Registrar

The cases **Al Nashiri v. Poland** (application no. 28761/11) and **Husayn (Abu Zubaydah) v. Poland** (no. 7511/13) concerned allegations of torture, ill-treatment and secret detention of two men suspected of terrorist acts. The applicants allege that they were held at a CIA “black site” in Poland.

In today’s Chamber judgments, which are not final, the European Court of Human Rights held, unanimously:

in both cases, that Poland had failed to comply with its obligation under **Article 38** of the European Convention on Human Rights (**obligation to furnish all necessary facilities for the effective conduct of an investigation**);

in both cases, that there had been:

a violation of Article 3 (prohibition of torture and inhuman or degrading treatment) of the Convention, in both its substantive and procedural aspects;

a violation of Article 5 (right to liberty and security);

a violation of Article 8 (right to respect for private and family life);

a violation of Article 13 (right to an effective remedy); and,

a violation of Article 6 § 1 (right to a fair trial).

As regards Mr Al Nashiri, the Court further held that there had been **a violation of Articles 2 (right to life) and 3 of the Convention taken together with Article 1 of Protocol No. 6 (abolition of the death penalty)**.

Having regard to the evidence before it, the Court came to the conclusion that the applicants’ allegations that they had been detained in Poland were sufficiently convincing. The Court found that Poland had cooperated in the preparation and execution of the CIA rendition, secret detention and interrogation operations on its territory and it ought to have known that by enabling the CIA to detain the applicants on its territory, it was exposing them to a serious risk of treatment contrary to the Convention.

The full texts of the Court’s judgments are accessible on its website (<http://www.hudoc.echr.coe.int>)

Principal facts

The applicants in the two cases are Abd Al Rahim Hussayn Muhammad Al Nashiri, a Saudi Arabian national of Yemeni descent who was born in 1965; and Zayn Al-Abidin Muhammad Husayn, also known as Abu Zubaydah, a stateless Palestinian, who was born in 1971 in Saudi Arabia. Both men are currently detained in the Internment Facility at the United States (US) Guantanamo Bay Naval Base in Cuba.

Mr Al Nashiri has been suspected of the terrorist attack on the US Navy ship USS Cole in the harbor of Aden, Yemen, in October 2000. He has also been suspected of playing a role in the attack on the French oil tanker MV Limburg in the Gulf of Aden in October 2002. At the time of his capture, Mr Husayn was considered by the US authorities to be one of the key members of the terrorist network Al' Qaeda, who allegedly played a role in several terrorist operations, including planning the 11 September 2001 attacks. Since his capture in March 2002, he has not been charged with any criminal offence and remains in "indefinite detention" in Guantanamo. The only review of his detention was carried out by a panel of officials of a US military tribunal in March 2007, which found that he was to remain in detention.

Both applicants allege that they were victims of an "extraordinary rendition" by the US Central Intelligence Agency (CIA), that is, of apprehension and extrajudicial transfer to a secret detention site in Poland with the knowledge of the Polish authorities for the purpose of interrogation, during which they were tortured. Both men state that in December 2002 they were taken to Poland on board the same "rendition plane".

Mr Al Nashiri submits that, having been captured in Dubai, the United Arab Emirates, in October 2002, and subsequently transferred to secret CIA detention facilities in Afghanistan and Thailand, he was brought to Poland on 5 December 2002. He was placed in a CIA secret detention facility and held there until 6 June 2003, when he was secretly transferred on board the rendition plane – with the assistance of the Polish authorities – to Morocco and, in September 2003, to the US Naval Base in Guantanamo Bay. He was subsequently transferred to two other sites before eventually being moved back to Guantanamo Bay.

According to Mr Al Nashiri, he was subjected to torture and ill-treatment while being held in unacknowledged detention in Poland. In particular, so-called "enhanced interrogation techniques" (EITs) were used against him. He was also subjected to "unauthorised" interrogation methods, which included, among other things, two mock executions, prolonged stress positions – kneeling on the floor and leaning back – and he was threatened with his family being brought to the site and abused in front of him if he did not comply and provide information. Mr Al Nashiri maintains that, when he was transferred from Poland, there was no attempt by the Polish Government to seek diplomatic assurances from the United States to avert the risk of his being subjected to further torture, incommunicado detention, an unfair trial and the death penalty when in US custody. The US Government brought charges against Mr Al Nashiri in June 2008 for trial before a military commission, but so far he has not been convicted and he remains in detention in Guantanamo Bay. The date for his trial has been set for 2 September 2014.

Mr Husayn submits that, having been seized in Pakistan in March 2002 and subsequently transferred to a secret CIA detention facility in Thailand, he was brought to Poland on 5 December 2002 where he was held in a secret CIA detention facility until 22 September 2003. He was then taken to Guantanamo Bay and consecutively to several secret detention facilities in a number of countries before eventually being transferred back to Guantanamo Bay.

According to his submission, Mr Husayn was subjected to various forms of abuse and ill-treatment during his detention in Poland. According to Mr Husayn's lawyers, communication with him is

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extremely restricted, making it impossible to pass on information or evidence directly from him to the European Court of Human Rights. The presentation of his case is principally based on publicly available sources.

Both Mr Al Nashiri and Mr Husayn note, in support of their submissions, that the circumstances surrounding their extraordinary rendition have been the subject of various reports and investigations, including reports prepared by Swiss Senator Dick Marty, in 2006, 2007 and 2011, as rapporteur for the investigation conducted by the Parliamentary Assembly of the Council of Europe into allegations of secret detention facilities being run by the CIA in several Member States (the “Marty Reports”). The Marty Reports detail an intricate network of CIA detention and transfer in certain Council of Europe States. Among other things, the reports identify the secret detention centre in Poland as being located in the Stare Kiejkuty intelligence training base near the town of Szczytno in Northern Poland.

The submissions by Mr Al Nashiri and Mr Husayn are also based on various CIA documents that were disclosed to the public. In particular, the applicants rely on a report prepared by the CIA Inspector General in 2004 – “Special Review Counterterrorism Detention and Interrogation Activities September 2001-October 2003”. The report, previously classified as “top secret”, was released by the US authorities in August 2009 with large parts being blackened out. It shows that Mr Al Nashiri and Mr Husayn fell into the category of “High-Value Detainees” (HVD) – terrorist suspects likely to be able to provide information about current terrorist threats against the United States – against whom the “enhanced interrogation techniques” (EITs) were being used, which included the “waterboard technique”, confinement in a box, wall-standing and other stress positions. The applicants’ submissions also refer to a 2007 report by the International Committee for the Red Cross on the treatment of “High-Value Detainees” in CIA custody, based on interviews with 14 such detainees, including Mr Al Nashiri and Mr Husayn, which describes the treatment to which they were subjected in CIA custody.

A criminal investigation in Poland against persons unknown concerning secret CIA prisons on Polish territory was opened in March 2008. It has been extended a number of times and remains pending. The authorities have not disclosed the exact terms of reference or the precise scope of the investigation.

Complaints, procedure and composition of the Court

Mr Al Nashiri’s and Mr Husayn’s complaints before the European Court of Human Rights related to three principal issues: their torture, ill-treatment and incommunicado detention in Poland while in US custody; their transfer from Poland; and Poland’s failure to conduct an effective investigation into those events. They maintained in particular that Poland had knowingly and intentionally enabled the CIA to hold them in secret detention in the Stare Kiejkuty facility, for six and nine months, respectively, without any legal basis or review and without any contact with their families. They complained that Poland had knowingly and intentionally enabled their transfer from Polish territory despite the real risk of further ill-treatment and incommunicado detention, allowing them to be transferred to a jurisdiction where they would be denied a fair trial. Finally, they complained that Poland had failed to conduct an effective investigation into the circumstances surrounding their ill-treatment, detention and transfer from the Polish territory.

They relied in particular on Article 3 (prohibition of torture and inhuman or degrading treatment), Article 5 (right to liberty and security), Article 6 (right to a fair trial), Article 8 (right to respect for private and family life) and Article 13 (right to an effective remedy) of the European Convention on Human Rights. Mr Al Nashiri also invoked Article 2 (right to life), Article 3 (prohibition of torture and inhuman or degrading treatment), and Article 1 of Protocol No. 6 to the Convention (abolition of the death penalty) as regards his transfer from Poland, alleging that there had been substantial grounds for believing that there was a real and serious risk that he would be subjected to the death penalty.

The full texts of the Court’s judgments are accessible on its website (<http://www.hudoc.echr.coe.int>)

The applications were lodged with the European Court of Human Rights on 6 May 2011 and on 28 January 2013 respectively. In the case of *Al Nashiri v. Poland*, the Helsinki Foundation for Human Rights was granted leave to submit written comments as a third party (under Article 36 of the Convention); the UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism also submitted comments as a third party. He was subsequently invited to take part in the public hearing. In both cases, Amnesty International and the International Commission of Jurists were granted leave to jointly submit written comments as third parties. Prior to the public hearing on 3 December 2013, the Court held a fact-finding hearing on 2 December 2013, during which it heard evidence from three experts, Claudio Fava, former Member of the European Parliament and rapporteur, in 2006 and 2007, of the Temporary Committee on the alleged use of European countries by the CIA for the transport and illegal detention of prisoners; Swiss Senator Dick Marty; Mr J.G.S., a lawyer and investigator; and from a witness, Senator Józef Piniór, former Member of the European Parliament and currently a member of the Polish Senate. The fact-finding hearing was followed by a hearing with the parties. The hearing on 2 December 2013 was not open to the public (held in camera).

Judgment was given by a Chamber of seven judges, composed as follows:

Ineta **Ziemele** (Latvia), President,
 Päivi **Hirvelä** (Finland),
 George **Nicolaou** (Cyprus),
 Ledi **Bianku** (Albania),
 Zdravka **Kalaydjieva** (Bulgaria),
 Vincent A. **de Gaetano** (Malta),
 Krzysztof **Wojtyczek** (Poland),
 and also Françoise **Elens-Passos**, Section Registrar.

Decision of the Court

Preliminary objection

As regards the admissibility of the cases, the Court joined to the merits the Government's preliminary objection of non-exhaustion of domestic remedies – on the grounds that the criminal investigation in Poland was still pending – and dismissed it.

Article 38

The Court held that, in view of the Polish Government's refusals to comply with the Court's requests for the submission of evidence and, in consequence, Poland's failure to discharge its obligations under Article 38 – to furnish all necessary facilities for the effective conduct of an investigation – it was entitled to draw negative inferences from the Government's conduct.

Establishment of the facts and responsibility

Having regard to the evidence before it, including evidence heard from the experts and the witness, and evidence obtained through several international inquiries and various documents, the Court found that the applicants' allegations that they had been detained in Poland were sufficiently convincing.

It also found that Poland had known of the nature and purposes of the CIA's activities on its territory at the material time. Poland had cooperated in the preparation and execution of the CIA rendition, secret detention and interrogation operations on its territory in the following manner: by enabling the CIA to use its airspace and the airport; by its complicity in disguising the movements of rendition aircraft; and, by providing logistics and services, including special security arrangements, a special

The full texts of the Court's judgments are accessible on its website (<http://www.hudoc.echr.coe.int>)

procedure for landings, the transportation of CIA teams with detainees on land, and the securing of the Stare Kiejkuty base for the CIA's secret detention. Having regard to the widespread public information about ill-treatment and abuse of detained terrorist suspects in the custody of the US authorities, Poland ought to have known that, by enabling the CIA to detain such persons on its territory, it was exposing them to a serious risk of treatment contrary to the Convention.

Article 3

The Court found a violation of Article 3 in its procedural aspect. It held that the criminal investigation in Poland had failed to meet the requirements of a "prompt", "thorough" and "effective" investigation for the purposes of that provision.

The Court also found a violation of Article 3 in its substantive aspect. It held that the treatment to which the applicants had been subjected by the CIA during their detention in Poland had amounted to torture. It was true that the interrogations and, therefore, the ill-treatment of the applicants at the Stare Kiejkuty facility had been the exclusive responsibility of the CIA and it was unlikely that the Polish officials had witnessed or known exactly what had happened inside the facility. However, under Article 1 of the Convention, taken together with Article 3, Poland had been required to take measures to ensure that individuals within its jurisdiction were not subjected to torture or inhuman or degrading treatment or punishment. For all practical purposes, Poland had facilitated the whole process, had created the conditions for it to happen and had made no attempt to prevent it from occurring. Accordingly, the Polish State, on account of its acquiescence and connivance in the HVD Programme had to be regarded as responsible for the violation of the applicants' rights committed on its territory. Furthermore, Poland had been aware that the transfer of the applicants to and from its territory was effected by means of "extraordinary rendition". Consequently, by enabling the CIA to transfer the applicants to its other secret detention facilities, the Polish authorities exposed them to a foreseeable serious risk of further ill-treatment and conditions of detention in breach of Article 3.

Article 5

As regards Article 5, the Court found that its conclusions concerning Article 3 applied in the context of the applicants' complaint about their undisclosed detention and that Poland's responsibility had been engaged in respect of their detention on its territory and their transfer from Polish territory.

Article 8

As regards Article 8, the Court found that the interference with the applicants' right to respect for their private and family life had not been in accordance with the law and lacked any justification.

Article 13

As regards Article 13, the Court found that the criminal investigation by Poland had fallen short of the standards of an "effective investigation". The applicants had thus been denied the right to an "effective remedy".

Article 6

As regards Article 6 § 1, the Court held that in view of the publicly available information, Poland had known that any terrorist suspect would be tried before a military commission in Guantanamo in a procedure which did not meet the standard of a "fair trial". Accordingly, Poland's cooperation and assistance in the transfer of the applicants from its territory, despite a real and foreseeable risk that they could face a flagrant denial of justice, had engaged the Polish State's responsibility under this provision.

The full texts of the Court's judgments are accessible on its website (<http://www.hudoc.echr.coe.int>)

Articles 2 and 3 of the Convention taken together with Article 1 of Protocol No. 6

In the case of Mr Al Nashiri, the Court found that Poland had also violated of Articles 2 and 3 of the Convention taken together with Article 1 of Protocol No. 6 by having enabled the CIA to transfer him to the jurisdiction of the military commission and thus exposing him to a foreseeable serious risk that he could be subjected to the death penalty following his trial.

Just satisfaction (Article 41)

The Court held that Poland was to pay each applicant 100,000 euros (EUR) in respect of nonpecuniary damage. In the case of Husayn (Abu Zubaydah) it also awarded the applicant EUR 30,000 in respect of costs and expenses. No claim for costs and expenses was made in the case of Al Nashiri.

Individual measures in Al Nashiri (Article 46 – execution of judgments)

The Court decided that Poland, in order to comply with its obligations under Articles 2 and 3 of the Convention and Article 1 of Protocol No. 6 to the Convention, was required to seek to remove, as soon as possible, the risk that Mr Al Nashiri could be subjected to the death penalty by seeking assurances from the US authorities that such penalty would not be imposed on him.

70. Eur.Court HR, *Trabelsi v. Belgium, Former Fifth Section Judgment of 4 September 2014, Application No. 140/10, (Article 3, Prohibition of Torture – Violation; Article 34, Individual Applications – Violation)*. The applicant, a Tunisian national at that time incarcerated in the United States of America (USA), successfully argued that his extradition from Belgium to the USA where he was being prosecuted on charges of terrorist offences and facing life imprisonments, a sentence which, according to the Court, was irreducible as US law provided no adequate mechanism for reviewing this type of sentence, breached his Convention rights.

**ECHR 247 (2014)
04.09.2014**

Press release issued by the Registrar

In today's Chamber judgment in the case of **Trabelsi v. Belgium** (application no. 140/10), which is not final, the European Court of Human Rights held, unanimously, that there had been:

a violation of Article 3 (prohibition of inhuman or degrading treatment) of the European Convention on Human Rights, and

a violation of Article 34 (right of individual application).

The case concerned the extradition, which has been effected despite the indication of an interim measure by the European Court of Human Rights (Rule 39 of the Rules of Court), of a Tunisian national from Belgium to the United States, where he is being prosecuted on charges of terrorist offences and is liable to life imprisonment.

The Court considered that the life sentence to which Mr Trabelsi was liable in the United States was irreducible inasmuch as US law provided for no adequate mechanism for reviewing this type of sentence, and that it was therefore contrary to the provisions of Article 3. It concluded that Mr Trabelsi's extradition to the United States entailed a violation of Article 3 of the Convention.

Furthermore, the failure of the Belgian State to observe the suspension of extradition indicated by the Court had irreversibly lowered the level of protection of the rights secured under Article 3, which Mr Trabelsi had attempted to uphold by lodging his application with the Court, and had interfered with his right of individual application.

Principal facts

The applicant, Nizar Trabelsi, is a Tunisian national who was born in 1970. He is currently incarcerated in the United States.

On 30 September 2003 he was sentenced by the Brussels Regional Court to ten years' imprisonment, upheld on appeal, for having, among other offences, attempted to blow up a Belgian military base and having instigated a criminal conspiracy.

On 26 January 2005 Mr Trabelsi was sentenced in absentia by a Tunisian military court to ten years' imprisonment for belonging to a terrorist organisation abroad in peacetime. In 2009 the Permanent Military Court in Tunis issued a warrant for the applicant to be brought before it, for which an application for enforcement was submitted to the Belgian authorities.

The full texts of the Court's judgments are accessible on its website (<http://www.hudoc.echr.coe.int>)

On 25 August 2005, meanwhile, the applicant submitted an asylum application in Belgium, which was dismissed in 2009.

On 8 April 2008 the US authorities transmitted to the Belgian authorities a request for Mr Trabelsi's extradition, based on an indictment issued by the District Court of the District of Columbia on 16 November 2007. The indictment included four charges against Mr Trabelsi for offences relating to Al-Qaeda-inspired acts of terrorism, specifying that for the first two charges he was liable to a sentence of life imprisonment and for the other two a fifteen-year term.

On 19 November 2008 the Nivelles Regional Court declared the arrest warrant issued by the US District Court enforceable vis-à-vis offences other than those of which Mr Trabelsi had already been convicted in Belgium. His subsequent appeals against that decision were dismissed.

On 10 June 2010 the Brussels Court of Appeal issued a favourable opinion on Mr Trabelsi's extradition, specifying a number of conditions, including the fact that the death penalty should not be imposed on him or, failing that, should not be enforced, that the life sentence should be accompanied by the possibility of commutation of sentence and that Mr Trabelsi should not be reextradited to a third country without the agreement of Belgium. By a diplomatic note of 10 August 2010 the US authorities repeated their guarantees in this respect.

On 23 November 2011 the Minister for Justice, drawing on the assurances provided by the US authorities, adopted a ministerial decree granting the applicant's extradition to the US Government.

Meanwhile, on 6 December 2011 Mr Trabelsi lodged a request with the European Court of Human Rights for the indication of an interim measure pursuant to Rule 39 of the Rules of Court with a view to suspending his extradition. On the same day the Court acceded to his request and indicated to the Belgian Government that it should not extradite Mr Trabelsi to the United States. The Belgian Government submitted several requests for the lifting of this measure, which was nonetheless maintained for the duration of the proceedings before the Court.

On 3 October 2013 Mr Trabelsi was extradited to the United States, where he was immediately detained.

Complaints, procedure and composition of the Court

Mr Trabelsi complained that his extradition to the United States of America would expose him to treatment incompatible with Article 3 (prohibition of inhuman or degrading treatment). He contended that some of the offences for which his extradition had been granted carried a maximum life prison sentence which was irreducible de facto, and that if he were convicted he would have no prospect of ever being released. Still under Article 3 (prohibition of inhuman or degrading treatment), he also complained of his conditions of detention in Belgium, particularly the numerous transfers to which he had been subjected. Relying on Article 6 § 1 (right to a fair trial), he submitted that he had not had the benefit of a fair trial or the safeguards which should have accompanied criminal proceedings during the judicial procedure for enforcement of the US arrest warrant. He also alleged that his extradition entailed a violation of Article 4 of Protocol No. 7 (right not to be tried or punished twice). Furthermore, he complained that his extradition to the United States constituted interference with his private and family life in Belgium, in breach of Article 8 (right to respect for private and family life). Lastly, under Article 34 (right of individual application), he complained that his extradition to the US had taken place in breach of the interim measure indicated by the Court by virtue of Rule 39 of the Rules of Court.

The application was lodged with the European Court of Human Rights on 23 December 2009.

The full texts of the Court's judgments are accessible on its website (<http://www.hudoc.echr.coe.int>)

Judgment was given by a Chamber of seven judges, composed as follows:

Mark **Villiger** (Liechtenstein), President,
Ann **Power-Forde** (Ireland),
Ganna **Yudkivska** (Ukraine),
André **Potocki** (France),
Paul **Lemmens** (Belgium),
Helena **Jäderblom** (Sweden),
Aleš **Pejchal** (the Czech Republic),

and also Claudia **Westerdiek**, Section Registrar.

Decision of the Court

Article 3 (with regard to the applicant's extradition to the United States)

The Court firstly reiterated that the imposition of a sentence of life imprisonment on an adult offender was not in itself prohibited by any Article of the Convention, provided that it was not disproportionate. On the other hand, if it was to be compatible with Article 3 such a sentence should not be irreducible de jure and de facto. In order to assess this requirement the Court had to ascertain whether a life prisoner could be said to have any "prospect of release" and whether national law afforded the "possibility of review" of a life sentence with a view to its commutation, remission, termination or the conditional release of the prisoner. Moreover, the prisoner had to be informed of the terms and conditions of this review possibility at the outset of his sentence.

The Court then observed that Article 3 implied an obligation on Contracting States not to remove a person to a State where he or she would run the real risk of being subjected to prohibited ill treatment. In matters of removal of aliens, the Court affirmed that, in accordance with the preventive aim of Article 3, this risk had to be assessed before the persons concerned actually suffered a penalty or treatment of a level of severity proscribed by this provision, which meant, in the present case, before Mr Trabelsi's possible conviction in the United States.

In the present case the Court considered that in view of the gravity of the terrorist offences with which Mr Trabelsi stood charged and the fact that a sentence could only be imposed after the trial court had taken into consideration all relevant mitigating and aggravating factors, a discretionary life sentence would not be grossly disproportionate.

The Court held, however, that the US authorities had at no point provided any concrete assurance that Mr Trabelsi would be spared an irreducible life sentence. It also noted that, over and above the assurances provided, while US legislation provided various possibilities for reducing life sentences (including the Presidential pardon system), which gave Mr Trabelsi some "prospect of release", it did not lay down any procedure amounting to a mechanism for reviewing such sentences for the purposes of Article 3.

Therefore, the life imprisonment to which Mr Trabelsi might be sentenced could not be described as reducible, which meant that his extradition to the United States had amounted to a violation of Article 3.

Article 34

The Court mentioned the crucial importance of and the vital role played by interim measures under the Convention system.

The full texts of the Court's judgments are accessible on its website (<http://www.hudoc.echr.coe.int>)

It noted that by acting in breach of the interim measure indicated by the Court pursuant to Rule 39, the respondent State had deliberately and irreversibly lowered the level of protection of the rights set out in Article 3 of the Convention which Mr Trabelsi had endeavoured to uphold by lodging his application with the Court. The extradition had, at the very least, rendered any finding of a violation of the Convention otiose, as Mr Trabelsi had been removed to a country which was not a Party to that instrument, where he alleged that he would be exposed to treatment contrary to the Convention.

The Court also considered that the actions of the Belgian Government had made it more difficult for Mr Trabelsi, who was being held in solitary confinement with limited contact with the outside world, to exercise his right of petition.

Consequently, Belgium had failed to honour the obligations incumbent on it under Article 34.

Article 3 (as regards the applicant's conditions of detention in Belgium)

The Court dismissed the complaints under Article 3 concerning the applicant's conditions of detention in Belgium, on account of non-exhaustion of domestic remedies.

Other articles

The Court dismissed the complaint under Article 6 § 1 as being incompatible with the provisions of the Convention, as well as the complaints under Article 8 and Article 4 of Protocol No. 7 as being manifestly ill-founded.

Just satisfaction (Article 41)

The Court held that Belgium was to pay the applicant 60,000 euros (EUR) in respect of non-pecuniary damage and EUR 30,000 in respect of costs and expenses.

Separate opinion

Judge Yudkivska expressed a concurring opinion. This opinion is annexed to the judgment.

71. Eur.Court HR, Pleshkov v. Romania, Third Section Judgment of 16 September 2014, Application No. 1660/03, (Article 7, No Punishment without Law – Violation; Article 1 of Protocol No. 1, Protection of Property - Violation). The applicant, a Bulgarian national, was prosecuted for illegal shark fishing within Romania’s Exclusive Economic Zone in the Black Sea and successfully argued that given the lack of clear delimitation of maritime boundaries, his conviction had been based on a direct application of United Nations Convention on the Law of the Sea, which did not contain provisions for individual criminal responsibility.

ECHR 258 (2014)

16.09.2014

Press release issued by the Registrar

In today’s **Chamber** judgment in the case of **Plechkov v. Romania** (application no. 1660/03) the European Court of Human Rights held, unanimously, that there had been:

a violation of Article 7 (no punishment without law) of the European Convention on Human Rights, **and**

a violation of Article 1 of Protocol No. 1 (protection of property)

The case concerned the sentencing of Mr Plechkov to a suspended prison term together with the confiscation of his boat (including the installations, tools and cargo on board) for allegedly fishing illegally within the Romanian “exclusive economic zone” in the Black Sea.

The Court found that neither the provisions of domestic law nor its interpretation by the courts had rendered Mr Plechkov’s conviction sufficiently foreseeable.

The confiscation of the ship with the tools and cargo on board had constituted an interference with Mr Plechkov’s right to the peaceful enjoyment of his possessions.

Principal facts

The applicant, Iordan Georgiev Plechkov, is a Bulgarian national who was born in 1975 and lives in Kavarna (Bulgaria).

At the relevant time Mr Plechkov was the captain and owner of a fishing vessel registered in Bulgaria.

On 3 May 2002, while his boat was about 29 nautical miles off the Romanian coast, it was stopped by officers of the Romanian Navy and detained together with its cargo. Mr Plechkov was taken into police custody, then remanded pending trial, on a charge of having illegally engaged in shark fishing using longlines in Romania’s exclusive economic zone in the Black Sea and, moreover, during a period when such fishing was closed. The provisional seizure of the ship and its cargo was ordered. On 1 July 2002 Mr Plechkov was released on the posting of security.

Mr Plechkov was sent for trial before the Criminal Division of the Constanța District Court. A diplomatic note from the Bulgarian embassy was adduced in evidence, stating that Romania and Bulgaria had ratified the 1982 United Nations Convention on the Law of the Sea (UNCLOS), which laid down the legal framework for exclusive economic zones, but that no agreement had yet been

The full texts of the Court’s judgments are accessible on its website (<http://www.hudoc.echr.coe.int>)

concluded between the two countries for the delimitation of their respective zones, as diplomatic negotiations in that connection were still pending. Lastly, the note stated that, in accordance with UNCLOS, penalties for violations of fisheries laws and regulations in the exclusive economic zone could not include imprisonment.

In a judgment of 18 July 2002 the court acquitted the applicant, annulled the seizure measure and ordered the restitution of the security, taking the view that Mr Plechkov had not been arrested in a zone subject to Romanian law. The court found that the applicable law did not stipulate the exact breadth of the Romanian exclusive economic zone but merely indicated that it “could extend up to 200 nautical miles”, that the delimitation of the zone was to be fixed by agreement with the neighbouring States, in compliance with UNCLOS, and that the agreement in question had not yet been reached with Bulgaria.

In a judgment of 30 September 2002, the Constanța County Court quashed that judgment on appeal. It took the view that the law in question had to be construed as effectively creating an exclusive economic zone over a distance of 200 nautical miles and that any agreement with Bulgaria would, in any event, have been unfavourable to Mr Plechkov. The court found that Romania was entitled to exercise criminal jurisdiction in the sector where Mr Plechkov had been arrested and that his actions fell under Romanian criminal law. Mr Plechkov was given a suspended two-year sentence and put on probation for four years, and his vessel was confiscated (with its installations, tools and cargo). His appeal on points of law against that judgment was dismissed.

The vessel and tools were subsequently sold by public auction.

Complaints, procedure and composition of the Court

Relying on Article 7 (no punishment without law), Mr Plechkov alleged that his prison sentence and the confiscation of his boat and tools were unlawful, being incompatible with the United Nations Convention on the Law of the Sea. He further argued that such confiscation entailed a violation of Article 1 of Protocol No. 1 (protection of property).

The application was lodged with the European Court of Human Rights on 20 December 2002.

Judgment was given by a Chamber of seven judges, composed as follows:

Josep **Casadevall** (Andorra), *President*,
 Alvina **Gyulumyan** (Armenia),
 Ján **Šikuta** (Slovakia),
 Dragoljub **Popović** (Serbia),
 Luis **López Guerra** (Spain),
 Johannes **Silvis** (the Netherlands),
 Iulia Antoanella **Motoc** (Romania),

and also Fatoş **Aracı**, *Deputy Section Registrar*.

Decision of the Court

Article 7 (no punishment without law)

The Court found that it was not its role to decide on the interpretation of UNCLOS or the relevant Romanian legislation, or on the application of those instruments by the Romanian courts. It could not therefore rule on the breadth or existence of Romania’s exclusive economic zone within the meaning of UNCLOS or on any rights and obligations that Romania might have with regard to such a zone.

The full texts of the Court’s judgments are accessible on its website (<http://www.hudoc.echr.coe.int>)

However, it had to ascertain that the provisions of domestic law, as interpreted and applied by the domestic courts, had not produced any consequences that were incompatible with the European Convention on Human Rights.

The Court noted that Mr Plechkov's conviction was not based on UNCLOS but on section 9 of Law no. 17/1990 as amended by Law no. 36/2002, which the domestic courts had had to interpret, and found that the two courts in question had reached totally opposite conclusions.

It found that the legislation did not precisely delimit the Romanian exclusive economic zone and that the determination of the zone's "breadth" had been expressly reserved pending an agreement between Romania and the neighbouring States, including Bulgaria.

The statutory provision in question could not reasonably be regarded as foreseeable in its application. A precise definition of the limits of the exclusive economic zone proclaimed by Romania within the meaning of UNCLOS had been necessary, having regard to the criminal-law consequences that would arise in the event of a violation of the sovereign rights attached to that zone.

Moreover, the Court observed that the courts which had convicted Mr Plechkov had also held that, even if an agreement had been concluded between Romania and Bulgaria, it would not have been favourable to the applicant. However, such an interpretation was not based on any established domestic case-law.

Consequently, the Court took the view that neither the domestic legislation nor the interpretation thereof by the domestic courts rendered Mr Plechkov's conviction sufficiently foreseeable and found that there had been a violation of Article 7.

Article 1 of Protocol No. 1 (protection of property)

Having found that the offence for which Mr Plechkov had had his boat confiscated did not satisfy the conditions of lawfulness for the purposes of Article 7, the Court also took the view that the interference with his peaceful enjoyment of his possessions did not satisfy the similar condition of lawfulness under Article 1 of Protocol No. 1.

There had thus been a violation of Article 1 of Protocol No. 1.

Just satisfaction (Article 41)

The Court held that Romania was to pay the applicant 6,500 euros in respect of pecuniary and nonpecuniary damage.

72. Eur.Court HR, Hassan v. United Kingdom, Grand Chamber Judgment of 16 September 2014, Application No. 29750/09, (Article 1, Jurisdiction of the State – Jurisdiction Found; Article 2, Right to Life – No Violation; Article 3, Prohibition of Torture – No Violation; Article 5, Right to Liberty and Security – No Violation). The applicant, the brother of an Iraqi national who was captured and detained at Camp Bucca in south-eastern Iraq by the British armed forces and subsequently died during the hostilities in 2003, unsuccessfully claimed that his brother had been under the control of British forces for the purposes of extra-territorial jurisdiction of the Convention.

ECHR 260 (2014)
16.09.2014

Press release issued by the Registrar

The case Hassan v. the United Kingdom (application no. 29750/09) concerned the capture of an Iraqi national, Tarek Hassan, by the British armed forces and his detention at Camp Bucca in southeastern Iraq during the hostilities in 2003. His brother claims that Tarek was under the control of British forces, and that his dead body was subsequently found bearing marks of torture and execution.

In today's **Grand Chamber** judgment in the case the European Court of Human Rights held:

unanimously, that **Tarek Hassan had been within the jurisdiction of the United Kingdom** between the time of his arrest by British troops, in April 2003, until his release from the bus that had taken him from Camp Bucca under military escort to a drop-off point, in May 2003; but

by 13 votes to 4, that there had been **no violation of Article 5 §§ 1, 2, 3 or 4 (right to liberty and security)** of the European Convention on Human Rights as concerned the actual capture and detention of Tarek Hassan.

The case concerned the acts of British armed forces in Iraq, extra-territorial jurisdiction and the application of the European Convention of Human Rights in the context of an international armed conflict. In particular, this was the first case in which a contracting State had requested the Court to disapply its obligations under Article 5 or in some other way to interpret them in the light of powers of detention available to it under international humanitarian law.

The Court decided that international humanitarian law and the European Convention both provided safeguards from arbitrary detention in time of armed conflict and that the grounds of permitted deprivation of liberty set out in Article 5 of the Convention should be accommodated, as far as possible, with the taking of prisoners of war and the detention of civilians who pose a risk to security under the Third and Fourth Geneva Conventions. In the present case, it found that there had been legitimate grounds under international law for capturing and detaining Tarek Hassan, who had been found by British troops, armed and on the roof of his brother's house, where other weapons and documents of a military intelligence value had been retrieved. Moreover, following his admission to Camp Bucca, he had been subjected to a screening process, which established that he was a civilian who did not pose a threat to security and led to his being cleared for release. Tarek Hassan's capture and detention had not therefore been arbitrary.

The complaints under Article 2 (right to life) and 3 (prohibition of inhuman or degrading treatment) concerning the alleged ill-treatment and death of Tarek Hassan were declared inadmissible for lack of evidence.

The full texts of the Court's judgments are accessible on its website (<http://www.hudoc.echr.coe.int>)

Principal facts

The applicant, Khadim Resaan Hassan, is an Iraqi national who now lives in Syria. Prior to the invasion of Iraq in March 2003 by a coalition of armed forces led by the United States of America, Mr Hassan was a general manager in the national secretariat of the Ba'ath Party, at the time the governing party under the leadership of Saddam Hussein. Mr Hassan was also a General in El Quds Army, the private army of the Ba'ath Party. He lived in Um Qasr, a port city in the region of Basrah, south-eastern Iraq.

The case concerned the capture of Mr Hassan's brother, Tarek, by British armed forces and his detention at Camp Bucca in Iraq (close to Um Qasr). Mr Hassan claims that Tarek was under the control of British forces, and that his dead body was subsequently found bearing marks of torture and execution.

In April 2003, after occupying Basrah, the British army started arresting high-ranking members of the Ba'ath Party. According to Mr Hassan, he went into hiding at this time, leaving his brother Tarek behind to protect the family home. He claims that in April 2003, the British army came to his home in the early hours of the morning and took away Tarek. The UK Government accept that British forces arrested Tarek, claiming that he had been found armed with an AK-47 machine gun and on the roof of his brother's house, where other weapons and documents of a military intelligence value were retrieved and that he was therefore detained as a suspected prisoner of war, combatant or civilian posing a threat to security, in accordance with the Third Geneva Convention, until his status could be determined. It is the UK Government's argument that, in the context of an international armed conflict, the provisions of the European Convention on Human Rights either should not apply at all or should be applied to take account of law of armed conflict, including the Geneva Conventions of 12 August 1949.

The Government and Mr Hassan both accept that Tarek was taken by British forces to Camp Bucca, a detention facility operated by United States forces. However, the British forces exercised some control over inmates that had been arrested by the UK military. The extent of this control and its legal consequences are disputed by the parties. The UK Government, providing records of interviews with Tarek at Camp Bucca and screen shots of entries relating to him on a military database, state that, following interrogation by both US and UK authorities, Tarek was established to be a noncombatant who did not pose a threat to security and that he was released on or around 12 May 2003.

Mr Hassan states that Tarek did not contact his family during the period that the Government claim he was set free. According to Mr Hassan, Tarek's body was discovered with bullet wounds some 700 kilometres away from Um Qasr near a town north of Baghdad in early September 2003. The UK Government submit that there is no independent evidence of the cause of Tarek's death, emphasising that he was found in an area that had never been controlled by British forces.

In 2007 Mr Hassan brought proceedings in the British administrative court seeking a declaration that there had been a breach of his human rights under the European Convention on Human Rights, compensation and an order requiring the government to carry out an inquiry into the death of his brother. However, the case was dismissed after the court found that Camp Bucca was a US rather than a UK military establishment, and that the UK therefore did not have the relevant jurisdiction.

Complaints, procedure and composition of the Court

Mr Hassan lodged an application with the European Court of Human Rights on 5 June 2009. In his application, he alleged that his brother had been arrested and detained by British forces in Iraq and

The full texts of the Court's judgments are accessible on its website (<http://www.hudoc.echr.coe.int>)

had subsequently been found dead in unexplained circumstances. He complained under Article 5 §§ 1, 2, 3 and 4 (right to liberty and security) of the Convention that the arrest and detention had been arbitrary and unlawful and lacking in procedural safeguards. He also complained under Articles 2 (right to life), 3 (prohibition of torture and inhuman or degrading treatment) and 5 that the British authorities had failed to carry out an investigation into the circumstances of his brother's detention, ill-treatment and death.

The case was adjourned pending the Court's examination of *Al-Skeini and Others v. the UK* (application no. 55721/07), and was then communicated to the Government for observations on 30 August 2011. On 4 June 2013 the Chamber to which the case had been allocated relinquished jurisdiction in favour of the Grand Chamber. A Grand Chamber hearing was held on 11 December 2013.

Professor Françoise Hampson and Professor Noam Lubell, of the Human Rights Centre, University of Essex, who were authorised to intervene as third parties (under Article 36 § 2 of the Convention), submitted written comments.

Judgment was given by the Grand Chamber of 17 judges, composed as follows:

Dean **Spielmann** (Luxembourg), President,
 Josep **Casadevall** (Andorra),
 Guido **Raimondi** (Italy),
 Ineta **Ziemele** (Latvia),
 Mark **Villiger** (Liechtenstein),
 Isabelle **Berro-Lefèvre** (Monaco),
 Dragoljub **Popović** (Serbia),
 George **Nicolaou** (Cyprus),
 Luis López **Guerra** (Spain),
 Mirjana **Lazarova Trajkovska** ("the Former Yugoslav Republic of Macedonia"),
 Ledi **Bianku** (Albania),
 Zdravka **Kalaydjieva** (Bulgaria),
 Vincent A. **de Gaetano** (Malta),
 Angelika **Nußberger** (Germany),
 Paul **Mahoney** (the United Kingdom),
 Faris **Vehabović** (Bosnia and Herzegovina),
 Robert **Spano** (Iceland),

and also Michael **O'Boyle**, Deputy Registrar.

Decision of the Court

Article 2 and Article 3 (alleged failure to investigate Tarek Hassan's detention, ill-treatment and death)

The Court found that there was no evidence to suggest that Tarek Hassan had been ill-treated while in detention or that the UK authorities had in any way been responsible for his death, which had occurred some four months after his release from Camp Bucca in a distant part of the country not controlled by the British forces. There was therefore no obligation on the UK authorities to investigate such allegations and the complaints under Article 2 (right to life) and 3 (prohibition of inhuman or degrading treatment) were declared inadmissible.

Article 5 (Tarek Hassan's capture and detention)

The full texts of the Court's judgments are accessible on its website (<http://www.hudoc.echr.coe.int>)

Was Tarek Hassan within the jurisdiction of the United Kingdom?

The Court was not persuaded by the Government's argument that jurisdiction should not apply in the active hostilities phase of an international armed conflict, where the agents of the Contracting State were operating in territory of which they were not the occupying power, and where the conduct of the State should instead be subject to the requirements of international humanitarian law. Such a conclusion would have been inconsistent with the Court's previous case-law² and with the case-law of the International Court of Justice.

Nor did the Court accept the Government's other argument for excluding jurisdiction in so far as the period after Tarek Hassan had entered Camp Bucca was concerned as it involved a transfer of custody from the UK to the US. Having regard to the arrangements operating at Camp Bucca, the Court was of the view that the UK had retained authority and control over all aspects of the applicant's complaints under Article 5. That authority and control had covered both Tarek's actual admission to the Camp, which was as a UK prisoner, as well as the period after his admission when he had been taken to the Joint Forward Interrogation Team compound, which was entirely controlled by UK forces. Following Tarek Hassan's interrogation at the compound and in accordance with the Memorandum of Arrangement which set out the various responsibilities of the UK and the US in relation to individuals detained at the Camp, the UK authorities had classified Tarek under the Third and Fourth Geneva Conventions, deciding that he was a civilian who did not pose a threat to security and ordering his release as soon as practicable.

Lastly, it was clear that Tarek Hassan, when taken to the civilian holding area for release, had remained in the custody of armed military personnel and under the authority and control of the UK until the moment he had been let off the bus that took him from the Camp.

In conclusion, therefore, Tarek Hassan had been within the jurisdiction of the UK between the moment of his capture by the British troops, on 23 April 2003, until his release from the bus that had taken him from Camp Bucca under military escort to the drop-off point, most probably Um Qasr on 2 May 2003.

Was Tarek Hassan's capture and subsequent detention arbitrary?

The text of Article 5 includes a list of situations in which detention is permissible under the Convention. It does not include the lawful detention of a person pursuant to certain powers under international humanitarian law during an international armed conflict, for example, the internment of a prisoner of war.

This was the first case in which a contracting State had requested the Court to disapply its obligations under Article 5 or in some other way to interpret them in the light of powers of detention available to it under international humanitarian law, no formal derogation request under Article 15 (derogation in time of emergency) having been lodged by the UK Government.

The starting point for the Court's examination was its constant practice of interpreting the European Convention on Human Rights in the light of the rules set out in the 1969 Vienna Convention on the Law of Treaties. According to the Vienna Convention, when interpreting a treaty such as the European Convention, it was necessary to take into account any subsequent practice in the application of the treaty which established the agreement of the parties regarding its interpretation and also any relevant rules of international law applicable in the relations between the parties.

In this respect, the Court noted that it was not the practice of the Contracting States to derogate from their obligations under Article 5 in order to detain persons on the basis of the Third and Fourth Geneva Conventions during international armed conflicts. Moreover, the principle that the

Convention had to be interpreted in harmony with the rules of international law, of which it formed part, applied equally to the rules of international humanitarian law, such as those set out in the four Geneva Conventions of 1949. The Geneva Conventions, intended to mitigate the horrors of war, had been drafted in parallel to the European Convention on Human Rights and enjoyed universal ratification. The Court observed that it had to endeavour to interpret and apply the Convention in a manner which was consistent with the framework under international law delineated by the International Court of Justice.

In the light of the above considerations, the Court accepted the Government's argument that the lack of a formal derogation under Article 15 did not prevent the Court from taking account of the context and the provisions of international humanitarian law when interpreting and applying Article 5 in this case.

Nonetheless, and consistently with the case-law of the International Court of Justice, the Court considered that, even in situations of international armed conflict, the safeguards under the Convention continued to apply, albeit interpreted against the background of the provisions of international humanitarian law. By reason of the co-existence of the safeguards provided by international humanitarian law and by the Convention in time of armed conflict, the grounds of permitted deprivation of liberty set out under Article 5 should be accommodated, as far as possible, with the taking of prisoners of war and the detention of civilians who pose a risk to security under the Third and Fourth Geneva Conventions. The Court was mindful of the fact that internment in peacetime did not fall within the scheme of deprivation of liberty governed by Article 5 of the Convention without the exercise of the power of derogation under Article 15. It could only be in cases of international armed conflict, where the taking of prisoners of war and the detention of civilians who pose a threat to security were accepted features of international humanitarian law, that Article 5 could be interpreted as permitting the exercise of such broad powers.

As with the grounds of permitted detention set out under Article 5, deprivation of liberty pursuant to powers under international humanitarian law had to be "lawful" to preclude a violation of Article 5 § 1. That meant that detention had to comply with the rules of international humanitarian law, and most importantly, that it should be in keeping with the fundamental purpose of Article 5 § 1, which was to protect the individual from arbitrary detention.

The Court considered that the UK authorities had had reason to believe that Tarek Hassan, found by British troops armed and on the roof of his brother's house, where other weapons and documents of a military intelligence value had been retrieved, could be either a person who should be detained as a prisoner of war or whose internment had been necessary for imperative reasons of security, both of which provided a legitimate ground for capture and detention under the Third and Fourth Geneva Conventions. Almost immediately following his admission to Camp Bucca, Tarek Hassan had been subject to a screening process in the form of two interviews by US and UK military intelligence officers, which had led to his being cleared for release since it was established that he was a civilian who did not pose a threat to security.

Lastly, the Court also found that it was probable that Tarek Hassan had been released in or near Umm Qasr on 2 May 2003, given in particular the computer entries concerning Tarek Hassan's release, Umm Qasr's proximity to Camp Bucca, the town's mention in the annex of the military order relating to the release of detainees from the Camp and the UK policy of releasing detainees following the end of hostilities. Moreover, it was not surprising that no eye witness able to remember Tarek Hassan's release had been traced, taking into account the time that had elapsed before the applicant had lodged his claim and the large number of UK detainees that had been captured, processed and released from Camp Bucca around the end of April and beginning of May 2003.

Tarek Hassan's capture and detention had therefore been consistent with the powers available to the UK under the Third and Fourth Geneva Conventions, and had not been arbitrary.

In the light of these considerations, the Court held that there had been no violation of Article 5 §§ 1, 2, 3 or 4 in the circumstances of the present case.

Separate opinion

Judge Spano expressed a partly dissenting opinion, joined by Judges Nicolaou, Bianku and Kalaydjieva. The opinion is annexed to the judgment.

73. *Eur. Court HR, Tarakhel v. Switzerland, Grand Chamber Judgment of 4 November 2014, Application No. 29217/12, (Article 3, Prohibition of Torture – Violation)*. The applicants, an Afghan couple with six children living in Lausanne (Switzerland) and seeking asylum in Switzerland, successfully argued that under the Dublin Regulation their return to Italy in the absence of individual guarantees concerning their care and without obtaining from the Italian authorities guarantees that they would be taken charge of in a manner adapted to the age of the children, would breach their Convention rights.

ECHR 326 (2014)

04.11.2014

Press release issued by the Registrar

In today's **Grand Chamber** judgment in the case of *Tarakhel v. Switzerland* (application no. 29217/12) the European Court of Human Rights held, by a majority, that there would be:

a violation of Article 3 (prohibition of inhuman or degrading treatment) of the European Convention on Human Rights if the Swiss authorities were to send the applicants back to Italy under the Dublin Regulation without having first obtained individual guarantees from the Italian authorities that the applicants would be taken charge of in a manner adapted to the age of the children and that the family would be kept together.

The case concerned the refusal of the Swiss authorities to examine the asylum application of an Afghan couple and their six children and the decision to send them back to Italy.

The Court found in particular that, in view of the current situation regarding the reception system in Italy, and in the absence of detailed and reliable information concerning the specific facility of destination, the Swiss authorities did not possess sufficient assurances that, if returned to Italy, the applicants would be taken charge of in a manner adapted to the age of the children.

Principal facts

The applicants, Golajan Tarakhel, born in 1971, his wife Maryam Habibi, born in 1981, and their six minor children, born between 1999 and 2012, are Afghan nationals who live in Lausanne (Switzerland).

Mr Tarakhel left Afghanistan for Pakistan, where he met and married Mrs Habibi. The couple subsequently moved to Iran, where they lived for 15 years. They and their children later left Iran for Turkey and from there took a boat to Italy. The couple and their five oldest children landed on the coast of Calabria on 16 July 2011 and were immediately subjected to the EURODAC identification procedure (taking of photographs and fingerprints) after supplying a false identity. The same day they were placed in a reception facility, where they remained until 26 July 2011, when they were transferred to the Reception Centre for Asylum Seekers ("CARA") in Bari, once their true identity had been established.

On 28 July 2011 the applicants left the CARA in Bari without permission and travelled to Austria, where on 30 July 2011 they were again registered in the EURODAC system. They lodged an application for asylum which was rejected. On 1 August 2011 Austria submitted a request to take charge of the applicants to the Italian authorities, which on 17 August 2011 formally accepted the request.

The full texts of the Court's judgments are accessible on its website (<http://www.hudoc.echr.coe.int>)

The applicants later travelled to Switzerland and on 3 November 2011 lodged an asylum application. On 15 November 2011 Mr Tarakhel and his wife were interviewed by the Federal Migration Office (“the FMO”), which requested the Italian authorities to take charge of the applicants. The Italian authorities tacitly accepted the request.

On 24 January 2012 the FMO decided not to examine the applicants’ asylum application on the grounds that, in accordance with the European Union’s Dublin Regulation, by which Switzerland was bound under the terms of an association agreement with the European Union, Italy was the State responsible for examining the application. The FMO therefore issued an order for the applicants’ removal to Italy. On 2 February 2012 the applicants appealed to the Federal Administrative Court, which dismissed the appeal in a judgment of 9 February 2012.

The applicants requested the FMO to have the proceedings reopened and to grant them asylum in Switzerland. The request was forwarded to the Federal Administrative Court, which reclassified it as a “request for revision” of the judgment of 9 February 2012 and rejected it on 21 March 2012, on the ground that the applicants had not submitted any new arguments.

The applicants applied to the European Court of Human Rights and requested an interim measure suspending the enforcement of their deportation to Italy. The request was granted and on 18 May 2012 the Registry informed the Swiss Government’s Agent that the President of the Section to which the case had been assigned had decided to indicate to the Swiss authorities that the applicants should not be deported to Italy for the duration of the proceedings before the Court.

Complaints, procedure and composition of the Court

Relying on Article 3 (prohibition of torture and inhuman or degrading treatment), the applicants alleged that if they were returned to Italy “in the absence of individual guarantees concerning their care”, they would be subjected to inhuman and degrading treatment linked to the existence of “systemic deficiencies” in the reception arrangements for asylum seekers in Italy.

Under Article 8 (right to respect for private and family life), they argued that their return to Italy, where they had no ties and did not speak the language, would be in breach of their right to respect for their family life.

Under Article 13 (right to an effective remedy) taken in conjunction with Article 3, they submitted that the Swiss authorities had not given sufficient consideration to their personal circumstances and had not taken into account their situation as a family.

The application was lodged with the European Court of Human Rights on 10 May 2012. On 24 September 2013 the Chamber relinquished jurisdiction in favour of the Grand Chamber. The Italian, Dutch, Swedish, Norwegian and United Kingdom Governments and the organisations Defence for Children, the Centre for Advice on Individual Rights in Europe (“the AIRE Centre”), the European Council on Refugees and Exiles (“ECRE”) and Amnesty International, were given leave to intervene in the proceedings as third parties.

A hearing was held on 12 February 2014.

Judgment was given by the Grand Chamber of 17 judges, composed as follows:

Dean **Spielmann** (Luxembourg), *President*,
Josep **Casadevall** (Andorra),
Guido **Raimondi** (Italy),

The full texts of the Court’s judgments are accessible on its website (<http://www.hudoc.echr.coe.int>)

Mark **Villiger** (Liechtenstein),
 Isabelle **Berro-Lefèvre** (Monaco),
 András **Sajó** (Hungary),
 Ledi **Bianku** (Albania),
 Nona **Tsotsoria** (Georgia),
 Işıl **Karakaş** (Turkey),
 Nebojša **Vučinić** (Montenegro),
 Julia **Laffranque** (Estonia),
 Linos-Alexandre **Sicilianos** (Greece),
 Helen **Keller** (Switzerland),
 André **Potocki** (France),
 Paul **Lemmens** (Belgium),
 Helena **Jäderblom** (Sweden),
 Paul **Mahoney** (the United Kingdom),

and also Lawrence **Early**, *Deputy Grand Chamber Registrar*.

Decision of the Court

Article 3

The Court considered it appropriate to examine the complaint concerning the applicants' reception conditions in Italy solely from the standpoint of Article 3.

Concerning the overall situation of the reception arrangements for asylum seekers in Italy, the Court had previously observed³ that the Recommendations of the Office of the United Nations High Commissioner for Refugees ("UNHCR") and the report of the Commissioner for Human Rights of the Council of Europe, both published in 2012, referred to a number of failings. Without entering into the debate as to the exact number of asylum seekers without accommodation in Italy, the Court noted the glaring discrepancy between the number of asylum applications made in 2013 (over 14,000) and the number of places available in the facilities belonging to the SPRAR network [*Sistema di protezione per richiedenti asilo e rifugiati*] (9,630 places).

With regard to living conditions in the available facilities, the Court noted that in its Recommendations for 2013 UNHCR had described a number of problems. However, UNHCR had not reported situations of widespread violence or insalubrious conditions, and had stressed the efforts undertaken by the Italian authorities to improve reception conditions for asylum seekers. The Human Rights Commissioner, in his 2012 report, had noted the existence of some problems with regard to legal aid, care and psychological assistance in the emergency reception centres, the time taken to identify vulnerable persons and the preservation of family unity during transfers.

The Court reiterated that, as a "particularly underprivileged and vulnerable" population group, asylum seekers required "special protection" under Article 3 of the European Convention on Human Rights. This requirement of "special protection" of asylum seekers was particularly important when the persons concerned were children, even when they were accompanied by their parents

In view of the current situation of the reception system in Italy, the possibility that a significant number of asylum seekers removed to that country might be left without accommodation or might be accommodated in overcrowded facilities, in insalubrious and violent conditions, was not unfounded. The Swiss authorities were obliged to obtain assurances from their Italian counterparts that on their arrival in Italy the applicants would be received in facilities and in conditions adapted to the age of the children, and that the family would be kept together.

The full texts of the Court's judgments are accessible on its website (<http://www.hudoc.echr.coe.int>)

The Court noted that, according to the Italian Government, families with children were regarded as a particularly vulnerable category and were normally taken charge of within the SPRAR network. However, the Italian Government had not provided any further details on the specific conditions in which the authorities would take charge of the applicants.

Without detailed and reliable information about the specific reception facility to which the applicants would be sent, the physical conditions of their accommodation, and the question of whether the family would be kept together, the Court considered that the Swiss authorities did not have sufficient assurances that, if returned to Italy, the applicants would be taken charge of in a manner adapted to the age of the children.

Were the Swiss authorities to send the applicants back to Italy without having first obtained individual guarantees from the Italian authorities that they would be taken charge of in a manner adapted to the age of the children and that the family would be kept together, there would accordingly be a violation of Article 3 of the Convention.

Article 13 in conjunction with Article 3

The Court considered that the applicants had had available to them an effective remedy in respect of their complaint under Article 3. Accordingly, their complaint under Article 13 taken in conjunction with Article 3 had to be rejected as manifestly ill-founded.

Just satisfaction (Article 41)

The Court held that Switzerland was to pay the applicants 7,000 euros (EUR) in respect of costs and expenses.

Separate opinion

Judges Casadevall, Berro-Lefèvre and Jäderblom expressed a separate opinion which is annexed to the judgment.

- 74. Eur.Court HR, Jaloud v. the Netherlands, Grand Chamber Judgment of 20 November 2014, Application No. 47708/08, (Article 2, Right to Life – Violation).** The applicant, an Iraqi national and the father of an Iraqi civilian man killed by gunshot wounds in April 2004 in an incident involving the Netherlands Royal army personnel in Iraq at the time following the invasion of Iraq in March 2003 by a coalition of armed forces led by the United States of America, successfully claimed that the investigation into his son's death had neither been sufficiently independent nor effective.

ECHR 339 (2014)

20.11.2014

Press release issued by the Registrar

The case *Jaloud v. the Netherlands* (application no. 47708/08) concerned the investigation by the Netherlands authorities into the circumstances surrounding the death of an Iraqi civilian who died of gunshot wounds in Iraq in April 2004 in an incident involving Netherlands Royal Army personnel.

In today's **Grand Chamber** judgment in the case the European Court of Human Rights held, unanimously, that there had been:

a violation of Article 2 (right to life – procedural obligations) of the European Convention on Human Rights, as regards the failure of the Netherlands authorities to carry out an effective investigation into the death of Mr Jaloud's son.

The Court established that the complaint about the investigation into the incident – which had occurred in an area under the command of an officer of the armed forces of the United Kingdom – fell within the jurisdiction of the Netherlands within the meaning of Article 1 of the Convention (contract parties' obligation to respect the rights guaranteed in the Convention). The Court noted in particular that the Netherlands had retained full command over its military personnel in Iraq.

The Court came to the conclusion that the investigation had been characterised by serious shortcomings, which had made it ineffective. In particular, records of key witness statements had not been submitted to the judicial authorities; no precautions against collusion had been taken before questioning the Netherlands Army officer who had fired at the car carrying the victim; and the autopsy of the victim's body had been inadequate.

Principal facts

The applicant, Sabah Jaloud, is an Iraqi national who was born in 1943 and lives in An-Nasiryah, Iraq. He is the father of Azhar Sabah Jaloud, who died, aged 29, of gunshot wounds on 21 April 2004 in an incident involving Netherlands Royal Army personnel in Iraq.

Following the invasion of Iraq in March 2003 by a coalition of armed forces led by the United States of America, the Netherlands Government contributed troops to the Stabilisation Force in Iraq (SFIR).

From July 2003 until March 2005 Netherlands troops were stationed in the province of Al-Muthanna in south-eastern Iraq as part of Multinational Division South-East (MND-SE), which was under the command of an officer of the armed forces of the United Kingdom. The participation of Netherlands forces in MND-SE was governed by a Memorandum of Understanding between the United Kingdom

and the Kingdom of the Netherlands to which Rules of Engagement were appended. Both documents were and remain classified.

At around 2.30 a.m. on 21 April 2004, a patrol of six Netherlands soldiers led by Lieutenant A. arrived at a vehicle checkpoint located on the main supply route north of the town of Ar Rumaytah (in the province of Al-Muthanna). The personnel already present at the checkpoint were all members of the Iraqi Civil Defence Force (“ICDC”). The commander of the checkpoint, ICDC Sergeant H.S., had summoned the Netherlands soldiers following a drive-by shooting which had occurred at around 2.12 a.m. At this time a car had approached the checkpoint, slowed and turned. Shots had been fired at the ICDC personnel guarding the checkpoint, and the ICDC had returned fire. No one had been hit, and the car had driven away and disappeared.

Around 15 minutes after the arrival of the Netherlands soldiers, a black Mercedes car approached the checkpoint at speed. It hit a barrel set out in the middle of the road to form the checkpoint, but it did not stop. Shots were then fired at the car: Lieutenant A., a Netherlands soldier, fired 28 rounds from a Diemaco assault rifle, and shots may also have been fired by one or more ICDC personnel using the Kalashnikov AK-47 assault rifle. The driver then stopped the car. Azhar Sabah Jaloud was in the front passenger seat. He was hit in several places, including the chest. Netherlands soldiers removed him from the car and attempted to administer first aid; however, he was declared dead around one hour after the shooting.

An investigation was launched by the Netherlands Royal Military Constabulary (a branch of the Netherlands armed forces) later that morning. The AK-47 of Sergeant H.S., the Diemaco assault rifle of Lieutenant A., and the Mercedes car involved in the incident were all seized. Statements were taken from the personnel involved, and an X-Ray and autopsy were carried out on Azhar Sabah Jaloud’s body. An examination of the car suggested that it had been fired on from both the right and the left sides. The X-Ray and autopsy both found metallic objects inside the chest, the autopsy identified these as bullet fragments, and these were submitted for examination by the Baghdad police. However, none of these investigations were able to establish from which weapon the bullets had been fired.

In early 2007, Sabah Jaloud’s representative wrote to the Netherlands authorities, requesting information on whether any Netherlands personnel were being prosecuted for the incident. A public prosecutor replied, stating that the investigation had indicated that Lieutenant A. had acted in self-defence, mistakenly reacting to friendly fire from across the road, and that therefore no Netherlands servicemen had been identified as suspects. He further concluded that Azhar Sabah Jaloud had presumably been hit by an Iraqi bullet. In October 2007 Sabah Jaloud’s representative lodged a request with the Military Chamber of the Arnhem Court of Appeal for the prosecution of Lieutenant A., complaining that his son’s shooting had amounted to unnecessary use of force against a civilian. However, in April 2008 this court found that Lieutenant A. had reacted to friendly fire from across the road, mistaking it for hostile fire from inside the car. He had therefore acted within the confines of his instructions, and the decision not to prosecute had been sound.

Complaints, procedure and composition of the Court

Relying on Article 2 (right to life) of the Convention, Sabah Jaloud complained that the investigation into the shooting of his son had neither been sufficiently independent nor effective.

The application was lodged with the European Court of Human Rights on 6 October 2008.

On 9 July 2013 the Chamber to which the case had been allocated relinquished jurisdiction in favour of the Grand Chamber². The Government of the United Kingdom was given leave to submit written comments and take part in the hearing (Article 36 § 2 of the Convention). A Grand Chamber hearing was held on 19 February 2014.

The full texts of the Court’s judgments are accessible on its website (<http://www.hudoc.echr.coe.int>)

Judgment was given by the Grand Chamber of 17 judges, composed as follows:

Dean **Spielmann** (Luxembourg), President,
 Josep **Casadevall** (Andorra),
 Guido **Raimondi** (Italy),
 Ineta **Ziemele** (Latvia),
 Mark **Villiger** (Liechtenstein),
 Isabelle **Berro-Lefèvre** (Monaco),
 Elisabeth **Steiner** (Austria),
 Alvina **Gyulumyan** (Armenia),
 Ján **Šikuta** (Slovakia),
 Päivi **Hirvelä** (Finland),
 Luis **López Guerra** (Spain),
 András **Sajó** (Hungary),
 Zdravka **Kalaydjieva** (Bulgaria),
 Aleš **Pejchal** (the Czech Republic),
 Johannes **Silvis** (the Netherlands),
 Valeriu **Grițco** (the Republic of Moldova),
 Iulia Antoanella **Motoc** (Romania),

and also Michael **O'Boyle**, Deputy Registrar.

Decision of the Court

Article 1 – jurisdiction

The Court first addressed an objection of the Netherlands Government to the effect that the complaints did not fall within the jurisdiction of the Netherlands within the meaning of Article 1 of the Convention (contract parties' obligation to respect the rights guaranteed in the Convention).

The Court noted in particular the following points: The Netherlands was not divested of its jurisdiction solely because it had accepted the operational control of a United Kingdom officer. As was clear from a letter by the Ministers of Foreign Affairs and of Defence to the Parliament of the Netherlands, of June 2003, concerning the participation of Netherlands forces in SFIR, the Netherlands had retained full command over its military personnel in Iraq. It also followed from an excerpt of the Memorandum of Understanding for MND-SE, to which the Netherlands Government had given the Court access, that the drawing up of distinct rules on the use of force had remained in the domain of individual sending States. While the checkpoint where the shooting happened had nominally been manned by Iraqi ICDC personnel, the ICDC had been supervised by officers from the coalition forces. In view of these considerations the Court found that the Netherlands troops had not been at the disposal of any power, whether Iraq or the United Kingdom.

Having regard to the circumstances in which Azhar Sabah Jaloud had died – when the car in which he was a passenger was passing through a checkpoint manned by personnel under the command and direct supervision of a Netherlands officer – the Court found that his death had indeed occurred within the jurisdiction of the Netherlands within the meaning of Article 1.

The facts giving rise to the complaints derived from alleged acts and omissions of Netherlands military personnel and of the investigative and judicial authorities. As such they were capable of giving rise to the responsibility of the Netherlands under the Convention.

Article 2 – alleged breach of the duty to investigate

The full texts of the Court's judgments are accessible on its website (<http://www.hudoc.echr.coe.int>)

The Court could not agree with Sabah Jaloud's complaint that the investigation had not been sufficiently independent. He had called into question the independence of the Royal Military Constabulary unit which had undertaken the initial investigation, on the ground that they had shared their living quarters with the army personnel whom he blamed for his son's death. However, there was no evidence to show that that fact in itself had affected the independence of the Military Constabulary. Furthermore, the fact that the public prosecutor had relied to a large extent on the reports by the Royal Military Constabulary did not raise an issue in itself, given that public prosecutors inevitably relied on the police for information and support. Finally, the Court could not agree that the independence of the Military Chamber of the Court of Appeal – which had confirmed the decision not to prosecute Lieutenant A., who had fired at the car transporting Azhar Sabah Jaloud – had been tainted by the presence of a serving military officer as a judge. The Court noted in particular that the military member of that court was not subject, in his judicial role, to military authority; his functional independence was the same as those of civilian judges.

As regards Sabah Jaloud's complaint that the investigation had not been sufficiently effective, the Court observed that the investigation had indeed been characterised by a number of shortcomings.

Notably, the Military Chamber of the Court of Appeal had confined itself to establishing that Lieutenant A. had acted in self-defence, mistakenly reacting to friendly fire from across the road. It had not, however, addressed certain aspects relevant to the question of the proportionality of the force used, in particular whether more shots had been fired than necessary and whether the firing had ceased as soon as the situation had allowed. The Court observed that documents containing information potentially relevant to those questions – which had been submitted by the parties in the proceedings before the Court – had not been made available to the Netherlands judicial authorities at the time. In particular, an official record of statements from the Iraqi ICDC personnel who had been guarding the checkpoint at the time of the shooting and a list of the names of ICDC personnel who had fired their weapons had not been added to the case file.

Moreover, there had been a delay of more than six hours after the incident before Lieutenant A. was questioned. While there was no suggestion of foul play, the mere fact that no appropriate steps had been taken to reduce the risk of him colluding with other witnesses amounted to a shortcoming in the adequacy of the investigation. As regards the autopsy of Azhar Sabah Jaloud's body, it had been carried out without any qualified Netherlands official being present. The pathologist's report was extremely brief, lacked detail and did not include any pictures. Finally, fragments of metal identified as bullet fragments taken from Azhar Sabah Jaloud's body – potentially important material evidence – had subsequently been lost in unknown circumstances.

The Court recognised that the Netherlands military and investigators, being engaged in a foreign country in the aftermath of hostilities, had worked in difficult conditions. Nevertheless, the shortcomings in the investigation, which had seriously impaired its effectiveness, could not be considered inevitable, even in those conditions. The Court therefore concluded that the investigation had not fulfilled the standards required under Article 2. There had thus been a violation of Article 2 as regards the State's procedural obligation.

Just satisfaction (Article 41)

The Court held that the Netherlands was to pay Sabah Jaloud 25,000 euros (EUR) in respect of nonpecuniary damage and EUR 1,372.06 in respect of costs and expenses.

Separate opinions

The full texts of the Court's judgments are accessible on its website (<http://www.hudoc.echr.coe.int>)

Judge Spielmann, joined by Judge Raimondi, expressed a concurring opinion; Judges Casadevall, Berro-Lefèvre, Šikuta, Hirvelä, López Guerra, Sajó and Silvis expressed a joint concurring opinion; Judge Motoc expressed a concurring opinion. These separate opinions are annexed to the judgment.

75. *Eur.Court HR, Klausecker and Perez v. Germany, Fifth Section Decision of 29 January 2015, Application Nos. 415/07 & 15521/08, (Article 6, Right to a Fair Trial - Inadmissible)*. The applicants, both former employees at the European Patent Office and the United Nations respectively, complained about the lack of access to the German courts to challenge their refusal of employment and dismissal respectively. The Court declared the application inadmissible since Mr Klausecker had failed to make use of reasonably available means to protect his rights and Ms Perez had not exhausted all local remedies available to her.

ECHR 035 (2015)
29.01.2015

Press release issued by the Registrar

The cases of *Klausecker v. Germany* (application no. 415/07) and *Perez v. Germany* (no. 15521/08) concerned complaints related to employment in international organisations – the European Patent Office and the United Nations (UN) – and the alleged lack of access to the national courts in respect of those complaints.

In its decisions in these cases, the European Court of Human Rights has – by a majority in the case of *Klausecker* and unanimously in the case of *Perez* – declared the applications inadmissible. The decisions are final.

In the first case, brought by a physically handicapped person who was refused employment with the European Patent Office, the Court found in particular that the organisation's immunity from jurisdiction of the German courts had been proportionate in the circumstances of the case. Mr *Klausecker* would have had a reasonable alternative means to protect his rights under the Convention, namely by participating in an arbitration procedure.

In the second case, brought by a former staff member of the UN, the Court concluded that Ms *Perez* had failed to exhaust the national remedies. She had complained in a substantiated manner that there had been manifest deficiencies in the UN internal appeal proceedings. In the circumstances of her case, the German Federal Constitutional Court would therefore have had jurisdiction to examine whether the level of fundamental rights protection in the dispute concerning her dismissal had complied with the Constitution.

Principal facts

The applicant in the first case, Roland *Klausecker*, is a German national who was born in 1973 and lives in Erlangen. The applicant in the second case, Amalia *Perez*, is a Spanish national, who was born in 1950 and lives in Madrid.

Mr *Klausecker* is physically handicapped after he lost one eye, one hand and part of the fingers of his other hand in an accident at the age of 18. He later graduated in mechanical engineering and then worked as a research assistant at a university. Having applied to work at the European Patent Office in Munich, and passed the necessary professional exams, he was refused employment as patent examiner there in 2005, as he was considered not to meet the physical requirements of the post.

Both Mr *Klausecker*'s internal appeal within the European Patent Office against that decision and his complaint to the Administrative Tribunal of the International Labour Organisation (ILO) were

The full texts of the Court's judgments are accessible on its website (<http://www.hudoc.echr.coe.int>)

rejected as inadmissible, in November 2005 and July 2007, respectively, as job applicants did not have standing to lodge such motions. As the European Patent Organisation (“the EPO”) (of which the European Patent Office is part) had immunity from jurisdiction of the German labour or civil courts, Mr Klausecker lodged a complaint directly with the Federal Constitutional Court, which was equally rejected, on 22 June 2006, as inadmissible for lack of jurisdiction (file no. 2 BvR 2093/05). The European Patent Office subsequently offered Mr Klausecker to have the dispute determined by an arbitral tribunal, which he eventually refused in 2008, alleging in particular that the arbitration procedure proposed would be in breach of essential procedural guarantees, including the right to a public hearing within reasonable time.

Ms Perez is a former staff member of the United Nations (UN). Having worked for the organisation since 1970, she was promoted several times and, in 1998, moved to the UN Volunteer Programme, based in Bonn, Germany. After her professional performance had previously been rated by consecutive supervisors as fully satisfactory or exceptional, she was included in a reassignment scheme in 2002 after three negative appraisal reports. As she was subsequently unable to find a new post within the organisation, she was dismissed in 2003. Her internal administrative complaints as well as her appeal to the UN Joint Appeals Board and the UN Administrative Tribunal, challenging her dismissal, were unsuccessful.

Complaints, procedure and composition of the Court

The application in the case of Klausecker was lodged with the European Court of Human Rights on 22 December 2006, and the application in the case of Perez was lodged on 20 March 2008.

Both applicants relied on Article 6 (right to a fair trial), essentially complaining about the lack of access to the German courts to challenge their refusal of employment and dismissal, respectively. Mr Klausecker also complained, in particular, of the lack of access to and the deficient procedures within the European Patent Office and the Administrative Tribunal of the ILO, for which he considered Germany was to be held responsible. Ms Perez also alleged that the UN internal appeal proceedings did not meet the requirements of a fair trial by an independent and impartial tribunal and that Germany was to be held responsible for that.

The decisions were given by a Chamber of seven, composed as follows:

Mark **Villiger** (Liechtenstein), President,
 Boštjan M. **Zupančič** (Slovenia),
 Vincent A. **de Gaetano** (Malta),
 Angelika **Nußberger** (Germany),
 André **Potocki** (France),
 Helena **Jäderblom** (Sweden),
 Aleš **Pejchal** (the Czech Republic), Judges,

and also Claudia **Westerdiek**, Section Registrar.

Decision of the Court

Article 6

Klausecker

As regards Mr Klausecker’s complaint about his lack of access to the German courts, the Court was satisfied that granting the EPO immunity from German jurisdiction aimed at guaranteeing the proper functioning of that international organisation and thus pursued a legitimate aim.

The full texts of the Court’s judgments are accessible on its website (<http://www.hudoc.echr.coe.int>)

As to the question of whether limiting Mr Klausecker's access to the German courts had been proportionate to that aim, the Court considered it decisive whether there had been a reasonable alternative means to effectively protect his rights under the Convention. It came to the conclusion that he had indeed had such an alternative means available, as he had been offered to participate in an arbitration procedure. In reaching that conclusion, the Court noted in particular that under the arbitration contract offered by the EPO, the arbitrators would have determined the case on the basis of the rules which the Administrative Tribunal of the ILO would have applied had it had jurisdiction. The fact alone that the oral hearing before that tribunal, in which the parties could be represented by counsel, would not have been public did not make the arbitration procedure an unreasonable alternative to national court proceedings. Given that Mr Klausecker had had a reasonable alternative means to protect his rights under the Convention, the limitation on his access to the German courts had been proportionate. It followed that this part of the application had to be dismissed as manifestly ill-founded.

As regards Mr Klausecker's complaint about the lack of access to and the allegedly deficient procedures within the European Patent Office and the Administrative Tribunal of the ILO, the Court noted that, under the Court's case-law, Germany could only be held responsible in the circumstances of the case if the protection of fundamental rights offered by the EPO in his case was manifestly deficient. Having regard to the finding that by offering Mr Klausecker to participate in the arbitration procedure EPO had made available to him a reasonable alternative means to have his complaint examined in substance, the Court considered that the protection of fundamental rights within the EPO had not been manifestly deficient in his case. Accordingly this part of the application also had to be rejected.

Perez

As regards Ms Perez's allegations about the deficiencies in the UN internal appeal proceedings, the Court observed that there were strong elements pointing to the conclusion that she complained in a substantiated manner that there had been manifest deficiencies. It had indeed been confirmed by a panel of external, independent experts that the UN internal justice system in force at the time had been marked by a number of shortcomings.

However, the Court left open the question of whether Germany was to be held responsible for the alleged deficiencies in Ms Perez's case, as it came to the conclusion that she had failed to exhaust the national remedies.

In reaching that conclusion, the Court took note of the German Government's submission that a constitutional complaint would have been an effective remedy in respect of those complaints. It followed from several relevant decisions of the German Constitutional Court that – despite the immunity of international organisations from the jurisdiction of the German courts – the Constitutional Court had jurisdiction to examine whether the level of fundamental rights protection in employment disputes in international organisations complied with the Constitution. That jurisdiction was exercised only under restrictive conditions. In particular, a complainant had to show that the act complained of had a concrete effect within the German legal order – which was arguably the case when a complainant's dismissal was concerned, as in Ms Perez's case. Moreover, a complainant would have to claim in a substantiated manner that the level of protection of fundamental rights by the organisation concerned was manifestly below the level required by the Constitution – an allegation which had indeed been made by Ms Perez.

A complaint to the German Constitutional Court would therefore have been an effective remedy, which Ms Perez had failed to exhaust in respect of her complaint about the alleged deficiencies in the UN internal appeal proceedings. This part of the application therefore had to be rejected.

Similar considerations applied as regards Ms Perez's complaint of a lack of access to the German courts in general to challenge her dismissal by the UN. She could have complained before the Constitutional Court about that lack of access as a result of the UN's immunity from jurisdiction. This part of the application thus had to be rejected for non-exhaustion of the national remedies as well.

76. *Eur.Court HR, Petropavlovskis v. Latvia, Fourth Section Judgment of 13 January 2015, Application No. 44230/06, (Article 10, Freedom of Expression – Inapplicable; Article 11, Freedom of Assembly and Association – Inapplicable; Article 13, Right to an Effective Remedy – Inapplicable)*. The applicant unsuccessfully contested the refusal to grant him citizenship by naturalisation due to his political views, leading the Court in its judgment to refer to the legal relationship between citizens and States.

ECHR 006 (2015)

13.01.2015

Press release issued by the Registrar

In today's Chamber judgment in the case of *Petropavlovskis v. Latvia* (application no. 44230/06) the European Court of Human Rights held, unanimously, that:

Articles 10 (freedom of expression), 11 (freedom of association) and 13 (right to an effective remedy) of the European Convention on Human Rights were **not applicable** and that there was therefore no arguable complaint under the Convention.

The case concerned an allegation by a political activist that he was refused Latvian citizenship through naturalisation as punishment for his views on education reform in Latvia.

The Court found in particular that Mr Petropavlovskis had been free to disagree with government policies, which had been quite amply demonstrated by his numerous interviews in the mass media and civic activities both before and after the refusal to grant him citizenship, but that this was an entirely different matter from the issue of the criteria set for naturalisation and its procedure as determined by domestic law in Latvia. Indeed, requiring an individual seeking to obtain Latvian citizenship through naturalisation to demonstrate a genuine connection to the State, which includes a certain level of loyalty, could not be considered a punitive measure which interfered with freedom of expression and assembly.

Principal facts

The applicant, Jurijs Petropavlovskis, is a "permanently resident non-citizen" of the Republic of Latvia who was born in 1955 and lives in Riga.

In October 1998 the Latvian Parliament enacted a new law on education, which brought to an end instruction in State and municipal schools being conducted in Latvian and Russian, a practice inherited from Soviet times.

In 2003 and 2004, Mr Petropavlovskis was one of the main leaders of a movement involved in protesting against the education reform in Latvia. Mr Petropavlovskis participated in numerous meetings and demonstrations, which received wide media coverage (by the Latvian news agency LETA, the daily newspapers *Diena* and *Lauku Avīze* and the regional newspaper written in Russian, *Novaja Gazeta*). In particular, he made public statements advocating the Russian-speaking community's rights to education in Russian and the preservation of State-financed schools with Russian as the sole language of instruction.

The full texts of the Court's judgments are accessible on its website (<http://www.hudoc.echr.coe.int>)

On 5 February 2004 amendments to the Education Law were adopted. The new text provided in particular that, from 1 September 2004, all secondary State and municipal schools implementing national minority curricula had to ensure that not less than 60% of the classes taught as of tenth grade were in Latvian.

In the meantime, in November 2003, Mr Petropavlovskis applied for Latvian citizenship to the Naturalisation board. His application was refused in November 2004 by the Cabinet of Ministers. He instituted administrative proceedings to contest this decision and his case was examined in three court instances before eventually being refused because the decision of the Cabinet of Ministers was a political decision and thus not amenable to judicial review.

Those proceedings also received media coverage, Mr Petropavlovskis notably giving an interview to the daily newspaper *Lauku Avīze* in December 2004.

Complaints, procedure and composition of the Court

Relying on Articles 10 (freedom of expression) and 11 (freedom of assembly), Mr Petropavlovskis alleged that he had been denied Latvian citizenship because he had criticised the Government's position on education. Further relying on Article 13 (right to an effective remedy), he complained that he had not had any effective domestic remedy in respect of the alleged infringement of his rights as the domestic courts had ruled that the decision of the Cabinet of Ministers was a political decision. He also considered that an application for supervisory review by a public prosecutor was not an effective remedy.

The application was lodged with the European Court of Human Rights on 10 October 2006.

Judgment was given by a Chamber of seven judges, composed as follows:

Päivi **Hirvelä** (Finland), *President*,
 Ineta **Ziemele** (Latvia),
 George **Nicolaou** (Cyprus),
 Ledi **Bianku** (Albania),
 Zdravka **Kalaydjieva** (Bulgaria),
 Krzysztof **Wojtyczek** (Poland),
 Faris **Vehabović** (Bosnia and Herzegovina),

and also Françoise **Elens-Passos**, *Section Registrar*.

Decision of the Court

Articles 10 (freedom of expression), 11 (freedom of association and assembly) and 13 (right to an effective remedy)

The Court did not see in what manner Mr Petropavlovskis had been prevented either from expressing his disagreement with government policy or from participating in any meetings or movements.

Firstly, even though Mr Petropavlovskis maintained that the decision concerning his naturalization had been a punishment for his views and had thus weakened his resolve to speak out and participate in debates on matters of public interest, the Court observed that there was ample evidence to the contrary: namely, his views on education reform had been widely reported in the mass media in 2003 and 2004; he had continued to express those views even after his application for naturalisation had

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been refused; and he had remained politically active on other matters of public interest in 2005 when he became an assistant to a member of the European Parliament.

Secondly, Mr Petropavlovskis had never been given a criminal sanction for expressing his opinion or participating in a demonstration.

Thirdly, neither the European Convention nor international law in general provide for the right to acquire a specific nationality. There is nothing in the Latvian Citizenship Law to indicate that Mr Petropavlovskis could unconditionally claim a right to Latvian citizenship or that the decision of the Cabinet of Ministers against him could be seen as an arbitrary denial of such citizenship.

Lastly, the Court agreed with Mr Petropavlovskis that he was free to disagree with government policies – so as long as that critique took place in accordance with the law – and that the limits of such criticism were wider with regard to a government than to a private citizen or even to a politician. However, this was an entirely different matter from the issue of the criteria set for naturalisation and its procedure, which are both determined by domestic law. Requiring a person to demonstrate a genuine connection to the State (not to the government in power), which includes a certain level of loyalty, could not be considered a punitive measure which interfered with freedom of expression and assembly. Rather, that requirement is a criterion which has to be fulfilled by any individual seeking to obtain Latvian citizenship through naturalisation. Indeed, in many jurisdictions, acquisition of citizenship is accompanied by an oath of allegiance whereby the individual pledges loyalty to the State.

Consequently, the Court held that Articles 10 and 11 of the Convention were not applicable in the circumstances of Mr Petropavlovskis' case and that there was therefore no arguable complaint under the Convention.

Given that finding, the Court reached the same conclusion in respect of Article 13.

77. *Eur.Court HR, A.A. v. France & A.F. v. France, Fifth Section Judgment of 15 January 2015, Application Nos. 18039/11 & 80086/13, (Article 3, Prohibition of Torture – Violation)*. The applicants, two Sudanese nationals, successfully argued that given their special circumstances, their deportation to Sudan would put them at risk of inhuman and degrading treatment.

ECHR 09 (2015)
15.01.2015

Press release issued by the Registrar

In its two Chamber judgments, in the cases of *A.A. v. France* (application no. 18039/11) and *A.F. v. France* (application no. 80086/13), the European Court of Human Rights held, unanimously, that there would be

a violation of Article 3 (prohibition of torture and inhuman or degrading treatment) of the European Convention on Human Rights if the applicants were deported to Sudan.

The cases concerned proceedings to deport to Sudan two Sudanese nationals – *A.A.*, from a non-Arab tribe in Darfur, and *A.F.*, from South Darfur and of Tunjur ethnicity – who had arrived in France in 2010.

With regard to the general context, the Court had recently observed that the human-rights situation in Sudan was alarming, in particular where political opponents were concerned, and that merely belonging to a non-Arab ethnic group in Darfur gave rise to a risk of persecution. The Court noted that the situation had deteriorated further since the beginning of 2014.

The Court found in both cases that were the orders to deport the applicants to Sudan to be enforced, the applicants would, on account of their individual circumstances, run a serious risk of incurring treatment contrary to Article 3 of the Convention.

Principal facts

These two cases concerned proceedings to deport both applicants to Sudan. The applicant *A.A.* is a Sudanese national who was born in 1979 and lives in Calais (France). Originally from Muhajiriya in the South Darfur region, he is a member of the “Birqid” tribe, a non-Arab tribe from Darfur. He stated that one of his brothers had joined the Justice and Equality Movement (JEM), and that he himself shared that Movement’s ideas but had always refused to become involved in their armed activities. *A.A.* left Sudan, travelling through Egypt, Turkey, Greece and Italy before arriving in France in October 2010.

A.A. was arrested by the French authorities in Calais on 28 October 2010. He was issued with a removal order and placed in administrative detention, then released. He was subsequently arrested on dozens of occasions and placed in police custody. On 21 March 2011 he applied to the European Court of Human Rights for an interim measure, which was granted for the duration of the proceedings before the Court.

On 6 June 2011 *A.A.* lodged an application for asylum, which was dismissed by the French Office for the Protection of Refugees and Stateless Persons (OFPRA) on the ground that his account of events

The full texts of the Court’s judgments are accessible on its website (<http://www.hudoc.echr.coe.int>)

was unreliable. An appeal lodged by him with the National Asylum Tribunal (CNDA) was dismissed as being out of time.

The applicant A.F. is a Sudanese national who was born in 1986 and lives in Mulhouse (France). Originally from South Dafur, and of Tunjur ethnicity, A.F. started at Al-Jazeera University in Khartoum at the height of the armed conflict in Sudan in 2006. He stated that he had taken part in discussion groups on Darfur and the violence perpetrated by the regime with the help of Janjaweed militias, and that on several occasions he had been arrested, detained and beaten by members of the Sudanese security services.

A.F. left Sudan on 10 March 2010. On arriving in France he applied for asylum, but his application was rejected by the OFPRA on 21 June 2011. He lodged an appeal with the CNDA, in support of which he submitted, among other evidence, a letter from the JEM, a movement rebelling against the regime, confirming that he had been subjected to repeated persecution and arrests by the Government forces. The CNDA upheld the OFPRA's decision to reject his application.

On 31 July 2013 A.F. was served with an order to leave French territory, which he challenged unsuccessfully before the Strasbourg Administrative Court. Having attempted to lodge a second asylum claim under a false identity, A.F. was arrested and placed in administrative detention. On 19 December 2013 A.F. applied to the Court for an interim measure on the basis of Rule 39 of the Rules of Court. An interim measure was granted for the duration of the proceedings before the Court.

Complaints, procedure and composition of the Court

Relying in particular on Article 3 (prohibition of torture and inhuman or degrading treatment), both applicants alleged that deportation to Sudan would expose them to inhuman or degrading treatment.

The application was lodged with the European Court of Human Rights on 21 March 2011.

Judgment was given by a Chamber of seven judges, composed as follows:

Mark **Villiger** (Liechtenstein), President,
 Angelika **Nußberger** (Germany),
 Ganna **Yudkivska** (Ukraine),
 Vincent A. **de Gaetano** (Malta),
 André **Potocki** (France),
 Helena **Jäderblom** (Sweden),
 Aleš **Pejchal** (the Czech Republic),

and also Claudia **Westerdiek**, Section Registrar.

Decision of the Court

Article 3

With regard to the first case, the Court considered that it was in principle for the applicant to provide evidence capable of proving that he would be exposed to a risk of treatment contrary to Article 3 if he were deported. Regarding the inconsistencies in A.A.'s account, the Court found that they were not such as to render his allegations entirely unreliable. The Court noted that the applicant's description of events in Sudan had remained consistent both before it and before the OFPRA, and that only the chronology differed. A mere discrepancy in the chronology of events did not amount to a major inconsistency.

The full texts of the Court's judgments are accessible on its website (<http://www.hudoc.echr.coe.int>)

With regard to the general context, the Court had recently observed that the human-rights situation in Sudan was alarming, particularly where political opponents were concerned. The Court noted that the situation had deteriorated further since the beginning of 2014. Merely belonging to a non-Arab ethnic group in Darfur gave rise to a risk of persecution.

A.A. alleged that the Sudanese authorities had interrogated and tortured him several times in order to extract information from him about the JEM. Although brief, the medical certificate produced by him gave credibility to his allegations of ill-treatment. While A.A.'s allegations were not supported by any other document, he had however stated that he had been given a prison sentence for providing support to the opposition forces. The Court was of the view that the sentence imposed on A.A. reflected the fact that the Sudanese authorities were convinced that he was involved in a rebel movement despite his assertions to the contrary.

The Court considered that if the deportation order against A.A. were to be enforced, he ran a serious risk of incurring treatment contrary to Article 3 of the Convention.

With regard to the second case, the applicant A.F. submitted that he risked incurring ill-treatment if deported to Sudan on account of his Tunjur ethnic origins and his supposed links with the JEM. The OFPRA and the CNDA had considered that A.F.'s statements had remained evasive and confused both regarding his ethnic origins and his region of origin, but the Court noted that they had failed to state the grounds for their suspicions. A.F.'s account of the ill-treatment he had allegedly suffered on account of his supposed links with the JEM was particularly detailed and compatible with the international reports available. The medical certificate recording the presence of a number of scars on A.F.'s body lent credence to the allegations of torture and the suspicions by the Sudanese authorities of links between A.F. and the JEM. The Court considered that the inconsistencies in A.F.'s account did not suffice to cast doubt on the facts alleged by him.

The Court did not consider that the asylum application submitted under a false identity discredited all A.F.'s statements before the Court. It noted that whilst A.F.'s account in that asylum application differed from his initial account, the alleged risks of persecution were the same.

Given the suspicions of the Sudanese authorities towards Darfuris who had travelled abroad, the Court considered it likely that A.F., on his arrival at Karthoum Airport, would attract the unfavourable attention of the authorities on account of the few years he had spent abroad.

Accordingly, the Court held that, having regard to A.F.'s profile and the generalised acts of violence perpetrated against members of Darfur ethnic groups, his deportation to Sudan would expose him to a risk of ill-treatment under Article 3 of the Convention.

78. *Eur.Court HR, Eshonkulov v. Russia, First Section Judgment of 15 January 2015, Application No. 68900/13, (Article 3, Prohibition of Torture – Violation, in the event of Mr Eshonkulov’s forced return to Uzbekistan; Article 5-1, Right to Liberty and Security – Violation; Article 5-4, Right to Review of Lawfulness of Detention – Violation; Article 6, Right to a Fair Trial – Violation)*. The applicant, a wanted suspect in Uzbekistan on charges of membership of an extremist movement, successfully argued that his extradition to Uzbekistan and expulsion proceedings would put him at risk of torture and ill-treatment.

ECHR 008 (2015)

15.01.2015

Press release issued by the Registrar

The applicant, Javokhir Eshonkulov, is an Uzbek national who was born in 1983. The case concerned his complaint about extradition and expulsion proceedings against him in Russia.

In April 2013 Mr Eshonkulov was arrested in Moscow, where he had been living since May 2012, as he was wanted in Uzbekistan on charges of alleged membership of a Muslim extremist movement. He was subsequently placed in detention pending extradition to Uzbekistan. In October 2013 he was released, as the six-month maximum detention period had expired. Immediately following his release, he was rearrested for breaching migration rules. One day after his new arrest, a district court found him guilty of unlawful residence in Russia and ordered his administrative expulsion from Russia. His removal was, however, suspended in November 2013 following an interim measure granted by the European Court of Human rights under Rule 39 of its Rules of Court, which indicated to the Russian Government that Mr Eshonkulov should not be expelled to Uzbekistan pending the proceedings before the Court. Both the extradition and expulsion orders were upheld by the national courts in February 2014. In parallel, Mr Eshonkulov applied for refugee status in Russia. The migration service rejected his application in a decision which was upheld by the Moscow City Court in June 2014. In the extradition, expulsion and refugee-status proceedings he consistently argued that he was at risk of persecution and ill-treatment in Uzbekistan on account of the accusations against him of religious extremism.

Relying in particular on Article 3 (prohibition of torture and inhuman or degrading treatment), Mr Eshonkulov alleged that, if returned to Uzbekistan, he would run a real risk of being subjected to torture and ill-treatment given the nature of the accusations against him. Also relying on Article 5 §§ 1 (f) and 4 (right to liberty and security / right to have lawfulness of detention decided speedily by a court), he complained that his detention pending expulsion had been unlawful, alleging in particular that the real purpose of the expulsion proceedings had been to circumvent the maximum time-limit in domestic law for detention pending extradition, and that he had been unable to obtain judicial review of his detention. Lastly, relying on Article 6 § 2 (presumption of innocence), he alleged that the wording of the extradition decision against him, stating that he had “committed crimes ... in the Russian Federation”, had amounted to a declaration of his guilt which had prejudged the assessment of his case by the Uzbek courts.

Violation of Article 3 – in the event of Mr Eshonkulov’s forced return to Uzbekistan

Violation of Article 5 § 4

Violation of Article 5 § 1 (f) – in respect of Mr Eshonkulov’s detention in the framework of the expulsion proceedings)

Violation of Article 6 § 2

The full texts of the Court’s judgments are accessible on its website (<http://www.hudoc.echr.coe.int>)

Interim measure (Rule 39 of the Rules of Court) – not to expel Mr Eshonkulov’s from Russia – still in force until judgment becomes final or until further order.

Just satisfaction: EUR 8,500 (non-pecuniary damage) and EUR 5,000 (costs and expenses)

79. *Eur.Court HR, Gallardo Sanchez v. Italy, Fourth Section Judgment of 24 March 2015, Application No. 11620/07, (Article 5-1-f, Right to Liberty and Security - Violation)*. The applicant, a Venezuelan national detained in Italy with a view to being extradited to Greece, successfully contested the duration of his detention pending extradition.

ECHR 092 (2015)
24.03.2015

Press release issued by the Registrar

In today's **Chamber judgment** in the case of Gallardo Sanchez v. Italy (application no. 11620/07) the European Court of Human Rights held, unanimously, that there had been:

a violation of Article 5 § 1 (f) (right to liberty and security) of the European Convention on Human Rights.

The case concerned the excessive length of a Venezuelan national's detention in Italy with a view to his extradition to Greece.

The Court found that deprivation of liberty could be lawful in terms of domestic law but still arbitrary and thus contrary to the European Convention. Deprivation of liberty under Article 5 of the Convention was justified only for as long as extradition proceedings were being conducted. Accordingly, where the proceedings were not conducted with due diligence the detention ceased to be justified.

The Court held in particular that in the context of an extradition allowing the requesting State to try a defendant, the criminal proceedings were still pending, the person detained with a view to extradition was presumed innocent, their ability to exercise their defence rights was considerably limited, or even non-existent, and the authorities of the requested State were debarred from undertaking any examination of the case on the merits. For all those reasons the requested State was required to act with special diligence. However, Mr Gallardo Sanchez had been detained with a view to extradition for one and half years and the judicial phase of the proceedings in his case, which had not been complex, was marked by unjustified delays.

Principal facts

The applicant, Manuel Rogelio Gallardo Sanchez, is a Venezuelan national who was born in 1965.

On 19 April 2005 Mr Gallardo Sanchez was placed in detention, with a view to his extradition, by the Rome police in execution of an arrest warrant issued by the Greek authorities. On 22 April 2005 the Aquila Court of Appeal confirmed the arrest and ordered Mr Gallardo Sanchez to be kept in detention. The Ministry of Justice, in turn, requested that he be kept in detention. At a hearing on 27 April 2005 Mr Gallardo Sanchez stated that he did not consent to his extradition.

On 21 June 2005 the public prosecutor's office asked the Court of Appeal to grant the request for extradition that had been submitted by the Greek authorities. The hearing initially listed for 15 December 2005 was adjourned to 12 January 2006. The Court of Appeal then issued an opinion in favour of Mr Gallardo Sanchez's extradition, which it filed on 30 January 2006.

The full texts of the Court's judgments are accessible on its website (<http://www.hudoc.echr.coe.int>)

On 3 March 2006 Mr Gallardo Sanchez appealed to the Court of Cassation, which dismissed his appeal. In the meantime, between June and September 2005, Mr Gallardo Sanchez lodged three applications for release with the Court of Appeal, which rejected his applications on the grounds that there was still a risk that he might abscond and that the State had to comply with its international undertakings.

On 9 October 2006 the Minister for Justice signed the extradition order and on 26 October 2006 Mr Gallardo Sanchez was extradited.

Complaints, procedure and composition of the Court

Relying on Article 5 § 3 (right to liberty and security), Mr Gallardo Sanchez complained of the duration of the detention imposed on him with a view to his extradition. The Court, which was master of the legal characterisation to be given in law to the facts of the case, considered that the application should be examined under Article 5 § 1 (f) (right to liberty and security) of the Convention.

The application was lodged with the European Court of Human Rights on 7 March 2007.

Judgment was given by a Chamber of seven judges, composed as follows:

Päivi **Hirvelä** (Finland), *President*,
Guido **Raimondi** (Italy),
George **Nicolaou** (Cyprus),
Ledi **Bianku** (Albania),
Nona **Tsotsoria** (Georgia),
Paul **Mahoney** (the United Kingdom),
Krzysztof **Wojtyczek** (Poland),

and also Fatoş **Aracı**, *Deputy Section Registrar*.

Decision of the Court

Article 5 § 1 (f)

The Court observed at the outset that Mr Gallardo Sanchez's detention with a view to his extradition had pursued the aim for which it had been imposed and been in conformity with domestic law.

The Court reiterated, however, that deprivation of liberty could be lawful in terms of domestic law but still arbitrary and thus contrary to the Convention. Deprivation of liberty under Article 5 (right to liberty and security) was justified only for as long as extradition proceedings were being conducted and the detention ceased to be justified if the proceedings were not conducted with due diligence.

It was therefore not the Court's task in the present case to examine whether the length of the extradition proceedings was reasonable overall, but to establish whether the length of the detention had exceeded the reasonable time necessary to achieve the aim pursued. Accordingly, if there had been periods of inactivity on the part of the authorities or a lack of diligence, the detention would cease to be justified.

In order to specify the level of diligence required for each, the Court distinguished between two forms of extradition: extradition for the purposes of enforcing a sentence and extradition enabling the requesting State to try the person concerned. In the latter case, as criminal proceedings were pending, the person subject to extradition was to be presumed innocent. The ability of that person to exercise

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their defence rights for the purposes of proving their innocence was considerably limited, or even non-existent. The authorities of the requested State were debarred from undertaking any examination of the merits of the case. For all those reasons the requested State had a duty to act with special diligence.

The Court noted that in the present case the detention with a view to extradition had lasted approximately one and a half years. It observed that substantial delays had occurred at the different stages of the extradition proceedings: the first hearing before the Court of Appeal had been listed for 15 December 2005, that is, six months after the request for extradition had been sent by the Greek authorities to the Court of Appeal and eight months after Mr Gallardo Sanchez had been placed in detention with a view to extradition.

The Court then observed that the case had not been complex, since the Court of Appeal's task had consisted merely of verifying whether the extradition request had been submitted in accordance with the procedures laid down in the European Convention on Extradition, satisfying itself that the principle of the right not to be tried or punished twice and the double criminality principle had been complied with and that the criminal proceedings were not motivated by discriminatory or political reasons.

The Court also stressed the fact that the Court of Cassation, after ruling within two months on Mr Gallardo Sanchez's appeal, had taken more than four months to file a very brief judgment in which it confined itself to stating that the extradition request had been sent by the requesting State in accordance with the proper procedure and that the Court of Cassation did not itself have jurisdiction to call into question the charges filed against Mr Gallardo Sanchez by the Greek authorities. The Government had not produced any evidence capable of justifying that delay.

The Court acknowledged that Mr Gallardo Sanchez's objection to his extradition had justified an extension of his detention, but considered that this could not relieve the State of responsibility for the unjustified delays during the judicial phase of the proceedings.

Having regard to the nature of the extradition proceedings and the unjustified delay by the Italian courts, the Court concluded that Mr Gallardo Sanchez's detention had not been "lawful" within the meaning of Article 5 § 1 (f) of the Convention and that there had therefore been a violation of that provision.

Just satisfaction (Article 41)

The applicant did not submit a request for just satisfaction. Accordingly, the Court considered that there was no call to award him any sum under this head.

80. *Eur.Court HR, Ouabour v. Belgium, Second Section Judgment of 2 June 2015, Application No. 26417/10, (Article 3, Prohibition of Torture – Violation; Article 13, Right to an Effective Remedy, taken in conjunction with Article 3 – No Violation)*. After six year’s imprisonment for activity in a terrorist organisation, the applicant, in view of his pending extradition to Morocco, successfully raised a defence stating that his extradition for a person with his terrorist background would put him at risk of torture in Morocco.

ECHR 177 (2015)

02.06.2015

Press release issued by the Registrar

The applicant, Abdellah Ouabour, was born in 1974 and lives in Maaseik (Belgium).

The case concerned an order for his extradition to Morocco, issued after he had been sentenced in 2007 to six years’ imprisonment for taking part in the activities of a terrorist organisation and for criminal conspiracy.

In April 2005 the chief public prosecutor at the Rabat Court of Appeal (Morocco) issued an international arrest warrant in respect of Mr Ouabour, who was wanted for “forming a group to prepare and commit terrorist acts”. The Brussels Court of First Instance declared the warrant enforceable in July 2005.

In December 2009 Mr Ouabour appealed to the *Conseil d’État* against a ministerial order of 5 October 2009 approving his extradition. He alleged that torture was systematically practised in Morocco during questioning and in prison in the context of terrorism prevention and that he belonged to the category of persons affected by such practices. The legal adviser at the *Conseil d’État* expressed the opinion that the appeal was ill-founded, noting that most of the documents supplied by the applicant dated back to the period from 2003 to 2006 and did not warrant a conclusion that the situation in Morocco would be dangerous for him.

On 30 July 2010, after the European Court of Human Rights had indicated an interim measure (Rule 39 of the Rules of Court) to the effect that it would be advisable not to extradite Mr Ouabour to Morocco until further notice, his immediate release was ordered on the grounds that the length of his detention was disproportionate to the aim pursued.

Mr Ouabour and the Government disagree as to whether the *Conseil d’État*’s judgment of 19 November 2010 means that the ministerial order of 5 October 2009 approving the applicant’s extradition has been withdrawn.

Mr Ouabour alleged that if extradited to Morocco, he would face a real risk of being subjected to treatment in breach of Article 3 (prohibition of inhuman and degrading treatment) of the European Convention on Human Rights. Relying on Article 13 (right to an effective remedy) in conjunction with Article 3, he argued that his appeal to the *Conseil d’Etat* was ineffective.

Violation of Article 3 – in the event of Mr Ouabour’s extradition to Morocco
No violation of Article 13 in conjunction with Article 3

Interim measure (Rule 39 of the Rules of Court) – not to extradite Mr Ouabouar to Morocco – still in force until judgment becomes final or until further order

Just satisfaction: The Court held that the finding of a violation constituted adequate just satisfaction in respect of any possible non-pecuniary prejudice sustained by Mr Ouabouar. It further awarded him 6,500 euros (EUR) in respect of costs and expenses.

81. *Eur.Court HR, Kyriacou Tsiakkourmas and Others v. Turkey, Second Section Judgment of 2 June 2015, Application No. 13320/02, (Article 3, Prohibition of Torture – No Violation, as regards degrading treatment; Article 3, Prohibition of Torture – Violation, as regards effective investigation; Article 5-1, Right to Liberty and Security – No Violation; Article 5-4, Review of Lawfulness of Detention – Violation)*. The applicants, 13 Greek Cypriot nationals, brought a case arising from the abduction of Mr Tsiakkourmas who was snatched by Turkish Cypriot officials of the Sovereign Base Areas (SBAs) under British jurisdiction in Cyprus and tortured and detained in the “Turkish Republic of Northern Cyprus”, and partially successfully complained that the abduction from the SBAs had violated national and international law.
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ECHR 177 (2015)
02.06.2015

Press release issued by the Registrar

The applicants are 13 (Greek) Cypriot nationals: Panayiotis Kyriacou Tsiakkourmas and his wife Niki Kyriacou Tsiakkourma, born in 1962 and 1967 respectively; their three children; and the eight brothers and sisters of Mr Kyriacou Tsiakkourmas. The applicants live in Larnaca, Nicosia, and Famagusta (all in Cyprus) respectively.

The case essentially concerned the alleged abduction of Mr Kyriacou Tsiakkourmas by or with the connivance of Turkish Cypriot officials from one of the two Sovereign Base Areas (“SBA”) under British jurisdiction in Cyprus, and his alleged ill-treatment and unlawful detention in the “Turkish Republic of Northern Cyprus” (“TRNC”).

According to Mr Kyriacou Tsiakkourmas, who at the time owned a construction company, he was going to pick up by car several Turkish Cypriot workers from a café located in the SBA in the early morning of 13 December 2000 – as was his usual practice –, when he was stopped by four men in civilian clothes approaching him in another car on the territory of the SBA. One of the men threatened him with a gun and hit him on the head, making him fall to the ground into a large puddle. The group of men kicked and punched him while he was on the ground, then dragged him into their car and drove away with him into the “TRNC”. In the car, they threatened him, punched him the face and later blindfolded him. He was then taken to a building and, blindfolded, questioned about himself and his family, without being given any explanations as to where he was and why he was being held. Mr Kyriacou Tsiakkourmas later assumed that he was in a police station, as after the blindfold had been removed, he found himself in an office and later saw police officers in uniform in the reception area of the building. He was taken to a hospital, where he received a prescription for medication for his diabetes, but the doctor, who did not speak Greek or English, did not pay attention to his complaints about the injuries he had sustained as a result of the ill-treatment. Mr Kyriacou Tsiakkourmas was then presented with a bag containing drugs which had allegedly been discovered on him. Without being informed of his rights or asked whether he wanted the assistance of a lawyer, he was taken before a judge who charged him with possession of drugs and authorized his detention for eight days. The cell where he was subsequently held was small, cold and dirty and had no functioning toilet.

According to the Turkish Government, the police, having been informed of Mr Kyriacou Tsiakkourmas’ alleged plan to smuggle drugs, arrested him after he had entered the “TRNC” on foot.

The police confiscated a bag containing cannabis from him; he was subsequently questioned and brought before a judge who authorised his detention for eight days.

On 21 December 2000 Mr Kyriacou Tsiakkourmas was charged with possession of cannabis and its unlawful import into the “TRNC”. The court rejected his lawyer’s request for bail and extended his detention order. In April 2001, he was convicted as charged and sentenced to six months’ imprisonment; he was released from prison in view of the time he had already spent in detention.

Relying in particular on Article 5 §§ 1 and 4 (right to liberty and security / right to have lawfulness of detention decided speedily by a court), Mr Kyriacou Tsiakkourmas complained: that his abduction from the territory of the SBA had been in violation of national and international law; that he had been unlawfully remanded in custody without being adequately informed as to why he could not be released and without being able to challenge the lawfulness of his detention. Relying on Article 3 (prohibition of inhuman or degrading treatment), he complained in particular of the ill-treatment inflicted on him during his arrest.

Violation of Article 5 § 4

No violation of Article 5 § 1

No violation of Article 3 (treatment)

Violation of Article 3 (investigation)

Just satisfaction: The applicants did not submit a claim for just satisfaction.

82. *Eur.Court HR, J.K. and Others v. Sweden, Fifth Section Judgment of 4 June 2015, Application No. 59166/12, (Article 3, Prohibition of Torture – No Violation, in the event of the applicants’ deportation to Iraq)*. The applicants, an Iraqi married couple and their sons who had applied for asylum, unsuccessfully argued that their return to Iraq would put them at risk of persecution and ill-treatment by Al-Qaeda.

ECHR 181 (2015)
04.06.2015

Press release issued by the Registrar

The case concerned a family’s threatened deportation to Iraq.

The applicants, a married couple and their son, are Iraqi nationals who were born in 1964, 1965, and 2000, respectively. They all applied for asylum in Sweden in 2011. In the ensuing domestic proceedings, they claimed that they were at risk of persecution by al-Qaeda if deported to Iraq on account of the applicant husband having run a business in Baghdad with exclusively American clients. The family had been the target of a number of attacks: the husband had had to stay in hospital for three months in 2004 following a murder attempt by al-Qaeda; a bomb was placed next to their house in 2006; their home and business stock was destroyed in a fire in 2006 and 2008; and the husband and his daughter were shot at in their car in 2008, resulting in the daughter dying in hospital shortly afterwards. The husband stated that they had constantly been on the move since 2008 and had not therefore received any more threats. Their case was examined by the Migration Board and the Migration Court which found their story credible and acknowledged that they had been the victims of severe violence and harassment. However, those acts had been committed several years before and the applicant husband had ended his business with the Americans in 2008 and had stayed in Baghdad for two years after that without substantiating that the family had been the victim of any further attacks. In the event that the family was still under threat, they should seek protection from the Iraqi authorities. The Migration Court of Appeal refused leave to appeal in August 2012. Subsequently, in September 2012, the Migration Board refused their request for reconsideration of their case. The family’s deportation was, however, then suspended in September 2012 on the basis of an interim measure granted by the European Court of Human Rights under Rule 39 of its Rules of Court, which indicated to the Swedish Government that the applicants should not be expelled to Iraq whilst the Court was considering their case.

Relying on Article 3 (prohibition of torture and of inhuman or degrading treatment) of the Convention, the applicant family alleged that, if returned to Iraq, they would be at risk of persecution and ill-treatment by al-Qaeda who had infiltrated the domestic authorities, which had not therefore been in a position to protect them.

No violation of Article 3 – in the event of the applicants’ deportation to Iraq

Interim measure (Rule 39 of the Rules of Court) – not to deport the applicants to Iraq – still in force until judgment becomes final or until further order.

83. *Eur. Court HR, Sargsyan v. Azerbaijan, Grand Chamber Judgment of 16 June 2015, Application No. 40167/06, (Article 1 of Protocol No. 1, Protection of Property – Violation; Article 8, Right to Respect for Private and Family Life – Violation; Article 13, Right to an Effective Remedy – Violation)*. The applicant, a refugee from Armenia, successfully argued that as a result of having to flee from his home in Azerbaijan during the Nagorno-Karabakh conflict, he had been denied the right by his State to return to his village and to have access to his property.

ECHR 207 (2015)

16.06.2015

Press release issued by the Registrar

In today's **Grand Chamber** judgment in the case of **Sargsyan v. Azerbaijan** (application no. 40167/06) the European Court of Human Rights held, by a majority, that there had been:

a continuing violation of Article 1 of Protocol No. 1 (protection of property) to the European Convention on Human Rights;

a continuing violation of Article 8 (right to respect for private and family life) of the Convention; and

a continuing violation of Article 13 (right to an effective remedy).

The case concerned an Armenian refugee's complaint that, after having been forced to flee from his home in the Shahumyan region of Azerbaijan in 1992 during the Armenian-Azerbaijani conflict over Nagorno-Karabakh, he had since been denied the right to return to his village and to have access to and use his property there.

It was the first case in which the Court had to decide on a complaint against a State which had lost control over part of its territory as a result of war and occupation, but which at the same time was alleged to be responsible for refusing a displaced person access to property in an area remaining under its control.

There are currently more than one thousand individual applications pending before the Court which were lodged by persons displaced during the conflict over Nagorno-Karabakh.

In Mr Sargsyan's case, the Court confirmed that, although the village from which he had to flee was located in a disputed area, Azerbaijan had jurisdiction over it.

The Court considered that while it was justified by safety considerations to refuse civilians access to the village, the State had a duty to take alternative measures in order to secure Mr Sargsyan's rights as long as access to the property was not possible. The fact that peace negotiations were ongoing did not free the Government from their duty to take other measures. What was called for was a property claims mechanism which would be easily accessible to allow Mr Sargsyan and others in his situation to have their property rights restored and to obtain compensation.

Principal facts

The full texts of the Court's judgments are accessible on its website (<http://www.hudoc.echr.coe.int>)

The applicant, Minas Sargsyan, an Armenian national, was born in 1929 and died in 2009 in Yerevan after having lodged his complaint with the European Court of Human Rights in 2006. Two of his children have pursued the application on his behalf.

Mr Sargsyan stated that he and his family, ethnic Armenians, used to live in the village of Gulistan, in the Shahumyan region of the Azerbaijan SSR, where he had a house and a plot of land. According to his submissions, his family was forced to flee from their home in 1992 during the Armenian-Azerbaijani conflict over Nagorno-Karabakh.

At the time of the dissolution of the Soviet Union in December 1991, the Nagorno-Karabakh Autonomous Oblast (“the NKAO”) was an autonomous province landlocked within the Azerbaijan Soviet Socialist Republic (“the Azerbaijan SSR”). In 1989 the NKAO had a population of approximately 77% ethnic Armenians and 22% ethnic Azeris. The Shahumyan region shared a border with the NKAO and was situated north of it. According to Mr Sargsyan, prior to the conflict, 82% of the population of Shahumyan were ethnic Armenians.

Armed hostilities in Nagorno-Karabakh started in 1988. In September 1991 – shortly after Azerbaijan had declared its independence from the Soviet Union – the Regional Council of the NKAO announced the establishment of the “Nagorno-Karabakh Republic” (“NKR”), consisting of the territory of the NKAO and the Shahumyan district of Azerbaijan. Following a referendum in December 1991 – boycotted by the Azeri population – in which 99.9% of those participating voted in favour of the secession of the NKR from Azerbaijan, the “NKR” reaffirmed its independence from Azerbaijan in January 1992. After that, the conflict gradually escalated into full-scale war. By the end of 1993, ethnic Armenian forces had gained control over almost the entire territory of the former NKAO as well as seven adjacent Azerbaijani regions. The conflict resulted in hundreds of thousands of internally-displaced people and refugees on both sides. In May 1994 the parties to the conflict signed a cease-fire agreement, which holds to this day. Negotiations for a peaceful solution have been carried out under the auspices of the Organization for Security and Co-operation in Europe (OSCE). However, no final political settlement of the conflict has so far been reached. The self-proclaimed independence of the “NKR” has not been recognised by any state or international organisation.

Prior to their accession to the Council of Europe in 2001, Armenia and Azerbaijan both gave undertakings to the Committee of Ministers and the Parliamentary Assembly, committing themselves to the peaceful settlement of the Nagorno-Karabakh conflict.

Shahumyan, where Mr Sargsyan’s family lived, did not form part of NKAO, but was later claimed by the “NKR” as part of its territory. In 1991 special-purpose militia units of the Azerbaijan SSR launched an operation in the region with the stated purpose of “passport checking” and disarming local Armenian militants in the region. However, according to various sources, those Government forces used the official purpose as a pretext and expelled the Armenian population of a number of villages in the region. In 1992, when the conflict escalated into war, the Shahumyan region came under attack by Azerbaijani forces. Mr Sargsyan and his family fled Gulistan following heavy bombing of the village in July 1992. He and his wife subsequently lived as refugees in Yerevan, Armenia.

In support of his claim that he had lived in Gulistan for most of his life until his forced displacement in 1992, Mr Sargsyan submitted a copy of his former Soviet passport and his marriage certificate. He also submitted, in particular: a copy of an official certificate (“technical passport”), according to which a two-storey house in Gulistan and more than 2000 sq. m of land were registered in his name; photos of the house; and written statements from former officials of the village council and from former neighbours confirming that Mr Sargsyan had had a house and a plot of land in Gulistan.

Complaints, procedure and composition of the Court

Mr Sargsyan complained that the denial by the Azerbaijani Government of his right to return to the village of Gulistan and to have access to, control, use and enjoy his property or to be compensated for its loss amounted to a continuing violation of Article 1 of Protocol No. 1 (protection of property) to the European Convention on Human Rights. He further complained that the denial of his right to return to Gulistan and have access to his home and to the graves of his relatives constituted a continuing violation of Article 8 (right to respect for private and family life) of the Convention. Relying on Article 13 (right to an effective remedy) of the Convention, in conjunction with the other complaints, he further complained that no effective remedy was available to him. Lastly, he submitted under Article 14 (prohibition of discrimination), in conjunction with the other complaints, that he had been discriminated against on the basis of his ethnic origin and religious affiliation.

The application was lodged with the European Court of Human Rights on 11 August 2006. On 11 March 2010 the Chamber to which the case had been assigned relinquished jurisdiction in favour of the Grand Chamber. The Armenian Government was granted leave to intervene as a third party. A first Grand Chamber hearing was held on 15 September 2010.

In a decision of 14 December 2011, the Court declared the application partly admissible. Noting that it was in dispute between the parties whether the Government of Azerbaijan had effective control over Gulistan, the Court joined the Government's objection that it lacked jurisdiction and had no responsibility under Article 1 of the Convention to its examination of the merits of the case. Furthermore, the Court joined to the examination of the merits of the case the following questions: whether Mr Sargsyan had been in a position to claim victim status in respect of the alleged continued lack of access to the graves of his relatives in Gulistan; whether effective remedies existed at national level, which should have been used by him.

At the same time, the Court rejected the Government's objection based on the declaration, which they had made at the time of ratifying the Convention, and their objection that the application fell outside the Court's temporal jurisdiction, finding that Mr Sargsyan's lack of access to his property, his home and his relatives' graves had to be considered a continuing situation which the Court could examine as from 15 April 2002, the date on which Azerbaijan had ratified the Convention. The Court also dismissed the objection by the Government of Azerbaijan that the application had been submitted out of time.

A second Grand Chamber hearing on the merits of the case was held on 5 February 2014.

Judgment was given by the Grand Chamber of 17 judges, composed as follows:

Dean **Spielmann** (Luxembourg), *President*,
 Josep **Casadevall** (Andorra),
 Guido **Raimondi** (Italy),
 Mark **Villiger** (Liechtenstein),
 Isabelle **Berro** (Monaco),
 Ineta **Ziemele** (Latvia),
 Boštjan M. **Zupančič** (Slovenia),
 Alvin **Gyulumyan** (Armenia),
 Khanlar **Hajiyev** (Azerbaijan),
 George **Nicolaou** (Cyprus),
 Luis **López Guerra** (Spain),
 Ganna **Yudkivska** (Ukraine),
 Paulo **Pinto de Albuquerque** (Portugal),
 Ksenija **Turković** (Croatia),

The full texts of the Court's judgments are accessible on its website (<http://www.hudoc.echr.coe.int>)

Egidijus **Kūris** (Lithuania),
 Robert **Spano** (Iceland),
 Iulia Antoanella **Motoc** (Romania),

and also Michael **O'Boyle**, *Deputy Registrar*.

Decision of the Court

Admissibility

As regards the questions of admissibility, which it had joined to the examination of the merits of the case, the Court considered it appropriate to deal with the questions of exhaustion of domestic remedies and of lack of jurisdiction as separate points. On the other hand, it decided to deal with the Government's objection regarding Mr Sargsyan's victim status in respect of his relatives' graves when examining the alleged violation of Article 8 of the Convention.

Exhaustion of legal remedies at domestic level

The Court dismissed the objection of the Government of Azerbaijan that Mr Sargsyan had failed to exhaust the legal remedies at national level. It noted in particular that in view of the Nagorno-Karabakh conflict – having regard to the fact that there were no diplomatic relations between Armenia and Azerbaijan and that borders were closed – there might be considerable practical difficulties for a person from one country in bringing legal proceedings in the respective other country. The Government of Azerbaijan had failed to explain how the legislation on the protection of property would apply in the situation of an Armenian refugee who wished to claim restitution or compensation for the loss of property left behind in the context of the conflict. They had not provided any example of a case in which a person in the applicant's situation had been successful before the Azerbaijani courts. The Government had thus failed to prove that a remedy capable of providing redress in respect of Mr Sargsyan's complaints was available.

Jurisdiction and responsibility of Azerbaijan

The Court also dismissed the Government's objection that Azerbaijan lacked jurisdiction and had no responsibility under Article 1 of the Convention as regards Mr Sargsyan's complaints.

Given that the village of Gulistan was situated on the internationally recognised territory of Azerbaijan – a fact which was not in dispute between the parties – under the Court's case-law, the presumption applied that Azerbaijan had jurisdiction over the village. It was therefore for the Government to show that exceptional circumstances existed, which would limit their responsibility under Article 1 of the Convention. The Court noted that Gulistan and the Azerbaijani military forces were located on the north bank of a river, while the "NKR" positions were located on the south bank of that river. On the basis of the material before the Court it was not possible to establish whether there had been a presence of Azerbaijani military forces in Gulistan – of which there were a number of indications – throughout the period falling within its temporal jurisdiction, namely from April 2002, when Azerbaijan ratified the Convention, until the present. It was significant to note, however, that none of the parties had alleged that the "NKR" had any troops in the village. The Court was not convinced by the Government's argument that, since the village was located in a disputed area, surrounded by mines and encircled by opposing military positions, Azerbaijan had only limited responsibility under the Convention. The Court noted in particular that, in contrast to other cases in which it had found that a State had only limited responsibility over part of its territory due to occupation by another State or the control by a separatist regime, it had not been established that Gulistan was occupied by the armed forces of another State.

The full texts of the Court's judgments are accessible on its website (<http://www.hudoc.echr.coe.int>)

Article 1 of Protocol No. 1 (protection of property)

Having regard to the parties' submissions and all evidence before it, the Court considered that Mr Sargsyan had sufficiently substantiated his claim that at the time of his flight in June 1992 he had rights to a house and a plot of land in Gulistan, which constituted possessions within the meaning of Article 1 of Protocol No. 1.

In particular, the Court accepted that the "technical passport" submitted by Mr Sargsyan constituted evidence that he had held title to the house and the land, which had not convincingly been rebutted by the Government. Moreover, Mr Sargsyan's submissions as to how he had obtained the land and the permission to build a house were supported by statements from a number of family members and former villagers. While those statements had not been tested in cross-examination, they were rich in detail and demonstrated that the people concerned had lived through the events described. The Court observed that under the relevant laws of the Azerbaijan SSR in force at the time, there was no private ownership of land, but citizens could own residential houses. Plots of land could be allocated to citizens for special purposes such as farming or construction of individual houses. In that case, the citizen had a "right of use", limited to the specific purpose, which was protected by law and could be inherited. There was, therefore, no doubt that Mr Sargsyan's rights in respect of the house and land represented a substantive economic interest.

While Mr Sargsyan's forced displacement from Gulistan fell outside the Court's temporal jurisdiction, it had to examine whether the Government of Azerbaijan had breached his rights in the ensuing situation, which continued after the entry into force of the Convention in respect of Azerbaijan. His was the first case in which the Court had to rule on the merits of a complaint against a State which had lost control over part of its territory as a result of war and occupation, but which at the same time was alleged to be responsible for refusing a displaced person access to property in an area remaining under its control.

Having regard to the fact that Gulistan was situated in an area of military activity and at least the area around it was mined, the Court accepted the Government's argument that refusing civilians, including Mr Sargsyan, access to the village was justified by safety considerations. However, the Court considered that as long as access to the property was not possible, the State had a duty to take alternative measures in order to secure property rights – and thus to strike a fair balance between the competing public and individual interests concerned –, as was acknowledged by the relevant international standards issued by the United Nations and the Council of Europe.

The mere fact that peace negotiations under the auspices of the OSCE were ongoing – which included issues relating to displaced persons – did not free the Government from their duty to take other measures, especially having regard to the fact that the negotiations had been ongoing for over twenty years. It would therefore be important to establish a property claims mechanism which would be easily accessible to allow Mr Sargsyan and others in his situation to have their property rights restored and to obtain compensation for the loss of the enjoyment of their rights. While the Court was aware that the Government of Azerbaijan had had to provide assistance to hundreds of thousands of internally displaced persons – namely those Azerbaijanis who had had to flee from Armenia and from Nagorno-Karabakh and the surrounding districts –, the protection of that group did not exempt the Government entirely from its obligations towards Armenians as Mr Sargsyan who had had to flee as a result of the conflict.

In conclusion, the Court considered that the impossibility for Mr Sargsyan to have access to his property in Gulistan without the Government taking any alternative measures in order to restore his property rights or to provide him with compensation had placed an excessive burden on him. There had accordingly been a continuing violation of his rights under Article 1 of Protocol No. 1.

The full texts of the Court's judgments are accessible on its website (<http://www.hudoc.echr.coe.int>)

Article 8 (right to respect for private and family life and the home)

Having regard to the evidence submitted by Mr Sargsyan, the Court found it established that he had lived in Gulistan for the major part of his life until being forced to leave; he thus had had a “home” there and his inability to return to the village had affected his “private life” for the purpose of Article 8. The Court considered that, in the circumstances of the case, his cultural and religious attachment to his late relatives’ graves in the village might also fall within the notion of “private and family life”. The Court therefore dismissed the Government’s objection concerning Mr Sargsyan’s victim status in respect of his relatives’ graves.

The Court referred to its findings under Article 1 of Protocol No. 1 and held that the same considerations applied in respect of Mr Sargsyan’s complaint under Article 8. The impossibility for him to have access to his home and to his relatives’ graves in Gulistan without the Government taking any measures in order to address his rights or to provide him at least with compensation, had placed a disproportionate burden on him. There had accordingly been a continuing violation of Article 8.

Article 13 (right to an effective remedy)

The Court referred to its finding – with regard to the admissibility of the complaints – that the Government of Azerbaijan had failed to prove that a remedy capable of providing redress to Mr Sargsyan in respect of his Convention complaints and offering reasonable prospects of success was available. Moreover, the Court’s findings under Article 1 of Protocol No. 1 and Article 8 related to the State’s failure to create a mechanism which would allow him to have his rights in respect of property and home restored and to obtain compensation for the losses suffered. There was therefore a close link between the violations found under Article 1 of Protocol No. 1 and Article 8 on the one hand and the requirements of Article 13 on the other. In conclusion, the Court finds that there has been and continues to be no effective remedy available in respect of the violation of Mr Sargsyan’s rights. There had accordingly been a continuing breach of Article 13.

Article 14 (prohibition of discrimination)

The Court considered that no separate issue arose under Article 14, as Mr Sargsyan’s complaints under Article 14 amounted essentially to the same complaints which the Court had examined under Article 1 of Protocol No. 1, Article 8 and Article 13.

Just satisfaction (Article 41)

Having regard to the exceptional nature of the case, the Court, by a majority, held that the question of the application of Article 41 (just satisfaction) was not ready for decision. Consequently, it reserved that question and invited both parties to submit within twelve months their observations on this matter and to notify the Court of any agreement they might reach.

Separate opinions

Judges Ziemele and Yudkivska each expressed a concurring opinion. Judge Gyulumyan expressed a partly dissenting opinion. Judges Hajiyev and Pinto de Albuquerque each expressed a dissenting opinion. These separate opinions are annexed to the judgment.

84. *Eur. Court HR, Chiragov and Others v. Armenia, Grand Chamber Judgment of 16 June 2015, Application No. 13216/05 (Article 1 of Protocol No. 1, Protection of Property – Violation; Article 8, Right to Respect for Private and Family Life – Violation; Article 13, Right to an Effective Remedy – Violation)*. The applicants, six Azerbaijani nationals, successfully argued that their inability to return to their homes and property as a result of the Armenian-Azerbaijani Nagorno-Karabakh conflict breached their Convention rights.

ECHR 206 (2015)

16.06.2015

Press release issued by the Registrar

In today's **Grand Chamber** judgment in the case of **Chiragov and Others v. Armenia** (application no. 13216/05) the European Court of Human Rights held, by a majority, that there had been:

a continuing violation of Article 1 of Protocol No. 1 (protection of property) to the European Convention on Human Rights;

a continuing violation of Article 8 (right to respect for private and family life) of the Convention; and

a continuing violation of Article 13 (right to an effective remedy).

The case concerned the complaints by six Azerbaijani refugees that they were unable to return to their homes and property in the district of Lachin, in Azerbaijan, from where they had been forced to flee in 1992 during the Armenian-Azerbaijani conflict over Nagorno-Karabakh.

There are currently more than one thousand individual applications pending before the Court which were lodged by persons displaced during the conflict over Nagorno-Karabakh.

In the applicants' case, the Court confirmed that Armenia exercised effective control over Nagorno-Karabakh and the surrounding territories and thus had jurisdiction over the district of Lachin.

The Court considered that there was no justification for denying the applicants access to their property without providing them with compensation. The fact that peace negotiations were ongoing did not free the Government from their duty to take other measures. What was called for was a property claims mechanism which would be easily accessible to allow the applicants and others in their situation to have their property rights restored and to obtain compensation.

Principal facts

The applicants Elkhan Chiragov, Adishirin Chiragov, Ramiz Gebrayilov, Akif Hasanof, Fekhreiddin Pashayev and Qaraca Gabrayilov are all Azerbaijani nationals. Mr Qaraca Gabrayilov died in 2005; his son has pursued the application on his behalf. All but Mr Hasanof now live in Baku.

The applicants submitted that they are Azerbaijani Kurds who lived in the district of Lachin, in Azerbaijan. They stated that they were unable to return to their homes and property there, after having been forced to leave in 1992 during the Armenian-Azerbaijani conflict over Nagorno- Karabakh.

The full texts of the Court's judgments are accessible on its website (<http://www.hudoc.echr.coe.int>)

At the time of the dissolution of the Soviet Union in December 1991, the Nagorno-Karabakh Autonomous Oblast (“the NKAO”) was an autonomous province landlocked within the Azerbaijan Soviet Socialist Republic (“the Azerbaijan SSR”). There was no common border between the NKAO and the Armenian Soviet Socialist Republic (“the Armenian SSR”), which were separated by Azerbaijani territory, at the shortest distance by the district of Lachin, including a strip of land less than ten kilometres wide, referred to as the “Lachin corridor”. In 1989 the NKAO had a population of approximately 77% ethnic Armenians and 22% ethnic Azeris. In the district of Lachin, the majority of the population were Kurds and Azeris; only 5-6% were Armenians.

Armed hostilities in Nagorno-Karabakh started in 1988. In September 1991 – shortly after Azerbaijan had declared its independence from the Soviet Union – the Regional Council of the NKAO announced the establishment of the “Nagorno-Karabakh Republic” (“NKR”), consisting of the territory of the NKAO and the Shahumyan district of Azerbaijan. Following a referendum in December 1991 – boycotted by the Azeri population – in which 99.9% of those participating voted in favour of the secession of the NKR from Azerbaijan, the “NKR” reaffirmed its independence from Azerbaijan in January 1992. After that, the conflict gradually escalated into full-scale war. By the end of 1993, ethnic Armenian forces had gained control over almost the entire territory of the former NKAO as well as seven adjacent Azerbaijani regions. The conflict resulted in hundreds of thousands of internally-displaced people and refugees on both sides. In May 1994 the parties to the conflict signed a cease-fire agreement, which holds to this day. Negotiations for a peaceful solution have been carried out under the auspices of the Organization for Security and Co-operation in Europe (OSCE). However, no final political settlement of the conflict has so far been reached. The self-proclaimed independence of the “NKR” has not been recognised by any state or international organisation.

Prior to their accession to the Council of Europe in 2001, Armenia and Azerbaijan both gave undertakings to the Committee of Ministers and the Parliamentary Assembly, committing themselves to the peaceful settlement of the Nagorno-Karabakh conflict.

The district of Lachin, where the applicants lived, was attacked many times during the war. The applicants alleged that troops of both Nagorno-Karabakh and the Republic of Armenia were at the origin of the attacks. The Armenian Government maintained, however, that Armenia did not participate in the events, but that military action was carried out by the defence forces of Nagorno-Karabakh and volunteer groups. In mid-May 1992 Lachin was subjected to aerial bombardment, in the course of which many houses were destroyed. According to the applicants, on 17 May 1992, they were forced to flee from Lachin to Baku. Since then they have not been able to return to their homes and properties because of Armenian occupation.

In support of their claims that they had lived in Lachin for most of their lives until their forced displacement and that they had houses and land there, the applicants submitted various documents to the Court. In particular, all six applicants submitted: official certificates (“technical passports”), according to which houses and plots of land in the district of Lachin had been registered in their names; birth certificates, including of their children, and/or marriage certificates; and written statements from former neighbours confirming that the applicants had lived in their respective villages in the district of Lachin or in the town of Lachin.

Complaints, procedure and composition of the Court

The applicants complained that the loss of all control over, and of all potential to use, sell, bequeath, mortgage, develop and enjoy their properties in Lachin amounted to a continuing violation of Article 1 of Protocol No. 1 (protection of property) to the European Convention on Human Rights. They also complained that their inability to return to the district of Lachin constituted a continuing violation of Article 8 (right to respect for home and private and family life) of the Convention. Furthermore, they

The full texts of the Court’s judgments are accessible on its website (<http://www.hudoc.echr.coe.int>)

complained that no effective remedies had been available to them in respect of their complaints, in breach of Article 13 (right to an effective remedy). Finally, they submitted that, in relation to the other complaints, they had been discriminated against on the basis of their ethnic origin and religious affiliation, in violation of Article 14 (prohibition of discrimination).

The application was lodged with the European Court of Human Rights on 6 April 2005. On 9 March 2010 the Chamber to which the case had been assigned relinquished jurisdiction in favour of the Grand Chamber. The Azerbaijani Government intervened as a third party. A first Grand Chamber hearing in the case was held on 15 September 2010.

In a decision of 14 December 2011, the Court declared the complaints admissible. First, it held that the fact that negotiations within the OSCE about the Nagorno-Karabakh conflict – concerning the resettlement of refugees and internally displaced persons as well as compensation issues – were ongoing did not prevent the Court from examining the applicants' complaints. It rejected the Armenian Government's objection that the application fell outside the Court's temporal jurisdiction, finding that the applicants' lack of access to their homes and properties had to be considered a continuing situation which the Court could examine as from 26 April 2002, the date on which Armenia had ratified the Convention. The Court also dismissed the Armenian Government's objection that the application had been submitted out of time.

At the same time, the Court joined to the merits of the case the following questions: whether the Government of Armenia had effective control over the area concerned; whether the applicants had provided sufficient evidence of their identity and of their ownership of the property in question, and whether they could thus claim to be victims of the alleged violations of the Convention; and, whether effective remedies existed at national level which should have been used by the applicants.

A second Grand Chamber hearing on the merits of the case was held on 22 January 2014.

Judgment was given by the Grand Chamber of 17 judges, composed as follows:

Dean **Spielmann** (Luxembourg), *President*,
 Josep **Casadevall** (Andorra),
 Guido **Raimondi** (Italy),
 Mark **Villiger** (Liechtenstein),
 Isabelle **Berro** (Monaco),
 Ineta **Ziemele** (Latvia),
 Boštjan M. **Zupančič** (Slovenia),
 Alvina **Gyulumyan** (Armenia),
 Khanlar **Hajiyev** (Azerbaijan),
 George **Nicolaou** (Cyprus),
 Luis **López Guerra** (Spain),
 Ganna **Yudkivska** (Ukraine),
 Paulo **Pinto de Albuquerque** (Portugal),
 Ksenija **Turković** (Croatia),
 Egidijus **Kūris** (Lithuania),
 Robert **Spano** (Iceland),
 Iulia Antoanella **Motoc** (Romania),

and also Michael **O'Boyle**, *Deputy Registrar*.

Decision of the Court

Admissibility

The full texts of the Court's judgments are accessible on its website (<http://www.hudoc.echr.coe.int>)

In its decision of December 2011, the Court had joined to the merits of the case three questions concerning the admissibility of the complaints.

Exhaustion of legal remedies at national level

The Court dismissed the Armenian Government's objection that the applicants had failed to exhaust the legal remedies at national level. It found that the Government had not shown that there was any legal remedy – whether in Armenia or in the “NKR” – capable of providing redress in respect of the applicants' complaints. Furthermore, given that the Armenian Government had denied that their authorities had been involved in the events giving rise to the applicants' complaints or that Armenia exercised jurisdiction over Nagorno-Karabakh and the surrounding territories, it would not have been reasonable to expect the applicants to bring claims for restitution or compensation before the Armenian authorities. Finally, as no political solution to the conflict had been reached and military build-up in the region had escalated in recent years, it was not realistic that any possible remedy in the unrecognised “NKR” could in practice provide redress to displaced Azerbaijanis.

The applicants' victim status

The Court also dismissed the Armenian Government's objection concerning the applicants' victim status. It found that all six applicants had provided sufficient evidence to demonstrate that they had lived in the district of Lachin for major parts of their lives until being forced to leave, and that they had sufficiently substantiated that they had had houses and land there.

The Court observed that under the Soviet legal system, there was no private ownership of land, but citizens could own residential houses. Plots of land could be allocated to citizens for special purposes such as farming or construction of individual houses. In that case, the citizen had a “right of use”, limited to the specific purpose, which was protected by law and could be inherited. There was therefore no doubt that the applicants' rights in respect of the houses and land represented a substantive economic interest. In conclusion, at the time they had to leave the district of Lachin, the applicants held rights to land and to houses which constituted “possessions” within the meaning of Article 1 of Protocol No. 1. There was no indication that those rights had been extinguished afterwards; their proprietary interests were thus still valid. Moreover, their land and houses also had to be considered their “homes” for the purposes of Article 8.

Jurisdiction of Armenia

Finally, the Court dismissed the Armenian Government's objection that Armenia did not have effective control over the territory of Nagorno-Karabakh and the surrounding territories and thus lacked jurisdiction.

The Court noted in particular that numerous reports and public statements, including from members and former members of the Armenian Government, demonstrated that Armenia, through its military presence and by providing military equipment and expertise, had been significantly involved in the Nagorno-Karabakh conflict from an early date. Armenia's military support continued to be decisive for the control over the territories in question. Furthermore, it was evident from the facts established in the case that Armenia gave the “NKR” substantial political and financial support; its citizens were moreover required to acquire Armenian passports to travel abroad, as the “NKR” was not recognised by any State or international organisation. In conclusion, Armenia and the “NKR” were highly integrated in virtually all important matters and the “NKR” and its administration survived by virtue of the military, political, financial and other support given to it by Armenia. Armenia thus exercised effective control over Nagorno-Karabakh and the surrounding territories.

The full texts of the Court's judgments are accessible on its website (<http://www.hudoc.echr.coe.int>)

Article 1 of Protocol No. 1 (protection of property)

The Court had already found that the applicants held rights to land and to houses which constituted “possessions” for the purposes of Article 1 of Protocol No. 1. While the applicants’ forced displacement from Lachin fell outside the Court’s temporal jurisdiction, it had to examine whether they had been denied access to their property after the entry into force of the Convention in respect of Armenia in April 2002 and whether they had thereby suffered a continuous violation of their rights.

As the Court had found, there was no legal remedy, whether in Armenia or in the “NKR”, available to the applicants in respect of their complaints. Consequently, they had not had access to any legal means by which to obtain compensation for the loss of their property or to gain physical access to the property and homes left behind. Moreover, in the Court’s view, it was not realistic in practice for Azerbaijanis to return to Nagorno-Karabakh and the surrounding territories in the circumstances which had prevailed for more than twenty years after the ceasefire agreement. Those circumstances included in particular: a continued presence of Armenian and Armenian-backed troops; ceasefire breaches on the line of contact; an overall hostile relationship between Armenia and Azerbaijan; and do far no prospect of a political solution. There had accordingly been a continuing interference with the applicants’ rights under Article 1 of Protocol No. 1.

The Court considered that as long as access to the property was not possible, the State had a duty to take alternative measures in order to secure property rights, as was acknowledged by the relevant international standards issued by the United Nations and the Council of Europe.

The fact that peace negotiations under the auspices of the OSCE were ongoing – which included issues relating to displaced persons – did not free the Government from their duty to take other measures, especially having regard to the fact that the negotiations had been ongoing for over twenty years. It would therefore be important to establish a property claims mechanism which would be easily accessible to allow the applicants and others in their situation to have their property rights restored and to obtain compensation for the loss of the enjoyment of their rights. While the Court was aware that the Government of Armenia had had to provide assistance to hundreds of thousands of Armenian refugees and internally displaced persons, the protection of that group did not exempt the Government from its obligations towards Azerbaijani citizens as the applicants who had to flee as a result of the conflict.

In conclusion, as concerns the period under consideration, the Government had not justified denying the applicants access to their property without providing them with compensation for this interference. There had accordingly been a continuing violation of the applicants’ rights under Article 1 of Protocol No. 1.

Article 8 (right to respect for private and family life and the home)

For the same reasons as those which led to its findings under Article 1 of Protocol No. 1, the Court found that the denial of access to the applicants’ homes constituted an unjustified interference with their right to respect for their private and family lives as well as their homes. Accordingly, there had been and continued to be a breach of the applicants’ rights under Article 8.

Article 13 (right to an effective remedy)

The Court referred to its finding – with regard to the admissibility of the complaints – that the Armenian Government had failed to prove that a remedy capable of providing redress to the applicants in respect of their Convention complaints and offering reasonable prospects of success was available. For the same reasons, the Court concluded that there had been and continued to be a violation of their rights under Article 13.

The full texts of the Court’s judgments are accessible on its website (<http://www.hudoc.echr.coe.int>)

Article 14 (prohibition of discrimination)

The Court considered that there was no need to examine the complaints separately under Article 14.

Just satisfaction (Article 41)

Having regard to the exceptional nature of the case, the Court, by a majority, held that the question of the application of Article 41 (just satisfaction) was not ready for decision. Consequently, it reserved that question for a later date.

Separate opinions

Judge Motoc expressed a concurring opinion. Judge Ziemele expressed a partly concurring, partly dissenting opinion. Judge Hajiyev expressed a partly dissenting opinion. Judges Gyulumyan and Pinto de Albuquerque each expressed a dissenting opinion. These separate opinions are annexed to the judgment.

85. *Eur.Court HR, Manole and “Romanian Farmers Direct” v. Romania, Third Section Judgment of 16 June 2015, Application No. 46551/06, (Article 11, Freedom of Assembly and Association – No Violation)*. The applicants, wishing to register the union of self-employed farmers, argued that the refusal of the Romanian courts to register the farmers’ union had amounted to an infringement of their rights to freedom of association, but the Court, interpreting the International Labour Organization (ILO) Convention, ruled that a refusal to register the applicant’s union had not overstepped Romania’s margin of appreciation.

ECHR 204 (2015)

16.06.2015

Press release issued by the Registrar

In today’s **Chamber judgment** in the case of **Manole and “Romanian Farmers Direct” v. Romania** (application no. 46551/06) the European Court of Human Rights held, unanimously, that there had been:

No violation of Article 11 (freedom of assembly and association) of the European Convention on Human Rights.

The case concerned the refusal to register the union of self-employed farmers which Mr Manole wished to set up.

The Court, taking into consideration the relevant international instruments in this sphere and in particular the Conventions of the International Labour Organisation, found that under the Romanian legislation farmers’ organisations enjoyed essential rights enabling them to defend their members’ interests in dealings with the public authorities, without needing to be established as trade unions. In agriculture as in the other sectors of the economy, that form of association was now reserved solely for employees and members of cooperatives.

The Court held that the refusal to register the applicant union had not overstepped the Romanian authorities’ margin of appreciation as to the manner in which they secured the right of freedom of association to self-employed farmers.

Principal facts

The applicants are Benieamin Manole, a Romanian national who was born in 1956 and lives in Priponești (Galați county, Romania), and a group of 48 farmers including Mr Manole.

Prior to 2003, self-employed workers in Romania could form trade unions. A change in the legislation in 2003 allowed them only to join trade unions but not to set them up. Accordingly, Mr Manole’s application to register “Romanian Farmers Direct” as a trade union (*Sindicatul Agricultorilor „Cultivatorii Direcți din România”*) was rejected.

The applicant appealed. In a decision of 30 May 2006 the County Court upheld the refusal to register the union in question, reaffirming that only employees with a contract of employment and public servants could form trade unions; this option was not open to farmers and other self-employed persons, who could only join existing unions.

The full texts of the Court’s judgments are accessible on its website (<http://www.hudoc.echr.coe.int>)

Complaints, procedure and composition of the Court

The applicants alleged that the refusal of the Romanian courts to register the farmers' union amounted to an infringement of their right to freedom of association under Article 11 (freedom of assembly and association).

The application was lodged with the European Court of Human Rights on 14 November 2006.

Judgment was given by a Chamber of seven judges, composed as follows:

Josep **Casadevall** (Andorra), *President*,
 Luis **López Guerra** (Spain),
 Ján **Šikuta** (Slovakia),
 Kristina **Pardalos** (San Marino),
 Johannes **Silvis** (the Netherlands),
 Valeriu **Grițco** (the Republic of Moldova),
 Iulia Antoanella **Motoc** (Romania),

and also Stephen **Phillips**, *Section Registrar*.

Decision of the Court

Article 11

The Court found that there had been interference by the respondent State with the exercise of the rights guaranteed by Article 11, in so far as the applicants had been refused permission to register "Romanian Farmers Direct" as a trade union-type association. That interference had been based on the relevant provisions of Law no. 54/2003 on trade unions as in force at the relevant time, according to which only employees and public servants were entitled to set up trade union organisations; this excluded self-employed farmers. Having established that the interference had pursued a legitimate aim, namely to safeguard the economic and social order by maintaining a legal distinction between trade unions and other kinds of associations, the Court sought to ascertain whether the interference in question had been necessary in a democratic society.

The Court observed that States which, like Romania in 1930, had ratified Convention No. 11 of the International Labour Organisation (ILO) on the right of association (agriculture) undertook to secure to all those engaged in agriculture the same rights of association and combination as to industrial workers, and to repeal any statutory or other provisions restricting such rights in the case of agricultural workers. Nevertheless the Court, taking into account the sensitive social and political issues linked to rural employment and the high degree of divergence between national systems in that regard, considered that the Contracting States should be afforded a wide margin of appreciation as to the manner in which they secured the right of freedom of association to self-employed farmers. It also noted that under the current legislation farm employees and the members of cooperatives had the right to form trade unions and belong to them.

In the light of the general comments of the ILO's Committee of Experts on the Application of Conventions and Recommendations (CEACR) concerning the application by Romania of Convention no. 87 on Freedom of Association and Protection of the Right to Organise², the Court found no sufficient grounds to infer that the exclusion of self-employed farmers from the right to form trade unions constituted a breach of Article 11 of the European Convention on Human Rights. It observed that the legislation in force at the time of the events, like that currently in force, in no way restricted

The full texts of the Court's judgments are accessible on its website (<http://www.hudoc.echr.coe.int>)

the applicants' right to form professional associations with the essential prerogatives enabling them to defend the collective interests of their members in dealings with the public authorities.

The Court therefore found that the refusal to register the applicant union had not overstepped the national authorities' margin of appreciation in this sphere and had thus not been disproportionate.

The Court held that there had been no violation of Article 11.

86. *Eur.Court HR, Delfi AS v. Estonia, Grand Chamber Judgment of 16 June 2015, Application No. 64569/09, (Article 10, Freedom of Expression – No Violation)*. Interpreting and applying the European Union Directive 2000/31/EC, the Court held, contrary to the applicant's assertions, that the Estonian courts' finding of liability for user-generated comments on an Internet news portal against the applicant had been a justified and proportionate restriction on the portal's freedom of expression.

ECHR 205 (2015)
16.06.2015

Press release issued by the Registrar

In today's **Grand Chamber** judgment in the case of Delfi AS v. Estonia (application no. 64569/09) the European Court of Human Rights held, by 15 votes to two, that there had been:

no violation of Article 10 (freedom of expression) of the European Convention on Human Rights.

This was the first case in which the Court had been called upon to examine a complaint about liability for user-generated comments on an Internet news portal.

The applicant company, Delfi AS, which runs a news portal run on a commercial basis, complained that it had been held liable by the national courts for the offensive comments posted by its readers below one of its online news articles about a ferry company. At the request of the lawyers of the owner of the ferry company, Delfi removed the offensive comments about six weeks after their publication.

The case therefore **concerned the duties and responsibilities of Internet news portals** which provided on a commercial basis a platform for user-generated comments on previously published content and some users – whether identified or anonymous – engaged in clearly unlawful hate speech which infringed the personality rights of others. The Delfi case **did not concern other fora on the Internet** where third-party comments could be disseminated, for example an Internet discussion forum, a bulletin board or a social media platform.

The question before the Grand Chamber was not whether the freedom of expression of the authors of the comments had been breached but **whether holding Delfi liable for comments posted by third parties had been in breach of its freedom to impart information**.

The Grand Chamber found that the Estonian courts' **finding of liability against Delfi had been a justified and proportionate restriction on the portal's freedom of expression**, in particular, because: the comments in question had been extreme and had been posted in reaction to an article published by Delfi on its professionally managed news portal run on a commercial basis; the steps taken by Delfi to remove the offensive comments without delay after their publication had been insufficient; and the 320 euro fine had by no means been excessive for Delfi, one of the largest Internet portals in Estonia.

Principal facts

The applicant, Delfi AS, is a public limited company registered in Estonia. It owns one of the largest internet news sites in the country.

The full texts of the Court's judgments are accessible on its website (<http://www.hudoc.echr.coe.int>)

In January 2006, Delfi published an article on its webpage about a ferry company. It discussed the company's decision to change the route its ferries took to certain islands. This had caused ice to break where ice roads could have been made in the near future. As a result, the opening of these roads – a cheaper and faster connection to the islands compared to the ferry services – was postponed for several weeks. Below the article, readers were able to access the comments of other users of the site. Many readers had written highly offensive or threatening posts about the ferry operator and its owner.

At the request of the lawyers of the owner of the ferry company, Delfi removed the offensive comments about six weeks after their publication in March 2006.

The owner of the ferry company sued Delfi in April 2006, and successfully obtained a judgment against it in June 2008. The Estonian court found that the comments were defamatory, and that Delfi was responsible for them. The owner of the ferry company was awarded 5,000 kroons in damages (around 320 euros).

An appeal by Delfi was dismissed by Estonia's Supreme Court in June 2009. The Supreme Court rejected the portal's argument that, under EU Directive 2000/31/EC on Electronic Commerce, its role as an information society service provider or storage host was merely technical, passive and neutral, finding that the portal exercised control over the publication of comments. It did recognise that there was a difference between a portal operator and a traditional publisher of printed media, pointing out that the former could not reasonably be required to edit comments before publishing them in the same manner as the latter. However, both had an economic interest in the publication of comments and should therefore both be considered "publishers/disclosers" ("*avaldatajad*"). The Supreme Court therefore held Delfi liable under the relevant domestic law, notably the Constitution, the Civil Code (General Principles) Act and the Obligations Act, finding that the portal had not only failed to prevent the publication of comments which degraded human dignity, contained threats and were thus clearly unlawful but also to remove the comments from its portal on its own initiative.

Before the publication of the offensive comments, in September 2005, the Estonian Minister of Justice had had to respond to public criticism and concern about incessant taunting on public websites in Estonia, Delfi having been named as a source of brutal and arrogant mockery. In his response the Minister of Justice noted that victims of insults could bring a suit against Delfi and claim damages.

Complaints, procedure and composition of the Court

Relying on Article 10 (freedom of expression) of the European Convention on Human Rights, Delfi complained that the Estonian civil courts had found it liable for comments written by its readers.

The application was lodged with the European Court of Human Rights on 4 December 2009.

In its Chamber judgment of 10 October 2013 the Court held, unanimously, that there had been no violation of Article 10 (freedom of expression) of the European Convention. It found that the finding of liability by the Estonian courts had been a justified and proportionate restriction on the portal's right to freedom of expression, in particular, because: the comments were highly offensive; the portal had failed to prevent them from becoming public, profited from their existence, but allowed their authors to remain anonymous; and, the fine imposed by the Estonian courts had not been excessive.

On 9 January 2014 Delfi asked for the case to be referred to the Grand Chamber in accordance with Article 43 of the Convention² (referral before the Grand Chamber). On 17 February 2014 the Grand Chamber Panel accepted Delfi's request. A hearing was held on the case in Strasbourg on 9 July 2014.

The following organisations were given leave (under Article 36 § 2 of the Convention) to intervene as third parties in the written procedure: the Helsinki Foundation for Human Rights; Article 19; Access; Media Legal Defence Initiative, acting together with its 28 associated organisations; and the European

The full texts of the Court's judgments are accessible on its website (<http://www.hudoc.echr.coe.int>)

Digital Media Association, the Computer and Communications Industry Association and the pan-European association of European Internet Services Providers Associations, acting jointly.

Judgment was given by the Grand Chamber of 17 judges, composed as follows:

Dean **Spielmann** (Luxembourg), *President*,
 Josep **Casadevall** (Andorra),
 Guido **Raimondi** (Italy),
 Mark **Villiger** (Liechtenstein),
 Işıl **Karakaş** (Turkey),
 Ineta **Ziemele** (Latvia),
 Boštjan M. **Zupančič** (Slovenia),
 András **Sajó** (Hungary),
 Ledi **Bianku** (Albania),
 Nona **Tsotsoria** (Georgia),
 Vincent A. **de Gaetano** (Malta),
 Angelika **Nußberger** (Germany),
 Julia **Laffranque** (Estonia),
 Linos-Alexandre **Sicilianos** (Greece),
 Helena **Jäderblom** (Sweden),
 Robert **Spano** (Iceland),
 Jon Fridrik **Kjølbro** (Denmark),

and also Johan **Callewaert**, *Deputy Grand Chamber Registrar*.

Decision of the Court

The scope of the Court's assessment

The Grand Chamber first noted the conflicting realities between the benefits of Internet, notably the unprecedented platform it provided for freedom of expression (as protected under Article 10 of the European Convention), and its dangers, namely the possibility of hate speech and speech inciting violence being disseminated worldwide in a matter of seconds and sometimes remaining available online indefinitely, in violation of personality rights (such rights being protected under Article 8 of the European Convention).

As this was the first case in which the Court had been called upon to examine such a complaint in an evolving field of technological innovation, it decided to narrow the scope of its inquiry both as concerned the nature of the applicant company as well as of the speech in question.

As concerned the nature of Delfi, the Grand Chamber saw no reason to call into question the distinction made by the Supreme Court between a portal operator and a traditional publisher of printed media and considered that their duties and responsibilities might differ.

Next, the Grand Chamber noted the Supreme Court's characterisation of the comments posted on Delfi's portal as unlawful. This assessment was based on the fact that the comments were tantamount to hate speech and incitement to violence against the owner of the ferry company. The Grand Chamber thus considered that the remarks, established as manifestly unlawful, did not require any linguistic or legal analysis.

Consequently, the case concerned the duties and responsibilities of Internet news portals, under Article 10 § 2 of the Convention, which provided on a commercial basis a platform for user-generated comments on previously published content and some users – whether identified or anonymous –

The full texts of the Court's judgments are accessible on its website (<http://www.hudoc.echr.coe.int>)

engaged in clearly unlawful speech, which infringed the personality rights of others and amounted to hate speech and incitement to violence against them. The Grand Chamber emphasised that Delfi was one of the biggest professionally managed Internet news portals in Estonia, run on a commercial basis, and published news articles which it invited its readers to comment on. Furthermore, Delfi had a wide readership and there was a known public concern about the controversial nature of the comments it attracted.

The case did not, on the other hand, concern other fora on the Internet where third-party comments could be disseminated, for example an Internet discussion forum or a bulletin board where users could freely set out their ideas on any topic without the discussion being channelled by any input from the forum's manager; or a social media platform where the platform provider did not offer any content and where the content provider might be a private person running the website or a blog as a hobby.

The restriction on Delfi's freedom of expression, its aim and application of the law

It was not in dispute that the national courts' decisions had constituted an interference with Delfi's right to freedom of expression and that that restriction had pursued the legitimate aim of protecting the reputation and rights of others.

The parties' opinions differed, however, as regards the law to be applied. Delfi argued in particular that the national courts had erred in applying the general provisions of the domestic law – in particular the Constitution, the Civil Code (General Principles) Act and the Obligations Act – to the facts of the case as they should have relied upon the domestic and European legislation on Internet service providers. Notably, the domestic courts, in interpreting and applying the relevant provisions of the domestic law, considered that Delfi was a “publisher/discloser” and could be held liable for the uploading of clearly unlawful comments on its news portal. The domestic courts chose to apply those norms, having found that the special regulation contained in the Information Society Services Act transposing the EU Directive on Electronic Commerce into Estonian law had not applied to Delfi's case since the Directive related to activities of a merely technical, automatic and passive nature, unlike Delfi's activities, which did not involve simply providing an intermediary service.

However, the Grand Chamber found that it was for national courts to resolve issues of interpretation and application of domestic law. Thus it did not address the issue under EU law and limited itself to the question of whether the Supreme Court's application of the domestic law to Delfi's situation had been foreseeable.

Indeed, as a professional publisher running an Internet news portal – one of the largest in Estonia – for an economic purpose, Delfi should have been familiar with the relevant legislation and case-law, and could also have sought legal advice. Moreover, public concern had already been expressed before the publication of the comments in question and the Minister of Justice had noted that victims of insults could bring a suit against Delfi and claim damages. Thus, the Grand Chamber considered that Delfi had been in a position to assess the risks related to its activities and that it had to have been able to foresee, to a reasonable degree, the consequences which those activities could entail. It therefore concluded that the interference with Delfi's freedom of expression had been “prescribed by law”.

Whether the restriction on Delfi's freedom of expression was necessary in a democratic society

The Grand Chamber considered that the offensive comments posted on Delfi's news portal, amounting to hate speech or incitement to violence, did not enjoy the protection of Article 10 and thus the freedom of expression of the authors of the comments was not at issue. The question before the Grand Chamber was rather whether the national courts' decisions, holding Delfi liable for comments posted by third parties, were in breach of its freedom to impart information as guaranteed by Article 10 of the Convention.

The full texts of the Court's judgments are accessible on its website (<http://www.hudoc.echr.coe.int>)

The Grand Chamber went on to examine whether that finding of liability by the domestic courts, notably the Supreme Court, had been based on relevant and sufficient grounds. The Grand Chamber agreed with the Chamber's assessment of the question which had identified four key aspects: the context of the comments; the liability of the actual authors of the comments as an alternative to Delfi being held liable; the steps taken by Delfi to prevent or remove the defamatory comments; and the consequences of the proceedings before the national courts for Delfi.

Firstly, as regards the context, the Grand Chamber attached particular weight to the extreme nature of the comments and the fact that Delfi was a professionally managed Internet news portal run on a commercial basis which sought to attract a large number of comments on news articles published by it. Moreover, as the Supreme Court had pointed out, Delfi had an economic interest in the posting of the comments. The actual authors of the comments could not modify or delete their comments once they were posted, only Delfi had the technical means to do this. The Grand Chamber therefore agreed with the Chamber and the Supreme Court that, although Delfi had not been the actual writer of the comments, that did not mean that it had no control over the comment environment and its involvement in making the comments on its news article public had gone beyond that of a passive, purely technical service provider.

Secondly, Delfi had not ensured a realistic prospect of the authors of the comments being held liable. The owner of the ferry company could have attempted to sue the specific authors of the offensive comments as well as Delfi itself. However, Delfi allowed readers to make comments without registering their names, and the measures to establish the identity of the authors were uncertain. Nor had Delfi put in place any instruments to identify the authors of the comments making it possible for a victim of hate speech to bring a claim.

Thirdly, the steps taken by Delfi to prevent or remove without delay the defamatory comments once published had been insufficient. Delfi did have certain mechanisms for filtering hate speech or speech inciting violence, namely a disclaimer (stating that authors of comments were liable for their content, and that threatening or insulting comments were not allowed), an automatic system of deletion of comments containing a series of vulgar words and a notice-and-take-down system (whereby users could tell the portal's administrators about offensive comments by clicking a single button). Nevertheless, both the automatic word-based filter and the notice-and-take-down system had failed to filter out the manifest expressions of hatred and blatant threats to the owner of the ferry company by Delfi's readers and the portal's ability to remove offending comments in good time had therefore been limited. As a consequence, the comments had remained online for six weeks. The Grand Chamber considered that it was not disproportionate for Delfi to have been obliged to remove from its website, without delay, clearly unlawful comments, even without notice from the alleged victims or from third parties whose ability to monitor the Internet was obviously more limited than that of a large commercial Internet news portal such as Delfi.

Finally, the Grand Chamber agreed with the Chamber that the consequences of Delfi having been held liable were small. The 320 euro fine was by no means excessive for Delfi, one of the largest Internet portals in Estonia, and the portal's popularity with those posting comments had not been affected in any way – the number of comments posted had in fact increased. Registered comments are now a possibility but anonymous comments are still predominant, with Delfi even having set up a team of moderators for their follow-up. Furthermore, the tangible result for Internet operators in post-Delfi cases before the national courts has been that they have taken down offending comments but have not been ordered to pay compensation.

Based on the concrete assessment of the above aspects and taking into account the reasoning of the Supreme Court in the present case, the Grand Chamber found that the Estonian courts' finding of

liability against Delfi had been a justified and proportionate restriction on the portal's freedom of expression. Accordingly, there had been no violation of Article 10 of the Convention.

Separate opinions

Judges Raimondi, Karakaş, De Gaetano and Kjølbro expressed a joint concurring opinion. Judge Zupančič expressed a concurring opinion and Judges Sajó and Tsotsoria a joint dissenting opinion. These opinions are annexed to the judgment.

87. *Eur.Court HR, A.S. v. Switzerland, Second Section Judgment of 30 June 2015, Application No. 39350/12, (Article 3, Prohibition of Torture – No Violation; Article 8, Right to Respect for Private and Family Life – No Violation)*. The applicant, a Syrian national of Kurdish origin living in Geneva (Switzerland), unsuccessfully argued that his return to Italy, following a request by the Swiss authorities under the European Union Dublin Regulation, would put him at risk of ill-treatment.

ECHR 227 (2015)

30.06.2015

Press release issued by the Registrar

The case of *A.S. v. Switzerland* (application no. 39350/13) concerned an asylum seeker's impending removal from Switzerland to Italy.

In today's **Chamber** judgment in the case the European Court of Human Rights held, unanimously, that, if *A.S.* were removed to Italy, there would be:

no violation of Article 3 (prohibition of inhuman or degrading treatment) of the European Convention on Human Rights, and

no violation of Article 8 (right to respect for private and family life).

The Court observed in particular that *A.S.* was not critically ill and found that there was currently no indication that he would not receive appropriate psychological treatment if removed to Italy. While the Court had previously raised serious doubts as to the capacities of the reception system for asylum seekers in Italy, the reception arrangements there could not in itself justify barring all removals of asylum seekers to Italy.

Principal facts

The applicant, *A.S.*, is a Syrian national of Kurdish origin who was born in 1988 and currently lives in Geneva (Switzerland).

Having entered Switzerland from Italy, *A.S.* sought asylum in Switzerland in February 2013. The Swiss Federal Office of Migration (now the State Secretariat for Migration) rejected his request in May 2013 based on the fact that his fingerprints had already been registered in Greece and Italy before he had entered Switzerland. Furthermore, the Italian authorities had already accepted a request by the Swiss authorities under the EU Dublin Regulation that *A.S.* be taken back to Italy.

A.S. appealed against the decision, arguing in particular that he had been diagnosed with severe post-traumatic stress disorder, after having been persecuted and tortured in Syria, and was receiving treatment in Switzerland. Furthermore, his two sisters lived in Switzerland, whose presence gave him a certain emotional stability. In June 2013, the Federal Administrative Court dismissed his appeal, holding in particular that under the Dublin Regulation he had to return to Italy.

Complaints, procedure and composition of the Court

The full texts of the Court's judgments are accessible on its website (<http://www.hudoc.echr.coe.int>)

A.S. complained that, if returned to Italy, he would face treatment in breach of Article 3 (prohibition of inhuman or degrading treatment). In particular he argued that due to systemic deficiencies in the reception system for asylum seekers in Italy, he would not be provided with proper housing and adequate medical treatment. He further alleged, in particular, that his removal to Italy would sever his relationship with his sisters in Switzerland and violate his rights under Article 8 (right to respect for private and family life).

The application was lodged with the European Court of Human Rights on 17 June 2013.

Judgment was given by a Chamber of seven judges, composed as follows:

Işıl **Karakaş** (Turkey), *President*,
 András **Sajó** (Hungary),
 Nebojša **Vučinić** (Montenegro),
 Helen **Keller** (Switzerland),
 Paul **Lemmens** (Belgium),
 Egidijus **Kūris** (Lithuania),
 Jon Fridrik **Kjølbro** (Denmark),

and also Stanley **Naismith**, *Section Registrar*.

Decision of the Court

Article 3

The Court referred to its judgment in the case of *Tarakhel v. Switzerland*², in which it had raised serious doubts as to the capacities of the reception system for asylum seekers in Italy. In particular, there was a possibility that asylum seekers might be left without accommodation or might be accommodated in overcrowded facilities without any privacy. At the same time, the Court had found that the overall situation of reception arrangements in Italy could not in itself justify barring all removals of asylum seekers to Italy.

The Court noted that A.S. was not, at the present moment, critically ill. It was a matter of some speculation how quickly his health would deteriorate and to what extent he would be able to obtain access to medical treatment if removed to Italy. There was currently no indication that he would not receive appropriate psychological treatment there and no indication that he would not have access to the anti-depressant of the kind which he was receiving in Switzerland.

Moreover, the case of A.S. did not disclose exceptional circumstances comparable to those in another case in which the Court had found that the deportation of the applicant, who was in the final stages of AIDS and had no prospect of medical care or family support in his country of origin, would violate the Convention.³

Accordingly, the Court found that A.S.'s removal to Italy would not be in violation of Article 3.

Article 8

There was no indication that A.S. had lived in Switzerland before lodging his asylum request in February 2013, which was four months before he lodged his application before the Court. During that short period of time, his presence in Switzerland had been accepted by the authorities only for the purpose of examining his status as an asylum seeker. It could thus not be argued that the tolerance by the Swiss authorities of his presence in the country for a long period had enabled him to establish and

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develop strong family ties there. The Court had already found in other cases that relations between parents and adult children or between adult siblings did not constitute family life for the purpose of Article 8 unless the applicants could demonstrate additional elements of dependence.

Moreover, bearing in mind that States had a certain room for manoeuvre (“margin of appreciation” under the Court’s case-law) in immigration matters, the Court found that a fair balance had been struck between the competing interests at stake, namely A.S.’s personal interests in establishing any family life in Switzerland on the one hand and, on the other, the public order interests of the Swiss Government in controlling immigration.

As to A.S.’s complaint that his removal to Italy would prevent him from continuing to benefit from the support from his sisters in the context of his therapy, it had already been dealt with under Article 3. The Court did not consider that it raised any separate issues under Article 8.

Accordingly, the Court found that A.S.’s removal to Italy would not be in violation of Article 8.

Separate opinion

Judges Sajó, Vučinić and Lemmens expressed a joint concurring opinion, which is annexed to the judgment.

88. *Eur.Court HR, V.M. and Others v. Belgium, Second Section Judgment of 7 July 2015, Application No. 60125/11, (Article 3, Prohibition of Torture – Violation; Article 13, Right to an Effective Remedy, taken in conjunction with Article 3 – Violation; Article 2, Right to Life – No Violation)*. The applicants, a family of seven Serbian nationals, partially successfully argued that the reception conditions of their asylum in Belgium had not been commensurate to their specific vulnerability.

ECHR 236 (2015)
07.07.2015

Press release issued by the Registrar

In today's **Chamber judgment** in the case of *V.M. and Others v. Belgium* (application no. 60125/11) the European Court of Human Rights held, by a majority, that there had been:

a violation of Article 3 (prohibition of inhuman or degrading treatment) of the European Convention on Human Rights and of Article 13 (right to an effective remedy) taken in conjunction with Article 3, and

no violation of Article 2 (right to life).

The case concerned the reception conditions of a family of Serbian nationals seeking asylum in Belgium. Following an order to leave the country and despite their appeals against the measure, the applicants were left without basic means of subsistence and were obliged to return to their country of origin, where their severely disabled child died.

The Court found in particular that the Belgian authorities had not given due consideration to the vulnerability of the applicants, who had remained for four weeks in conditions of extreme poverty, and that they had failed in their obligation not to expose the applicants to degrading treatment, notwithstanding the fact that the reception network for asylum seekers in Belgium had been severely overstretched at the time (the "reception crisis" of 2008 to 2013). The Court considered that the requirement of special protection of asylum seekers had been even more important in view of the presence of small children, including an infant, and of a disabled child.

Furthermore, the fact that the appeal against the order for the applicants' deportation did not have suspensive effect had resulted in all material support for the applicants being withdrawn and had forced them to return to their country of origin without their fears of a possible violation of Article 3 in that country having been examined.

Principal facts

The applicants are seven Serbian nationals, a father and mother and their five children. They were born in 1981, 1977, 2001, 2004, 2007 and 2011 respectively and live in Serbia. Their eldest daughter, who was born in 2001 and was mentally and physically disabled from birth, died in December 2011. The applicants are of Roma origin and were born in Serbia, where they have lived for most of their lives.

In March 2010 the applicants travelled to France, where they submitted an asylum application which was rejected. In March 2011 they travelled to Belgium and lodged an asylum application there. On 12 April 2011 the Belgian authorities submitted a request to the French authorities to take back the family. On 6 May 2011 France accepted the request under the Dublin II Regulation². On 17 May 2011 the Aliens Office in Belgium issued the applicants with an order to leave Belgian territory for France, on the ground that Belgium was not responsible for considering the asylum application under the Dublin II Regulation. On 25 May 2011 the time-limit for enforcement of the order to leave the territory was extended until 25 September 2011 owing to the mother's pregnancy and imminent confinement.

On 16 June 2011 the applicants submitted to the Aliens Appeals Board a request for the suspension and setting-aside of the decision refusing them leave to remain and ordering them to leave the country. On 22 September 2011 the applicants applied for leave to remain on medical grounds on behalf of their disabled eldest daughter. The Aliens Office rejected their application. On 26 September 2011, on expiry of the time-limit for enforcement of the order to leave the country, the applicants were expelled from the Sint-Truiden reception centre where they had been staying, as they were no longer eligible for the material support provided to refugees. They travelled to Brussels, where voluntary associations directed them to a public square in the Schaerbeek municipality in the centre of the Brussels-Capital district, together with other homeless Roma families. They remained there until 5 October 2011. On 7 October 2011 they were assigned to a new reception facility as a mandatory place of registration in the Province of Luxembourg, 160 km from Brussels. The applicants eventually took up residence in Brussels North railway station, where they remained for three weeks until their return to Serbia was arranged on 25 October 2011 by a charity under the return programme run by Fedasil, the federal agency for the reception of asylum seekers.

In a judgment of 29 November 2011 the Aliens Appeals Board set aside the impugned decisions (the refusal of leave to remain and the order to leave the country) on the grounds that the Aliens Office had not established on what legal basis it considered France to be the State responsible for the applicants' asylum application. The Belgian State lodged an appeal on points of law with the *Conseil d'État* against the judgment of the Aliens Appeals Board. In a judgment of 28 February 2013 the *Conseil d'État* declared the appeal inadmissible for lack of current interest, given that the applicants had returned to Serbia and that the Belgian State had been released from its obligations under the procedure for determining the Member State responsible for their asylum application.

Complaints, procedure and composition of the Court

Relying on Article 3 (prohibition of inhuman or degrading treatment), the applicants complained that their exclusion from the reception facilities in Belgium from 26 September 2011 onwards had exposed them to inhuman and degrading treatment. Under Article 2 (right to life), they alleged that the reception conditions in Belgium had caused the death of their eldest daughter. Lastly, under Article 13 (right to an effective remedy), they complained that they had been unable to assert before the courts their claim that their removal to Serbia and the refusal to regularise their residence status had exposed them to a risk to their eldest daughter's life (Article 2) and to a risk of suffering inhuman and degrading treatment (Article 3).

The application was lodged with the European Court of Human Rights on 27 September 2011.

Judgment was given by a Chamber of seven judges, composed as follows:

Işıl **Karakaş** (Turkey), *President*,
 András **Sajó** (Hungary),
 Nebojša **Vučinić** (Montenegro),
 Helen **Keller** (Switzerland),
 Paul **Lemmens** (Belgium),

The full texts of the Court's judgments are accessible on its website (<http://www.hudoc.echr.coe.int>)

Egidijus **Kūris** (Lithuania),
Jon Fridrik **Kjølbro** (Denmark),

and also Abel **Campos**, *Deputy Section Registrar*.

Decision of the Court

Article 3 (prohibition of inhuman or degrading treatment)

The Court reiterated that neither the Convention nor its Protocols conferred the right to political asylum and that Contracting States had the right, subject to their international undertakings including the Convention, to control the entry, residence and expulsion of non-nationals. Nevertheless, the State's responsibility could be engaged in relation to asylum seekers' conditions of reception. The Court observed³ that, in order to determine whether the threshold of severity required under Article 3 was met in a given situation, particular importance should be attached to the person's status as an asylum seeker and, as such, a member of a particularly underprivileged and vulnerable population group in need of special protection. Asylum seekers' vulnerability was heightened in the case of families with children⁴, and the requirement of special protection had been even more important in the applicants' case in view of the presence of small children, including one infant, and of a disabled child.

The Court had to ascertain in this case whether the applicants' living conditions in Belgium between 26 September and 25 October 2011 engaged the responsibility of the Belgian State under Article 3. The Court's review related only to that period, between their eviction from the accommodation centre and their departure for Serbia, since the applicants' reception and the fulfilment of their needs prior to that period were not the subject of dispute. Between 26 September and 25 October 2011 their situation had been particularly serious as they had spent nine days on a public square in Brussels and then, after two nights in a transit centre, a further three weeks in a Brussels train station. The Court noted that this situation could have been avoided or made shorter if the proceedings brought by the applicants seeking the setting-aside and suspension of the decisions refusing them leave to remain and ordering them to leave the country, which had lasted for two months, had been conducted more speedily.

However overstretched the reception network for asylum seekers in Belgium may have been at the time of the events⁵, the Court considered that the Belgian authorities had not given due consideration to the applicants' vulnerability and had failed in their obligation not to expose the applicants to conditions of extreme poverty for four weeks, leaving them living on the street, without funds, with no access to sanitary facilities and no means of meeting their basic needs. The Court found that these living conditions, combined with the lack of any prospect of an improvement in the applicants' situation, had attained the level of severity required under Article 3. The applicants had therefore been subjected to degrading treatment, in breach of that provision.

Article 2 (right to life)

The Court noted that, although the Belgian authorities must have been aware that the applicants were living in poverty following their eviction from the centre, and must have known about their eldest daughter's medical conditions, the medical certificate had not mentioned the degree of severity of those conditions. It also noted, with regard to the timing of the events, that a number of factors may have contributed to the child's death, including having spent several weeks in insalubrious conditions after the family's return to Serbia. Accordingly, the Court considered that the applicants had not shown that their eldest daughter's death had been caused by their living conditions in Belgium, or that the Belgian authorities had failed in their obligation to protect her life. The Court therefore found no violation of Article 2.

The full texts of the Court's judgments are accessible on its website (<http://www.hudoc.echr.coe.int>)

Article 13 (right to an effective remedy) taken in conjunction with Article 3 (prohibition of inhuman or degrading treatment)

On the basis of its analysis of the Belgian system as in force at the time of the events, the Court considered that the applicants had not had an effective remedy available to them, in the sense of one that had automatic suspensive effect and enabled their allegations of a violation of Article 3 to be examined in a rapid and effective manner.

The order for the applicants to leave the country had been liable to be enforced at any time by the Belgian authorities, and the application to set aside and the request for suspension of the measure lodged by the applicants did not have suspensive effect. The Court observed in particular that the lack of suspensive effect had resulted in the material support granted to the applicants being withdrawn and had forced them to return to their country of origin without their fears of a possible violation of Article 3 having been examined. The Court also noted that the length of the proceedings concerning the application to set aside had been unsatisfactory, given that the Aliens Appeals Board had not delivered its judgment until 29 November 2011, after the applicants had left for Serbia, thereby effectively depriving them of the opportunity to continue the proceedings in Belgium and France. Accordingly, since the applicants had not had an effective remedy, there had been a violation of Article 13 taken in conjunction with Article 3.

Article 13 (right to an effective remedy) taken in conjunction with Article 2 (right to life)

The Court considered it unnecessary to examine the applicants' complaint under Article 13 taken in conjunction with Article 2 of the Convention.

Article 41 (just satisfaction)

The Court held that Belgium was to pay the applicants 22,750 euros (EUR) in respect of nonpecuniary damage and EUR 8,120 in respect of costs and expenses.

Separate opinions

Judges Sajó, Keller and Kjølbrot each expressed a dissenting opinion. These opinions are annexed to the judgment.

89. *Eur.Court HR, A.H. and J.K. v. Cyprus, Fourth Section Judgment of 21 July 2015, Application Nos. 41903/10 and 41811/10, (Article 5-1, Right to Liberty and Security, as regards the lawfulness of the applicants' detention from 11 June 2010 until 20 May 2011– Violation; Article 5-1, Right to Liberty and Security, as regards the lawfulness of the applicants' detention from 11 June 2010 until 20 May 2011 – No Violation; Article 5-1, Right to Liberty and Security, as regards the lawfulness of the second applicant's detention from 29 November 2012 until 20 December 2012 – Violation; Article 5-2, Information on Reasons for Arrest, in so far as the applicant's arrest on 11 June 2010 and their ensuing detention on the basis of the deportation and detention orders issued on that date were concerned – No Violation; Article 5-4, Speediness of Review – Violation; Article 4 of Protocol No. 4, Prohibition of Collective Expulsion of Aliens – No Violation).*

Eur.Court HR, H.S. and Others v. Cyprus, Fourth Section Judgment of 21 July 2015, Application No. 41753/10, (Article 5-4, Speediness of Review – Violation; Article 5-1, Right to Liberty and Security– Violation; Article 5-1, Right to Liberty and Security, in respect of nine of the applicants – No Violation; Article 5-1, Right to Liberty and Security, in respect of the remaining five applicants – Violation; Article 5-2, Information on Reasons for Arrest– No Violation; Article 5-4, Speediness of Review – Violation; Article 4 of Protocol No. 4, Prohibition of Collective Expulsion of Aliens – No Violation).

Eur.Court HR, K.F. v. Cyprus, Fourth Section Judgment of 21 July 2015, Application No. 41858/10, (Article 5-1, Right to Liberty and Security, as regards the lawfulness of the applicant's detention on 11 June 2010 – Violation; Article 5-1, Right to Liberty and Security, as regards the lawfulness of the applicant's detention on 11 June 2010 until 20 April 2011 – No Violation; Article 5-2, Information on Reasons for Arrest – No Violation; Article 5-4, Speediness of Review – Violation; Article 5-4 of Protocol No. 4, Prohibition of Collective Expulsion of Aliens – No Violation).

The applicants, 17 Syrian asylum seekers, argued, partially successfully, that their collective expulsion and deportation from Cyprus to Syria would put them at risk of ill-treatment.

ECHR 251 (2015)
21.07.2015

Press release issued by the Registrar

The applications concerned the deportation of 17 asylum seekers from Cyprus to Syria.

The applicants in the first case are two Syrian nationals of Kurdish origin, who are husband and wife and are currently living in Paphos (Cyprus). The applicants in the second case are 12 Syrian nationals of Kurdish origin and two Ajanib (registered stateless) Kurds of Syria who were all deported in 2012; the majority of them are currently living in Syria, some in Northern Iraq and the others either in

The full texts of the Court's judgments are accessible on its website (<http://www.hudoc.echr.coe.int>)

Austria, Greece or Cyprus. The applicant in the third case is a Syrian national of Kurdish origin who was born in 1979. He left Cyprus voluntarily in 2012 and is currently living in Northern Iraq.

All but one of the 17 applicants entered Cyprus illegally between 2004 and 2011; the other one entered Cyprus on a tourist visa. They all subsequently applied for asylum, basing their claims on fears of ill-treatment and/or persecution if they were returned to Syria. 14 of the applicants' claims were dismissed by the asylum authorities, essentially on the basis that their claims lacked credibility and that they had failed to make a plausible case that they were at risk of persecution and were in need of international protection. The asylum proceedings concerning the remaining three applicants were discontinued and their files closed as they had not showed up to scheduled interviews. The applicants' removal was, however, stayed on the basis of an interim measure (under Rule 39 of the Rules of Court) issued on June 2010 by the European Court of Human Rights to the Cypriot Government indicating that they should not deport the applicants to Syria pending its examination of the cases. This interim measure was subsequently lifted with regard to the applicants in the second and third cases but remains in force with regard to the first case.

The applicants alleged that their deportation to Syria had or would put them at risk of ill-treatment and/or torture due to their Kurdish origins, referring in particular to Kurds in Syria as an oppressed minority, and their political activities as members of the Kurdish Yekiti Party. They all also complained that they did not / had not had an effective remedy at national level against their planned deportations. They relied on Article 3 (prohibition of inhuman or degrading treatment) and Article 13 (right to an effective remedy) of the European Convention on Human Rights.

The applicants also made a number of complaints under Article 5 §§ 1, 2 and 4 (right to liberty and security). In particular, on 11 June 2010, in the early hours of the morning, the applicants, along with many other Kurds from Syria, were transferred from a street camp in front of Government buildings in Nicosia where they were protesting against the Cypriot asylum authorities' restrictive policies in granting international protection, to police headquarters. Some of the protestors were deported on the same day and those who were found to be lawfully residing in the Republic were allowed to leave. The majority of the applicants were charged with unlawful stay and then detained on the basis of detention and deportation orders issued against them on the same day. The rest of the applicants were detained on the basis of detention and deportation orders that had been issued earlier on. The applicants in the first case were detained for just over 11 months and released in May 2011. Nine of the applicants in the second case were detained for just over three months and were deported in late September/early October 2010, just after the ECtHR interim measure in their case was lifted; the remaining five applicants were kept in detention following the lifting of the interim measure and were deported nearly three months later, in December 2010. The applicant in the third case was detained for just over ten months and released in April 2011. The applicants' complaints under Article 5 §§ 1 (lawfulness of detention) and 2 (right to be informed promptly of the reasons for arrest) concerned their transfer and stay at police headquarters and their ensuing detention and, under Article 5 § 4, the alleged lack of an effective remedy at their disposal to challenge the lawfulness of this detention.

One of the applicants in the first case made a further complaint under Article 5 § 1 about the lawfulness of his detention from 29 November 2012 until 20 December 2012 following his arrest at Paphos airport for trying to leave Cyprus with a false passport and without a valid residence permit.

Lastly, they all relied on Article 4 of Protocol No. 4 (prohibition of collective expulsion of aliens) complaining that the authorities were going to deport them collectively without carrying out an individual assessment of their cases.

90. *Eur.Court HR, G.S. v. Georgia, Fourth Section Judgment of 21 July 2015, Application No. 2361/13, (Article 8, Right to Respect for Private and Family Life – Violation)*. The applicant, relying on the 1980 Hague Convention on the Civil Aspects of International Child Abduction, successfully complained about the refusal of the Georgian courts to order the return of her son to Ukraine.

ECHR 253
21.07.2015

Press release issued by the Registrar

In today's **Chamber** judgment in the case of *G.S. v. Georgia* (application no. 2361/13) the European Court of Human Rights held, unanimously, that there had been:

a violation of Article 8 (right to respect for private and family life) of the European Convention on Human Rights

The case concerned the complaint by G.S., the applicant, about proceedings in Georgia for the return of her son, born in 2004, to Ukraine. Her former partner decided to keep their son in Georgia with family at the end of the summer holidays in 2010, while himself living in Russia and occasionally visiting his son in Georgia.

The Court considered that there had been shortcomings in the Georgian courts' examination of the expert and other evidence in the return proceedings on the case. In particular, when identifying what would be in the boy's best interests, the courts gave no consideration to reports by social workers and a psychologist, which had concluded that the boy was suffering from lack of contact with both parents and a situation which was barely understandable. Indeed, it was questionable whether keeping the boy, who had spent the first six years of his life in Ukraine, in Georgia in the care of his paternal family – who had no custody rights – and without either of his parents, was itself in his best interests.

Principal facts

The applicant, G.S., is a Ukrainian national who was born in 1981 and lives in Kharkiv (Ukraine).

She had a son, L., in 2004 with G. Ch., a dual Georgian-Ukrainian national, who moved to Russia in 2005. L. continued to live with his mother. The couple had another child together in 2006, who died in a tragic accident in 2010 when she fell out of an open window of an apartment. L., who witnessed his sister's death, was subsequently diagnosed with an adjustment disorder.

In July 2010 G.S. allowed her former partner to take L. to Georgia for the summer holidays. According to her submissions, L. was expected to return to Kharkiv by the end of August to start primary school there. However, G. Ch. decided to keep L. in Georgia with his family, while himself living in Russia and occasionally visiting his son in Georgia.

After having failed to persuade her former partner to let their son return to Ukraine, G.S. brought child return proceedings in October 2010 under the Hague Convention via the Ministries of Justice of Ukraine and Georgia. In the proceedings under the Hague Convention, two reports were drawn up: the first in April 2011 by two social workers who concluded that L. was suffering from the lack of contact with his parents; and the second in May 2011 by a psychologist who corroborated that conclusion and

The full texts of the Court's judgments are accessible on its website (<http://www.hudoc.echr.coe.int>)

added that the boy was suffering from a complicated situation which must have been barely understandable for him.

On the basis of those reports, in May 2011, the Tbilisi City Court rejected G.S.'s request, concluding that L.'s return to Ukraine would expose him to a psychological risk on account of the separation it would entail from his father and the trauma he had suffered in the country as a result of the death of his sister. The mother's argument that her son was suffering from an adjustment disorder and from a lack of contact with his parents was dismissed.

Ultimately, in August 2012, the Supreme Court – also relying on the social workers' and psychologist's reports – concluded that L.'s interests would be better protected if he remained in Georgia on account of the risk of psychological harm if he were returned to Ukraine, which he had left primarily on account of the trauma he had suffered following the death of his sister.

L. thus continued to live with his uncle and grandfather in Tbilisi.

In the meantime – in March 2011 – in parallel proceedings in Ukraine, a district court ordered that G.S.'s son be returned to Ukraine.

Complaints, procedure and composition of the Court

Relying on Article 8 (right to respect for private and family life), G.S. complained about the refusal of the Georgian courts to order the return of her son to Ukraine and about the length of the return proceedings.

The application was lodged with the European Court of Human Rights on 28 December 2012.

Judgment was given by a Chamber of seven judges, composed as follows:

Guido **Raimondi** (Italy), *President*,
 Päivi **Hirvelä** (Finland),
 George **Nicolaou** (Cyprus),
 Ledi **Bianku** (Albania),
 Nona **Tsotsoria** (Georgia),
 Paul **Mahoney** (the United Kingdom),
 Faris **Vehabović** (Bosnia and Herzegovina),

and also Françoise **Elens-Passos**, *Section Registrar*.

Decision of the Court

The Court accepted the Government's argument that the interference with G.S.'s right to family life had had a legal basis, namely Article 13 § b of the Hague Convention, which provides that a State does not have to return a child if it is at a grave risk of psychological harm. Furthermore, that interference pursued the legitimate aim of protecting the child's best interests.

However, the Court found that there had been no direct and convincing evidence in the case file to support the first and cassation instances' main line of reasoning in the return proceedings, namely the allegation that there was a grave risk for L. if he were returned to Ukraine, on account of the psychological trauma he had suffered following the death of his sister.

First, no expert examinations were carried out concerning the risks, on the one hand, of a return to Ukraine or, on the other hand, of L.'s separation from the paternal family.

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The examinations which were carried out, by the psychologist and social workers, essentially stated that the boy had experienced psychological trauma and was in need of help. The Supreme Court, relying on those reports, concluded that the boy was at risk of harm if returned to Ukraine, but completely omitted to examine the risks the boy faced if retained in Georgia. Thus, the Supreme Court, when identifying what would be in the boy's best interests, had given no consideration to the social workers' and psychologist's conclusions with regard to the lack of contact between the boy and his parents and the complicated, "barely understandable" situation.

Moreover, there was no allegation that G.S. herself had posed a threat to the boy.

Lastly, the fact that L.'s father lived in Russia and that the boy was primarily being looked after by the paternal family, who had no custody rights, had quite simply been ignored in the return proceedings. Indeed, it was questionable whether keeping L. – who had spent the first six years of his life in Ukraine – in Georgia without either of his parents, was in itself in his best interests.

In sum, the Court considered that the shortcomings in the examination of the expert and other evidence in the current case meant that the Supreme Court's decision not to return L. to Ukraine had not been based on relevant and sufficient reasoning. Furthermore, it had failed to properly determine L.'s best interests in the specific circumstances of the case or to strike a fair balance between the parties' conflicting interests.

The Court further held that the domestic courts had failed to address the case in an expeditious manner: of particular concern was the delay of almost nine months at the cassation stage, despite the six-week time-limit for taking decisions on requests in proceedings for the return of children provided for under the Georgian Civil Code of Procedure.

The decision-making process before the domestic courts under the Hague Convention had therefore amounted to a disproportionate interference with G.S.'s right to respect for her family life, in violation of Article 8.

Just satisfaction (Article 41)

The Court held that Georgia was to pay G.S. 300 euros (EUR) in respect of pecuniary damage, EUR 8,000 in respect of non-pecuniary damage and EUR 800 for costs and expenses

91. *Eur.Court HR, Khlaifia and Others v. Italy, Second Section Judgment of 1 September 2015, Application No. 16483/12, (Article 3, Prohibition of Torture – No Violation, in respect of the conditions of detention on board the ships; Article 3, Prohibition of Torture – Violation, in respect of the conditions of detention in the Contrada Imbracola reception centre; Article 4 of Protocol No. 4, Prohibition of Collective Expulsion of Aliens – Violation; Article 5-1, Right to Liberty and Security – Violation; Article 5-2, Information on Reasons for Arrest – Violation; Article 5-4, Speediness of Review – Violation; Article 13, Right to an Effective Remedy – Violation, taken in conjunction with Articles 3 and 4 of Protocol No. 4).* The applicants, Tunisian nationals, successfully alleged, *inter alia*, that their asylum in detention centres on Lampedusa during the Arab springs of 2011 and their repatriation to Tunisia had been unlawful.

ECHR 263 (2015)
01.09.2015

Press release issued by the Registrar

The European Court of Human Rights today delivered a **Chamber judgment** in the case of **Khlaifia and Others v. Italy** (application no. 16483/12).

The case concerned the detention in a reception centre on Lampedusa and subsequently on ships moored in Palermo harbour, as well as the repatriation to Tunisia, of clandestine migrants who had landed on the Italian coast in 2011 during the events linked to the “Arab Spring”.

The Court held unanimously that there had been:

a violation of Article 5 § 1 (right to liberty and security) of the European Convention on Human Rights;

a violation of Article 5 § 2 (right to be informed promptly of the charge against the applicants);

a violation of Article 5 § 4 (right to a speedy decision by a court on the lawfulness of detention);

no violation of Article 3 (prohibition of inhuman or degrading treatment) in respect of the conditions of detention on board the ships.

The Court held by a majority that there had been:

a violation of Article 3 (prohibition of inhuman or degrading treatment) in respect of the conditions of detention in the Contrada Imbracola reception centre;

a violation of Article 4 of Protocol No. 4 (prohibition of collective expulsions of aliens);

a violation of Article 13 (right to an effective remedy) taken in conjunction with Articles 3 and 4 of Protocol No. 4.

The Court held that the applicants' detention had been unlawful. They had not been notified of the reasons for their detention, for which there was no statutory basis, and had been unable to challenge it. Concerning their conditions of detention in the reception centre, the Court took account of the

The full texts of the Court's judgments are accessible on its website (<http://www.hudoc.echr.coe.int>)

exceptional humanitarian crisis facing Italy on the island of Lampedusa in 2011 in the wake of the Arab Spring (55,298 migrants had landed around the time the applicants had been present there). The Court nonetheless concluded that the applicants' conditions of detention had diminished their human dignity, although that had not been the case on board the ships moored in Palermo harbour.

The Court further considered that the applicants had suffered a collective expulsion, as their *refoulement* decisions did not refer to their personal situation – the Court held in particular that an identification procedure was insufficient to disprove collective expulsion. Furthermore, the Court noted that at the time a large number of Tunisians had been expelled under such simplified procedures. Lastly, the Court considered that the applicants had not benefited from any effective remedy in order to lodge a complaint, because under Article 13, if a remedy was to be deemed effective in the case of a collective expulsion it had to have automatic suspensive effect – which in this case meant that it should have suspended the *refoulement* to Tunisia – and that had not been the case.

Principal facts

The applicants, Saber Ben Mohamed Ben Ali Khlaifia, Fakhreddine Ben Brahim Ben Mustapha Tabal and Mohamed Ben Habib Ben Jaber Sfar, are Tunisian nationals who were born in 1983, 1987 and 1988 respectively. Mr Khlaifia lives in Om Laarass (Tunisia) and Mr Tabal and Mr Sfar live in El Mahdia (Tunisia).

On 16 and 17 September 2011 they left Tunisia by sea; their boats were subsequently intercepted by the Italian authorities. The applicants were then escorted to the island of Lampedusa, where they were transferred to a “CSPA” (*Centro di Soccorso e Prima Accoglienza*) reception centre in Contrada Imbriacola.

According to the applicants, the conditions of hygiene in the centre were appalling: there were no doors separating the toilets and showers from the other rooms and water supplies were limited. They also submitted that owing to overcrowding the migrants had to sleep on the floor and that, furthermore, they were allowed no contact with the outside.

On 20 September the CSPA suffered fire damage following a riot by the migrants. The applicants were taken to a sports park for the night, where they managed to evade detection by the law enforcement agencies and reach the village of Lampedusa, where they joined in a protest demonstration with almost 1,800 other migrants. Having been arrested by the police, the applicants were finally transferred by aircraft to Palermo and placed on two ships moored in that city's harbour, where they spent four days aboard.

The applicants were finally expelled to Tunisia on 27 and 29 September 2011. Before their departure they were interviewed by the Tunisian Consul, who, according to the applicants, merely recorded their civil status data in accordance with the Italo-Tunisian agreements concluded in April 2011.

Complaints, procedure and composition of the Court

Relying on Article 3, (prohibition of inhuman or degrading treatment), the applicants complained of their conditions of detention in the reception centre and on board the ships. They also alleged that their detention had been contrary to Articles 5 § 1 (right to liberty and security), 5 § 2 (right to be promptly informed of the reasons for deprivation of liberty) and 5 § 4 (right to examination of the lawfulness of detention). Relying on Article 13 (right to an effective remedy), they also submitted that they had had no effective domestic remedy to complain of the violation of their rights. Finally, the applicants submitted that they had been subjected to collective expulsion, which is prohibited under Article 4 of Protocol No. 4 (prohibition of collective expulsion of aliens).

The full texts of the Court's judgments are accessible on its website (<http://www.hudoc.echr.coe.int>)

The application was lodged with the European Court of Human Rights on 9 March 2012.

Judgment was given by a Chamber of seven judges, composed as follows:

Işıl **Karakaş** (Turkey), *President*,
 Guido **Raimondi** (Italy),
 András **Sajó** (Hungary),
 Nebojša **Vučinić** (Montenegro),
 Helen **Keller** (Switzerland),
 Paul **Lemmens** (Belgium),
 Robert **Spano** (Iceland),
 and also Stanley **Naismith**, *Section Registrar*.

Decision of the Court

Article 5 § 1 (right to liberty and security)

The Court observed that the applicants had been free to leave neither the CSPA nor the ships, the latter, as stated by the Government themselves, being an “extension of the CSPA”. They had been kept under constant surveillance by the police and prohibited from communicating with the outside. Given that such restrictions constituted deprivation of liberty, Article 5 of the Convention was applicable. Although that article allowed States to restrict aliens’ freedom for the purposes of immigration controls, any deprivation of liberty had to have a legal basis in domestic law, particularly by virtue of the principle of legal certainty. The Court noted that Italian law did not provide expressly for the detention of migrants placed, like the applicants, in a CSPA². Even supposing that the applicants’ detention had been covered by the bilateral agreement with Tunisia, the applicants could not have foreseen the consequences of that agreement, which had not been made public, and had had no safeguard against arbitrary treatment. Their deprivation of liberty had therefore been unlawful, in breach of Article 5 § 1.

Article 5 § 2 (right to be informed promptly of the reasons for deprivation of liberty)

The reasons for the applicants’ detention were not set out in any document. The Government did present *refoulement* decisions, but the latter provided incomplete and insufficient information and had not been handed over to the applicants until their repatriation to Tunisia. Therefore, as the applicants had not been promptly informed of the reasons for their deprivation of liberty the Court concluded that there had been a violation of Article 5 § 2.

Article 5 § 4 (right to examination of the lawfulness of detention)

The Court observed that since the applicants had at no stage been informed of the reasons for their detention, they had never been able to challenge its lawfulness. The Court consequently concluded that there had been a violation of Article 5 § 4.

Article 3

The Court observed that in the wake of the “Arab Spring” (the uprisings in Tunisia and Libya in 2011), the island of Lampedusa had faced a mass influx of migrants arriving in boats – 55,298 had landed around the time the applicants had been present on the island – which had induced Italy to declare a state of humanitarian emergency. The Court was aware that the uprising of 20 September 2011 had been an aggravating factor and that the local authorities had worked intensively to accommodate the refugees. Although the Court did not underestimate the problems encountered by

The full texts of the Court’s judgments are accessible on its website (<http://www.hudoc.echr.coe.int>)

the States in cases of exceptional waves of immigration, the Court nonetheless reiterated that no derogation was possible to Article 3.

Several reports, including those by the Extraordinary Commission of the Italian Senate and Amnesty International, corroborated the fact that the CSPA in Contrada Imbriacola was encountering serious issues of overcrowding (migrants sleeping in corridors), hygiene (smells, unusable sanitary facilities) and lack of contact with the outside. The Court therefore considered these poor conditions of detention in the centre as proven. Moreover, the applicants had been vulnerable because they had just undergone a perilous sea crossing. Consequently, even though they had only remained in the CSPA for four days, their detention under such conditions had diminished their human dignity; this situation had gone beyond the suffering inherent in detention and had amounted to degrading treatment contrary to Article 3.

On the other hand, the Court could not uphold the applicants' allegations regarding their conditions of detention on the ships because their statements had been contradicted by an Italian Member of Parliament who had visited the vessels. The feelings of anxiety and agitation inspired in the applicants by the lack of explanations for their detention on board the ships had not reached the severity threshold for the applicability of Article 3. The Court therefore concluded that there had been no violation of Article 3 in that regard.

Article 4 of Protocol No. 4 (prohibition of collective expulsion of aliens)

The Court observed that although the applicants had indeed been presented with individual *refoulement* decisions, the latter had all been identically worded, with no reference to their personal situations; nor had they been interviewed individually. The Court also noted that although the applicants, unlike the migrants in the case of *Hirsi Jamaa and Others*³, had undergone an identification procedure, the latter was insufficient to preclude the existence of collective expulsion.

The collective nature of the applicants' removal was confirmed by the fact that the bilateral agreements with Tunisia provided for the repatriation of clandestine Tunisian migrants under simplified procedures based on the straightforward identification by the Tunisian consular authorities of the persons concerned.

The Court therefore considered that the applicants had been victims of collective expulsion and concluded that there had been a violation of Article 4 of Protocol No. 4.

Article 13 (right to an effective remedy) taken in conjunction with Articles 3 and 4 of Protocol No. 4

The applicants had not benefited from a remedy to complain of their conditions of detention in the CSPA because an appeal to a magistrate could only concern the lawfulness of their repatriation to Tunisia. There had therefore been a violation of Article 13 taken in conjunction with Article 3 in that regard.

Moreover, the aforementioned appeal to a magistrate had no suspensive effect *vis-à-vis* the measure at issue (namely removal to Tunisia), even though that is one of the requirements of Article 134. The Court therefore concluded that there had been a violation of Article 13 taken in conjunction with Article 4 of Protocol No. 4.

Just satisfaction (Article 41)

The Court held that Italy was to pay each applicant 10,000 euros (EUR) in respect of non-pecuniary damage and the applicants EUR 9,344.51, jointly, in respect of costs and expenses.

The full texts of the Court's judgments are accessible on its website (<http://www.hudoc.echr.coe.int>)

Separate opinions

Judge Keller expressed a concurring opinion. Judges Sajó and Vučinić expressed a joint partly dissenting opinion. Judge Lemmens expressed a partly dissenting opinion. These opinions are annexed to the judgment.

92. *Eur.Court HR, Sõro v. Estonia, First Section Judgment of 3 September 2015, Application No. 22588/08, (Article 8, Right to Respect for Private and Family Life – Violation)*. The applicant, a former employee for the Committee for State Security of the Union of Soviet Socialist Republics (KGB), successfully argued that the publication of his employment records had breached his right to respect for private life.

ECHR 269 (2015)

03.09.2015

Press release issued by Registrar

In today's **Chamber** judgment in the case of **Sõro v. Estonia** (application no. 22588/08) the European Court of Human Rights held, by a majority, that there had been:

a violation of Article 8 (right to respect for private life) of the European Convention on Human Rights.

The case concerned Mr Sõro's complaint about the fact that information about his employment during the Soviet era as a driver for the Committee for State Security of the USSR (the KGB) had been published in the Estonian State Gazette in 2004.

The Court found that in Mr Sõro's case this measure had been disproportionate to the aims sought. In particular, under the relevant national legislation, information about all employees of the former security services – including drivers, as in Mr Sõro's case – was published, regardless of the specific function they had performed.

Principal facts

The applicant, Mihhail Sõro, is an Estonian national who was born in 1948 and lives in Tartu (Estonia).

From 1980 to 1991 Mr Sõro was employed as a driver by the Estonian branch of the Committee for State Security of the USSR (the KGB). In February 2004 the Estonian Internal Security Service presented him with a notice according to which he had been registered under the national legislation on "Disclosure of Persons who Have Served in or Co-operated with Security Organisations or Intelligence or Counterintelligence Organisations of Armed Forces of States which Have Occupied Estonia" ("the Disclosure Act"). Under the Disclosure Act, which had entered into force in 1995, the persons concerned were to be registered and information about their service or cooperation with the security or intelligence organisations was to be made public unless they had made a confession about it to the Estonian Internal Security Service within a year from the Act's entry into force.

The notice received by Mr Sõro stated that an announcement about his past employment would be published in an appendix to the State Gazette. It stated that the person concerned had the right to have access to the documents proving his or her links to the security or intelligence organisations and to contest that information before the Estonian Internal Security Service or the courts. According to Mr Sõro, his request to be shown the material gathered in respect of him was not met. The Estonian Government contested that allegation.

In June 2004 the announcement about Mr Sõro's having worked for the Committee for State Security as a driver was published in the appendix to the State Gazette, both in its printed version and on the

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Internet. He subsequently complained to the Chancellor of Justice, who, in a report to Parliament, concluded that the Disclosure Act was unconstitutional, in particular because information on all employees of the security and intelligence organisations was made public irrespective of whether they had merely performed technical tasks not related to the main functions of the organisations. However, the Parliament's constitutional law committee disagreed with this assessment and the Chancellor of Justice did not bring constitutional review proceedings.

In 2006, Mr Sõro lodged a complaint before the administrative court, asking for the text published in the Gazette to be declared unlawful and, in particular, to delete the word “occupier” (in the reference to States having occupied Estonia). He noted in particular that he had never been accused of or provided with any evidence showing that he had participated in the forceful occupation of the Estonian territory. He asserted that he had only worked for the Committee for State Security as a driver and did not know anything about gathering information. Moreover, as a result of the publication of the announcement he had lost his work and he had been a victim of groundless accusations by other people. The administrative court dismissed his complaint, noting in particular that he had failed to contest the notice with which he had been presented. That decision was upheld by the appeal court and, in February 2008, the Supreme Court declined to hear Mr Sõro's appeal.

Complaints, procedure and composition of the Court

Mr Sõro complained that the publication of information about his employment as a driver of the KGB had breached his rights under Article 8 (right to respect for private and family life).

The application was lodged with the European Court of Human Rights on 3 May 2008.

Judgment was given by a Chamber of seven judges, composed as follows:

Elisabeth **Steiner** (Austria), *President*,
 Khanlar **Hajiyev** (Azerbaijan),
 Mirjana **Lazarova Trajkovska** (“The former Yugoslav Republic of Macedonia”),
 Julia **Laffranque** (Estonia),
 Paulo **Pinto de Albuquerque** (Portugal),
 Ksenija **Turković** (Croatia),
 Dmitry **Dedov** (Russia),
 and also Søren **Nielsen**, *Section Registrar*.

Decision of the Court

Article 8

The Court considered that the publication of information about Mr Sõro's employment as a driver of the KGB had affected his reputation and therefore constituted an interference with his right to respect for his private life. The lawfulness of that interference – which had been based on the Disclosure Act – was not in dispute between the parties. The Court also considered that the interference had pursued a legitimate aim for the purpose of Article 8, namely the protection of national security and public safety, the prevention of disorder and the protection of the rights and freedoms of others.

As regards the question of whether the measure had been proportionate to the aims pursued, the Court observed that in a number of previous cases against other countries concerning similar measures it had criticised the lack of individualisation of those measures. Such considerations also applied in Mr Sõro's case. The Court noted that the Disclosure Act did not make any distinction between different levels of past involvement with the KGB. It was true that under the applicable procedure Mr Sõro had been informed beforehand of the text of the announcement to be published, and given the possibility

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to contest the factual information it contained. However, there was no procedure to evaluate the specific tasks performed by individual employees of the former security services in order to assess the danger they could possibly pose several years after the end of their career in those institutions. The Court was not convinced that there was a reasonable link between the legitimate aims sought by the Act and the publication of information about all employees of the former security services, including drivers, as in Mr Sõro's case, regardless of the specific function they had performed in those services.

Furthermore, while the Disclosure Act had come into force three and a half years after Estonia had declared its independence, publication of information about former employees of the security services had stretched over several years. In Mr Sõro's case, the information in question had only been published in 2004, almost 13 years after Estonia had declared its independence. The Court considered that any threat which the former servicemen of the KGB could initially have posed to the new democracy must have considerably decreased with time. There had been no assessment of the possible threat posed by Mr Sõro at the time the announcement was published.

Finally, although the Disclosure Act itself did not impose any restrictions on Mr Sõro's employment, according to his submissions he had been derided by his colleagues and had been forced to quit his job. The Court considered that even if such a result was not sought by the Act it nevertheless testified to how serious the interference with Mr Sõro's right to respect for his private life had been. In the light of those considerations the Court concluded that this interference had been disproportionate to the aims pursued. There had accordingly been a violation of Article 8.

Just satisfaction (Article 41)

The Court held that Estonia was to pay Mr Sõro 6,000 euros (EUR) in respect of non-pecuniary damage and EUR 1,444.74 in respect of costs and expenses.

Separate opinions

Judge Pinto de Albuquerque expressed a concurring opinion; Judges Hajiyev, Laffranque and Dedov expressed a joint dissenting opinion. These opinions are annexed to the judgment.

93. *Eur.Court HR, R.H. v. Sweden, Fifth Section Judgment of 10 September 2015, Application No. 4601/14, (Article 3, Prohibition of Torture – No Violation)*. The applicant, a Somali asylum-seeker, unsuccessfully argued that her deportation back to Somalia would put her at risk of ill-treatment.

ECHR 273 (2015)

10.09.2015

Press release issued by the Registrar

The case concerned the deportation of a Somali asylum-seeker.

The applicant, Ms R.H., is a Somali national who was born in 1988. She applied for asylum in Sweden in December 2011, claiming that she had just arrived in the country. The Migration Board and migration courts examined her situation and eventually rejected her asylum application in June 2013 and ordered her deportation to Somalia. Those instances found that the applicant's statements to the authorities lacked credibility: notably, she had already filed asylum applications in Italy and the Netherlands before arriving in Sweden in 2007, staying there illegally until contacting the migration authorities in 2011; and, initially claiming that she had left Somalia because of the war, had then changed her story to allege that she had fled Somalia with a secret boyfriend to escape a forced marriage to an older man and feared ill-treatment by her family on her return, particularly by her uncles who had already severely beaten her in 2004 for trying to escape. The applicant subsequently submitted a petition to have the enforcement of her deportation order stopped, claiming that her uncles had joined al-Shabaab, a jihadist terrorist group based in Somalia, forcing her brother to also join the group and killing her sister. The Migration Board rejected her petition in September 2013. The applicant's deportation was stayed in January 2014 on the basis of an interim measure granted by the European Court of Human Rights under Rule 39 of its Rules of Court, which indicated to the Swedish Government that the applicant should not be expelled to Somalia whilst the Court was considering the case.

Relying in particular on Article 3 (prohibition of inhuman or degrading treatment) of the European Convention on Human Rights, Ms R.H. alleged that, if removed from Sweden to Somalia, she would face a real risk of either being killed by her uncles for refusing to agree to a forced marriage before fleeing Somalia or forced to marry a man against her will again upon her return. She further claimed that the general situation in Somalia for women was very difficult, in particular for those – such as herself – who lacked a male network and were therefore all the more vulnerable.

No violation of Article 3 in the event of Ms R.H.'s deportation to Mogadishu in Somalia

Interim measure (Rule 39 of the Rules of Co

94. *Eur.Court HR, L.M. and Others v. Russia, First Section Judgment of 15 October 2015, Application No. 40081/14, (Article 2, Right to Life – Violation; Article 3, Prohibition of Torture – Violation; Article 5-1, Right to Liberty and Security – Violation; Article 5-4, Speediness of Review – Violation; Article 34, Individual Applications – Failure to Comply)*. The applicants, Syrian nationals and a stateless Palestinian from Syria, successfully argued that their impending expulsion from Russia to Syria would expose them to a real risk to their lives and personal security.

ECHR 323 (2015)

15.10.2015

Press release issued by the Registrar

The case of *L.M. and Others v. Russia* (application nos. 40081/14, 40088/14, and 40127/14) concerned the impending expulsion of three men to Syria from Russia and their detention pending expulsion in Russia.

In today's **Chamber** judgment in the case, the European Court of Human Rights held, unanimously: that the applicants' forced return to Syria would give rise to **a violation of Article 2 (right to life) and/or Article 3 (prohibition of torture and of inhuman or degrading treatment)** of the European Convention on Human Rights;

that there had been **a violation of Article 5 § 1 (f) (right to liberty and security) and Article 5 § 4 (right to have lawfulness of detention decided speedily by a court)**; and

that Russia had **failed to comply with its obligations under Article 34 (right of individual petition)**.

This was the first time that the Court addressed in a judgment the issue of returns to Syria in the current situation. The Court found that, in view of international reports about the crisis in Syria and additional information about the applicants' individual situation, the applicants had put forward a well-founded allegation that their return to Syria would expose them to a real risk to their lives and personal security.

Having regard to its finding that the applicants' detention, since the last decision by the Russian courts confirming their expulsion order in May 2014, had been in breach of Article 5, the Court held, in application of Article 46 (binding force and execution of judgments), that Russia was to ensure the immediate release of two of the applicants who had so far remained in detention.

Principal facts

The applicants, L.M., a stateless Palestinian from Syria, and A.A. and M.A., Syrian nationals, were born in 1988, 1987, and 1994 respectively. At the time of lodging their applications they were detained in a detention centre for foreign nationals in Maloyaroslavets, Kaluga Region (Russia).

The applicants entered Russia in 2013. In March 2014 A.A. sought refugee status in Russia and, according to the Russian Government, the request was dismissed. In April 2014 all three applicants were arrested at a clothing factory in Maloyaroslavets. The district court subsequently found them guilty of administrative offences, namely the breach of residence rules and working without a permit. The court ordered their expulsion to Syria and their detention pending expulsion. L.M. and M.A. have

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since then remained in the detention centre for foreign nationals, while A.A. escaped in August 2014, his subsequent whereabouts being unknown.

On 27 May 2014 the regional court rejected the applicants' appeals against the expulsion orders, following which the orders became enforceable. Their expulsion was stayed, however, in view of an interim measure applied by the European Court of Human Rights (under Rule 39 of its Rules of Court) indicating to the Russian Government that the applicants should not be expelled to Syria for the duration of the proceedings before the Court.

In parallel to the expulsion proceedings, following their arrest, all three applicants applied for refugee status and submitted requests for temporary asylum. They indicated that their reasons for leaving Syria were the war and danger to their lives. It appears that the proceedings in respect of L.M. and A.A. were terminated by the Federal Migration Service in December 2014. M.A.'s requests for refugee status and temporary asylum were both refused and his appeal was rejected by the regional court in November 2014.

Complaints, procedure and composition of the Court

The applicants complained that their expulsion to Syria, if carried out, would be in breach of their rights under Article 2 (right to life) and Article 3 (prohibition of torture and of inhuman or degrading treatment), and that they had no effective domestic remedies available in respect of these complaints, in breach of Article 13 (right to an effective remedy). They further complained that the conditions of their detention were in breach of Article 3. The applicants moreover relied on Article 5 § 1 (f) (right to liberty and security) and Article 5 § 4 (right to have lawfulness of detention decided speedily by a court), complaining that they had no access to effective judicial review of their continued detention and that the court decisions ordering their detention did not stipulate the maximum length of that detention. Finally, relying on Article 34 (right of individual petition), the applicants complained that restrictions placed on their contact with their representatives and a lack of interpreting services had interfered with their ability to communicate effectively with the European Court of Human Rights.

The applications were lodged with the European Court of Human Rights on 29 May and 30 May 2014 respectively.

Judgment was given by a Chamber of seven judges, composed as follows:

András **Sajó** (Hungary), *President*,
 Mirjana **Lazarova Trajkovska** ("The former Yugoslav Republic of Macedonia"),
 Julia **Laffranque** (Estonia),
 Paulo **Pinto de Albuquerque** (Portugal),
 Linos-Alexandre **Sicilianos** (Greece),
 Erik **Møse** (Norway),
 Dmitry **Dedov** (Russia),

and also Søren **Nielsen**, *Section Registrar*.

Decision of the Court

Article 2 and Article 3

As regards the admissibility of the complaints, the Court dismissed an objection by the Russian Government to the effect that the applicants had failed to exhaust the domestic remedies, as at the time of lodging their complaints their applications for refugee status and/or temporary asylum had not yet been considered in the final instance.

The full texts of the Court's judgments are accessible on its website (<http://www.hudoc.echr.coe.int>)

The Court noted in particular that the decisions of the regional court of 27 May 2014 confirming the expulsion orders were final and remained valid in respect of all three applicants. The proceedings concerning refugee status and asylum were unsuccessful, or remained unfinished. Moreover, certain aspects of the applicants' confinement in the detention centre had prevented them from effectively participating in the proceedings for the determination of their refugee and asylum status.

As regards the alleged violation of the Convention in the event of the applicants' expulsion to Syria, the Court found that the applicants had presented the Russian authorities with substantial grounds for believing that they faced a real risk to their lives and personal security if expelled. In the proceedings by which they had challenged the expulsion orders, they had argued that they originated from Aleppo and Damascus, where heavy and indiscriminate fighting had been raging since 2012. They had then submitted additional and individualised information about the risks in the event of return in the proceedings aimed at obtaining refugee status. Moreover, the need for international protection for asylum seekers from Syria had been recognised by a report of the Russian Federal Migration Service.

The Court was not persuaded that the applicants' allegations had been duly examined by the Russian authorities in any set of proceedings. In the proceedings resulting in the expulsion order, the scope of the review by the national courts had been largely confined to establishing that the applicants' presence in Russia had been illegal. Both the district court and the regional court had avoided engaging in any in-depth discussion about the dangers referred to by the applicants and the wide range of international sources on the current situation in Syria. The Court underlined that, in view of the absolute nature of the prohibition of inhuman or degrading treatment under Article 3, it was not possible to weigh the risk of such treatment against the reasons put forward for expulsion. The Court found the Russian courts' approach in the applicants' case particularly regretful since there had been cases in Russia, including before the Russian Supreme Court, in which the courts, when considering administrative offences in the immigration sphere, had taken into account and given sufficient weight to the arguments advanced by the claimants that they would risk being ill-treated if returned. As a result of such examination, the expulsion orders could be lifted.

The European Court of Human Rights had not yet adopted a judgment to evaluate the allegations of a risk of danger to life or of ill-treatment in the context of the ongoing conflict in Syria. This was undoubtedly in part due to the fact that most European countries did not at present carry out involuntary returns to Syria. In October 2014 the United Nations High Commissioner for Refugees (UNHCR) had welcomed the protection practices of many European States with respect to Syrian nationals, including *de facto* moratoria on returns to Syria. The latest UN reports described the situation as a "humanitarian crisis" and spoke of "immeasurable suffering" of civilians, massive violations of human rights by all parties and the resulting displacement of almost half of the country's population.

The applicants originated from Aleppo and Damascus, where particularly heavy fighting had been raging. M.A. had referred to the killing of his relatives by armed militia who had taken over the district where he had lived, and had stated that he feared being killed too. L.M. was a stateless Palestinian. According to the UNHCR, "nearly all the areas hosting large numbers of Palestinian refugees are directly affected by the conflict". This group was regarded by the UNHCR as being in need of international protection.

The Court concluded that the applicants had put forward a well-founded allegation that their return to Syria would be in breach of Articles 2 and/or 3 of the Convention. The Russian Government had not presented any information that could dispel these allegations, nor referred to any special circumstances which could ensure sufficient protection for the applicants if returned.

Accordingly, the applicants' expulsion to Syria, if carried out, would be in breach of Articles 2 and/or 3 of the Convention.

The Court did not consider it necessary to examine the applicants' complaints separately under Article 13.

As regards the complaint under Article 3 about the conditions of the applicants' detention, the Court did not find, in the light of the material submitted by the parties, that those conditions disclosed any appearance of a violation of the Convention. It therefore declared this part of the application inadmissible.

Article 5

The Court had found a violation of Article 5 § 4 in a number of cases against Russia on account of the lack of any provision under national law which could have allowed a claimant to bring proceedings for a judicial review of his detention pending expulsion. As in those cases, the applicants did not have at their disposal a procedure for judicial review of the lawfulness of their detention. Accordingly, there had been a violation of Article 5 § 4 in respect of all three of them.

As regards the complaint under Article 5 § 1, the Court was satisfied that initially the applicants' detention pending expulsion had been ordered by the district court in connection with an offence punishable by expulsion and thus in compliance with national law. Furthermore, during the initial period of the applicants' detention the authorities had still been investigating whether their removal would be possible. However, in their pleadings before the regional court, the applicants had submitted sufficient information, with reference to the relevant Russian sources, that their expulsion to Syria could not be carried out. The regional court had failed to address these allegations and had confirmed the expulsion orders. Consequently, after the decisions of 27 May 2014, it could no longer be said that the applicants were persons "against whom action [was] being taken with a view to deportation or extradition" within the meaning of Article 5 § 1 (f). Even though no real action had been taken since May 2014 with a view to expulsion, they had remained in detention without any indication of a time-limit. There had accordingly been a violation of Article 5 § 1.

Article 34

As regards the complaints under Article 34, the Court observed that the applicants had been denied meetings with their lawyers and representatives. Moreover, the applicants claimed that they had been forced to sign statements in Russian, withdrawing their asylum requests, which they had later retracted as signed under duress and without their understanding. The Court noted with concern that there had not been any meaningful reaction from the relevant authorities to these complaints. Furthermore there was sufficient evidence that the applicants' communication with their representatives had been seriously obstructed. The Court considered that those restrictions had constituted an interference with the exercise of their right of individual petition and that therefore Russia had failed to comply with its obligations under Article 34.

Application of Article 46

In view of its finding of a violation of Article 5 § 1 on account of the applicants' detention after 27 May 2014, the Court considered it necessary to indicate individual measures for the execution of the judgment, in application of Article 46 (binding force and execution of judgments). It held that Russia was to ensure the immediate release of those two applicants who had so far remained in detention.

Just satisfaction (Article 41)

The full texts of the Court's judgments are accessible on its website (<http://www.hudoc.echr.coe.int>)

The Court held that Russia was to pay each of the applicants 9,000 euros (EUR) in respect of nonpecuniary damage and to the applicants jointly EUR 8,600 in respect of costs and expenses.

95. *Eur.Court HR, Vasiliauskas v. Lithuania, Grand Chamber Judgment of 20 October 2015, Application No. 34343/05, (Article 7, No Punishment without Law – Violation)*. The applicant, a former officer in the State security services of the Lithuanian partisans, successfully argued that his conviction for genocide, allegedly based on the offence of genocide derived from public international law and contained in particular in the Convention on the Prevention and Punishment of the Crime of Genocide of 1948, had been *ex post facto* and therefore unlawful.

ECHR 332 (2015)

20.10.2015

Press release issued by Registrar

In today's **Grand Chamber** judgment in the case of *Vasiliauskas v. Lithuania* (application no. 35343/05) the European Court of Human Rights held, by nine votes to eight, that there had been:

a violation of Article 7 (no punishment without law) of the European Convention on Human Rights.

The case concerned the conviction in 2004 of Mr Vasiliauskas, an officer in the State security services of the Lithuanian Soviet Socialist Republic from 1952 to his retirement in 1975, for the genocide in 1953 of Lithuanian partisans who resisted Soviet rule after the Second World War. Mr Vasiliauskas notably complained that the wide interpretation of the crime of genocide, as adopted by the Lithuanian courts in his case, had no basis in the wording of that offence as laid down in public international law. He submitted in particular that he had been convicted on the basis of Article 99 of the new Lithuanian Criminal Code which, providing for criminal liability for genocide, includes political groups – such as partisans – among the groups that could be considered as victims of genocide. However, the Convention on the Prevention and Punishment of the Crime of Genocide of 1948 (“Genocide Convention”) does not include political groups among those protected.

The Court found in particular that it was clear that Mr Vasiliauskas' conviction had been based upon legal provisions that had not been in force in 1953, and that such provisions had therefore been applied retroactively. The retrospective application of the criminal law to an accused's disadvantage being prohibited under the European Convention, it therefore had to be established whether Mr Vasiliauskas' conviction had been based upon international law as it stood in 1953. Although the offence of genocide had been clearly defined in the international law (notably, it had been codified in the 1948 Genocide Convention, approved by the United Nations in 1948 and signed by the Soviet Union in 1949) and therefore accessible to Mr Vasiliauskas, the Court took the view that his conviction could not have been foreseen under international law as it stood at the time of the killings of the partisans. Notably, international treaty law had not included a “political group” in the definition of genocide and customary international law was not clear on the definition (opinions being divided). Nor was the Court convinced that the Lithuanian courts' interpretation of the crime of genocide in Mr Vasiliauskas' case had been in accordance with the understanding of the concept of genocide as it stood in 1953: even though the courts had rephrased his conviction to attribute Lithuanian partisans to “representatives of the Lithuanian nation”, that is a national group which is protected under the Genocide Convention, no explanation had been given as to what the notion “representatives” entailed or how historically or factually the Lithuanian partisans had represented the Lithuanian nation. Indeed, the definition of the crime of genocide in Lithuanian law had not only had no basis in the wording of that offence as expressed in the 1948 Genocide Convention, but had also been gradually

enlarged during the years of Lithuania's independence. Mr Vasiliauskas' conviction of genocide had not therefore been justified.

Principal facts

The applicant, Vytautas Vasiliauskas, is a Lithuanian national who was born in 1930 and lives in Tauragė (Lithuania).

During the Second World War the Soviet army invaded Lithuania. In August 1940 the Soviet Union completed the annexation of the country, which was subsequently named "the Lithuanian Soviet Socialist Republic" (the "LSSR"). A nation-wide partisan resistance movement began aiming at the liberation and re-establishment of an independent Lithuania. In the 1950s anti-Soviet armed groups – in particular partisans – continued to put up resistance throughout the LSSR and they were suppressed by the Soviet authorities. Lithuania regained its independence in 1990 and the Russian army left the country in 1993.

On 1 May 2003 a new Criminal Code came into force in the newly independent Lithuania and criminal liability for genocide was provided for under Article 99 of the new code.

In the meantime, the Lithuanian prosecuting authorities had started an investigation into the deaths of two brothers in January 1953 in the Šakiai area. Thus, on 4 February 2004 a regional court found Mr Vasiliauskas, an LSSR Ministry of State Security (MGB) officer in 1953, guilty of the killing of the two brothers, considering that as they were representatives of a political group, the Lithuanian partisans, this corresponded to the crime of genocide under Article 99 of the new Lithuanian Criminal Code. Mr Vasiliauskas was sentenced to six years' imprisonment.

The decision of the regional court was upheld by the Court of Appeal in September 2004 and then by the Supreme Court in a final decision of February 2005.

The Court of Appeal held in particular that to attribute Lithuanian partisans to a political group was not precise enough. It found that the Lithuanian partisans had been representatives of the Lithuanian nation, that is, a national group, and that the Soviet genocide had been carried out precisely on account of the inhabitants' nationality-ethnicity which would be the requirement under international law for their deaths to be considered genocide.

The Supreme Court further upheld the finding of the lower courts that Mr Vasiliauskas had participated in the killing of the resistance fighters and that he had to have known the goal of the Soviet government – namely, to eradicate the resistance fighters – and had to have realised that the two partisans would either be killed or arrested and sentenced.

Most recently, steps were taken to have Mr Vasiliauskas' criminal case re-opened, but the Prosecutor found that there were no new circumstances to justify a request being made to the Supreme Court to reconsider the case.

Complaints, procedure and composition of the Court

Mr Vasiliauskas complained that his conviction of genocide had been in breach of Article 7 (no punishment without law) of the European Convention on Human Rights. He submitted that Article 99 of the Lithuanian Criminal Code, which only entered into force on 1 May 2003, had retroactive effect and defined the notion of genocide in wider terms than the international definition under Article II of the Convention on the Prevention and Punishment of the Crime of Genocide of 1948 (the "Genocide Convention"). Namely, Article 99 includes political groups among the groups that could be

The full texts of the Court's judgments are accessible on its website (<http://www.hudoc.echr.coe.int>)

considered as victims of genocide. However, the Genocide Convention does not include political groups among those protected.

The application was lodged with the European Court of Human Rights on 30 July 2005.

The Court gave notice of the application to the Lithuanian Government, with questions, on 16 June 2009. A statement of facts submitted by the Court to the Lithuanian Government is available in English only on the Court's website.

On 17 September 2013 the Chamber to which the case was allocated decided to relinquish jurisdiction in favor of the Grand Chamber.

A hearing was held on the case in Strasbourg on 4 June 2014.

The Russian Government were given leave (under Article 36 § 2) to intervene as a third party in the written procedure.

Judgment was given by the Grand Chamber of 17 judges, composed as follows:

Dean **Spielmann** (Luxembourg), *President*,
 Josep **Casadevall** (Andorra),
 Guido **Raimondi** (Italy),
 Mark **Villiger** (Liechtenstein),
 Isabelle **Berro** (Monaco),
 Işıl **Karakaş** (Turkey),
 Ineta **Ziemele** (Latvia),
 Khanlar **Hajiyev** (Azerbaijan),
 Dragoljub **Popović** (Serbia),
 András **Sajó** (Hungary),
 Ann **Power-Forde** (Ireland),
 Nebojša **Vučinić** (Montenegro),
 Paulo **Pinto de Albuquerque** (Portugal),
 André **Potocki** (France),
 Ksenija **Turković** (Croatia),
 Egidijus **Kūris** (Lithuania),
 Jon Fridrik **Kjølbro** (Denmark),
 and also Erik Fribergh, *Registrar*.

Decision of the Court

The Court reiterated that Article 7 of the Convention prohibits the retrospective application of the criminal law to an accused's disadvantage. It also more generally embodies the principles that only the law can define a crime and prescribe a penalty and that criminal law must not be extensively construed to an accused's detriment. Thus, an offence must be clearly defined in the law (or be "accessible") and an individual should be able to know (or "foresee") from the wording of the relevant provision of the law – if need be with informed legal advice – what acts and omissions will make him or her criminally liable.

The crime of genocide was introduced into Lithuanian law in 1992 and was subsequently provided for under Article 99 of the new Criminal Code. The new Criminal Code entered into force in 2003, a year before Mr Vasiliauskas was convicted. It was therefore clear that Mr Vasiliauskas' conviction had been based upon legal provisions that had not been in force in 1953, and that such provisions had therefore been applied retroactively. Consequently, there would be a violation of Article 7 of the

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European Convention unless it could be established that Mr Vasiliauskas' conviction had been based upon international law as it stood in 1953. In the Court's view, Mr Vasiliauskas' conviction therefore had to be examined from that perspective.

As concerned whether the offence of genocide had been clearly defined in the international law, the Court found that instruments of international law prohibiting genocide had been sufficiently accessible to Mr Vasiliauskas. Genocide had been clearly recognised as a crime under international law in 1953. It was codified in the Genocide Convention, which was approved unanimously by the United Nations General Assembly in 1948 and signed by the Soviet Union in 1949. Even before then, genocide had been acknowledged and condemned by the United Nations in 1946.

However, the Court took the view that Mr Vasiliauskas' conviction for genocide could not have been foreseen under international law as it stood at the time of the killings of the partisans. When examining this foreseeability aspect of the case, the Court bore in mind that the stringent requirements – namely, proof of specific intent that a protected group was targeted for destruction in its entirety or in substantial part – for imposing a conviction of genocide guarded against the danger of such a conviction being imposed lightly.

First, in 1953 international treaty law had not included a “political group” in the definition of genocide. Notably, Article II of the 1948 Genocide Convention lists four protected groups of persons – national, ethnical, racial or religious – and does not refer to political groups.

Second, opinions appear to be divided with regard to the scope of genocide under customary international law. It could not therefore be established with sufficient clarity that customary international law had provided for a broader definition of genocide than that set out in Article II of the 1948 Genocide Convention. Notwithstanding certain views favouring the inclusion of political groups in the definition of genocide, the scope of the codified definition of genocide remained narrower in the 1948 Convention and has been retained in all subsequent international law instruments.

Third, as concerned the argument that the Lithuanian partisans had been “part” of a national group, that is a group protected by the Genocide Convention, the Court considered that Mr Vasiliauskas could not have foreseen in 1953 the subsequent judicial interpretations of the term “in part” as used in Article II of the Genocide Convention. In particular, he could not have foreseen the judicial guidance which emerged concerning cases on genocide brought before the international courts, such as cases brought before the International Criminal Tribunal for the former Yugoslavia and the International Court of Justice. In those cases it was found that the intentional destruction of a “distinct” part of a protected group could be interpreted as genocide of the entire protected group, provided that the “distinct part” was substantial.

Nor was the Court convinced that the Lithuanian courts' interpretation of the crime of genocide in Mr Vasiliauskas' case had been in accordance with the understanding of the concept of genocide as it stood in 1953.

There was no firm finding in the establishment of the facts on Mr Vasiliauskas' case by the domestic criminal courts to enable the Court to assess on which basis it had been concluded that in 1953 the Lithuanian partisans constituted a significant part of the national group, in other words, a group protected under Article II of the Genocide Convention. Even though the Court of Appeal had rephrased Mr Vasiliauskas' conviction to attribute Lithuanian partisans to “representatives of the Lithuanian nation, that is, the national group” rather than to a political group, it had not explained what the notion “representatives” entailed. Nor did it provide much historical or factual account as to how the Lithuanian partisans had represented the Lithuanian nation. The partisans' specific mantle with regard to the “national” group was not apparently interpreted by the Supreme Court either. The Court was not therefore convinced that Mr Vasiliauskas, even with the assistance of a lawyer, could

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have foreseen in 1953 that the killing of the Lithuanian partisans could have constituted the offence of genocide of Lithuanian nationals or of ethnic Lithuanians.

The Court accepted that Mr Vasiliauskas' actions had been aimed at the extermination of the partisans as a separate and clearly identifiable group, characterised by their armed resistance to Soviet power. It was not immediately obvious that the ordinary meaning of the terms "national" or "ethnic" in the Genocide Convention could be extended to partisans. Thus, the domestic courts' conclusion that the victims came within the definition of genocide as part of a protected group was an interpretation by analogy, to Mr Vasiliauskas' detriment, which also rendered his conviction unforeseeable.

Indeed, the definition of the crime of genocide in Lithuanian law had not only had no basis in the wording of that offence as expressed in the 1948 Genocide Convention, but had also been gradually enlarged during the years of Lithuania's independence, thus further aggravating his situation.

Given the Lithuanian courts' arguments in Mr Vasiliauskas' case, the Court was not persuaded that his conviction of genocide had been consistent with the essence of that offence as defined in international law in 1953 or that it could reasonably have been foreseen by him at the time of his participation in the operation during which the two partisans had been killed. Mr Vasiliauskas' conviction had not therefore been justified under Article 7 § 1 of the Convention. Given that finding, the Court did not consider that Mr Vasiliauskas' conviction could be justified either under Article 7 § 2.

There had therefore been a violation of Article 7 of the Convention.

Article 41 (just satisfaction)

The Court held that the finding of a violation of Article 7 constituted in itself sufficient just satisfaction for any non-pecuniary damage sustained by Mr Vasiliauskas. It further held that Lithuania was to pay Mr Vasiliauskas 10,072 euros (EUR) in respect of pecuniary damages and EUR 2,450 for costs and expenses.

Separate opinions

Judges Villiger, Power-Forde, Pinto de Albuquerque and Kūris expressed a joint dissenting opinion. Judges Sajó, Vučinić and Turković also expressed a joint dissenting opinion. Judges Ziemele, Power-Forde and Kūris each expressed a dissenting opinion. These opinions are annexed to the judgment.

96. *Eur. Court HR, Tadzhibayev v. Russia, Third Section Judgment of 1 December 2015, Application No. 17724/14, (Article 3, Prohibition of Torture – Violation)*. The applicant, an ethnic Uzbek refugee in Russia, successfully argued that his threatened extradition to Kyrgyzstan would put him at risk of ill-treatment.

ECHR 375 (2015)

01.12.2015

Press release issued by the Registrar

The applicant, Mirodin Tadzhibayev, is a Kyrgyz national of Uzbek ethnic origin who was born in 1988. The case concerned his threatened extradition to Kyrgyzstan and the risks he would face there as an ethnic Uzbek.

Mr Tadzhibayev fled to Russia, together with many other ethnic Uzbeks, following mass disorder and inter-ethnic clashes in and around Osh (Kyrgyzstan) in June 2010. He was granted a temporary residence permit in Russia for the period from 3 December 2010 to 3 December 2013.

Wanted in Kyrgyzstan for his involvement in the clashes and placed on a fugitives list, he was arrested while travelling in a train in Russia in October 2012. He was placed in detention and a request by the Kyrgyz authorities for him to be extradited was subsequently granted. However, in November 2013 on appeal the St Petersburg City Court quashed the extradition order, finding it to be unlawful, and Mr Tadzhibayev was released. He is at present at large. In February 2014 the Supreme Court of Russia then upheld the extradition order, basing its decision essentially on diplomatic assurances provided by the Kyrgyz authorities that Mr Tadzhibayev would not be at risk of ill-treatment if extradited and that Russian diplomatic staff would be given an opportunity to visit him in the detention facility where he would be held. His extradition was, however, subsequently stayed on the basis of an interim measure granted by the European Court of Human Rights under Rule 39 of its Rules of Court, which indicated to the Russian Government that Mr Tadzhibayev should not be extradited to Kyrgyzstan or any other country whilst the Court was considering his case.

In the meantime, while in detention, Mr Tadzhibayev had applied to the migration authorities for refugee status, claiming that a criminal case had been opened against him in Kyrgyzstan exclusively because of his ethnic origin and that he would face ill-treatment if sent back. The authorities refused his application in March 2013, finding that he was not eligible for refugee status because there was no evidence that he was being persecuted on the grounds of his ethnic origin. This finding was subsequently upheld by the domestic courts.

Relying in particular on Article 3 (prohibition of torture and of inhuman or degrading treatment) Mr Tadzhibayev alleged that, due to his Uzbek ethnic origin, he would face a real risk of ill-treatment if extradited to Kyrgyzstan and that his arguments concerning those risks had not been given any genuine or thorough consideration by the Russian authorities. He further argued in particular that all ethnic Uzbeks suspected of involvement in the violence of June 2010 in Kyrgyzstan were systematically tortured by the Kyrgyz authorities.

Violation of Article 3 – in the event of Mr Tadzhibayev’s extradition to Kyrgyzstan

Interim measure (Rule 39 of the Rules of Court) – not to extradite Mr Tadzhibayev – still in force until judgment becomes final or until further order

Just satisfaction: The Court held that its finding of a violation constituted sufficient just satisfaction for any non-pecuniary damage suffered by Mr Tadzhibayev. It further awarded him EUR 4,123 in respect of costs and expenses.

97. *Eur.Court HR, G.S.B. v. Switzerland, Third Section Judgment of 22 December 2015, Application No. 28601/11, (Article 8, Right to Respect for Private and Family Life – No Violation; Article 14, Prohibition of Discrimination – No Violation)*. The applicant, a Saudi and United States of America (USA) national living in Switzerland, complained that his privacy had been breached when his bank details had been transferred to the USA authorities for tax purposes, but the Court, interpreting the European Convention on Human Rights in line with the Vienna Convention on the Law of Treaties (1969) with regard to the cooperation agreement signed between Switzerland and the USA, ruled against the applicant holding that there had been no violation.

ECHR 406 (2015)
22.12.2015

Press release issued by the Registrar

In today's **Chamber** judgment in the case of *G.S.B. v. Switzerland* (application no. 28601/11) the European Court of Human Rights held, unanimously, that there had been:

no violation of Article 8 (right to respect for private and family life) of the European Convention on Human Rights;

no violation of Article 14 (prohibition of discrimination) taken in conjunction with Article 8 of the Convention.

The case concerned the transmission to the US tax authorities of the applicant's bank account details in connection with an administrative cooperation agreement between Switzerland and the USA.

In 2008 the US tax authorities had discovered that the bank UBS SA had allowed US taxpayers to conceal their assets and income from them and had advised customers who had not declared their accounts to those authorities.

Following an agreement which, in its consolidated form with a protocol, was entitled "Convention 10", the Swiss federal tax authority had ordered UBS to transmit the applicant's file in the context of that authority's cooperation with the US Internal Revenue Service.

The applicant had appealed against that measure, arguing that it had no basis in law and that it breached the European Convention on Human Rights and other international treaties. The Federal Administrative Court had dismissed his appeals, finding that "Convention 10" was binding on the Swiss authorities, which did not need to verify its conformity with Federal law or prior conventions. It declared that the economic interests at stake had been important for the country and emphasized that Switzerland's interest in fulfilling its international commitments prevailed over the individual interest of those concerned by the measure.

The Court accepted that Switzerland had had a major interest in acceding to the US request for administrative cooperation in order to enable the US authorities to identify any assets which might have been concealed in Switzerland. At the procedural level, the Court noted that the applicant had had access to several effective and genuine procedural safeguards in order to contest the transmission

The full texts of the Court's judgments are accessible on its website (<http://www.hudoc.echr.coe.int>)

of his bank details and to secure protection against arbitrary implementation of agreements concluded between Switzerland and the US.

Principal facts

The applicant, G.S.B., is a Saudi and US national who was born in 1960 and lives in Miami (United States of America).

In 2008 the US tax authorities (Internal Revenue Service - IRS) had discovered that thousands of US taxpayers held bank accounts in the Swiss bank UBS SA which had not been declared to their national authorities. Being exposed to a risk of criminal proceedings, UBS concluded an “agreement to suspend criminal prosecution” with the US Justice Department. Proceedings were discontinued in return for the payment of a transaction amount of 780 million US dollars.

On 19 February 2009 the IRS brought civil proceedings to order UBS to hand over the identities of its 52,000 US customers and a number of data on the accounts held by the latter. Switzerland was concerned that the dispute between the US authorities and UBS might give rise to a conflict between Swiss and US law should the IRS obtain that information, and the civil proceedings were therefore suspended pending extra-judicial reconciliation.

With a view to identifying the taxpayers in question, the Government of the Swiss Confederation and the United States concluded an agreement entitled “Agreement 09”.

On 31 August 2009 the IRS sent the Federal tax authority (AFC) a request for administrative cooperation with a view to obtaining information on the US taxpayers who had been authorised to open bank accounts with UBS.

On 1 September 2009 the AFC decided to instigate an administrative cooperation procedure and invited the bank UBS to supply detailed files on the customers mentioned in the appendix to Convention 09.

By judgment of 21 January 2010 the Federal Administrative Court allowed an appeal against an AFC decision, resulting in the invalidation of all decisions issued by the AFC on the basis of Convention 09. The entry into force of that judgment called into question the implementation of Convention 09.

In order to avoid such a situation, on 31 March 2010, following fresh negotiations with the United States, the Federal Council concluded a “Protocol modifying the Agreement between Switzerland and the United States” known as “Protocol 10”. The provisions of that Protocol were incorporated into Agreement 09, and the consolidated version of Agreement 09 as amended by the Protocol 10 is referred to as “Convention 10”.

On 19 January 2010 UBS transmitted the applicant’s file to the AFC. In its final decision of 7 June 2010 the AFC stated that all the conditions had been met for affording administrative cooperation to the IRS and for ordering the requested documents to be handed over to the latter. On 8 December 2010 the applicant appealed to the Federal Administrative Court against that decision. The latter Court set aside the 7 June 2010 decision, finding that the applicant’s right to be heard had not been respected. It referred the case back to the AFC. In its final decision of 4 November 2010 the AFC held that all the conditions had been met for affording administrative cooperation to the IRS and for ordering UBS to forward the requested documents. The applicant appealed to the Federal Administrative Court, which, adjudicating at last instance, found that Convention 10 was binding upon the Swiss authorities, which did not have to verify the conformity of that text to Federal law or previous conventions. The Federal Administrative Court dismissed the applicant’s appeal.

The full texts of the Court’s judgments are accessible on its website (<http://www.hudoc.echr.coe.int>)

On 24 March 2011 the applicant lodged a public-law appeal with the Federal Court on the ground that the considerations set out in the impugned judgment were relevant to criminal-law cooperation but not to administrative cooperation. The Federal Court declared that appeal inadmissible, with reference to a previous judgment to the effect that appeals against decisions which the AFC had given in pursuance of agreements concluded with the US did indeed relate to administrative cooperation.

On 14 December 2012 the applicant's bank account details were transmitted to the US tax authorities.

Complaints, procedure and composition of the Court

Relying on Article 8 (right to respect for private and family life), the applicant complained that the disclosure of his bank details had amounted to a violation of his right to respect for his private life.

Relying on Article 14 (prohibition of discrimination) in conjunction with Article 8, he considered himself a victim of discrimination as an UBS customer with US taxpayer status, as compared with the customers of other banks who had not, at the relevant time, been covered by administrative cooperation in tax matters

The application was lodged with the European Court of Human Rights on 4 May 2011.

Judgment was given by a Chamber of seven judges, composed as follows:

Luis **López Guerra** (Spain), *President*,
George **Nicolaou** (Cyprus),
Helen **Keller** (Switzerland),
Johannes **Silvis** (the Netherlands),
Dmitry **Dedov** (Russia),
Branko **Lubarda** (Serbia),
Pere **Pastor Vilanova** (Andorra),
and also Stephen **Phillips**, *Section Registrar*.

Decision of the Court

Article 8

As regards the legal basis for the measure, the Court reiterated that Agreement 09 and Protocol 10 had been negotiated and concluded by the Federal Council, approved by the Federal Parliament and then ratified by the Government in accordance with the procedure for concluding treaties set out in constitutional law. Inasmuch as the applicant submitted that the AFC's decision of 1 September 2009 lacked any basis in law because Parliament had not yet approved Agreement 09 at the time, the Court agreed with the Government that the AFC had only taken the decision so that it could assess whether the conditions for affording cooperation had been met. At all events, the immediate implementation of Agreement 09 on a provisional basis had been confirmed by the Government at the time of its approval, and that of Protocol 10 had been confirmed by the Federal Parliament on 17 June 2010.

As regards the foreseeability of the impugned measure, the Court reiterated that the European Convention of Human Rights should be interpreted in line with the general principles of international law. Indeed, under the 1969 Vienna Convention on the Law of Treaties regard should be had to "any relevant rules of international law applicable in the relations between the parties". In the present case the Court considered relevant the Federal Court's and the Government's argument that Article 28 of the Vienna Convention allows the parties to an international treaty to go against the principle of non-retroactivity and provide for the consideration of acts or facts which occurred before the treaty in question entered into force.

The full texts of the Court's judgments are accessible on its website (<http://www.hudoc.echr.coe.int>)

In the present case the Federal Court had settled case-law to the effect that provisions on administrative and criminal-law cooperation requiring third parties to provide specific information were procedural in nature and consequently applied, in principle, to all present or future proceedings, including those relating to tax periods predating their adoption. The applicant, assisted by a lawyer, could not reasonably have been unaware of that judicial practice. He therefore could not validly submit to the Court that the interference had occurred in a manner which he could not have foreseen. The impugned measure could therefore be regarded as being “prescribed by law”.

As regards the legitimacy of the aim pursued by the measure, in the knowledge that the banking sector is an economic branch of great importance to Switzerland, the Court held that the impugned measure formed part of an all-out effort by the Swiss Government to settle the conflict between the bank UBS and the US tax authorities. The measure might validly be considered as conducive to protecting the country’s economic well-being. The Court accepted the Government’s argument that the US tax authorities’ allegations against Swiss banks were liable to jeopardise the very survival of UBS, a major player in the Swiss economy employing a large number of persons. Therefore, given Switzerland’s interest in finding an effective legal solution in cooperation with the US, it had pursued a legitimate aim within the meaning of Article 8 § 2 of the Convention.

As regards whether the measure had been “necessary in a democratic society”, the Court noted that the Federal Administrative Court had ruled that the conditions set out in Article 8 for any interference with private or family life had been met in the instant case. The major economic interests at stake for the country and the Swiss interest in being able to honour its international undertakings had taken precedence over the individual interests of the persons concerned by the measure.

With particular regard to the applicant’s situation, it should be noted that only his bank account details, that is to say purely financial information, had been disclosed. No private details or data closely linked to his identity, which would have deserved enhanced protection, had been transmitted. His bank details had been forwarded to the relevant US authorities so that they could use standard procedures to ascertain whether the applicant had in fact honoured his tax obligations, and if not, to take the requisite legal action.

Finally, the Court observed that the applicant had benefited from various procedural safeguards. He had been able to lodge an appeal with the Federal Administrative Court against the AFC’s 7 June 2010 decision. The latter court had subsequently set aside the said decision on the grounds of violation of the applicant’s right to a hearing. The AFC had invited the applicant to transmit any comments he might have, of which right the applicant had availed himself. On 4 November 2010 the AFC had given a fresh decision finding that all the conditions had been met for affording administrative cooperation. The applicant had subsequently lodged a second appeal with the Federal Administrative Court, which dismissed it. The applicant had consequently benefited from several effective and genuine procedural guarantees to challenge the disclosure of his bank details and obtain protection against the arbitrary implementation of agreements concluded between Switzerland and the United States.

It follows that there had been no violation of Article 8 of the Convention.

Article 14 in conjunction with Article 8

The Court found, essentially on the same grounds as those mentioned above in support of the absence of violation of Article 8, that the applicant had not suffered discriminatory treatment for the purposes of Article 14 in conjunction with Article 8. It added that the applicant had provided no evidence to permit an assessment of whether his treatment would have been any different in another Swiss bank.

The full texts of the Court’s judgments are accessible on its website (<http://www.hudoc.echr.coe.int>)

Therefore, there had been no violation of Article 14 in conjunction with Article 8 of the Convention.

98. *Eur.Court HR, A.G.R v. the Netherlands, Third Section Judgment of 12 January 2016, Application No. 13442/08, (Article 3, Prohibition of Torture – No Violation, in the event of Mr A.G.R.’s removal to Afghanistan)*

Eur.Court HR, A.W.Q and D.H. v. the Netherlands, Third Section Judgment of 12 January 2016, Application No. 25077/06, (Article 3, Prohibition of Torture – No Violation, in the event of Mr A.W.Q.’s removal to Afghanistan).

Eur.Court HR, M.R.A. and Others v. the Netherlands, Third Section Judgment of 12 January 2016, Application No. 46856/07, (Article 3, Prohibition of Torture – No Violation, in the event of Mr M.R.A’s removal to Afghanistan; Article 13, Right to an effective remedy, taken together with Article 3 – No Violation, in respect of Mr M.R.A.)

Eur.Court HR, S.D.M and Others v. the Netherlands, Third Section Judgment of 12 January 2016, Application No. 8161/07, (Article 3, Prohibition of Torture – No Violation, in the event of Mr S.D.M.’s removal to Afghanistan).

Eur.Court HR, S.S. v. the Netherlands, Third Section Judgment of 12 January 2016, Application No. 39575/06, (Article 3, Prohibition of Torture – No Violation, in the event of Mr S.S.’s removal to Afghanistan).

The applicants, Afghan asylum seekers in the Netherlands and former high ranking officers of the former Afghan intelligence service, unsuccessfully argued that their expulsion to Afghanistan would put them at real risk of ill-treatment.

**ECHR 008 (2016)
12.01.2016**

Press release issued by the Registrar

All five cases concerned the threatened expulsion from the Netherlands of Afghan asylum seekers, most of whom had been more or less high ranking officers in the former Afghan army or intelligence service.

The applicant in the first case, Mr A.G.R., is an Afghan national of Pashtun origin national who was born in 1965. He worked as an official for the Afghan security service KhAD/WAD (“*Khadimat-e Atal’at-e Dowlati / Wezarat-e Amniyat-e Dowlati*”) from 1982 to 1992, attaining the rank of major after periodical promotions. He fled Afghanistan in 1992, one week after the mujahideen seized power in the country, and, first going to Pakistan, entered the Netherlands in 1997.

The applicants in the second case, Mr A.W.Q. and Ms D.H., husband and wife, are Afghan nationals who were born in 1956 and 1966 respectively. Mr A.W.Q. was a career soldier in the Afghan army from 1981, rising to the rank of senior captain in 1988 and appointed first secretary of the Army Museum in Kabul in 1990. After the collapse of the communist regime in 1992, Mr A.W.Q. first

The full texts of the Court’s judgments are accessible on its website (<http://www.hudoc.echr.coe.int>)

remained in Kabul continuing his work in the Army Museum, then lived in Kunduz from 1994 until 1998 when, on being denounced by relatives, he was arrested and detained by the Taliban. Having managed to abscond he fled to Mazar-e-Sharif, where he was joined by his family and with whom he fled to the Netherlands in December 1999.

The applicants in the third case, Mr M.R.A., his wife, Ms F.A.K., and their three children, are Afghan nationals who were born in 1959, 1966, 1991, 1996, and 2007 respectively. Mr M.R.A. started to work in 1982 as a construction engineer within the ranks of KhAD, attaining the rank of major. He moved to Mazar-e-Sharif in 1992 when the mujahideen seized power and continued to work as a construction engineer until 1998 when the Taliban seized power and he was arrested. Having managed to abscond he fled Afghanistan with his family and entered the Netherlands in April 1999.

The applicants in the fourth case, Mr S.D.M., Ms M.A., a divorced couple, and their child O.M., are Afghan nationals who were born in 1969, 1975 and 2002 respectively. Mr S.D.M. worked from 1988 to 1992 for the Afghan security service, rising to the rank of Second Lieutenant. When the communist regime was overthrown in 1992 he remained in Herat, continuing to work under mujahideen rule until 1996 when the Taliban seized power. In October/November 1995 he was sentenced to death by a Taliban tribunal for conspiracy and, fearing for his life, he fled to Turkmenistan in January 1996 and travelled by plane shortly afterwards to the Netherlands.

The applicant in the fifth case, Mr S.S., is an Afghan national of Pashtun origin who was born in 1964.

He started working at an administrative department of one of the directorates of the Afghan security service KhAD/WAD in 1982, rising to the rank of lieutenant-colonel in 1990. After the fall of Kabul in

1992, he fled to Mazar-e-Sharif where he remained until various mujahideen groups came to the city in 1997 and, fearing for his life, he had to go into hiding. He subsequently fled to Pakistan with his family, entering the Netherlands in August 1998.

On arriving in the Netherlands, all the applicants applied for asylum and, in their interviews with immigration officials, claimed in particular that they were at risk of persecution and ill-treatment by the mujahideen and/or the Taliban if returned to Afghanistan, citing both their personal situations as former officials of KhAD/WAD and the general security situation in the country.

Mr A.W.Q.'s wife and four children were granted asylum in September 2010. Mr M.R.A.'s wife, daughter and youngest son were granted a Netherlands residence permit in September 2011; two sets of proceedings concerning the residence permit for his eldest adult son are currently still pending. Mr S.D.M.'s ex-wife and child were granted asylum in the Netherlands in March 2009.

In the asylum proceedings concerning the men, however, they were all later informed of decisions to hold Article 1F of the 1951 Refugee Convention against them, under which they could be excluded from international protection. These decisions were based on an official report of February 2000 by the Netherlands Ministry of Foreign Affairs which found that there were serious reasons to believe that virtually every Afghan asylum seeker holding the rank of third lieutenant or higher for the KHAD (or its successor, the WAD), during the communist regime in Afghanistan had been implicated in human rights violations. The immigration authorities analysed each applicant's individual responsibility under Article 1F of the Refugee Convention, finding that throughout their careers in the KhAD, they could not have been unaware of its cruel, lawless methods – including torture – and the climate of terror it had spread throughout the whole of Afghan society. The authorities further examined whether the applicants' expulsion would be in breach of Article 3 (prohibition of inhuman or degrading treatment) of the European Convention and found that there was nothing to indicate that persons in Afghanistan should fear persecution merely because of their ties with the former communist regime. Nor had the applicants shown in a concrete and specific manner that their personal

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circumstances warranted their protection in the Netherlands. The authorities further considered that it was unlikely that Mr S.D.M.'s death sentence by the Taliban would be followed up on by Afghanistan's present courts. These decisions were all subsequently upheld by the domestic courts and the applicants' appeals rejected.

In the first, second and fifth cases the applicants' expulsion was stayed on the basis of an interim measure granted by the European Court of Human Rights under Rule 39 of its Rules of Court, which indicated to the Dutch Government that the applicants should not be expelled to Afghanistan whilst the Court was considering their cases.

Relying in particular on Article 3 (prohibition of inhuman or degrading treatment), the applicants alleged that their removal to Afghanistan would expose them to a real risk of ill-treatment.

- case of *A.G.R.*:

No violation of Article 3 – in the event of Mr A.G.R.'s removal to Afghanistan

Interim measure (Rule 39 of the Rules of Court) – not to expel Mr A.G.R. – still in force until judgment becomes final or until further order.

The Court further declared **inadmissible** the complaint brought on behalf of Mr A.G.R.'s wife and their children.

- case of *A.W.Q. et D.H.*:

No violation of Article 3 – in the event of Mr A.W.Q.'s removal to Afghanistan

Interim measure (Rule 39 of the Rules of Court) – not to expel Mr A.W.Q. – still in force until judgment becomes final or until further order.

The Court further **struck the application out of its list of cases** in so far as it concerned the complaints brought on behalf of Ms D.H. and the applicants' four children.

- case of *M.R.A. and Others*:

No violation of Article 3 – in the event of Mr M.R.A.'s removal to Afghanistan

No violation of Article 13 taken together with Article 3 – in respect of Mr M.R.A.

The Court further **struck the application out of its list of cases** in so far as it concerned the complaints brought on behalf of Mr M.R.A.'s wife and two of their children born in 1996 and 2007 respectively, and declared it **inadmissible** in so far as it concerned their eldest son born in 1991.

- case of *S.D.M. and Others*:

No violation of Article 3 – in the event of Mr S.D.M.'s removal to Afghanistan

The Court further **struck the application out of its list of cases** in so far as it concerned the complaints brought on behalf of Mr M. S.D.M.'s ex-wife and their child.

- case of *S.S.* :

No violation of Article 3 – in the event of Mr S.S.'s removal to Afghanistan

The full texts of the Court's judgments are accessible on its website (<http://www.hudoc.echr.coe.int>)

Interim measure (Rule 39 of the Rules of Court) – not to expel Mr S.S. – still in force until judgment becomes final or until further order.

99. ***Eur.Court HR, M.D. and M.A. v. Belgium, Second Section Judgment of 19 January 2016, Application No. 58689/12, (Article 3, Prohibition of Torture – Violation)***. The applicants, a Russian couple of Chechen origin which had fled Russia after a deadly family dispute and after receiving several warnings that certain people were looking for them, unsuccessfully argued that their expulsion from Belgium back to Russia would put them at real risk of ill-treatment.

ECHR 020 (2016)
19.01.2016

Press release issued by the Registrar

The applicants, M.D. and M.A., are two Russian nationals who were born in 1974 and 1976 respectively and live in Belgium.

The case concerned proceedings for the removal of a Russian couple of Chechen origin to the Russian Federation.

According to M.D., his father was murdered by supporters of a Chechen leader. In order to avenge the murder M.D.'s elder brother killed a member of that leader's family. Two months later M.D. and his wife M.A. were attacked during a birthday party, whereupon they fled to Ingushetia. They were informed by M.D.'s mother and sister that some men were looking for him, and the couple therefore left Russia. Their brother-in-law, who had remained in Chechnya, was murdered after their departure.

On their arrival in Belgium M.D. and M.A. lodged their first asylum application. The Aliens Department declared the application inadmissible on the ground, among other things, that a personal vendetta did not constitute a reason for granting asylum. The Commissioner General for Refugees and Stateless Persons upheld the refusal, finding that M.D.'s and M.A.'s account of events lacked credibility. The *Conseil d'État* dismissed their application for judicial review as both M.D. and M.A. had failed to attend a hearing. They were served with an order to leave the country. Subsequently, M.D. and M.A. submitted three further applications, in support of which they produced various notices published in the local press in which a reward for information on the whereabouts of M.D. had been offered, and also produced the brother-in-law's death certificate and a summons from the Grozny police department for M.D. to appear on suspicion of bearing illegal arms and belonging to an unlawful armed organisation. Those applications were likewise dismissed. They were served with an order to leave the country, together with an order for their detention at a designated place pending their removal; their subsequent request for a stay of execution under the extremely urgent procedure was dismissed. On 11 September 2012 the Court, having received a request for an interim measure, decided to indicate to the Belgian Government that M.D. and M.A. should not be expelled to the Russian Federation for the duration of the proceedings before the Court. Following that measure, the Ghent Court of Appeal ordered their release.

Relying in particular on Article 3 (prohibition of inhuman or degrading treatment) of the European Convention on Human Rights, M.D. and M.A. complained that their removal to Russia would expose them to the risk of ill-treatment.

Violation of Article 3 – were M.D. and M.A. to be returned to Russia without the Belgian authorities having first re-examined the risk they face in the light of the documents submitted in support of their fourth asylum request.

Interim measure (Rule 39 of the Rules of Court) – not to expel M.D. and M.A. to Russia – still in force until judgment becomes final or until further order.

Just satisfaction: The Court held that the finding of a violation constituted in itself sufficient just satisfaction for the non-pecuniary damage sustained by the applicants.

100. Eur.Court HR, Sow v. Belgium, Second Section Judgment of 19 January 2016, Application No. 20781/13, (Article 3, Prohibition of Torture – No Violation; Article 13, Right to an Effective Remedy, in conjunction with Article 3, Prohibition of Torture – No Violation). The applicant, a Guinean national who had been forced to undergo partial excision (female genital mutilation) and had subsequently fled Guinea, unsuccessfully argued that her expulsion back to Guinea would put her at risk of ill-treatment through, *inter alia*, re-excision.

ECHR 020 (2016)

19.01.2016

Press release issued by the Registrar

The applicant, Oumou Fadil Sow, is a Guinean national who was born in 1987 and lives in Brussels (Belgium).

The case concerned the risk of Ms Sow being subjected to a further excision procedure in the event of her removal to her country of origin.

Following the death of Ms Sow's father, her mother married her paternal uncle. The latter forced Ms Sow and her sisters to undergo excision (female genital cutting). Ms Sow put up a struggle during the excision and so was only partly excised. Her uncle also forced Ms Sow to marry her cousin. Three days after the marriage she escaped. On her arrival in Belgium Ms Sow lodged an asylum application, claiming, among other things, that she had had to leave Guinea because of her forced marriage. The Commissioner General for Refugees and Stateless Persons (CGRA) denied her refugee status and subsidiary protection. The Aliens Litigation Council (CCE) upheld that decision. A few days later Ms Sow lodged a second asylum application based on the same facts and supported by new documents. Her application was once again rejected by the CGRA. The CCE upheld the latter's decision. Ms Sow was served with two orders to leave the country and on the same day was placed in a detention centre. She lodged a third asylum application, concentrating this time on her fears of being subjected once again to excision, but the Aliens Department served her with a fresh order to leave the country, refusing to consider her asylum application on the ground that the evidence provided at that stage should have been submitted together with one of her previous asylum applications. Her subsequent request for a stay of execution under the extremely urgent procedure was dismissed. Ms Sow lodged a request for an interim measure with the Court, which invited the Belgian Government not to remove her to Guinea for the duration of the proceedings before it. Ms Sow was released.

Relying on Article 3 (prohibition of inhuman or degrading treatment) and Article 13 (right to an effective remedy) of the Convention, Ms Sow complained that she risked being subjected to a further excision procedure in the event of her removal to Guinea and that no effective remedy had been available to her in respect of her complaint.

No violation of Article 3 – in the event of Ms Sow's removal to Guinea

No violation of Article 13 in conjunction with Article 3

Interim measure (Rule 39 of the Rules of Court) – not to remove Ms Sow to Guinea – still in force until judgment becomes final or until further order.

The full texts of the Court's judgments are accessible on its website (<http://www.hudoc.echr.coe.int>)

101. Eur.Court HR, L.E. v. Greece, First Section Judgment of 21 January 2016, Application No. 71545/12, (Article 4, Prohibition of Slavery and Forced Labour – Violation; Article 6-1, Right to a Fair Hearing within a Reasonable Time – Violation; Article 13, Right to an Effective Remedy – Violation). The applicant, a Nigerian national who had been forced into prostitution in Greece, successfully argued that the effectiveness and duration of the investigation process conducted by Greece for the purposes of granting her the status as a victim of human trafficking, had been unreasonable.

ECHR 28 (2016)
21.01.2016

Press release issued by the Registrar

In today's **Chamber** judgment in the case of L.E. v. Greece (application no. 71545/12) the European Court of Human Rights held, unanimously, that there had been:

a violation of Article 4 (prohibition of slavery and forced labour) of the European Convention on Human Rights;

a violation of Article 6 § 1 (right to a fair hearing within a reasonable time) of the Convention;
and

a violation of Article 13 (right to an effective remedy).

The case concerned a complaint by a Nigerian national who was forced into prostitution in Greece.

Officially recognised as a victim of human trafficking for the purpose of sexual exploitation, the applicant had nonetheless been required to wait more than nine months after informing the authorities of her situation before the justice system granted her that status.

The Court found that the effectiveness of the preliminary inquiry and subsequent investigation of the case had been compromised by a number of shortcomings. With regard to the administrative and judicial proceedings, the Court also noted multiple delays and failings with regard to the Greek State's procedural obligations.

Lastly, the Court considered that the length of the proceedings in question had been excessive for one level of jurisdiction and did not meet the "reasonable time" requirement.

Principal facts

The applicant, L.E., is a Nigerian national who was born in 1982 and lives in Glyka Nera (Greece).

In June 2004 L.E. entered Greek territory accompanied by K.A. He had allegedly promised her that he could take her to Greece to work in bars and nightclubs in exchange for a pledge to pay him 40,000 euros and not to tell the police. On her arrival in Greece K.A. confiscated her passport and forced her into prostitution. L.E. remained in forced prostitution for approximately two years, and contacted Nea Zoi, a non-governmental organisation which provides practical and psychological support to women who have been forced into prostitution.

The full texts of the Court's judgments are accessible on its website (<http://www.hudoc.echr.coe.int>)

On 12 July 2004 she applied to the Athens Aliens Department for asylum. On 8 June 2005 she was informed that a place had been found for her at the Red Cross Reception Centre for Asylum Seekers. It appears from the case file that L.E. did not go to the centre.

On 29 August 2005 L.E. was arrested for breaching the laws on prostitution and on the entry and residence of aliens in Greece. She was acquitted by a court judgment. In March 2006 she was again arrested for prostitution, convicted at first instance and acquitted on appeal.

On 2 April 2006 the head of the police department responsible for aliens issued an expulsion order. Her expulsion was suspended on the ground that it was impractical. In November 2006 L.E. was again arrested for prostitution, and then acquitted. She was subsequently placed in detention pending expulsion, as she did not have a residence permit in Greece.

In November 2006, while she was in detention pending expulsion, L.E. lodged a criminal complaint against K.A. and his partner D.J. She claimed that she was a victim of human trafficking and accused these two persons of forcing her, and two other Nigerian women, into prostitution. On 28 December 2006 the prosecutor at the Athens Criminal Court dismissed her complaint, noting that there was nothing in the case file to indicate that she had been a victim of human trafficking. On 26 January 2007 L.E. applied to the prosecutor for re-examination of her complaint and joined the proceedings as a civil party. In February 2007 the director of the Athens police department responsible for aliens ordered the suspension of the order for her expulsion. On 21 August 2007 the prosecutor brought criminal proceedings against K.A. and D.J. for the offence of trafficking in human beings. On 20 July 2009 the hearing in the case was suspended until such time as the defendants, who could not be found, had been arrested. In May 2011 D.J. was arrested and remanded in custody. The court delivered judgment on 20 April 2012, and held that D.J. was not K.A.'s accomplice but, on the contrary, established that she had been another of K.A.'s victims and that he had been sexually exploiting her too.

The relevant administrative authorities renewed L.E.'s residence permit until 2 November 2014.

Complaints, procedure and composition of the Court

Relying on Article 4 (prohibition of slavery and forced labour), L.E. submitted that she was a victim of human trafficking and had been forced into prostitution. She alleged that the Greek State's failings to comply with its positive obligations under this Article had entailed a violation of this Convention provision.

Relying on Article 6 § 1 (right to a fair hearing within a reasonable time) and Article 13 (right to an effective remedy), she complained about the length of the criminal proceedings in which she was claiming civil damages, and submitted that at the relevant time no effective remedy was available in Greece in respect of complaints concerning the length of proceedings.

The application was lodged with the European Court of Human Rights on 20 October 2012.

Judgment was given by a Chamber of seven judges, composed as follows:

Mirjana **Lazarova Trajkovska** ("The former Yugoslav Republic of Macedonia"), *President*,
 Päivi **Hirvelä** (Finland),
 Kristina **Pardalos** (San Marino),
 Linos-Alexandre **Sicilianos** (Greece),
 Paul **Mahoney** (the United Kingdom),

The full texts of the Court's judgments are accessible on its website (<http://www.hudoc.echr.coe.int>)

Aleš **Pejchal** (the Czech Republic),
Robert **Spano** (Iceland),
and also André **Wampach**, *Deputy Section Registrar*.

Decision of the Court

Article 4

The Court noted that, together with Articles 2 and 3, Article 4 enshrined one of the basic values of the democratic societies making up the Council of Europe. Article 4 imposed on the States a series of positive obligations concerning the protection of victims of trafficking. The Court noted that at the relevant time Article 351 of the Greek Criminal Code defined trafficking in human beings in line with the definition provided in the Palermo Protocol and the Council of Europe Convention on action against trafficking in human beings. The Court considered that the relevant legislation in force in Greece was capable of providing L.E. with practical and effective protection.

On 29 November 2006, and throughout her detention pending expulsion, L.E. had expressly informed the authorities that she was a victim of human trafficking. For the period prior to that date, she had not drawn the authorities' attention to her situation as a victim of trafficking. The relevant authorities, alerted by her that K.A. and D.J. were forcing her into prostitution, had not remained indifferent. The police had taken immediate action by entrusting L.E. to a specialised police department so that investigations could be conducted into the veracity of her allegations. Under the relevant legislation, the expulsion proceedings that had been pending against her had been suspended, and she had been issued with a residence permit allowing her to remain in Greek territory.

On 21 August 2007 the prosecutor at the Athens Criminal Court had formally classified L.E. as a victim of trafficking, which had been confirmed by the judgment from the Athens Assize Court. However, the prosecutor had not granted this status until about nine months after L.E. had informed the authorities about her situation. Equally, in December 2006 E.S., director of Nea Zoi, an NGO which was assisting the applicant, had confirmed the latter's statements and asserted that she did indeed require this type of State assistance. This statement by E.S. had not been included in the case file in good time. In consequence, the nine-month period between L.E.'s statement and the recognition of her victim status by the authorities could not be described as "reasonable". The domestic authorities' delay amounted to a failing in terms of the measures that they could have taken to protect L.E.

With regard to the administrative and judicial proceedings, the Court noted that L.E.'s first complaint had been dismissed by the prosecutor. The latter did not have available the witness statement by E.S., director of the NGO Nea Zoi, who confirmed L.E.'s claims. This witness statement had not been included in the case file on account of inadvertence by the police authorities. In addition, once the witness statement had been added to the case file, the judicial authorities had not resumed examination of her complaint of their own motion. She herself had had to revive the proceedings by applying to the prosecutor's office on 26 January 2007 and it was not until 1 June 2007 that the prosecutor ordered that criminal proceedings be brought. The Government did not provide any explanation as to this period of inactivity, which lasted for more than five months.

With regard to the preliminary inquiry and the subsequent investigation, the Court noted that a number of shortcomings had compromised their effectiveness. A house had been placed under police surveillance immediately after L.E.'s accusation, with a view to locating K.A., the presumed perpetrator. However, after having noted that he was no longer at the address in question, the police had not widened their search to the two other addresses specifically mentioned by L.E. in her statement. Nor did it appear that the police had attempted to gather other information, in particular

The full texts of the Court's judgments are accessible on its website (<http://www.hudoc.echr.coe.int>)

through further inquiries. There had been considerable delays in the preliminary inquiry and investigation of the case. Once criminal proceedings had been brought against K.A. and D.J. on 21 August 2007, more than four years and approximately eight months had passed before a hearing took place before the Athens Assize Court.

Lastly, with regard to K.A., the presumed principal offender in the acts of trafficking, the evidence did not indicate that the police had taken further tangible steps to find him and bring him before the courts, other than entering his name in the police criminal research file. Nor had the authorities established contact or instigated cooperation with the Nigerian authorities in order to arrest the suspect.

The Court noted a lack of promptness as well as failings with regard to the Greek State's procedural obligations under Article 4 of the Convention and held that there had been a violation of this Article.

Article 6 § 1 and Article 13

With regard to the length of the proceedings, the period to be taken into consideration began on 26 January 2007, the date on which L.E. had announced her intention to join the proceedings as a civil party, and ended on 20 April 2012, when the court had delivered its judgment. It had therefore lasted five years and more than two months at one level of jurisdiction. At the investigation level, and without overlooking the complexity of the case, the Court noted that about two and a half years had passed between L.E.'s civil-party application to join the proceedings and 20 July 2009, the date on which the hearing in the case had been suspended until such time as the suspects were found and arrested.

The Court considered that the length of the proceedings in question had been excessive for one level of jurisdiction and had not met the "reasonable time" requirement. The Court held that there had been a violation of Article 6 § 1.

As to the existence of an effective remedy to complain about the length of the proceedings, the Court had previously held that, at the relevant time, the Greek legal system did not provide an effective remedy within the meaning of Article 13 of the Convention for complaints about the length of proceedings. On account of the absence in domestic law of a remedy by which L.E. could have enforced her right to a hearing within a reasonable time, the Court held that there had been a violation of Article 13.

Just satisfaction (Article 41)

The Court held that Greece was to pay L.E. 12 000 euros (EUR) in respect of non-pecuniary damage and EUR 3,000 in respect of costs and expenses.

102. Eur.Court HR, R. v. Russia, Third Section Judgment of 26 January 2016, Application No. 11916/15, (Article 3, Prohibition of Torture – Violation, in the event of Mr R.’s removal to Kyrgyzstan; Article 3, Prohibition of Torture – Violation, with regard to degrading treatment; Article 3, Prohibition of Torture – Violation, with regard to the effective investigation; Article 5-4, Speediness of Review – Violation; Article 5-1, Right to Liberty and Security – Violation). The applicant, an ethnic Uzbek Kyrgyzstani national previously detained in Russia awaiting expulsion to Kyrgyzstan and having been subjected to degrading treatment in the detention centre, successfully argued that his expulsion would be in violation of the Convention rights and would put him at risk of ill-treatment considering his membership of a particularly vulnerable ethnic group.

**ECHR 035 (2016)
26.01.2016**

Press release issued by the Registrar

The applicant, Mr R., is a Kyrgyzstani national who was born in 1991. He is currently detained in a special facility for temporary detention of foreign nationals in Moscow. The case essentially concerned his threatened expulsion to Kyrgyzstan.

Mr R. is an ethnic Uzbek who lived in Jalal-Abad Region, Kyrgyzstan, until fleeing to Russia in June 2010 following mass disorders and inter-ethnic clashes between ethnic Uzbeks and Kyrgyz. During the rioting he had been wounded by a Molotov cocktail and spent almost two weeks in hospital on account of severe burns. In 2012 the Kyrgyzstan authorities opened a criminal case against Mr R. charging him with a number of violent crimes allegedly committed in the course of the riots in June 2010. His detention was ordered in his absence.

In January 2015 Mr R. was arrested in Moscow for not carrying an identity document and, placed in a detention centre for aliens, was subsequently found guilty of an administrative offence. His detention was ordered until his administrative removal from Russia. He appealed in February 2015 arguing that he would be subjected to ill-treatment in Kyrgyzstan like many other ethnic Uzbeks. His appeal was ultimately dismissed by the domestic courts on 20 March 2015. Mr R.’s expulsion was, however, stayed on the basis of an interim measure granted by the European Court of Human Rights under Rule 39 of its Rules of Court, which indicated to the Russian Government that he should not be expelled to Kyrgyzstan whilst the Court was considering his case.

In parallel proceedings brought by Mr R. he applied for refugee status, arguing that he would face persecution in Kyrgyzstan based on his ethnic origin. His request was refused in March 2015.

Meanwhile, on 24 February 2015 Mr R. alleged that officers in the detention centre severely beat him with rubber-truncheons on his back, buttocks and heels. On 26 February 2015 his lawyers reported the beatings, emphasising that the medical staff of the detention centre had refused to log his injuries. The complaint was forwarded to the investigation department, but it appears that to date no investigation has been instituted.

Relying on Article 3 (prohibition of torture and of inhuman or degrading treatment), Mr R. complained that, should he be expelled to Kyrgyzstan, he would face a serious risk of ill-treatment due to his Uzbek ethnic origin and that he had been beaten by police officers at the detention centre on

The full texts of the Court’s judgments are accessible on its website (<http://www.hudoc.echr.coe.int>)

24 February 2015. Also relying on Article 5 § 1 (f) (right to liberty and security) and Article 5 § 4 (right to have lawfulness of detention decided speedily by a court), Mr R. complained that there had been no time-limit on his detention pending administrative removal or legal avenues to obtain judicial review of its lawfulness.

Violation of Article 3 – in the event of Mr R.’s removal to Kyrgyzstan

Violation of Article 3 (treatment)

Violation of Article 3 (investigation)

Violation of Article 5 § 4

Violation of Article 5 § 1

Interim measure (Rule 39 of the Rules of Court) – not to expel or otherwise remove Mr R. to Kyrgyzstan or another country – still in force until judgment becomes final or until further order.

Just satisfaction: EUR 26,000 (non-pecuniary damage) and EUR 5,300 (costs and expenses)

103. Eur.Court HR, *Nasr and Ghali v. Italy*, Fourth Section Judgment of 23 February 2016, Application No. 44883/09, (With regard to Mr Nasr: Article 3, Prohibition of Torture – Violation; Article 5, Right to Liberty and Security – Violation; Article 8, Right to Respect for Private and Family Life – Violation; Article 13, Right to an Effective Remedy, read in conjunction with Articles 3, 5 and 8 – Violation; with regard to Ms Ghali: Article 3, Prohibition of Torture – Violation; Article 8, Right to Respect for Private and Family Life – Violation; Article 13, Right to an Effective Remedy, read in conjunction with Articles 3 and 8 – Violation). The applicants, one of which was an Egyptian national who had been subjected to an instance of extrajudicial transfer, successfully argued that his abduction by the Central Intelligence Agency and subsequent secret detention in Egypt, with cooperation of Italian officials, was unlawful.

**ECHR 070 (2016)
23.02.2016**

Press release issued by the Registrar

In today’s **Chamber** judgment in the case of **Nasr and Ghali v. Italy** (application no. 44883/09) the European Court of Human Rights held, unanimously, that there had been:

– with regard to Mr Nasr:

a violation of **Article 3 (prohibition of torture and inhuman or degrading treatment)** of the European Convention on Human Rights,

a violation of **Article 5 (right to liberty and security)** of the European Convention,

a violation of **Article 8 (right to respect for private and family life)** and

a violation of **Article 13 (right to an effective remedy) read in conjunction with Articles 3, 5 and 8**

– with regard to Ms Ghali:

a violation of **Article 3 (prohibition of torture and inhuman or degrading treatment)**,

a violation of **Article 8 (right to respect for private and family life)** and

a violation of **Article 13 (right to an effective remedy) read in conjunction with Articles 3 and 8**

The case concerned an instance of extrajudicial transfer (or “extraordinary rendition”), namely the abduction by CIA agents, with the cooperation of Italian officials, of the Egyptian imam Abu Omar, who had been granted political asylum in Italy, and his subsequent transfer to Egypt, where he was held in secret for several months.

The full texts of the Court’s judgments are accessible on its website (<http://www.hudoc.echr.coe.int>)

Having regard to all the evidence in the case, the Court found it established that the Italian authorities were aware that the applicant had been a victim of an extraordinary rendition operation which had begun with his abduction in Italy and had continued with his transfer abroad.

The Court had already held in previous cases (*El-Masri v. "The former Yugoslav Republic of Macedonia"* [GC], ECHR 2012; *Al Nashiri v. Poland*, no. 28761/11, 24 July 2014; and *Husayn (Abu Zubaydah) v. Poland*, no. 7511/13, 24 July 2014) that the treatment of "high-value detainees" for the purposes of the CIA's "extraordinary rendition" programme was to be classified as torture within the meaning of Article 3 of the Convention.

In the present case the Court held that the legitimate principle of "State secrecy" had clearly been applied by the Italian executive in order to ensure that those responsible did not have to answer for their actions. The investigation and trial had not led to the punishment of those responsible, who had therefore ultimately been granted impunity.

Principal facts

The first applicant is Osama Mustafa Hassan Nasr, also known as Abu Omar, who was born in 1963. The second applicant is Nabila Ghali, who was born in 1968. Both are Egyptian nationals. Mr Nasr, a member of the group Jama'a al-Islamiya – an Islamist movement regarded by the Egyptian government as a terrorist organisation – had lived in Italy since 1998. He became an imam and settled in Milan in July 2000. He was granted political asylum in February 2001 and married Ms Ghali in October of that year.

Mr Nasr was suspected, among other offences, of conspiracy to commit international terrorist acts, and his links to fundamentalist networks were investigated by the Milan public prosecutor's office. The investigations concluded in June 2005 when the investigating judge made an order for Mr Nasr's pre-trial detention. On 6 December 2013 the Milan District Court convicted Mr Nasr of membership of a terrorist organisation.

On 17 February 2003, while he was walking down a street in Milan, Mr Nasr was abducted and taken to the Aviano air base operated by USAFE (United States Air Forces in Europe), where he was put on a plane bound for the Ramstein US air base in Germany. From there he was flown in a military aircraft to Cairo. On his arrival he was interrogated by the Egyptian intelligence services about his activities in Italy, his family and his trips abroad. Mr Nasr was detained in secret until 19 April 2004 in cramped and unhygienic cells. He was taken out of his cell at regular intervals and subjected to interrogation sessions during which he was ill-treated and tortured.

On 19 April 2004 Mr Nasr was released. He maintained that he had been released because he had given statements in accordance with the instructions he had received and on condition that he did not leave Alexandria and remained silent about his experiences in prison. In spite of this condition, Mr Nasr telephoned his wife to let her know that he was safe. He also submitted a statement to the Milan public prosecutor's office in which he described his abduction and torture. Approximately 20 days after his release, Mr Nasr was rearrested and detained. He was released on 12 February 2007 without charge but was prohibited from leaving Egypt.

On 20 February 2003 Ms Ghali had reported her husband's disappearance to the police. The Milan public prosecutor's office immediately started an investigation into abduction by a person or persons unknown. The Milan police department dealing with special operations and terrorism (the "Digos") was put in charge of the investigation. In February 2005 it submitted a report on the investigation to the public prosecutor's office. All the information obtained in the investigation confirmed Mr Nasr's version of events with regard to his abduction and his transfer to the Aviano US air base and subsequently to Cairo. It also established that 19 US nationals had been involved in the events,

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including members of the United States diplomatic and consular corps in Italy. The investigators also found that the CIA chief in Milan at the time, Robert Seldon Lady, had played a key role in the events.

On 23 March 2005 the public prosecutor requested the pre-trial detention of 19 US nationals, including Mr Lady, who were suspected of involvement in planning and carrying out the abduction. The Milan investigating judge ordered the pre-trial detention of a further three US nationals. All 22 were declared “fugitives”. In November and December 2005 the prosecutor in charge of the investigation requested the principal public prosecutor to ask the Ministry of Justice to seek the extradition of the accused on the basis of a bilateral agreement with the United States and to request Interpol to initiate an international search for them. On 12 April 2006 the Minister of Justice informed the prosecuting authorities that he had decided not to seek the extradition of the 22 accused US nationals or to have an international wanted notice issued concerning them.

The second phase of the investigation related to the involvement of Italian nationals, including State agents. During the investigation it transpired that two senior officials of the SISMI (the Italian military intelligence agency) had been aware of the CIA’s plan to abduct Mr Nasr and of possible SISMI involvement. A journalist, Mr Farina, was also implicated, having allegedly attempted to lay false trails for the investigators at the request of SISMI agents.

In July 2006 the Prime Minister stated that the information and documents requested by the public prosecutor’s office were covered by State secrecy and that the conditions for lifting that secrecy were not met. In a judgment of 18 March 2009 the Constitutional Court held that the interests protected by State secrecy took precedence over any other interests guaranteed by the Constitution, and pointed out that the executive was invested with discretionary powers to assess the need for secrecy in order to protect those interests. The Constitutional Court specified that these powers were exempt from review, including by the Constitutional Court, and emphasised that it was not its task to examine the reasons for having recourse to State secrecy. Numerous items of evidence in the ongoing proceedings were therefore declared confidential and unusable.

On 4 November 2009 the Milan District Court delivered a judgment in which it found that Mr Nasr’s abduction had been planned and carried out by CIA operatives on the basis of a decision taken at political level; that the abduction had been carried out without the knowledge of the Italian authorities also engaged in investigating Mr Nasr at that time; and that the fact that authorization had been given by very senior CIA officials suggested that the operation had been staged with the knowledge or even the tacit consent of the Italian authorities, although it had not been possible to further investigate the evidence existing in that regard for reasons of State secrecy.

Lastly, 22 CIA operatives and high-ranking officials, and one US army officer, were convicted *in absentia* of Mr Nasr’s abduction and were given prison sentences of between six and nine years. Two members of the SISMI were found guilty of obstructing the investigation and sentenced to three years’ imprisonment. The convictions of the former head of the SISMI and his deputy, and those of the three former SISMI members, were quashed by the Court of Cassation on grounds of State secrecy. The US nationals were also ordered to pay damages to the applicants in an amount to be determined in civil proceedings. The District Court provisionally awarded one million euros (EUR) to Mr Nasr and EUR 500,000 to Ms Ghali. The applicants have received no compensation to date, nor have the Italian authorities sought the extradition of the convicted US nationals.

Complaints, procedure and composition of the Court

Relying on Articles 3 (prohibition of inhuman or degrading treatment), 5 (right to liberty and security), 6 (right to a fair trial) and 13 (right to an effective remedy) of the Convention, Mr Nasr complained of his abduction, in which the Italian authorities had been involved, of the ill-treatment to

The full texts of the Court’s judgments are accessible on its website (<http://www.hudoc.echr.coe.int>)

which he had been subjected during his transfer and detention, of the fact that those responsible had been granted impunity owing to the application of State secrecy, and of the fact that the sentences imposed on the convicted US nationals had not been enforced because of the refusal of the Italian authorities to request their extradition. Lastly, both applicants alleged, among other violations, a breach of Article 8 (right to respect for private and family life) in that Mr Nasr's abduction and detention had resulted in their forced separation for over five years.

The application was lodged with the European Court of Human Rights on 6 August 2009.

Judgment was given by a Chamber of seven judges, composed as follows:

George **Nicolaou** (Cyprus), *President*,
 Guido **Raimondi** (Italy),
 Päivi **Hirvelä** (Finland),
 Ledi **Bianku** (Albania),
 Nona **Tsotsoria** (Georgia),
 Paul **Mahoney** (the United Kingdom),
 Krzysztof **Wojtyczek** (Poland),

and Françoise **Elens-Passos**, *Section Registrar*

Decision of the Court

Article 3 (prohibition of torture and inhuman or degrading treatment)

Regarding the investigation and trial

The Court began by observing that the domestic courts had conducted a detailed investigation that had enabled them to reconstruct the events. The evidence that had ultimately been disregarded by the courts on the ground that the Constitutional Court had found it to be covered by State secrecy had been sufficient to convict the accused. The Court went on to note that the information implicating the SISMI agents had been widely circulated in the press and on the Internet; it therefore found it difficult to imagine how invoking State secrecy had been apt to preserve the confidentiality of the events once the information in question had been disclosed. In the Court's view, the executive's decision to apply State secrecy to information that was already widely known to the public had resulted in the SISMI agents avoiding conviction.

As to the convicted US agents, the Court noted that the Government had acknowledged never having sought their extradition. According to the Government, they had issued European arrest warrants and a single international arrest warrant against Mr Lady, which had yielded no results. Furthermore, the President of the Republic had pardoned three of the convicted persons, including Mr Lady, who had received a heavier sentence because of the extent of his responsibility in the extraordinary rendition operation.

The Court noted that in spite of the efforts of the Italian investigators and judges, which had identified the persons responsible and secured their convictions, the latter had remained ineffective owing to the attitude of the executive. The legitimate principle of "State secrecy" had clearly been applied in order to ensure that those responsible did not have to answer for their actions. Accordingly, the investigation and trial had not led to the punishment of those responsible, who had ultimately been granted impunity.

The Court therefore took the view that the domestic investigation had not satisfied the requirements of the Convention. Accordingly, there had been a violation of the procedural aspect of Article 3 of the Convention.

The full texts of the Court's judgments are accessible on its website (<http://www.hudoc.echr.coe.int>)

Regarding the inhuman and degrading treatment

It was beyond doubt that Mr Nasr's abduction had entailed the use of techniques that must have caused him emotional and psychological distress. His ensuing detention, including his transfer by plane to an unknown destination, had undoubtedly placed Mr Nasr in a situation of complete vulnerability, and he had undeniably lived in a permanent state of anxiety owing to his uncertainty about his fate. In fact, in his statement to the Milan public prosecutor Mr Nasr had given details of the circumstances surrounding his abduction and his detention in Egypt and the treatment to which he had been subjected, and in particular the violent interrogation sessions. The Court had previously held that similar treatment of "high-value detainees" for the purposes of the CIA's extraordinary rendition programme was to be classified as torture within the meaning of Article 3 of the Convention².

In view of the fact that the Italian authorities had been aware of the extraordinary rendition operation carried out in the context of the CIA's high-value detainee programme, and had actively cooperated with the CIA during the initial phase of the operation – Mr Nasr's abduction and his transfer abroad – the Court considered that those authorities had known or should have known that this would place him at a real risk of ill-treatment. In those circumstances, the likelihood of a violation of Article 3 had been particularly high and should have been considered as inherent in the Italian authorities had exposed him to a serious and foreseeable risk of ill-treatment and of conditions of detention contrary to Article 3 of the Convention.

Under Articles 1 and 3 of the Convention the Italian authorities had had a duty to take the appropriate measures to ensure that the persons within their jurisdiction were not subjected to torture or to inhuman or degrading treatment or punishment. This had not been the case, and the respondent State had to be considered directly responsible for the violation of the first applicant's rights under this head, as its agents had failed to take the measures that would have been necessary in the circumstances of the case to prevent this situation from occurring. The State's responsibility in this regard was all the greater since Mr Nasr had been granted refugee status in Italy.

In the Court's view, by allowing the US authorities to abduct the first applicant, the Italian authorities had knowingly exposed him to a real risk of treatment contrary to Article 3 of the Convention. There had therefore been a violation of the substantive aspect of Article 3 of the Convention.

Regarding the violation of Article 3 in the case of Ms Ghali

As acknowledged by the Italian courts, Ms Ghali had suffered significant non-pecuniary damage as a result of her husband's disappearance, especially on account of the sudden interruption of their married life and the damage to her psychological well-being and that of her husband. The unjustified conduct of the Italian authorities and the suffering caused to Ms Ghali as a result had been regarded by the Italian courts as sufficiently serious to warrant an award of 500,000 euros in damages.

Furthermore, the uncertainty, doubt and apprehension felt by Ms Ghali over a lengthy and continuous period had caused her severe mental suffering and distress. Like Mr Nasr's disappearance, the prolonged period during which Ms Ghali had been left without any news of her husband was attributable to the domestic authorities. In the Court's view, Ms Ghali had been subjected to treatment proscribed by Article 3. With regard to the investigation and trial, as the Court had already found that these had not led to the punishment of those responsible, there had also been a violation of Article 3 in Ms Ghali's case.

Article 5 (right to liberty and security)

The full texts of the Court's judgments are accessible on its website (<http://www.hudoc.echr.coe.int>)

The unlawful nature of Mr Nasr's detention had been established by the domestic courts, which found that he had been subjected from the outset to unacknowledged detention in complete disregard of the guarantees enshrined in Article 5 of the Convention; this constituted a particularly serious violation of his right to liberty and security. The detention of terrorist suspects under the programme of renditions set up by the US authorities had already been found in similar cases to be arbitrary³.

The Court had already found under Article 3 that Italy had been aware of Mr Nasr's transfer outside the country in the context of an extraordinary rendition and that the Italian authorities, by allowing the CIA to abduct Mr Nasr in order to transfer him to Egypt, had knowingly exposed him to a real risk of treatment contrary to Article 3. The Court maintained those findings and considered them to be applicable in the context of Article 5. It concluded that Italy's responsibility was engaged with regard both to Mr Nasr's abduction and to the entire period of detention following his handover to the US authorities. There had therefore been a violation of Article 5 of the Convention in that regard.

Article 8 (right to respect for private and family life)

In view of its findings concerning the responsibility of the respondent State under Articles 3 and 5 of the Convention, the Court took the view that the State's actions and omissions also engaged its responsibility under Article 8 of the Convention. In the light of the facts as established, the Court considered that the interference with the first applicant's exercise of his right to respect for his private and family life had not been "in accordance with the law". There had therefore been a violation of Article 8 of the Convention.

The Court was of the view that Mr Nasr's disappearance, which was attributable to the Italian authorities, also amounted to interference with Ms Ghali's private and family life. As that interference had not been in accordance with the law, there had also been a violation of Article 8 of the Convention with regard to Ms Ghali.

Article 13 (right to an effective remedy) read in conjunction with Articles 3, 5 and 8

The Court had established that the investigation carried out by the national authorities – the police, the prosecuting authorities and the courts – had been deprived of its effectiveness by the executive's decision to invoke State secrecy. The Court had demonstrated that the State's responsibility was engaged on account of the violations of the applicants' rights under Articles 3, 5 and 8 of the Convention.

In the Court's view, the applicants should have been able to avail themselves of practical and effective remedies capable of leading to the identification and punishment of those responsible, to the establishment of the truth and to an award of compensation. In view of the circumstances already examined, the Court could not consider that the criminal proceedings had been effective within the meaning of Article 13 with regard to the complaints under Articles 3, 5 and 8.

As the Government themselves acknowledged, it had not been possible to use the evidence covered by State secrecy; likewise, a request for the extradition of the convicted US agents had proved futile. As to the civil consequences, the Court considered that, in view of the circumstances, any possibility for the applicants to obtain damages had been virtually ruled out.

There had therefore been a violation of Article 13 read in conjunction with Articles 3, 5 and 8 in Mr Nasr's case and a violation of Article 13 read in conjunction with Articles 3 and 8 in the case of Ms Ghali.

Article 6 (right to a fair trial)

The full texts of the Court's judgments are accessible on its website (<http://www.hudoc.echr.coe.int>)

The Court considered that this complaint covered the same ground as the applicants' complaint under the procedural limb of Article 3, in so far as it related only to one specific aspect of proceedings which the Court had already found not to satisfy the criterion of effectiveness for Convention purposes. The Court therefore deemed it unnecessary to examine this complaint separately under Article 6.

Article 41 (just satisfaction)

The Court held that Italy was to pay 70,000 euros (EUR) to Mr Nasr and EUR 15,000 to Ms Ghali in respect of non-pecuniary damage and EUR 30,000 to the applicants jointly in respect of costs and expenses.

104. Eur.Court HR, K.J. v. Poland, Fourth Section Judgment of 1 March 2016, Application No. 30813/14, (Article 8, Right to Respect for Private and Family Life - Violation). The applicant, in reliance on the 1980 Hague Convention on the Civil Aspects of International Child Abduction, successfully brought a claim seeking the return of his child to the United Kingdom from Poland.

ECHR 082 (2016)
01.03.2016

Press release issued by the Registrar

In today's **Chamber** judgment in the case of **K.J. v. Poland** (application no. 30813/14) the European Court of Human Rights held, unanimously, that there had been:

a violation of Article 8 (right to respect for private and family life) of the European Convention on Human Rights.

The case concerned a Polish national's complaint about the proceedings before the Polish courts for the return of his child to the United Kingdom where he is currently living and where the child had been born and raised for the first two years of her life. The mother, also Polish, left the U.K. with their daughter for a holiday in Poland in July 2012 and has never returned. In the ensuing Hague Convention proceedings, the Polish courts dismissed the father's request for the return of his daughter.

The Court found in particular that the mother, instead of substantiating any specific risks to her daughter if she were returned to the U.K., had only referred to the break-up of her marriage and her fear that the child would not be allowed to leave the U.K. The Polish courts had, however, accepted her reasons as convincing enough to conclude that – with or without the mother – the child's return to her habitual environment in the U.K. would place her in an intolerable situation. The Court considered that that assessment by the Polish courts was misguided. Firstly, there was no objective obstacle to the mother's return to the U.K. Secondly, in assessing that the child's return to the U.K. with her mother would not have a positive impact on the child's development, the courts had not taken into account the conclusions in an expert report by psychologists that the child, who adapted easily, was in good physical and psychological health, was emotionally attached to both parents and perceived Poland and the U.K. on an equal footing.

Principal facts

The applicant, K.J., is a Polish national who was born in 1978 and lives in Kent (the United Kingdom).

K.J. had a daughter with his wife, a Polish national, in 2010 in the United Kingdom. In July 2012 the child went with her mother to Poland on holiday, with the father's consent. However, at the end of the summer his wife informed him that she would not be coming back to the UK with their daughter. Divorce proceedings are currently pending in the UK.

K.J. immediately lodged a request for the return of his daughter under the Hague Convention on the Civil Aspects of International Child Abduction. During the ensuing Hague proceedings before the Polish courts the mother objected to the child's return to the UK, essentially giving two reasons: the break-up of the marriage; and her fear that the child would not be allowed to leave the UK. The

The full texts of the Court's judgments are accessible on its website (<http://www.hudoc.echr.coe.int>)

proceedings lasted for 12 months until October 2013, when the courts dismissed K.J.'s request on the ground that the child's return to the UK with or without her mother would put her in an intolerable situation within the meaning of Article 13 (b) of the Hague Convention. Under that provision, a State is not bound to order the return of a child if it is established that there is a grave risk that the child would be exposed to psychological harm or otherwise placed in an intolerable situation.

The courts attached particular importance to the child's young age (just over three years old), the fact that the mother had always been the child's primary caregiver and that contact with the father – since the abduction – had been rare. The child's separation from her mother would therefore cause negative and irreversible consequences. Furthermore, even if the child were returned to the U.K. with her mother, this would not have a positive impact on the child's development either. Her mother had never adapted to her life in the U.K. and would only leave Poland against her will.

The courts also referred to a psychologists' expert report, which had concluded that the child's best interests were to stay in Poland with her mother.

The proceedings concerning K.J.'s contact rights with his daughter were stayed in February 2013 pending the couple's divorce proceedings. These rights were settled by the Polish courts in November 2014 when K.J. was authorised to see his daughter two weekends per month and during certain periods during the holidays.

Complaints, procedure and composition of the Court

Relying on Article 8 (right to respect for private and family life) of the European Convention, the applicant complained in particular about the Polish courts' refusal to order the return of his daughter.

The application was lodged with the European Court of Human Rights on 12 April 2014.

Judgment was given by a Chamber of seven judges, composed as follows:

András **Sajó** (Hungary), *President*,
 Nona **Tsotsoria** (Georgia),
 Paulo **Pinto de Albuquerque** (Portugal),
 Krzysztof **Wojtyczek** (Poland),
 Egidijus **Kūris** (Lithuania),
 Iulia Antoanella **Motoc** (Romania),
 Gabriele **Kucsko-Stadlmayer** (Austria),
 and also Fatoş **Aracı**, *Deputy Section Registrar*.

Decision of the Court

The Court noted that the fact that the mother had been unwilling to live in the U.K. had remained central to the Polish courts' analysis. They had accepted that the conflict between the applicant and his wife and her alleged inability to adapt to her life abroad had been convincing enough reasons to conclude that – with or without the mother – the child's return to her habitual environment in the U.K. would place her in an intolerable situation within the meaning of Article 13 (b) of the Hague Convention.

It having been the applicant's estranged wife who opposed the child's return, it had been for her to substantiate any potential allegation of specific risks to her daughter. However, she had essentially referred to the break-up of the marriage, and her fear that the child would not be allowed to leave the U.K.. Both those arguments fell short of the requirements of Article 13 (b) of the Hague Convention.

The full texts of the Court's judgments are accessible on its website (<http://www.hudoc.echr.coe.int>)

The Polish courts nevertheless proceeded with the case, assessing the risks in view of what appeared to be a rather arbitrary refusal of the child's mother to return with the child. Notably, nothing in the circumstances unveiled before the domestic courts had ruled out the possibility of the mother's return together with the child. It was not implied that the applicant's wife had not had access to U.K. territory or that she would have faced criminal sanctions on her return. Nor did it seem that the applicant would actively prevent the mother from seeing her child in the U.K. or seek to deprive her of parental rights of custody.

Equally misguided was the Polish courts' finding that the child's return to the U.K. with her mother would not have a positive impact on the child's development. The courts seemed to have completely ignored the remaining conclusions of the psychologists' report, namely that the child, who adapted easily, was in good physical and psychological health, was emotionally attached to both parents and perceived Poland and the U.K. on an equal footing.

Moreover, the Court found that the domestic proceedings, despite the recognised urgent nature of the Hague Convention proceedings, had lasted one year from the date on which the applicant's request for the return of the child had been registered and the date of the final decision. No explanation had been given for that delay.

In conclusion, in the circumstances of the case seen as a whole, the Court considered that the State had failed to comply with its obligations under Article 8 of the European Convention.

Lastly, the Court observed that, as the child had lived with her mother in Poland for over three and a half years, there was no basis for this judgment to be interpreted as obliging Poland to take steps to order the child's return to the U.K.

Article 41 (just satisfaction)

The Court held that Poland was to pay the applicant 9,000 euros (EUR) in respect of non-pecuniary damage and EUR 6,145 for costs and expenses.

105. Eur.Court HR, Arlewin v. Sweden, Third Section Judgment of 1 March 2016, Application No. 22302/10, (Article 6-1, Right to a Fair Hearing within a Reasonable Time – Violation). The applicant, a self-employed Swedish businessman, successfully argued for his right of access to a court when the Swedish Courts had declined jurisdiction in defamation proceedings arising out of a defamatory television broadcast accusing the applicant of organised crime, and the Court in its judgment interpreted the Brussels I Regulation and the EU Audiovisual Media Services Directive.

ECHR 081 (2016)

01.03.2016

Press release issued by the Registrar

In today's **Chamber** judgment in the case of **Arlewin v. Sweden** (application no. 22302/10) the European Court of Human Rights held, unanimously, that there had been:

a violation of Article 6 § 1 (access to court) of the European Convention on Human Rights.

The case concerned the Swedish courts' decision to decline jurisdiction in defamation proceedings arising out of the content of a transborder television programme service. The programme in question had been broadcast live in Sweden and had accused Mr Arlewin, the applicant, of organised crime in the media and advertising sectors. The Swedish courts subsequently declined jurisdiction to examine Mr Arlewin's complaint, finding that a UK-based company, which had up-linked the programme to a satellite and transmitted it to viewers in Sweden, was responsible for its content.

The Court found in particular that, except for the technical detail that the broadcast had been routed via the UK, the programme and its broadcast were for all intents and purposes entirely Swedish. Moreover, the alleged harm to Mr Arlewin had occurred in Sweden. In those circumstances, the Swedish State had had the obligation under Article 6 of the European Convention to provide Mr Arlewin with an effective access to court. However, Mr Arlewin had been put in a situation in which he could not hold anyone responsible under Swedish law for his allegation of defamation. Requiring him to take proceedings in the UK courts could not be said to have been a reasonable and practical alternative for him. In the Court's view, the limitations on Mr Arlewin's right of access to court had therefore been too far-reaching and could not, in his particular case, be considered proportionate.

Principal facts

The applicant, Raja Arlewin, is a Swedish national who was born in 1970 and lives in Stockholm. He is a self-employed businessman.

In October 2006 Mr Arlewin attempted to bring private prosecution proceedings and a claim for damages for gross defamation against X, following the live broadcast in Sweden of a programme in which he was accused of, among other things, involvement in organised crime in the media and advertising sectors. The television programme had been produced in Sweden in the Swedish language and was backed by Swedish advertisers.

In a preliminary ruling of May 2008 the Stockholm District Court declined jurisdiction. In its view, and with reference to the relevant Swedish law, the programme had not originated in Sweden. It had been sent from Sweden by satellite to a London-based company, Viasat Broadcasting UK Ltd, which

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was responsible for the content of the programme, and thereafter up-linked to a satellite, which had in turn transmitted the programme to viewers in Sweden. The Court of Appeal upheld this decision, finding that Mr Arlewin had not established that the decisions concerning the content of the programme had been taken in Sweden, and that the material before it indicated that it would be possible for him to bring proceedings before a court in the United Kingdom.

Mr Arlewin appealed, alleging that the Swedish courts' position ran contrary to Community law and requesting that a question concerning the interpretation of the Brussels I Regulation be referred to the Court of Justice of the European Union (ECJ) for a preliminary ruling. According to him, the regulation entitled a person claiming non-contractual damages to bring actions where the harm had actually occurred, namely in Sweden in his case. In September 2009 the Supreme Court rejected Mr Arlewin's referral request and refused leave to appeal in the case, finding no reason to request a preliminary ruling from the ECJ.

Complaints, procedure and composition of the Court

Relying on Article 6 § 1 (access to court), Article 8 (right to respect for private and family life) and Article 13 (right to an effective remedy) of the European Convention on Human Rights, Mr Arlewin essentially complained that he had been denied access to a court in Sweden for a determination on the merits of his defamation action.

The application was lodged with the European Court of Human Rights on 18 March 2010.

Judgment was given by a Chamber of seven judges, composed as follows:

Luis **López Guerra** (Spain), *President*,
 Helena **Jäderblom** (Sweden),
 George **Nicolaou** (Cyprus),
 Helen **Keller** (Switzerland),
 Johannes **Silvis** (the Netherlands),
 Dmitry **Dedov** (Russia),
 Branko **Lubarda** (Serbia),
 and also Stephen **Phillips**, *Section Registrar*.

Decision of the Court

Article 6 § 1 (access to court)

First, the Court addressed the relevance to Mr Arlewin's case of two instruments adopted within the framework of the European Union, namely the EU Audiovisual Media Services Directive and the Brussels I Regulation.

The Court was not convinced by the Government's argument that the Directive determined, even for the purposes of EU law, the country of jurisdiction when an individual brought a defamation claim and wished to sue for damages. In particular under Article 28 of the Directive, which addresses the situation where a person's reputation and good name have been damaged in a programme, it only talks about the right of reply, and does not deal with defamation proceedings or a related claim for damages. The Court therefore considered that the Directive did not regulate the matter of jurisdiction when it came to defamation proceedings arising out of the content of a transborder programme service.

Rather, jurisdiction under EU law was regulated by the Brussels I Regulation, and under Articles 2 and 5 of that Regulation, it would appear that both the United Kingdom and Sweden had jurisdiction

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over the subject matter of Mr Arlewin's case. On the one hand, X is domiciled in Sweden, and, on the other, Viasat Broadcasting UK Ltd is registered, and thus domiciled in the United Kingdom. Furthermore, it could be argued that the harmful event had occurred in either country, as the television programme had been broadcast from the United Kingdom and the alleged injury to Mr Arlewin's reputation and privacy had manifested itself in Sweden.

That being said, the Court noted that the content, production and broadcasting of the television programme as well as its implications had very strong connections to Sweden. The programme had been produced in Sweden in the Swedish language, was backed by Swedish advertisers, and was to be shown live to an exclusively Swedish audience. Moreover, the alleged harm to Mr Arlewin had occurred in Sweden. Except for the technical detail that the broadcast had been routed via the United Kingdom, the programme and its broadcast were for all intents and purposes entirely Swedish in nature.

In those circumstances the Swedish State had an obligation under Article 6 of the Convention to provide Mr Arlewin with an effective right of access to court. However, in Mr Arlewin's case, the programme was broadcast in a manner which had made the national courts consider that it had not originated in Sweden and that had led to a situation in which Mr Arlewin could not hold anyone responsible under Swedish law. Requiring Mr Arlewin to take proceedings in the UK courts could not be said to have been a reasonable and practical alternative for him. The Swedish State could not therefore escape responsibility under Article 6 by referring to that alternative.

In dismissing Mr Arlewin's action without an examination of the merits, the Swedish courts had impaired the very essence of his right of access to court. In the Court's view, the limitations on Mr Arlewin's right of access to court had therefore been too far-reaching and could not, in the circumstances of the case, be considered proportionate. There had, accordingly, been a violation of Article 6 § 1.

Other articles

The Court held that no separate issues arose under Articles 8 or 13 of the Convention.

Article 41 (just satisfaction)

The Court held that Sweden was to pay Mr Arlewin 12,000 euros (EUR) in respect of non-pecuniary damage and EUR 20,000 for costs and expenses.

Separate opinion

Judge Silvis expressed a concurring opinion which is annexed to the judgment.

106. Eur.Court HR, F.G. v. Sweden, Grand Chamber Judgment of 23 March 2016, Application No. 43611/11, (Article 2, Right to Life – No Violation; Article 3, Prohibition of Torture – No Violation). The applicant, an Iranian Asylum seeker who had converted to Christianity, argued unsuccessfully that an expulsion would put him at risk of ill-treatment for fear of being sentenced to death owing to his political past and his conversion to Christianity.

ECHR 104 (2016)
23.03.2016

Press release issued by the Registrar

The case **F.G. v. Sweden** (application no. 43611/11) concerned the refusal of asylum to an Iranian national converted to Christianity in Sweden. The applicant, F.G., notably alleged that, if expelled to Iran, he would be at a real risk of being persecuted and punished or sentenced to death owing to his political past in the country and his conversion from Islam to Christianity.

In today's **Grand Chamber** judgment in the case the European Court of Human Rights held, unanimously:

that there **would be no violation of Article 2 (right to life) and Article 3 (prohibition of torture and of inhuman or degrading treatment)** of the European Convention on Human Rights, on account of F.G.'s political past in Iran, if he were deported to his country of origin, and

that there **would be a violation of Articles 2 and 3** of the Convention if F.G. were to be returned to Iran without a fresh and up-to-date assessment being made by the Swedish authorities of the consequences of his religious conversion.

The Court pointed out that the case involved important issues concerning the duties to be observed by the parties in asylum proceedings.

The Court considered that there was no evidence to support the allegation that the national authorities, in their decisions refusing asylum, had been wrong to come to the conclusion that F.G. had been a low-profile activist or political opponent and was not therefore in need of protection in Sweden. Indeed, they had taken into account F.G.'s political activities against the Iranian regime, as well as the fact that he had been arrested on a number of occasions and summoned before the Iranian courts. Nor could the Court conclude that the asylum proceedings had in any way been inadequate as concerned its assessment of F.G.'s political activities.

However, as concerned F.G.'s conversion to Christianity, the Swedish authorities had so far never made an assessment of the risks that F.G. could encounter upon returning to Iran. Regardless of F.G.'s conduct (namely, the fact that he declined to invoke his conversion as an asylum ground in the original proceedings), the Court considered that the Swedish authorities would now be under an obligation – given the absolute nature of Articles 2 and 3 of the Convention – to make a fresh assessment, of their own motion, of all the information brought to their attention before taking a decision on his removal.

Principal facts

The full texts of the Court's judgments are accessible on its website (<http://www.hudoc.echr.coe.int>)

The applicant, F.G., is an Iranian national who was born in 1962 and is currently living in Sweden. F.G. arrived in Sweden in November 2009 claiming asylum. In his initial request for asylum he submitted that he had been politically active against the Iranian regime, claiming that he had mainly worked with the student movement since 2007, helping them to create and publish web pages which were critical of the system. He had been arrested in April 2007, June 2009 and again in September 2009 and finally fled the country on being summoned to appear before the Revolutionary Court in November 2009. He also mentioned that he had converted to Christianity after coming to Sweden but didn't wish to rely on it as an asylum ground, either before the Migration Board or, on appeal, before the Migration Court, since he considered it a personal matter.

The Migration Board rejected F.G.'s request in a decision eventually upheld by the migration courts in June 2011. The authorities notably found that he had exaggerated his political activities, which they considered to have taken place at a low level, and that he was not therefore in need of protection in Sweden. The low-profile nature of his activities was moreover supported by the fact that F.G. had not received any new summonses since 2009 and that his remaining family in Iran had not been targeted by the Iranian authorities. In their decisions the authorities did not, however, carry out a thorough examination of F.G.'s conversion to the Christian faith, due to the fact that he had declined to invoke this factor as a ground for requesting asylum.

Having thus been refused asylum on political grounds, F.G. requested a stay on his deportation order, relying on his conversion to Christianity as a new circumstance to be taken into consideration. His request was refused by the authorities in a decision which was eventually upheld in November 2011, on the ground that his conversion was not a "new circumstance" which could justify a re-examination of the proceedings.

F.G.'s expulsion was, however, then stayed on the basis of an interim measure granted in October 2011 by the European Court of Human Rights under Rule 39 of its Rules of Court, which indicated to the Swedish Government that the applicant should not be expelled to Iran whilst the Court was considering his case.

Complaints, procedure and composition of the Court

Relying on Article 2 (right to life) and Article 3 (prohibition of torture and of inhuman or degrading treatment) of the European Convention on Human Rights, F.G. complained that if expelled to Iran he would be at a real risk of being persecuted and punished or sentenced to death, owing to his political past in the country and his conversion from Islam to Christianity in Sweden.

The application was lodged with the European Court of Human Rights on 12 July 2011.

In its Chamber judgment of 16 January 2014 the Court held, by four votes to three, that F.G. had failed to substantiate that, if returned to Iran, he would face a real and concrete risk of being subjected to treatment contrary to Article 2 or 3 of the Convention. Consequently, it found that the implementation by Sweden of the expulsion order against the applicant would not give rise to a violation of these provisions. The Court also decided to continue to indicate to the Swedish Government, under Rule 39 (interim measures) of the Rules of Court, not to expel F.G. until the Court's judgment became final or pending any further order.

On 16 April 2014 the applicant requested that the case be referred to the Grand Chamber under Article 43 (referral to the Grand Chamber) and on 2 June 2014 the panel of the Grand Chamber accepted that request.

The full texts of the Court's judgments are accessible on its website (<http://www.hudoc.echr.coe.int>)

Third-party comments were received from the European Centre for Law and Justice, the Alliance Defending Freedom assisted by Jubilee Campaign, the Advice on Individual Rights in Europe (“the AIRE Centre”), the European Council on Refugees and Exiles (“ECRE”), the International Commission of Jurists, and the Office of the United Nations High Commissioner for Refugees (“UNHCR”), which had been granted leave to intervene in the written procedure (under Article 36 § 2 of the Convention and Rule 44 § 3).

A Grand Chamber hearing on the case was held in public in Strasbourg on 3 December 2014.

Judgment was given by the Grand Chamber of 17 judges, composed as follows:

Guido **Raimondi** (Italy), *President*,
 Dean **Spielmann** (Luxembourg),
 András **Sajó** (Hungary),
 Josep **Casadevall** (Andorra),
 Ineta **Ziemele** (Latvia),
 Elisabeth **Steiner** (Austria),
 George **Nicolaou** (Cyprus),
 Ledi **Bianku** (Albania),
 Vincent A. **de Gaetano** (Malta),
 Julia **Laffranque** (Estonia),
 Paulo **Pinto de Albuquerque** (Portugal),
 Linos-Alexandre **Sicilianos** (Greece),
 Helena **Jäderblom** (Sweden),
 Aleš **Pejchal** (the Czech Republic),
 Krzysztof **Wojtyczek** (Poland),
 Dmitry **Dedov** (Russia),
 Robert **Spano** (Iceland),

and also Johan **Callewaert**, *Deputy Grand Chamber Registrar*.

Decision of the Court

The Court dismissed, by 16 votes to one, the Government’s request to strike the case out of its list of cases on the ground that the deportation order had expired in June 2015 and was therefore no longer enforceable. Even though it was not in doubt that F.G. might institute new and full proceedings for asylum in Sweden, the Court was not satisfied that he had completely lost his victim status. He is currently in limbo, not having been granted asylum or a residence permit in Sweden. In any case, the Court noted that there were important issues involved in the case, notably concerning the duties to be observed by the parties in asylum proceedings. The impact of the case going beyond just the particular situation of the applicant, the Court therefore found that there were special circumstances regarding respect for human rights which required the continued examination of the case.

Articles 2 (right to life) and 3 (prohibition of torture and of inhuman or degrading treatment)

F.G.’s political activities in Iran

First, the Court found that F.G., if returned to Iran, would not be at risk as a result of the general situation in the country.

As concerned the particular circumstances of F.G.’s situation, in their decisions refusing asylum the national authorities had taken into account F.G.’s political activities against the Iranian regime, as well as the fact that he had been arrested on a number of occasions and summoned before the Iranian

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courts. Making an overall assessment, the authorities concluded that he had not been a highprofile activist or political opponent and was not therefore in need of protection in Sweden. That conclusion was supported by the fact that since 2009 F.G. had not received any new summonses from the Revolutionary Court and that none of his family members remaining in Iran had been subjected to any reprisals by the Iranian authorities. The Court considered that there was no evidence to support the allegation that the authorities had been wrong to come to those conclusions or that the asylum proceedings had been in any way inadequate as concerned its assessment of F.G.'s political activities.

Nor was there any evidence in the case to indicate that the Swedish authorities had not duly taken the risk of detention at the airport into account when assessing globally the risk faced by the applicant if returned to Iraq.

Finally, as to the applicant's allegation before the Grand Chamber that the Iranian authorities could identify him from the judgments delivered by the European Court, the Court pointed out that the applicant had been granted anonymity in October 2011 and that, based on the material before the Court, there were no strong indications of an identification risk.

It followed that, if F.G. were to be expelled to Iran, Articles 2 and 3 of the Convention would not be violated on account of his political past in the country.

F.G.'s conversion to Christianity

The Court noted that F.G. had lived almost the whole of his life in Iran, spoke English well and was experienced with computers, web pages and the Internet. He was also a regime critic. It was thus difficult to accept that he would not have become aware of the risk for converts in Iran either by himself or via the church where he was baptised shortly after his arrival in Sweden. Nor was the Court convinced that F.G. had not been provided with sufficient legal advice and support to understand the risk associated with his conversion.

Turning to the Swedish authorities, the Court noted that the Migration Board and the Migration Court were aware that F.G. had converted in Sweden from Islam to Christianity and that he might therefore belong to a group of persons who could be at risk upon returning to Iran. However, due to the fact that the applicant had declined to invoke the conversion as an asylum ground, they had not carried out a thorough examination of his conversion, the seriousness of his beliefs, the way he manifested his Christian faith in Sweden, or how he intended to manifest it in Iran if the removal order were to be executed. Moreover, in the reopening proceedings the conversion was not considered a "new circumstance" which could justify a re-examination of his case. The Swedish authorities had therefore so far never made an assessment of the risk that F.G. could encounter, as a result of his conversion, upon returning to Iran. The Court considered that, regardless of the applicant's conduct, the national authorities would now be under an obligation – given the absolute nature of Articles 2 and 3 of the Convention – to make a fresh assessment, of their own motion, of all the information brought to their attention before taking a decision on his removal to Iran.

Moreover, before the Grand Chamber F.G. has submitted various documents which have not been presented to the national authorities, notably two written statements: the first dated 13 September 2014 concerning his conversion, the way he currently manifests his Christian faith in Sweden and how he intends to manifest it in Iran if the removal order is executed; and the second dated 15 September 2014 from a former pastor at the applicant's church. In light of this material in particular as well as material previously submitted to the national authorities, the Court concluded that F.G. had sufficiently shown that his claim for asylum on the basis of his conversion warranted an assessment by the national authorities. It was for the domestic authorities to take this material into account, as well as any further development regarding the general situation in Iran and the particular circumstances of F.G.'s situation.

The full texts of the Court's judgments are accessible on its website (<http://www.hudoc.echr.coe.int>)

It followed that there would be a violation of Articles 2 and 3 of the Convention if F.G. were to be returned to Iran without a fresh and up-to-date assessment being made by the Swedish authorities of the consequences of his conversion.

Article 41 (just satisfaction)

The Court held that Sweden was to pay the applicant 33,742 euros (EUR) for costs and expenses.

Separate opinions

Judge Bianku expressed a concurring opinion. Judge Jäderblom expressed a partly concurring, partly dissenting opinion, joined in respect of part 1 by Judge Spano. Judges Ziemele, De Gaetano, Pinto de Albuquerque and Wojtyczek expressed a joint separate opinion. Judge Sajó expressed a separate opinion. These opinions are annexed to the judgment.

107. Eur.Court HR, Avotiņš v. Latvia, Grand Chamber Judgment of 23 May 2016, Application No. 17502/07, (Article 6-1, Right to a Fair Hearing within a Reasonable Time – No Violation). The applicant complained to the Court that in issuing a declaration of enforceability in respect of a judgment from the Cypriot courts, which had been given in breach of his defence rights, the Latvian Supreme Court had infringed his right to a fair trial leading the Court in its judgment to examine observance of the guarantees of a fair hearing in the context of mutual recognition in civil and commercial matters based on European Union law, specifically the Brussels I Regulation.

ECHR 165 (2016)
23.05.2016

Press release issued by the Registrar

In today's **Grand Chamber** judgment in the case of Avotiņš v. Latvia (application no. 17502/07) the European Court of Human Rights held, by a majority, that there had been:

no violation of Article 6 § 1 (right to a fair hearing) of the European Convention on Human Rights.

The case concerned a judgment given by a Cypriot court ordering the applicant to pay a debt he had contracted with a Cypriot company, and the order made by the Latvian courts for the enforcement of the Cypriot judgment in Latvia.

The Court reiterated that, when applying European Union law, the Contracting States remained bound by the obligations they had entered into on acceding to the European Convention on Human Rights. Those obligations were to be assessed in the light of the presumption of equivalent protection established by the Court in the *Bosphorus* judgment and developed in the *Michaud* judgment.

The Court held in particular that it had been up to Mr Avotiņš himself, after he became aware of the judgment given in Cyprus, to enquire as to the remedies available in Cyprus. The Court considered that Mr Avotiņš should have been aware of the legal consequences of the acknowledgment of debt deed which he had signed. That deed, governed by Cypriot law, had concerned a sum of money which he had borrowed from a Cypriot company, and contained a clause conferring jurisdiction on the Cypriot courts. Accordingly, Mr Avotiņš should have ensured that he was familiar with the manner in which possible proceedings would be conducted before the Cypriot courts. As a result of his inaction and lack of diligence, Mr Avotiņš had contributed to a large extent to the situation of which he complained before the Court and which he could have prevented.

The Court did not consider that the protection of fundamental rights had been manifestly deficient such that the presumption of equivalent protection was rebutted.

Principal facts

The applicant, Peteris Avotiņš, is a Latvian national who was born in 1954 and lives in Garkalne (Riga district). At the time of the events he was an investment consultant.

On 4 May 1999 Mr Avotiņš and F.H. Ltd, a commercial company incorporated under Cypriot law, signed an acknowledgment of debt deed before a notary, under the terms of which Mr Avotiņš declared that he had borrowed 100,000 United States dollars from F.H. Ltd. and undertook to repay

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that sum with interest by 30 June 1999. The deed specified that it was governed in all respects by Cypriot law and that the Cypriot courts had non-exclusive jurisdiction to hear any disputes arising out of it. It gave the applicant's address as G. Street in Riga.

In 2003 F.H. Ltd. brought proceedings against Mr Avotiņš in the Limassol District Court in Cyprus, alleging that he had not repaid the debt and requesting that he be ordered to pay it together with interest. On 24 July 2003 a summons was drawn up which gave Mr Avotiņš's address as G. Street in Riga. Since the applicant was not resident in Cyprus, F.H. Ltd. applied to the same District Court on 11 September 2003 seeking an order enabling a summons to be served on Mr Avotiņš outside the country and requiring him to appear within 30 days from the date of issuing of the summons. Mr Avotiņš contended that he could not have received the summons at the address in question, which was neither his home nor his business premises.

On 7 October 2003 the Limassol District Court ordered that notice of the proceedings be served on Mr Avotiņš at the address in G. Street in Riga. Mr Avotiņš claimed never to have received the summons.

As Mr Avotiņš did not appear, the Limassol District Court ruled in his absence on 24 May 2004.

On 22 February 2005 F.H. Ltd. applied to the Riga City Latgale District Court seeking recognition and enforcement of the judgment of 24 May 2004 and also sought to have a temporary precautionary measure applied. The request gave as Mr Avotiņš's place of residence an address which differed from the one previously notified.

In an order of 27 February 2006 the Latgale District Court granted the company's request in full. It ordered the recognition and enforcement of the Limassol District Court's judgment of 24 May 2004 and the entry in the land register of a charge on the property owned by Mr Avotiņš.

Mr Avotiņš alleged that it was not until 15 June 2006 that he had learned, from the bailiff responsible for enforcement of the Cypriot judgment, of the existence of that judgment and of the Latgale District Court order for its enforcement. He did not attempt to appeal against the Cypriot judgment in the Cypriot courts, but lodged an appeal against the order of 27 February 2006 with the Riga Regional Court, while asking the District Court to extend the time allowed for lodging the appeal. He maintained that the statutory 30-day period should start running on 16 June 2006, the date on which he had taken cognisance of the order in question. The District Court granted his request and extended the time-limit for lodging an appeal.

In his appeal Mr Avotiņš contended that the recognition and enforcement of the Cypriot judgment in Latvia breached Council Regulation (EC) No 44/2001 of 22 December 2000 ("the Brussels I Regulation") and several provisions of the Latvian Civil Procedure Law. He alleged in particular that he had not been duly informed of the proceedings in Cyprus and that the document instituting the proceedings had not been served on him in sufficient time and in such a way as to enable him to arrange for his defence.

In a judgment of 2 October 2006 the Riga Regional Court quashed the impugned order and rejected the request for recognition and enforcement of the Cypriot judgment. F.H. Ltd. lodged an appeal against that judgment with the Senate of the Supreme Court, which on 31 January 2007 quashed and annulled the judgment of 2 October 2006. It granted F.H. Ltd.'s request and ordered the recognition and enforcement of the Cypriot judgment. As to Mr Avotiņš's argument that he had not been duly notified of the examination of the case by the Cypriot court, the Supreme Court found that it "lack[ed] relevance" since the applicant had not appealed against the judgment in Cyprus.

Complaints, procedure and composition of the Court

The full texts of the Court's judgments are accessible on its website (<http://www.hudoc.echr.coe.int>)

Relying on Article 6 § 1, the applicant complained that in issuing a declaration of enforceability in respect of the Cypriot judgment of 24 May 2004, which in his view was clearly defective as it had been given in breach of his defence rights, the Senate of the Latvian Supreme Court had infringed his right to a fair hearing.

The application was lodged with the European Court of Human Rights on 20 February 2007.

In its judgment of 25 February 2014 the Chamber held by four votes to three that there had been no violation of Article 6 § 1 of the Convention.

On 23 May 2014 the applicant requested that the case be referred to the Grand Chamber under Article 43 of the Convention (referral to the Grand Chamber). On 8 September 2014 the panel of the Grand Chamber granted that request. A hearing was held on 8 April 2015.

Judgment was given by the Grand Chamber of 17 judges, composed as follows:

András **Sajó** (Hungary), *President*,
 Işıl **Karakaş** (Turkey),
 Josep **Casadevall** (Andorra),
 Elisabeth **Steiner** (Austria),
 Ján **Šikuta** (Slovakia),
 Nona **Tsotsoria** (Georgia),
 Ganna **Yudkivska** (Ukraine),
 André **Potocki** (France),
 Paul **Lemmens** (Belgium),
 Aleš **Pejchal** (the Czech Republic),
 Faris **Vehabović** (Bosnia and Herzegovina),
 Ksenija **Turković** (Croatia),
 Egidijus **Kūris** (Lithuania),
 Robert **Spano** (Iceland),
 Iulia **Motoc** (Romania),
 Jon Fridrik **Kjølbro** (Denmark) and,
 Jautrīte **Briede** (Latvia), *ad hoc Judge*,
 and also Johan **Callewaert**, *Deputy Grand Chamber Registrar*.

Decision of the Court

Article 6 § 1

The Court observed that it had never previously been called upon to examine observance of the guarantees of a fair hearing in the context of mutual recognition in civil and commercial matters based on European Union law. In the present case it had to determine whether the review conducted by the Senate of the Latvian Supreme Court had been sufficient for the purposes of Article 6 § 1.

The Court noted that the recognition and enforcement of the Cypriot judgment had taken place in accordance with Council Regulation (EC) No 44/2001 of 22 December 2000, known as the Brussels I Regulation, which had been applicable at the relevant time. Mr Avotiņš alleged that the Senate of the Supreme Court had breached Article 34(2) of that Regulation and the corresponding provision of the Latvian Civil Procedure Law.

The Court reiterated that it was not competent to rule on compliance with domestic law, other international treaties or European Union law. The task of interpreting and applying the provisions of the Brussels I Regulation fell firstly to the Court of Justice of the European Union (CJEU), and

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secondly to the domestic courts in giving effect to the Regulation as interpreted by the CJEU. The Court's jurisdiction was limited to reviewing compliance with the requirements of the Convention.

The Court reiterated that, when applying European Union law, the Contracting States remained bound by the obligations they had entered into on acceding to the Convention. Those obligations were to be assessed in the light of the presumption established by the Court in the *Bosphorus* judgment and developed in the *Michaud* judgment.

In the *Bosphorus* judgment (§ 72) the Court had held that the protection of fundamental rights afforded by the legal system of the European Union was in principle equivalent to that for which the Convention provided. In *Michaud* (§ 106) it had stressed that this finding applied *a fortiori* since 1 December 2009, the date of entry into force of Article 6 (amended) of the Treaty on European Union, which gave fundamental rights, as guaranteed by the Convention and as they resulted from shared constitutional traditions, the status of general principles of European Union law. The Court had also recognised that the mechanism provided for by European Union law for supervising observance of fundamental rights likewise afforded protection comparable to that for which the Convention provided. The Court had attached considerable importance to the role and powers of the CJEU, despite the fact that individual access to that court was more limited than access to the Strasbourg Court.

The application of the presumption of equivalent protection in the legal system of the European Union was subject to two conditions: the absence of any margin of manoeuvre on the part of the domestic authorities and the deployment of the full potential of the supervisory mechanism provided for by European Union law.

With regard to the first condition, the Court noted that the provision in question had been contained in a Regulation, which was directly applicable, and not in a Directive, which would have been binding on the State with regard to the result to be achieved but would have left it to the State to choose the means and manner of achieving it. As to the provision applied in the instant case – Article 34(2) of the Brussels I Regulation – the Court noted that it had allowed the refusal of recognition or enforcement of a foreign judgment only within very precise limits and subject to certain conditions. It was clear from the interpretation given by the CJEU in a fairly extensive body of case-law that this provision did not confer any discretion on the court from which the declaration of enforceability was sought. The Court concluded that the Senate of the Latvian Supreme Court had not enjoyed any margin of manoeuvre in this case. Article 34(2) of the Brussels I Regulation had not granted States any discretionary powers of assessment.

With regard to the second condition, the Court observed that it had recognised in the *Bosphorus* judgment that the supervisory mechanisms put in place within the European Union afforded a level of protection equivalent to that for which the Convention mechanism provided. It noted that the Senate of the Supreme Court had not requested a preliminary ruling from the CJEU regarding the interpretation and application of Article 34(2) of the Regulation. Nevertheless, it noted that Mr Avotiņš had not advanced any specific argument concerning the interpretation of Article 34(2) of the Brussels I Regulation and its compatibility with fundamental rights such as to warrant a finding that a preliminary ruling should have been sought from the CJEU. Likewise, he had not requested the Senate of the Latvian Supreme Court to seek a preliminary ruling.

The Court concluded that the presumption of equivalent protection was applicable in the present case, as the Senate of the Supreme Court had done no more than implement Latvia's legal obligations arising out of its membership of the European Union.

The Court observed that the Brussels I Regulation was based on mutual recognition mechanisms founded on the principle of mutual trust between the Member States of the European Union. The

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Court had repeatedly asserted its commitment to international and European cooperation. It considered the creation of an area of freedom, security and justice in Europe, and the adoption of the means necessary to achieve it, to be wholly legitimate from the standpoint of the Convention. Nevertheless, the methods used to create that area must not infringe the fundamental rights of the persons affected by the resulting mechanisms. However, it was apparent that the aim of effectiveness pursued by some of those methods resulted in the review of the observance of fundamental rights being tightly regulated or even limited. Limiting to exceptional cases the power of the State in which recognition was sought to review the observance of fundamental rights by the State of origin of the judgment could run counter to the requirement imposed by the Convention according to which the court in the State addressed must be empowered to conduct a review in order to ensure that the protection of those rights was not manifestly deficient.

The Court further observed that where the domestic authorities gave effect to European Union law and had no discretion in that regard, the presumption of equivalent protection was applicable. This was the case where the mutual recognition mechanisms required the court to presume that the observance of fundamental rights by another Member State had been sufficient. The domestic court was thus deprived of its discretion in the matter, leading to automatic application of the presumption of equivalence. Accordingly, the Court had to satisfy itself, where the conditions for application of the presumption of equivalent protection were met, that the mutual recognition mechanisms did not leave any gap or particular situation which would render the protection of the human rights guaranteed by the Convention manifestly deficient. It had to verify that the principle of mutual recognition was not applied automatically and mechanically to the detriment of fundamental rights. Where the courts of a State which was both a Contracting Party to the Convention and a Member State of the European Union were called upon to apply a mutual recognition mechanism established by EU law, and a serious and substantiated complaint was raised before them to the effect that the protection of a Convention right had been manifestly deficient and that this situation could not be remedied by European Union law, they could not refrain from examining that complaint on the sole ground that they were applying EU law.

The Court considered that the requirement to exhaust remedies arising from the mechanism provided for by the Brussels I Regulation, as interpreted by the CJEU (the defendant must have made use of any remedies available in the State of origin), was not problematic in terms of the guarantees of Article 6 § 1. This was a precondition which was based on an approach similar to that underpinning the rule of exhaustion of domestic remedies set forth in Article 35 § 1 of the Convention. States were dispensed from answering before an international body for their acts before they had had an opportunity to put matters right through their own legal system, and it was presumed that there was an effective remedy available in the domestic system in respect of the alleged breach.

In the present case the Court noted that, in the proceedings before the Senate of the Supreme Court, Mr Avotiņš had complained that he had not received any summons or been notified of the Cypriot judgment. He had relied on the grounds for non-recognition provided for by the Brussels I Regulation. That provision stated expressly that such grounds could be invoked only on condition that proceedings had previously been commenced to challenge the judgment in question, in so far as it was possible to do so. The fact that Mr Avotiņš had not challenged the judgment as required necessarily raised the question of the availability of that legal remedy in Cyprus. The Senate had thus not been entitled simply to criticise the applicant, as it had done in its judgment of 31 January 2007, for not appealing against the judgment concerned, and to remain silent on the issue of the burden of proof with regard to the existence and availability of a remedy in the State of origin.

Nevertheless, in the circumstances of the case Cypriot law had afforded Mr Avotiņš, after he had learned of the existence of the judgment, a perfectly realistic opportunity of appealing despite the length of time that had elapsed since the judgment. In accordance with Cypriot law, where a defendant against whom a judgment had been given in default applied to have that judgment set aside

The full texts of the Court's judgments are accessible on its website (<http://www.hudoc.echr.coe.int>)

and alleged that he or she had not been duly summoned before the court which gave judgment, the court hearing the application was required – and not merely empowered – to set aside the judgment given in default. Accordingly, the Court was not convinced by Mr Avotiņš's argument that such a procedure would have been bound to fail. In the period between 16 June 2006 (the date on which he had been able to acquaint himself with the content of the Cypriot judgment and the entire case file) and 31 January 2007 (the date of the hearing of the Senate of the Supreme Court), Mr Avotiņš had had sufficient time to pursue a remedy in the Cypriot courts, but had made no attempt to do so.

The Court did not consider that the protection of fundamental rights had been manifestly deficient such that the presumption of equivalent protection was rebutted.

The Court held by sixteen votes to one that there had been no violation of Article 6 § 1.

Separate opinions

Judge Lemmens and Judge Briede expressed a joint concurring opinion and Judge Sajó expressed a dissenting opinion. These opinions are annexed to the judgment.

108. Eur.Court HR, Beortegui Martinez v. Spain, Third Section Judgment of 31 May 2016, Application No. 36286/14, (Article 3, Prohibition of Torture – Violation, on account of the investigation conducted by the national authorities; Article 3, Prohibition of Torture – No Violation, as regards the applicant’s allegation of ill-treatment during his arrest and in police custody). The applicant complained that there had been no effective investigation into his complaint of having been ill-treated while held incommunicado in police custody and the Court in its judgment assessed the conditions of detention of the applicant, referring to the importance of adopting the measures recommended by the European Committee for the Prevention of Torture (CPT) and the reports by the Council of Europe Commissioner for Human Rights.

ECHR 179 (2016)
31.05.2016

Press release issued by the Registrar

The case **Beortegui Martinez v. Spain** (application no. 36286/14) concerned the alleged failure to investigate an allegation by Mr Beortegui Martinez that he was ill-treated by four *Guardia Civil* officers while detained incommunicado in police custody on suspicion of belonging to a terrorist organisation.

In today’s **Chamber** judgment in the case the European Court of Human Rights held, unanimously, that there had been:

a violation of Article 3 (prohibition of torture and inhuman or degrading treatment) of the European Convention on Human Rights on account of the **investigation conducted by the national authorities**,
 and

no violation of Article 3 as regards the applicant’s **allegation of ill-treatment** during his arrest and in police custody.

The Court found in particular that there had not been a thorough and effective investigation into Mr Beortegui Martinez’s allegations of ill-treatment during his incommunicado detention in police custody. As a result of the lack of a thorough and effective investigation by the national authorities, the Court did not have enough evidence to determine whether Mr Beortegui Martinez had been subjected to treatment attaining the minimum level of severity to fall within the scope of Article 3.

The Court also reiterated the importance of adopting the measures recommended by the European Committee for the Prevention of Torture (CPT) with a view to improving the quality of forensic medical examinations of individuals held incommunicado in police custody and urged the Spanish authorities to draw up a clear code of conduct for officers responsible for supervising such individuals as to the procedures for questioning them and for ensuring their physical integrity.

Principal facts

The applicant, Xabier Beortegui Martinez, is a Spanish national who was born in 1980 and lives in Pamplona (Spain).

The full texts of the Court’s judgments are accessible on its website (<http://www.hudoc.echr.coe.int>)

On the night of 17 to 18 January 2011 Mr Beortegui Martinez was arrested at home by police officers in the context of a judicial investigation into a suspected offence of membership of EKIN, an organisation attached to the terrorist group ETA. His home was searched. During the journey by car to Madrid, Mr Beortegui Martinez, who was handcuffed, was allegedly subjected to threats and insults and was struck on the head, testicles and ribs by the four *Guardia Civil* officers accompanying him. On his arrival in Madrid he was taken to the *Guardia Civil* headquarters and placed in incommunicado police custody. According to his allegations, he was forced to wear a mask over his eyes, subjected to episodes of asphyxiation, touched indecently and threatened with the insertion of electrodes and a truncheon into his anus.

On 18, 19, 20 and 21 January 2011 Mr Beortegui Martinez was examined by forensic specialists.

On 21 January 2011, at around 1 a.m., Mr Beortegui Martinez gave evidence in the presence of an officially appointed lawyer. At an unspecified time later that day he was allegedly given a statement consisting of 20 questions with 20 pre-written answers, which he had to learn by heart. He was then brought before the central investigating judge at the *Audiencia Nacional*. In his statement to the judge Mr Beortegui Martinez retracted the contents of the statement he had signed while in police custody. The judge did not order any investigative measures and Mr Beortegui Martinez was released.

On 16 May 2011 Mr Beortegui Martinez, assisted by two lawyers, filed a criminal complaint with the Pamplona duty judge, alleging that he had been subjected to ill-treatment while in incommunicado police custody. On 14 December 2011 he gave a statement to the Pamplona investigating judge and maintained his initial complaint. On 5 March 2012 the investigating judge made a provisional discharge order, finding that there was no evidence of the alleged ill-treatment. Mr Beortegui Martinez appealed. In a decision of 31 October 2012 the Navarre *Audiencia Provincial* noted that the gravity of the alleged offence warranted a thorough investigation but that this did not grant the applicant an unlimited right to have all evidence adduced as he wished. It upheld the discharge order. Mr Beortegui Martinez lodged an *amparo* appeal with the Constitutional Court, which declared it inadmissible.

Complaints, procedure and composition of the Court

Relying on Article 3 (prohibition of torture and inhuman or degrading treatment), Mr Beortegui Martinez complained that there had been no effective investigation into his complaint that he had been subjected to ill-treatment while held incommunicado in police custody.

The application was lodged with the European Court of Human Rights on 7 May 2014.

Judgment was given by a Chamber of seven judges, composed as follows:

Helena **Jäderblom** (Sweden), *President*,
 Luis **López Guerra** (Spain),
 Helen **Keller** (Switzerland),
 Johannes **Silvis** (the Netherlands),
 Branko **Lubarda** (Serbia),
 Pere **Pastor Vilanova** (Andorra),
 Alena **Poláčková** (Slovakia),
 and also Stephen **Phillips**, *Section Registrar*.

Decision of the Court

Article 3

The full texts of the Court's judgments are accessible on its website (<http://www.hudoc.echr.coe.int>)

The Court noted that Mr Beortegui Martinez had been held incommunicado in police custody for three days, during which time he had been unable to inform a person of his choice about his detention, or to be assisted by a lawyer of his own choosing, as provided by the rules applicable to incommunicado detention in police custody. He had also allegedly been unable to confer with his officially appointed lawyer in private before giving his statement while in custody.

In the criminal complaint filed with the duty judge on 16 May 2011 Mr Beortegui Martinez had given a specific and detailed description of the ill-treatment to which he claimed to have been subjected while held incommunicado in police custody.

The seriousness of the offences forming the subject of his complaint had warranted a thorough investigation by the State, as the Navarre *Audiencia Provincial* had noted in its decision of 31 October 2012.

As regards the investigative steps taken by the national authorities, the Court observed that the Pamplona investigating judge had simply examined the reports by the forensic medical experts, the applicant's general practitioner and a psychologist who had examined him. However, Mr Beortegui Martinez had asked for a number of other evidence-gathering measures to be taken, namely: production of the various statements he had given while in incommunicado police custody; production of any security camera recordings at the premises where he had been detained; identification and examination by the judge of the *Guardia Civil* officers involved in taking him into custody and supervising him during his detention; an examination of the forensic medical experts who had examined him, and of the officially appointed lawyer; and a physical and psychological examination in order to establish the existence of any injuries or after-effects. His requests had not been taken into consideration by the Pamplona investigating judge.

As regards the time that had elapsed between Mr Beortegui Martinez's release and the filing of his complaint – three months and 25 days – the Court reiterated that the obligation to apply promptly to the domestic authorities had to be assessed in the light of the circumstances of the case. It noted that on 21 January 2011 Mr Beortegui Martinez had been brought before the central investigating judge at the *Audiencia Nacional*, whom he had informed of the ill-treatment to which he had allegedly been subjected during and after his transfer to Madrid. However, the central investigating judge had not ordered any investigative measures and had not referred the case to any other competent court. Bearing in mind the vulnerable position of Mr Beortegui Martinez following his detention and the fact that the court dealing with the accusations against him had not initiated an investigation of its own motion, it could not be concluded that the delay by Mr Beortegui Martinez in making another complaint about the ill-treatment had been such as to undermine the effectiveness of the investigation or cast doubt on the seriousness of his complaint.

The Court reiterated that where there were reasonable grounds to believe that acts of ill-treatment had been committed, the competent State authorities had a duty to initiate an investigation promptly of their own motion. The Court again stressed the importance of adopting the measures recommended by the European Committee for the Prevention of Torture (CPT) with a view to improving the quality of forensic medical examinations of individuals being held incommunicado in police custody. It also took note of the CPT's reports on its visits to Spain in 2007 and 2011 and the report by the Council of Europe Commissioner for Human Rights [Reports of 25 March 2011 and 30 April 2013 by the CPT and report of 9 October 2013 by the Council of Europe Commissioner for Human Rights] and indicated that the Spanish authorities should draw up a clear code of conduct for officers responsible for supervising those held incommunicado as to the procedures for questioning them and for ensuring their physical integrity.

Having regard to the lack of a thorough and effective investigation into Mr Beortegui Martinez's arguable claims that he had been ill-treated while held incommunicado in police custody, the Court found that there had been a violation of Article 3 in its aspect relating to the investigation.

As regards the allegations of ill-treatment during detention, the Court was unable to establish from the evidence before it that Mr Beortegui Martinez had been subjected to treatment attaining the minimum level of severity to fall within the scope of the prohibition in Article 3. It pointed out that this inability was largely the result of the national authorities' failure to carry out a thorough and effective investigation after Mr Beortegui Martinez had filed his complaint, a shortcoming that had prompted the Court to find a violation of Article 3 in its procedural aspect. Accordingly, the Court was unable to find a substantive violation of Article 3 in respect of the ill-treatment to which the applicant claimed to have been subjected during his arrest and in police custody.

Article 41 (just satisfaction)

The Court held that Spain was to pay the applicant 20,000 euros (EUR) in respect of non-pecuniary damage and EUR 3,500 in respect of costs and expenses.

109. Eur.Court HR, R.D. v. France, Fifth Section Judgment of 16 June 2016, Application No. 34648/14, (Article 3, Prohibition of Torture – Violation, in the event of Ms R.D.’s removal to Guinea; Article 13, Right to an Effective Remedy, taken in conjunction with Article 3– No Violation). The applicant, a Guinean national who had been subjected to violent reprisals from her Muslim father and brothers following her marriage to a Christian, successfully argued that her deportation from France back to Guinea would put her at risk of ill-treatment.

ECHR 207 (2016)

16.06.2016

Press release issued by the Registrar

The applicant, Ms R.D., is a Guinean national who was born in 1993 and lives in Neuilly-sur-Seine (France). The case concerned the procedure for her deportation to Guinea. She is married to a Christian and has endured all sorts of violent reprisals on the part of her Muslim father and brothers.

Ms R.D., who is from Conakry (Guinea), states that her family are Muslim and her father an imam. In 2010 she met X, who is a Christian, and they kept their relationship secret. In March 2012 X asked for her hand in marriage. R.D.’s father categorically refused to allow his daughter to marry a non-Muslim. R.D.’s father and brothers threatened to kill her if she continued the relationship. Ms R.D. ran away from home and took refuge at X’s house. They married in November 2012, when she was three months’ pregnant. In December 2012 her father, brothers and half-brothers burst into the house she shared with her husband, X. They beat her up and brought her back to her father’s house by force. The police, who had been alerted by the neighbours, went to the house and found her tied to a tree. She was released and taken to hospital where she learnt that she had lost her child. She was kept in hospital for two months. She then took refuge with an uncle in a town 800 km from Conakry. Meanwhile, her father, an influential imam, had her husband arrested. Her in-laws’ house was wrecked. When threatened with being discovered at her uncle’s house, Ms R.D. fled. She left Guinea for France.

After arriving in France in February 2014 she sought help from associations in Reims in obtaining an address for administrative purposes so that she could lodge an asylum application. After being alerted by compatriots and fearing that her father would find her in France, she attempted to escape and was arrested at the gare du Nord in Paris. On 28 April 2014 the authorities served her with an order for her immediate removal to Guinea and an administrative detention order. She unsuccessfully sought judicial review in the Paris Administrative Court. On 30 April 2014 she lodged an asylum application which was processed under the fast-track procedure and rejected. An appeal Rule 39 of the Rules of Court (interim measures), not to deport R.D. to Guinea for the duration of the proceedings before it.

Ms R.D. alleged that enforcement of her deportation to Guinea would expose her to a risk of treatment contrary to Article 3 (prohibition of torture and inhuman or degrading treatment) of the European Convention on Human Rights. Relying on Article 13 (right to an effective remedy) of the European Convention taken in conjunction with Article 3, she complained that, owing to the examination of her asylum application under the fast-track procedure, she had not had an effective remedy under French law by which to assert her complaint under Article 3.

Violation of Article 3 – in the event of Ms R.D.’s removal to Guinea

The full texts of the Court’s judgments are accessible on its website (<http://www.hudoc.echr.coe.int>)

No violation of Article 13 taken in conjunction with Article 3

Interim measure (Rule 39 of the Rules of Court) - not to deport Ms R.D.– still in force until this judgment becomes final or until further order.

Just satisfaction: The applicant did not submit a claim for just satisfaction

- 110. Eur.Court HR, Nait-Liman v. Switzerland, Second Section Judgment of 21 June 2016, Application No. 51357/07, (Article 6, Right to a Fair Trial – No Violation).** Following the refusal of the Swiss civil courts to examine the applicant's civil claim for compensation in respect of the non-pecuniary damage caused by his alleged torture in Tunisia, the Court held that the decision of the Swiss Courts to decline universal jurisdiction, despite the absolute prohibition on torture under international law, had not violated the applicant's rights.

ECHR 216 (2016)

21.06.2016

Press release issued by the Registrar

In today's **Chamber** judgment in the case of **Nait-Liman v. Switzerland** (application no. 51357/07) the European Court of Human Rights held, by a majority, that there had been:

no violation of Article 6 § 1 (right of access to a court) of the European Convention on Human Rights

The case concerned the refusal of the Swiss civil courts to examine Mr Naït-Liman's civil claim for compensation in respect of the non-pecuniary damage caused by his alleged torture in Tunisia. The Court found that the decision of the Swiss courts to decline jurisdiction to hear Mr Naït-Liman's civil action despite the absolute prohibition on torture under international law had not violated his right of access to a court, had pursued legitimate aims and had been proportionate to those aims. It followed that there had been no violation of the right of access to a court concerning both the action against Tunisia and the action against A.K., the then Tunisian Minister of the Interior.

Principal facts

The applicant, Abdennacer Naït-Liman, is a Tunisian national who has acquired Swiss nationality. He was born in 1962 and lives in Versoix in the Canton of Geneva.

According to the applicant, he was arrested on 22 April 1992 by the Italian police at his place of residence in Italy and taken to the Tunisian consulate in Genoa. He was presented with a bill of indictment according to which he represented a threat to Italian State security. He was then taken to Tunis by Tunisian agents. Mr Naït-Liman alleges that, from 24 April to 1 June 1992, he was arbitrarily detained and tortured in Tunis at the premises of the Ministry of the Interior on the orders of A.K., the then Minister of the Interior.

Following the alleged torture, Mr Naït-Liman fled Tunisia in 1993 for Switzerland, where he applied for political asylum. The Swiss authorities granted him asylum on 8 November 1995.

On 14 February 2001 Mr Naït-Liman lodged a criminal complaint with the Principal Public Prosecutor for the Canton of Geneva against A.K., while the latter was in hospital in Switzerland. Mr Naït-Liman applied to join the proceedings as a civil party seeking damages. On 19 February 2001 the Principal Public Prosecutor made an order discontinuing the proceedings on the grounds that A.K. had left Switzerland and the police had been unable to arrest him.

On 8 July 2004 the applicant lodged a claim for damages with the District Court against Tunisia and against A.K. The District Court declared the claim inadmissible on the ground that the court lacked

The full texts of the Court's judgments are accessible on its website (<http://www.hudoc.echr.coe.int>)

territorial jurisdiction. It found that the Swiss courts did not have jurisdiction by necessity in the case at hand, owing to the lack of a sufficient link connecting the alleged facts with Switzerland. Mr Naït-Liman lodged an appeal with the Cantonal Court of Justice, which dismissed his claims on the Chamber judgment of 21 November 2001 in the case of *Al-Adsani v. the United Kingdom*.

Mr Naït-Liman lodged an appeal with the Federal Court which was dismissed on 22 May 2007. The Federal Court considered that the Swiss courts in any event lacked territorial jurisdiction.

On 14 May 2007 Mr Naït-Liman obtained Swiss nationality from the town of Versoix, which confirmed its consent on 25 May 2007.

Complaints, procedure and composition of the Court

Relying on Article 6 § 1 (right of access to a court), Mr Naït-Liman complained of the fact that the Swiss courts had declined jurisdiction to examine the substance of his claim for damages in respect of the acts of torture to which he alleged that he had been subjected in Tunisia.

The application was lodged with the European Court of Human Rights on 20 November 2007.

Judgment was given by a Chamber of seven judges, composed as follows:

Işıl **Karakaş** (Turkey), *President*,
 Nebojša **Vučinić** (Montenegro),
 Helen **Keller** (Switzerland),
 Paul **Lemmens** (Belgium),
 Egidijus **Kūris** (Lithuania),
 Robert **Spano** (Iceland),
 Jon Fridrik **Kjølbro** (Denmark),
 and also Stanley **Naismith**, *Section Registrar*.

Decision of the Court

Article 6 § 1

The Court found that the refusal to entertain Mr Naït-Liman's civil action had been aimed at ensuring the proper administration of justice. It shared the Government's view that universal jurisdiction, in a civil context, would risk creating considerable practical difficulties for the courts, particularly regarding the administration of evidence and the enforcement of such judicial decisions. Furthermore, the acceptance of universal jurisdiction would be liable to cause undesirable interference by a country in the internal affairs of another country. Accordingly, the Court concluded that the refusal of the Swiss courts to examine the substance of Mr Naït-Liman's action had pursued legitimate aims.

The Court reiterated that it was for the national authorities, particularly the courts, to interpret domestic law. It could not therefore call into question the assessment by the domestic authorities regarding alleged errors of law, save where these were arbitrary or manifestly unreasonable.

The Court observed that the decision of the domestic courts to decline jurisdiction was based on section 3 of the Federal Act on International Private Law ("the LDIP"). The Federal Court had concluded that there was no link between the applicant's claim and Switzerland, albeit that the Swiss authorities had granted him political asylum on 8 November 1995, precisely on account of the persecution suffered in his country of origin, and he had lived in Switzerland since then – that is, 11 and a half years – when the Federal Court had delivered its judgment on 22 May 2007.

The full texts of the Court's judgments are accessible on its website (<http://www.hudoc.echr.coe.int>)

The Federal Court's interpretation of section 3 of the LDIP was therefore not arbitrary. Moreover, the Swiss courts' decision that they lacked territorial jurisdiction did not appear unreasonable either having regard to the fact, observed by the Federal Court, that all the aspects of the case concerned Tunisia. The Swiss authorities had been justified in having regard to the problems of administering evidence and enforcing judgments that would arise as a result of accepting jurisdiction in such circumstances. The Court found that the Federal Court had also been justified in finding that the fact that Mr Naït-Liman had settled in Switzerland after the events had not altered the decision to declare that the Swiss courts lacked jurisdiction, that fact being subsequent to the cause of action and not being part of it. Confirmation of Mr Naït-Liman's acquisition of Swiss nationality, on 25 May 2007, had been made after adoption of the Federal Court's judgment of 22 May 2007 and could not therefore be taken into account.

The Court observed that the respondent State was not bound to accept universal jurisdiction in a civil context, despite the absolute prohibition on torture in international law. The wording of Article 14 of the Convention against Torture ratified by Switzerland was not unequivocal as to its extraterritorial application. Although the Committee against Torture had indicated that the application of Article 14 was not limited to victims of torture committed on the territory of the State Party or by or against a national of that State, that approach had not been followed by the States Parties to that instrument.

The Court concluded that no convention obligation had obliged Switzerland to accept Mr Naït-Liman's civil action. Nor had the Swiss authorities been under such an obligation under customary law since there was clearly no practice of States in favour of the existence of civil universal jurisdiction. It concluded that there had therefore been no violation of Article 6 § 1.

111. *Eur.Court HR, Al-Dulimi and Montana Management Inc. v. Switzerland, Grand Chamber Judgment of 21 June 2016, Application No. 5809/08, (Article 6-1, Right to a Fair Hearing within a Reasonable Time – Violation)*. The applicants, an Iraqi national living in Jordan and a Panama-based company of which the first applicant was the managing director, successfully claimed in an appeal from an earlier judgment that Switzerland's enforcement of the United Nations Security Council resolutions mandating the confiscation of the applicants' assets violated their Convention rights, especially in the absence of any procedure compatible with the Convention to challenge the asset freeze.

ECHR 219 (2016)
21.06.2016

Press release issued by the Registrar

In today's **Grand Chamber** judgment in the case of *Al-Dulimi and Montana Management Inc. v. Switzerland* (application no. 5809/08) the European Court of Human Rights held, by a majority, that there had been:

a violation of Article 6 § 1 (right to a fair hearing) of the European Convention on Human Rights.

The case concerned the freezing of the assets in Switzerland of Mr Al-Dulimi and the company Montana Management Inc. pursuant to UN Security Council Resolution 1483 (2003), which provided for sanctions against the former Iraqi regime.

The Court found that none of the provisions of Resolution 1483 (2003) expressly prohibited the Swiss courts from verifying, to ensure respect for human rights, the measures taken at national level to implement the Security Council's decisions. The inclusion of individuals and entities on the lists of persons subject to the UN sanctions entailed practical interferences that could be extremely serious for the Convention rights of those concerned.

In the Court's view, before taking those measures the Swiss authorities had a duty to ensure that the listings were not arbitrary. The Federal Court had merely verified that the applicants' names actually appeared on the Sanctions Committee's lists and that the assets concerned belonged to them. The applicants should, on the contrary, have been given at least a genuine opportunity to submit appropriate evidence to a court, for examination on the merits, to seek to show that their inclusion on the lists had been arbitrary. Consequently, the very essence of their right of access to a court had been impaired.

Lastly, noting that the UN sanctions system, and in particular the procedure for the listing of individuals and legal entities and the manner in which delisting requests were handled, had received very serious, reiterated and consistent criticisms, the Court found that access to the delisting procedure could not therefore replace appropriate judicial scrutiny at the level of the respondent State or even partly compensate for its absence.

Principal facts

The applicants are Mr Khalaf M. Al-Dulimi, an Iraqi national who was born in 1941 and lives in Amman (Jordan) and Montana Management Inc., a Panama-based company, of which the first

The full texts of the Court's judgments are accessible on its website (<http://www.hudoc.echr.coe.int>)

applicant is the managing director. According to the UN Security Council, he was finance manager for the Iraqi secret services under the regime of Saddam Hussein.

After Iraq invaded Kuwait on 2 August 1990 the UN Security Council adopted two Resolutions calling upon States, whether or not UN members, to impose a general embargo on Iraq, which also concerned confiscated Kuwaiti resources and air transport. On 7 August 1990 the Swiss Federal Council accordingly adopted the “Iraq Ordinance” to implement those economic measures against Iraq.

On 22 May 2003 the UN Security Council adopted Resolution 1483 (2003), imposing on States an obligation to “freeze without delay”, among other funds, the financial assets or economic resources acquired by senior officials of the former Iraqi regime and entities belonging to them. On 24 November 2003 the UN Security Council set up a Sanctions Committee responsible for drawing up a list of persons concerned by those measures and on 26 April 2004 the Committee added Mr Al-Dulimi and Montana Management Inc. to its list. On 12 May 2004 the applicants’ names were also added to the list of individuals and legal entities annexed to the Swiss Iraq Ordinance, as amended. Their assets in Switzerland were then frozen on that basis and the Federal Department for Economic Affairs subsequently initiated a confiscation procedure.

On 22 May 2006 the Federal Department for Economic Affairs sent the applicants a draft decision on the confiscation and transfer of the funds that were deposited in their names in Geneva. They challenged that decision unsuccessfully. Then in three decisions of 16 November 2006 the Federal Department for Economic Affairs ordered the confiscation of a certain number of assets, observing that the applicants’ names appeared on the lists of individuals and entities drawn up by the Sanctions Committee, that Switzerland was bound by the resolutions of the UN Security Council and that it could only delete a name from the Swiss sanctions list where the relevant decision had been taken by the UN Sanctions Committee. It also indicated that an administrative-law appeal could be lodged with the Federal Court against its decisions.

On 19 December 2006 the UN Security Council adopted Resolution 1730 (2006), which created a delisting procedure.

The applicants lodged appeals with the Federal Court against each of the Federal Department’s three decisions of 16 November 2006. They argued that the confiscation of their assets breached the property right guaranteed by the Swiss Federal Constitution and that the procedure leading to the addition of their names to the sanctions lists had breached the basic procedural safeguards enshrined in the International Covenant on Civil and Political Rights (ICCPR) of 16 December 1966, the European Convention on Human Rights and the Federal Constitution.

In three almost identical judgments, the Federal Court dismissed the appeals, confining itself to verifying that the applicants’ names actually appeared on the lists drawn up by the Sanctions Committee and that the assets concerned belonged to them.

On 13 June 2008 the applicants lodged a delisting application in accordance with the procedure introduced by Resolution 1730 (2006), but it was rejected. In a favourable opinion issued by the State Secretariat for Economic Affairs they were informed that they would be authorised to make use of the frozen assets to pay the fees charged by a lawyer for work on their defence in connection with the Swiss confiscation procedure and the delisting procedure.

Complaints, procedure and composition of the Court

The applicants complained that the confiscation of their assets had been ordered in the absence of any procedure compatible with Article 6 § 1 (right to a fair hearing) of the Convention.

The full texts of the Court’s judgments are accessible on its website (<http://www.hudoc.echr.coe.int>)

The application was lodged with the European Court of Human Rights on 1 February 2008.

In its Chamber judgment of 26 November 2013 the Court found, by four votes to three, that there had been a violation of Article 6 § 1.

On 25 February 2014 the Government requested that the case be referred to the Grand Chamber under Article 43 (referral to the Grand Chamber) and on 14 April 2014 the panel of the Grand Chamber accepted that request. The applicants and the Government filed further written observations. Comments were also received from the French and United Kingdom Governments, which had been given leave by the President to intervene in the proceedings. A hearing was held on 10 December 2014.

Judgment was given by the Grand Chamber of 17 judges, composed as follows:

Mirjana **Lazarova Trajkovska** (“The Former Yugoslav Republic of Macedonia”), *President*,
 Dean **Spielmann** (Luxembourg),
 Josep **Casadevall** (Andorra),
 Angelika **Nußberger** (Germany),
 Mark **Villiger** (Liechtenstein),
 Ineta **Ziemele** (Latvia),
 Khanlar **Hajiyev** (Azerbaijan),
 Vincent A. **de Gaetano** (Malta),
 Julia **Laffranque** (Estonia),
 Paulo **Pinto de Albuquerque** (Portugal),
 Linos-Alexandre **Sicilianos** (Greece),
 Helen **Keller** (Switzerland),
 André **Potocki** (France),
 Aleš **Pejchal** (the Czech Republic),
 Dmitry **Dedov** (Russia),
 Egidijus **Kūris** (Lithuania),
 Robert **Spano** (Iceland),
 and also Johan **Callewaert**, *Deputy Grand Chamber Registrar*.

Decision of the Court

Article 6 § 1

The Court began by reiterating that the right to a fair hearing had to be construed in the light of the rule of law, requiring that all litigants should have an effective judicial remedy enabling them to assert their civil rights. Everyone had the right to have any claim relating to his civil rights and obligations brought before a court or tribunal. However, as the Court had constantly found, the right of access to a court was not absolute, but might be subject to limitations, these being permitted by implication since the right of access by its very nature called for regulation by the State. The Contracting States enjoyed a certain room for manoeuvre (“margin of appreciation”) in such matters, although the final decision as to the observance of the Convention’s requirements rested with the Court, which had to be satisfied that the limitations applied had not restricted the individual’s access in such a way or to such an extent that the very essence of the right was impaired.

The Court found that, in its judgments of 23 January 2008, the Swiss Federal Court had set out very detailed reasons why it considered itself to be bound only to verify that the applicants’ names actually appeared on the Sanctions Committee’s lists and that the assets concerned belonged to them. On the other hand, it had refused to examine the applicants’ allegations concerning the compatibility of the

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confiscation procedure with the fundamental procedural safeguards of a fair hearing enshrined in the Convention. The Federal Court had invoked the absolute primacy of obligations stemming from the UN Charter and UN Security Council decisions in accordance therewith over other norms of international law; the very precise and detailed nature of the obligations imposed by Resolution 1483 (2003) did not leave the States any discretion. In those circumstances, the Court was of the view that the applicants' right of access to a court had clearly been restricted and that it remained to be examined whether that restriction was justified.

The Court observed that the confiscation of the applicants' assets had been ordered pursuant to Resolution 1483 (2003), adopted by the UN Security Council with the aim of imposing on member States a series of measures designed to further the stabilisation and development of Iraq. One of those measures was to ensure that the assets and property of senior officials of the former Iraqi regime – including Mr Al-Dulimi, considered by the Sanctions Committee to be a former head of finance of the Iraqi secret services – would be transferred to the Development Fund for Iraq. The Court acknowledged that the impugned decision was taken to implement an objective that was compatible with the Convention. It accepted the respondent Government's argument that the domestic courts' refusal to examine the applicants' complaints on the merits could be explained by their concern to ensure the efficient implementation, at domestic level, of the obligations under the Resolution. The refusal had thus pursued a legitimate aim, namely to maintain international peace and security.

The Court reiterated that, in spite of its specific nature as an instrument for the protection of human rights, the Convention was an international treaty to be interpreted in accordance with the relevant norms and principles of public international law, and, in particular, in the light of the Vienna Convention on the Law of Treaties of 23 May 1969, which, in Article 31 § 3 (c), provided that the interpretation of a treaty must take account of "any relevant rules of international law applicable in the relations between the parties".

The Court emphasised that one of the basic elements of the current system of international law was constituted by Article 103 of the UN Charter, which asserted the primacy, in the event of conflict, of the obligations deriving from the Charter over any other obligation arising from an international agreement. One of the Charter obligations, under Article 25, was "to accept and carry out the decisions of the Security Council in accordance with ... the Charter".

The respondent Government had argued that Switzerland had been confronted with a conflict between its UN Charter obligations and its Convention obligations and that it could not be resolved because Switzerland had no room for manoeuvre in the implementation of the UN Resolution. The Court referred to the purposes for which the United Nations was created: as well as to maintain international peace and security, Article 1 of the Charter provided that the United Nations was created "[t]o achieve international co-operation ... in promoting and encouraging respect for human rights and for fundamental freedoms ...". Consequently, there had to be a presumption that the Security Council did not intend to impose any obligation on member States that would breach fundamental principles of human rights. Where a Security Council resolution did not contain any clear or explicit wording excluding or limiting respect for human rights in the context of the implementation of sanctions at national level, the Court would always presume those measures to be compatible with the Convention and would in principle conclude that there was no conflict of obligations to be resolved by the State.

The Court found that none of the provisions of Resolution 1483 (2003) expressly prohibited the Swiss courts from verifying, to ensure respect for human rights, the measures taken at national level to implement the Security Council decisions. The inclusion of individuals and entities on the lists of persons subject to the UN sanctions entailed practical interferences that could be extremely serious for the Convention rights of those concerned. Being drawn up by bodies whose role was limited to the individual application of political decisions taken by the Security Council, those lists nevertheless

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reflected choices of which the consequences for the persons concerned might be so weighty that they were entitled to appropriate review.

The Court reiterated that the Convention was a constitutional instrument of European public order and that the States Parties were required to ensure a level of scrutiny of Convention compliance which preserved the foundations of that public order. One of the fundamental components of European public order was the principle of the rule of law, and arbitrariness constituted the negation of that principle. In the context of interpreting and applying domestic law, the Court left the national authorities very wide discretion, subject to a prohibition of arbitrariness. This would necessarily be true for the implementation of a Security Council resolution. Where a resolution did not contain any clear or explicit wording excluding the possibility of judicial supervision of the measures taken for its implementation, it would always have to be understood as authorising the courts of the respondent State to exercise sufficient scrutiny so that any arbitrariness could be avoided. By limiting that scrutiny to arbitrariness, the Court struck a fair balance between the need to ensure respect for human rights and the imperatives of the protection of international peace and security.

In the event of a dispute over a decision to add a person to the list or to refuse delisting, the domestic courts had to be able to obtain sufficiently precise information in order to exercise the requisite scrutiny. Any inability to access such information was therefore capable of constituting a strong indication that the measure was arbitrary. Accordingly, any State Party whose authorities gave effect to the addition of an individual or a legal entity to a sanctions list, without first ensuring that the listing was not arbitrary, would engage its responsibility under Article 6 of the Convention.

The Court found that Switzerland had not been faced in the present case with a real conflict of obligations such as to engage the primacy rule of the UN Charter. This finding made it unnecessary for the Court to determine the question of the hierarchy between the obligations of the States Parties to the Convention under that instrument, on the one hand, and those arising from the UN Charter, on the other.

As regards the substance of the sanctions – the freezing of the assets and property of senior officials of the former Iraqi regime – the Court took the view that the choice fell within the eminent role of the UN Security Council as the ultimate political decision-maker in this field. However, before taking the above-mentioned measures, the Swiss authorities had a duty to ensure that the listing was not arbitrary. In its judgments of 23 January 2008 the Federal Court had merely confined itself to verifying that the applicants' names actually appeared on the Sanctions Committee's list and that the assets concerned belonged to them, but that was insufficient to ensure that the applicants had not been listed arbitrarily. The applicants should have been afforded at least a genuine opportunity to submit appropriate evidence to a court, for examination on the merits, to seek to show that their inclusion on the impugned lists had been arbitrary. The very essence of their right of access to a court had thus been impaired.

The Court further noted that the applicants had been, and continued to be, subjected to major restrictions. The confiscation of their assets had been ordered on 16 November 2006. The fact that it had remained totally impossible for them to challenge the confiscation measure for many years was hardly conceivable in a democratic society.

Lastly, the Court observed that the UN sanctions system, and in particular the procedure for the listing of individuals and legal entities and the manner in which delisting requests were handled, had received very serious, reiterated and consistent criticisms from UN Special Rapporteurs, the Council of Europe's Parliamentary Assembly, and a number of courts, such as the European Court of Justice, the United Kingdom Supreme Court and the Federal Court of Canada. The respondent Government themselves had admitted that the system applicable in the present case to the delisting procedure did

not afford satisfactory protection. Access to that procedure could not therefore replace appropriate judicial scrutiny at the level of the respondent State or even partly compensate for its absence.

The Court held that there had been a violation of Article 6 § 1.

Article 41 (just satisfaction)

The Court found that there was no causal link between the violation of Article 6 § 1 and the allegation of pecuniary damage, the existence of such damage remaining for the time purely hypothetical. It further observed that the applicants had requested neither compensation for nonpecuniary damage nor the reimbursement of their costs and expenses. It was not therefore appropriate to reserve the question of just satisfaction and no award was due by way of just satisfaction.

Separate opinions

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to the judgment: the concurring opinion of Judge Pinto de Albuquerque, joined by Judges Hajiyev, Pejchal and Dedov; the concurring opinion of Judge Sicilianos; the concurring opinion of Judge Keller; the concurring opinion of Judge Kūris; the partly dissenting opinion of Judge Ziemele; and the dissenting opinion of Judge Nußberger.