

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

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**CASE LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS RELATED TO PUBLIC  
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**45. ECHR, *Sergey Zolotukhin v. Russia*, no. 14939/03, Grand Chamber judgment of 10 February 2009 (Article 4 of Protocol No. 7, Right not to be tried or punished twice – Violation).** The applicant complained that, after he had already served a three days’ detention for minor disorderly acts under the Code of Administrative Offences, he had been tried again in criminal proceedings for the same offence in violation of the *ne bis in idem* principle. ....190

**46. ECHR, *Andrejeva v. Latvia*, no. 55707/00, Grand Chamber judgment of 18 February 2009 (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 had deprived her of pension entitlements in respect of 17 years of employment. ....193

**47. ECHR, *A. and Others v. the United Kingdom*, no. 3455/05, Grand Chamber judgment of 19 February 2009 (Article 15, Derogation in times of emergency – disproportionate measure; Article 3, Prohibition of torture and inhuman or degrading treatment – No violation; Article 3 taken in conjunction with Article 13, Right to an effective remedy – No violation; Article 5-1, Right to liberty and security – Violation; Article 5-4, Right to judicial review of detention - Violation; Article 5-5, Right to compensation for unlawful detention – Violation).** The United Kingdom passed the Anti-terrorism, Crime and Security Act 2001 in the aftermath of the terrorist attacks in the United States of America the same year. The act enabled the detention of non-nationals suspected of being international terrorists even when they were not charged with any crime and when their deportation was impossible at that moment. The United Kingdom Government had notified a derogation from Article 5-1 under Article 15 but the Court found that the derogating measures had been disproportionate in that they had discriminated unjustifiably between nationals and non-nationals.. ....197

**48. ECHR, *Opuz v. Turkey*, no. 33401/02, Chamber judgment of 9 June 2009 (Article 2, Right to life – Violation; Article 3, Prohibition of torture and inhuman or degrading treatment - Violation; Article 14, Prohibition of discrimination, read in conjunction with Articles 2 and 3 - Violation).** The applicant, a Turkish national, was subjected to serious acts of domestic violence by her husband, who finally shot her mother death. Before the Court she successfully alleged that the Turkish authorities failed to protect the life of her mother and that they were negligent in the face of the repeated violence, death threats and injury to which she herself was subjected to. Having regard to the provisions of more specialised international legal instruments in the field, such as the Convention for the Elimination of Discrimination Against Women of 1979 (CEDAW) and the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women of 1994 (the Belém do Pará Convention), the Court concluded that the violence suffered by the applicant and her mother could be regarded as gender-based, which constituted a form of discrimination against women. The overall unresponsiveness of the judicial system and impunity enjoyed by the aggressors, as found in the applicant’s case, indicated that there was insufficient commitment to take appropriate action to address domestic violence in Turkey. ....205

**49. ECHR, *Varnava and Others v. Turkey*, nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90, Grand Chamber judgment of 18 September 2009 (Article 2, Right to life – Violation; Article 3, Prohibition of torture and inhuman or degrading treatment – Violation; Article 5, Right to liberty and security – Violation with respect to two of the applicants / No violation with respect to the remaining applicants).** The case concerned applications in the name and on behalf of 9 Cypriot nationals, who had

disappeared during military operations carried out by the Turkish Army in northern Cyprus in 1974, and their relatives. The applicants successfully claimed that the disappeared had been detained by Turkish military forces prior to their disappearance and that the Turkish authorities had not accounted for them since.....210

**50. ECHR, *Rantsev v. Cyprus and Russia*, no. 25965/04, Chamber judgment of 7 January 2010 (Article 2, Right to life – Violation by Cyprus / No violation by Russia; Article 4, Prohibition of slavery and forced labour – Violation by Cyprus and Russia; Article 5, Right to liberty and security – Violation by Cyprus).** The applicant's daughter was recruited from Russia to supposedly work as an artist in a cabaret in Cyprus. She abandoned her place of work and lodging three days later and died shortly after in strange and unestablished circumstances having fallen from a window of a private home. The applicant complained, *inter alia*, that no adequate investigation had been carried out by the Cypriot authorities into the death of his daughter and by the Russian authorities into his daughter's alleged trafficking in human beings for the purposes of sexual exploitation. In its judgment, the Court took note of the Council of Europe Convention on Action against Trafficking in Human Beings of 2005 as well as of other international legal instruments in the field.....214

**51. ECHR, *Al-Saadoon and Mufdhi v. the United Kingdom*, no. 61498/08, Chamber judgment of 2 March 2010 (Article 3, Prohibition of torture and inhuman or degrading treatment or punishment – Violation; Article 6, Right to a fair trial – No violation; Article 13, Right to an effective remedy – Violation; Article 34, Right of individual application – 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.....218

**52. ECHR, *Cudak v. Lithuania*, no. 15869/02, Grand Chamber judgment of 23 March 2010 (Article 6-1, Right of access to a court – Violation).** The applicant, a Lithuanian employee of the Polish embassy in Lithuania, successfully argued that to deny her a hearing for alleged sexual harassment in the workplace after the embassy invoked its immunity had amounted to a violation of her Convention rights.....222

**53. ECHR, *Medvedyev and Others v. France*, no. 3394/03, Grand Chamber judgment of 29 March 2010 (Article 5-1, Right to liberty and security – Violation; Article 5-3, Right to be brought promptly before a judge – No violation).** The applicants, crew members of a Cambodian-registered cargo vessel 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 navy prior to conviction. ....225

**54. ECHR, *Kononov v. Latvia*, no. 36376/04, Grand Chamber judgment of 17 May 2010 (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 for having allegedly executed several civilians, unsuccessfully complained that the acts of which he had been accused of did not, at the time of their commission, constitute an offence under either domestic or international law.....229

**55. ECHR, *Van Anraat v. Netherlands*, no. 65389/09, Chamber decision of 6 July 2010 (Article 6-1, Right to a fair trial – Inadmissible; Article 7-1, No punishment without law – Inadmissible).** The applicant, convicted of war crimes by a domestic court for supplying chemicals to Iraq between 1984 and 1988 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, the 1949 Geneva Conventions as well as the United Nations General Assembly had condemned their use, declared the application inadmissible. ....234

**56. ECHR, *Neulinger und Shuruk v. Switzerland*, no. 41615/07, Grand Chamber judgment of 6 July 2010 (Article 8, Right to respect for private and family life – Violation if the return order were enforced).** The applicants of Swiss nationality, a mother and her son aged seven, alleged that the son's return to his father in Israel pursuant to the Hague Convention on the Civil Aspects of International Child Abduction of 1980 would violate their rights under the Convention. The first applicant had feared that her son would be taken by his father to an ultra-orthodox community abroad following which she had pursued an order by an Israeli court imposing a ban on the child's removal from Israel until he attained his majority. She subsequently left secretly Israel for Switzerland with her son. The Swiss Federal Court ordered the child's return to Israel.....237

**57. ECHR, *Mangouras v. Spain*, no. 12050/04, Grand Chamber judgment of 28 September 2010 (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 thus causing a major environmental disaster, 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. ....241

**58. ECHR, *M.S.S. v. Belgium and Greece*, no. 30696/09, Grand Chamber judgment of 21 January 2011 (Article 3, Prohibition of torture and inhuman or degrading treatment – Violations by Greece and Belgium; Article 13, Right to an effective remedy, taken together with Article 3 – Violation by Greece and Belgium).** The case concerned the expulsion of an asylum seeker to Greece by Belgian authorities in application of the EU Dublin II Regulation. The applicant alleged, *inter alia*, that the conditions of his detention and living in Greece amounted to treatment contrary to Article 3. ....244

**59. ECHR, *Zylkov v. Russia*, no. 5613/04, Chamber judgment of 21 June 2011 (Article 6-1, Right to access to a tribunal – Violation).** The applicant, a Russian national with permanent residence in Lithuania, had applied for child allowance payable by the Russian Federation to parents with minors at the Russian Embassy in Vilnius (Lithuania). His attempts to challenge the decision refusing the payment before the Russian courts remained in vain. The domestic court found that he should have lodged his claim with a court in Lithuania without explaining how their view that the matter was to be considered by a foreign court complied with the principles of international law on State immunity. ....250

**60. ECHR, *Sabeh El Leil v. France*, no. 34869/05, Grand Chamber judgment of 29 June 2011 (Article 6, Right of access to a court – 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 against his dismissal. ....251

**61. ECHR, *Al-Jedda v. the United Kingdom*, no. 27021/08, Grand Chamber judgment of 7 July 2011 (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 United Kingdom 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. ....254

**62. ECHR, *Al-Skeini and Others v. the United Kingdom*, no. 55721/07, Grand Chamber judgment of 7 July 2011 (Article 1 – State jurisdiction affirmed; Article 2, Right to life –**

**Violation).** The applicants, Iraqi nationals whose relatives had been killed by British forces in Basrah in 2003, successfully claimed that the United Kingdom was bound by the Convention in military operations abroad and that a proper investigation into their relatives' deaths had not been carried out.....258

**63. ECHR, *AO Neftyanaya Kompaniya Yukos v. Russia*, no. 14902/04, Chamber judgment of 20 September 2011 (Article 6-1 and 6-3-b, Right to a fair trial: adequate time and facilities for the preparation of one's defence – Violation; Article 1 of Protocol No. 1, Protection of property – Violation regarding the imposition and calculation of penalties in the 2000-2001 tax assessments / No violation regarding the rest of the 2000-2003 tax assessments / Violation regarding the enforcement proceedings; Article 14, Prohibition of discrimination, in conjunction with Article 1 of Protocol No. 1 – No violation; Article 18, Limitation on use of restrictions on rights, in conjunction with Article 1 of Protocol No. 1 – No violation).** The applicant, a company registered in the Russian Federation, partially successfully complained of irregularities in the proceedings concerning its tax liability for the tax year 2000 and about the unlawfulness and lack of proportionality of the 2000-2003 tax assessments and their subsequent enforcement. (See also the Chamber judgment on just satisfaction, case no. 94). .....265

**64. ECHR, *Ahorugeze v. Sweden*, no. 37075/09, Chamber judgment of 27 October 2011 (Article 3, Prohibition of torture and inhuman or degrading treatment – No violation; Article 6, Right to a fair trial – No violation).** Following the relevant case-law of the Special Court for Sierra Leone and the International Criminal Tribunal for Rwanda (ICTR) the Court found that the extradition of the applicant, a Rwandan national and genocide suspect, from Sweden to Rwanda would not put him at risk of ill-treatment or amount to a flagrant denial of justice. ....271

**65. ECHR, *Othman (Abu Qatada) v. the United Kingdom*, no. 8139/09, Chamber judgment of 17 January 2012 (Article 3, Prohibition of torture and inhuman or degrading treatment – 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, successfully claimed that his planned deportation from the United Kingdom to Jordan would put him at a real risk of a grossly unfair trial amounting to a flagrant denial of justice due to widespread use of evidence obtained through torture before Jordanian courts.....274

**66. ECHR, *Harkins and Edwards v. the United Kingdom*, no. 9146/07, Chamber judgment of 17 January 2012 (Article 3, Prohibition of torture and inhuman or degrading treatment or punishment – Inadmissible with regard to a risk of the imposition of the death penalty / No violation concerning a sentence of life imprisonment without the possibility of parole).** The applicants were indicted in the United States for murder, among other offences. They alleged that if extradited from the United Kingdom they would face a real risk of being convicted to the death penalty or a life sentence without parole in the United States. ....278

**67. ECHR, *Zontul v. Greece*, no. 12294/07, Chamber judgment of 17 January 2012 (Article 3, Prohibition of torture and inhuman or degrading treatment – Violation).** The applicant, an illegal migrant of Turkish nationality, successfully complained that he had been raped with a truncheon by one of the coastguard officers supervising him. The Court expressly followed the jurisprudence of other international courts, notably the International Criminal Tribunal for the former Yugoslavia, the International Criminal Tribunal for Rwanda and the Inter-American Court of Human Rights, holding that penetration with an object amounted to an act of torture.....281

**68. ECHR, *Hirsi Jamaa and Others v. Italy*, no. 27765/09, Grand Chamber judgment of 23 February 2012 (Article 1 – State jurisdiction affirmed; Article 3, Prohibition of torture and inhuman or degrading treatment – Violation; Article 4 of Protocol No. 4, Prohibition of collective expulsion 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 that they had been exposed to the risk of being subjected to ill-treatment in Libya and being repatriated to Somalia or Eritrea when sent back to Libya. ....285

**69. ECHR, *Kurić and Others v. Slovenia*, no. 26828/06, Grand Chamber judgment of 26 June 2012 (Article 8, Right to respect of private and family life – Violation; Article 13, Right to an effective remedy, in conjunction with Article 13 – Violation; Article 14, Prohibition of discrimination, in conjunction with Article 8 - Violation).** The applicants belonged to a group of persons known as the “erased”, who had lost their status as permanent residents following Slovenia’s declaration of independence in 1991. The Court held in particular that, despite the efforts made since 1999, the Slovenian authorities had failed to remedy comprehensively and with the requisite promptness the grave consequences for the applicants of the erasure of their names from the Slovenian Register of Permanent Residents which had violated their Convention rights.....290

**70. ECHR, *Toniolo v. San Marino and Italy*, no. 44853/10, Chamber judgment of 26 June 2012 (Article 5-1, Right to liberty and security – Violation).** The applicant, an Italian national living in San Marino was arrested in San Marino following criminal proceedings brought against him in Italy. He successfully argued that his preventive detention and subsequent extradition to Italy were unlawful. ....296

**71. ECHR, *Wallishauser v. Austria*, no. 156/04, Chamber judgment of 17 July 2012 (Article 6-1, Right of access to a court - Violation).** The applicant, a former employee of the United States Embassy in Vienna who was owed salary payments after her unlawful dismissal, successfully argued that she had been denied access to a court when the United States’ authorities had invoked immunity and refused to be served with summons to a hearing. ....298

**72. ECHR, *Nada v. Switzerland*, no. 10593/08, Grand Chamber judgment of 12 September 2012 (Article 5, Right to liberty and security – Inadmissible; Article 8, Right to respect for private and family life – Violation; Article 13, Right to an effective remedy, taken in conjunction with Article 8 – Violation).** The applicant, an Italian and Egyptian national living in an Italian enclave surrounded by the Swiss Canton of Ticino, was prevented from entering or transiting through Switzerland because his name was added to a list of persons and organisations associated with Osama bin Laden and al-Qaeda annexed to a federal Ordinance in the context of the implementation by Switzerland of the United Nations Security Council counter-terrorism resolutions. ....300

**73. ECHR, *Djokaba Lambi Longa v. the Netherlands*, no. 33917/12 Chamber decision of 9 October 2012 (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 (ICC), 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.....305

**74. ECHR, *Catan and Others v. Moldova and Russia*, nos. 43370/04, 8252/05 and 18454/06, Grand Chamber judgment of 19 October 2012 (Article 2 of Protocol No. 1, Right to education – No violation in respect of Moldova / Violation in respect of Russia).** The applicants, children and parents from the Moldovan community in the unrecognised separatist entity “Moldavian Republic of Transdnistria”, successfully complained with respect to the Russian Federation about the effects of a language policy adopted by the separatist regime, highly dependent on Russian support, forbidding the use of the Latin alphabet in schools and the subsequent measures taken to enforce the policy. ....308

**75. ECHR, *El-Masri v. "The former Yugoslav Republic of Macedonia"*, no. 39630/09, Grand Chamber judgment of 13 December 2012 (Article 3, Prohibition of torture and inhuman or degrading treatment – 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).** 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 before being transferred by the Central Intelligence Agency (CIA) of the United States of America to a secret detention facility in Afghanistan, where he was further ill-treated for more than four months. He successfully argued that during his extrajudicial abduction and arbitrary detention he had been subjected to inhuman and degrading treatment on various counts. The Court further 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. Moreover, the failure by the State to carry out an effective investigation into the arguable complaints of Mr El-Masri had undermined the effectiveness of any other remedy, including a civil action for damages, in violation of Article 13. ....313

**76. ECHR, *Chapman v. Belgium*, no. 39619/06, Chamber decision of 5 March 2013 (Article 6-1, Right of access to a court – Inadmissible).** The applicant, a former employee of the North Atlantic Treaty Organization (NATO), was denied a judgment in his favour at the Brussels Employment Tribunal after NATO invoked jurisdictional immunity. The Court declared the application inadmissible since the applicant had omitted to make use of an effective internal remedy at his disposal before the NATO Appeal Board. ....319

**77. ECHR, *Oleynikov v. Russia*, no. 36703/04, judgment of 14 March 2013 (Article 6, Right of access to a court – 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 loan 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. ....321

**78. ECHR, *Stichting Mothers of Srebrenica and Others v. the Netherlands*, no. 65542/12, Chamber decision of 11 June 2013 (Article 6, Right of access to a court – Inadmissible).** The applicants, 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 persons killed in the massacre, claimed 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 had not been disproportionate. ....323

**79. ECHR, *Wallishauser v. Austria (No. 2)*, no. 14497/06, Chamber judgment of 20 June 2013 (Article 1 of Protocol No. 1, Protection of property – No violation; Article 14, Prohibition of Discrimination, taken in conjunction with Article 1 of Protocol No. 1 or Article 6 – No violation).** The applicant, an Austrian national unlawfully dismissed from her job at United States Embassy in Vienna, obtained payment of salary arrears from the United States of America in proceedings before the Austrian courts, but was ordered to pay the entire social security contributions, including the employer’s share for these. She 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. ....327

**80. ECHR, *Maktouf and Damjanović v. Bosnia and Herzegovina*, nos. 2312/08 and 34179/08, Grand Chamber judgment of 18 July 2013 (Article 7, No punishment without law – Violation).** The applicants, two men convicted of war crimes by the Court of Bosnia and Herzegovina, successfully argued that a more stringent criminal law had been applied to them retroactively instead of the criminal law which had actually been applicable at the time they had committed the offences. ....328

**81. ECHR, *Janowiec and Others v. Russia*, nos. 55508/07 & 29520/09, Grand Chamber judgment of 21 October 2013 (Article 2, Right to life – No jurisdiction *ratione temporae*; Article 3, Prohibition of torture and inhuman or degrading treatment – No violation; Article 38, Obligation to furnish all necessary facilities for the examination of the case – Violation).** The applicants, 15 Polish nationals who are relatives of 12 victims of the Katyń massacre, complained that an effective investigation had not been carried out, as instances of war crimes, 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. ....333

**82. ECHR, *Al-Dulimi and Montana Management Inc. v. Switzerland*, no. 5809/08, Chamber judgment of 26 November 2013 (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 (see also the Grand Chamber judgment, case no. 143). ....338

**83. ECHR, *X v. Latvia*, no. 27853/09, Grand Chamber judgment of 26 November 2013 (Article 8, Right to respect for private and family life – Violation).** The applicant, a Latvian national, successfully contested the Latvian courts' order for the return of her daughter from Latvia to Australia in application of the Hague Convention on the Civil Aspects of International Child Abduction of 1980. The child had been born out of wedlock in Australia to the applicant and an Australian father. The applicant, then the child's sole guardian, had brought her daughter to Latvia at the age of three. The Court considered that the European Convention on Human Rights and the Hague Convention had to be applied in a combined and harmonious manner, and that the best interests of the child had to be the primary consideration. ....342

**84. ECHR, *Perinçek v. Switzerland*, no. 27510/08, Chamber judgment of 17 December 2013 (Article 10, Freedom of expression – Violation).** The applicant, a Turkish politician, successfully argued that he had been wrongfully convicted by the Swiss courts for having publicly expressed the view at conferences in Switzerland that the mass deportations and massacres suffered by the Armenians in the Ottoman Empire in 1915 and the following years had not amounted to genocide describing the Armenian genocide as an "international lie" (see also the Grand Chamber judgment, case no. 120). ....346

**85. ECHR, *Jones and Others v. the United Kingdom*, nos. 34356/06 and 40528/06, Chamber judgment of 14 January 2014 (Article 6-1, Right of access to a court – No violation).** The applicants, four British nationals alleging to have 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. ....350

**86. ECHR, *Paposhvili v. Belgium*, no. 41738/10, Chamber judgment of 17 April 2014 (Article 2, Right to life - No violation; Article 3 - Prohibition of torture and inhuman or degrading treatment - No violation in the event of the applicant's removal to Georgia, Article 8, Right to respect for private and family life – No violation).** The applicant, a seriously ill Georgian national living in Brussels, unsuccessfully argued that if removed to Georgia he would face a risk of premature death as well as a real risk of being subjected to inhuman or degrading treatment or punishment on the ground that the medical treatment he needed did not exist or was unavailable in Georgia (see also the Grand Chamber judgment, case no. 154). ....353

**87. ECHR, *Cyprus v. Turkey*, no. 25781/94, Grand Chamber judgment of 12 May 2014, (Article 41, 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.....354

**88. ECHR, *Ilgar Mammadov v. Azerbaijan*, no. 15172/13, Chamber judgment of 22 May 2014 (Article 5-1, Right to liberty and security – Violation; Article 5-4, Right to judicial review of detention – Violation; Article 6-2, Presumption of innocence – Violation; Article 18, Limitation on use of restrictions on rights - Violation).** The applicant, an Azerbaijani opposition politician and blogger, was arrested and detained pending trial following his reports on street protests in the town of Ismayilli in January 2013. The Court considered that Mr Mammadov, who had a history of criticising the Government, had been arrested and detained without any evidence to reasonably suspect him of having committed the offence with which he was charged, namely that of having organised actions leading to public disorder. The Court concluded that the actual purpose of his detention had been to silence or punish Mr Mammadov for criticising the Government and publishing information it was trying to hide.....358

**89. ECHR, *Marguš v. Croatia*, no. 4455/10, Grand Chamber judgment of 27 May 2014 (Article 6-1, Right to a fair trial, and, Article 6-3-c, Right to legal assistance – No violation; Article 4 of Protocol No. 7, Right not to be tried or punished twice – 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 the *ne bis in idem* principle. ....363

**90. ECHR, *Jelić v. Croatia*, no. 57856/11, Chamber judgment of 12 June 2014 (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 1991 and subsequently killed by the police, successfully complained that there had been no adequate investigation into the death of her husband.....368

**91. ECHR, *Georgia v. Russia (I)*, no. 13255/07, Grand Chamber judgment of 3 July 2014 (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 and inhuman or degrading treatment – Violation; Article 13, Right to an effective remedy – Violation; Article 38, Obligation to furnish all necessary facilities for the examination of the case – 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.....371

**92. ECHR, *Ališić and Others v. Bosnia and Herzegovina, Croatia, Serbia, Slovenia and "The former Yugoslav Republic of Macedonia"*, no. 60642/08, Grand Chamber judgment of 16 July 2014 (With regard to Mr Šahdanović: Article 1 of Protocol No. 1, Protection of property – Violation by Serbia; Article 13, Right to an effective remedy – Violation by Serbia; With regard to Ms Ališić and Mr Sadžak: Article 1 of Protocol No. 1 – Violation by Slovenia; Article 13 – Violation by Slovenia; With regard to the other respondent States: Article 1 of Protocol No. 1 – No violation; Article 13 – 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, had been unable to retrieve money deposited by them at national banks in the former Yugoslavia since the dissolution of the country. They partially successfully claimed the successor States were responsible for the deposits made at national banks prior to dissolution.....378

**93. ECHR, *Al Nashiri v. Poland*, no. 28761/11, and, *Husayn (Abu Zubaydah) v. Poland*, no. 7511/13, Chamber judgments of 24 July 2014 (Article 3, Prohibition of torture and inhuman or**

**degrading treatment – 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 trial – Violation; Articles 2 and 3 taken together with Article 1 of Protocol No. 6, Abolition of the death penalty – Violation as regards Mr Al-Nashiri).** 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 (CIA) facility in Poland and later to Guantanamo Bay, alleging torture and ill-treatment, and failure to carry out a subsequent investigation into their allegations.....**383**

**94. ECHR, *Oao Neftyanyaya Kompaniya Yukos v. Russia* (just satisfaction), no. 14902/04, Chamber judgment of 31 July 2014 (Article 41, Just satisfaction).** In its Chamber judgment on the merits (see case no. 63) the Court found several Convention violations concerning the tax assessment proceedings against the applicant, a company registered in the Russian Federation. In this subsequent judgment on just satisfaction the Court found that Russia was to pay 1,866,104,634 euros (EUR) in respect of pecuniary damage to the shareholders of Yukos as they had stood at the time of the company's liquidation and 300,000 euros (EUR) in respect of costs and expenses to the Yukos International Foundation.....**389**

**95. ECHR, *Trabelsi v. Belgium*, no. 140/10, Chamber judgment of 4 September 2014 (Article 3, Prohibition of torture and inhuman or degrading treatment or punishment – Violation; Article 34, Right of individual application – Violation).** The applicant, a Tunisian national prosecuted for terrorism offences and facing an irreducible life sentence in the United States of America (USA), successfully argued that his extradition from Belgium to the USA, effected despite the indication of an interim measure by the Court, had breached his rights under the Convention as the US law provided for no adequate mechanism for reviewing this type of sentence.....**392**

**96. ECHR, *Pleshkov v. Romania*, no. 1660/03, Chamber judgment of 16 September 2014 (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.....**396**

**97. ECHR, *Hassan v. United Kingdom*, no. 29750/09, Grand Chamber judgment of 16 September 2014 (Article 1 - State jurisdiction affirmed; Article 2, Right to life – Inadmissible; Article 3, Prohibition of torture and inhuman or degrading treatment – Inadmissible; Article 5, Right to liberty and security – No violation).** The applicant's brother, an Iraqi national, had been captured and detained by British forces at Camp Bucca, a detention centre operated by United States forces in southeastern Iraq during the hostilities in 2003. After his release, the brother's dead body was found bearing marks of torture and execution. The applicant successfully claimed that his brother had been under the control of British forces for the purposes of extra-territorial jurisdiction of the Convention.....**399**

**98. ECHR, *Tarakhel v. Switzerland*, no. 29217/12, Grand Chamber judgment of 4 November 2014 (Article 3, Prohibition of torture and inhuman or degrading treatment – Violation).** The applicants, an Afghan couple with six children living in Lausanne (Switzerland) and seeking asylum in Switzerland, successfully argued that their return to Italy under the Dublin Regulation in the absence of individual guarantees that the applicants would be taken charge of in a manner adapted to the age of the children would breach their Convention rights.....**404**

**99. ECHR, *Jaloud v. the Netherlands*, no. 47708/08, Grand Chamber judgment of 20 November 2014 (Article 2, Right to life – Violation).** The applicant's son, a civilian Iraqi national, was 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. The applicant successfully claimed that the investigation into his son's death had neither been sufficiently independent nor effective.....408

**100. ECHR, *Ali Samatar and Others v. France*, nos. 17110/10 and 17301/10, and *Hassan and Others v. France*, nos. 46695/10 and 54588/10, Chamber judgments of 4 December 2014 (Article 5-1, Right to liberty and security – Violation; Article 5-3, Right to be brought promptly before a judge - Violation).** The applicants, nine persons who separately took possession of two French-registered cruise ships and their crews hostage with the intention of negotiating their release for a ransom, were arrested on Somalian waters and held in the custody of French military personnel for four and six days respectively before being taken in a military aircraft to France, where they were brought before an investigating judge and placed under judicial investigation. ....412

**101. ECHR, *Klausecker and Perez v. Germany*, nos. 415/07 and 15521/08, Chamber decision of 6 January 2015 (Article 6, Right of access to a court - Inadmissible).** Based on jurisdictional immunity of the international organisations in question, the applicants were denied access to German labour and civil courts to challenge their refusal of employment at the European Patent Office, in the first case, and, dismissal from the United Nations, in the second case. The Court declared both applications inadmissible. Given that Mr Klausecker had had access to an arbitration procedure offered by the EPO to protect his rights, the limitation on his access to the German courts had been proportionate and his application to the Court manifestly ill-founded. The Court noted that Germany could only be held responsible in the circumstances of the case if the protection of fundamental rights offered by the EPO was manifestly deficient. The application of Ms Perez was declared inadmissible due to non-exhaustion of local remedies. ....417

**102. ECHR, *Petropavlovskis v. Latvia*, no. 44230/06, Chamber judgment of 13 January 2015 (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.....421

**103. ECHR, *A.A. v. France & A.F. v. France*, nos. 18039/11 and 80086/13, Chamber judgment of 15 January 2015 (Article 3, Prohibition of torture and inhuman or degrading treatment – 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. ....424

**104. ECHR, *Gallardo Sanchez v. Italy*, no. 11620/07, Chamber judgment of 24 March 2015 (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. ....427

**105. ECHR, *Ouabour v. Belgium*, no. 26417/10, Chamber judgment of 2 June 2015 (Article 3, Prohibition of torture and inhuman or degrading treatment – Violation; Article 13, Right to an effective remedy, taken in conjunction with Article 3 – No violation).** The applicant was sentenced to six years imprisonment for activity in a terrorist organisation and for criminal conspiracy. In view of his pending extradition to Morocco, he successfully alleged that his terrorist background would put him at risk of torture in Morocco.....430

**106. ECHR, *Kyriacou Tsiakkourmas and Others v. Turkey*, no. 13320/02, Chamber judgment of 2 June 2015 (Article 3, Prohibition of torture and inhuman or degrading treatment – No violation with regard to alleged ill-treatment / Violation with regard to effective investigation; Article 5-1, Right to liberty and security – No violation; Article 5-4, Right to judicial review of detention – Violation).** The first applicant, a Greek Cypriot national, 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”. He and 12 of his relatives maintained before the Court that the abduction of the first applicant from the SBAs had violated national and international law.....432

**107. ECHR, *J.K. and Others v. Sweden*, no. 59166/12, Chamber judgment of 4 June 2015 (Article 3, Prohibition of torture and inhuman or degrading treatment – 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 in Sweden, unsuccessfully argued that their return to Iraq would put them at risk of persecution and ill-treatment by Al-Qaeda (see also the Grand Chamber judgment, case no. 145).....434

**108. ECHR, *Sargsyan v. Azerbaijan*, no. 40167/06, Grand Chamber judgment of 16 June 2015 (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 in 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.....435

**109. ECHR, *Chiragov and Others v. Armenia*, 13216/05, Grand Chamber judgment of 16 June 2015 (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.....441

**110. ECHR, *Manole and “Romanian Farmers Direct” v. Romania*, no. 46551/06, Chamber judgment of 16 June 2015 (Article 11, Freedom of assembly and association – No violation).** The applicants’ wish to register the union of self-employed farmers was refused by the Romanian courts. 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.....447

**111. ECHR, *Delfi AS v. Estonia*, no. 64569/09, Grand Chamber judgment of 16 June 2015 (Article 10, Freedom of expression – No violation).** Interpreting and applying the European Union Directive 2000/31/EC, the Court held – contrary to the applicants’ 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.....450

**112. ECHR, *Abdulla Ali v. the United Kingdom*, no. 30971/12, Chamber judgment of 30 June 2015 (Article 6-1, Right to a fair trial – No violation).** The applicant alleged that, because of extensive adverse media coverage, the criminal proceedings against him for conspiring in a terrorist plot to cause explosions on aircraft using liquid bombs had been unfair.....455

**113. ECHR, *A.S. v. Switzerland*, no. 39350/13, Chamber judgment of 30 June 2015 (Article 3, Prohibition of torture and inhuman or degrading treatment – 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. ....458

**114. ECHR, *V.M. and Others v. Belgium*, no. 60125/11, Chamber judgment of 7 July 2015 (Article 3, Prohibition of torture and inhuman or degrading treatment – 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. ....461

**115. ECHR, *A.H. and J.K. v. Cyprus*, nos. 41903/10 and 41911/10, Chamber judgment of 21 July 2015 (Article 5-1, Right to liberty and security, – Violation as regards the lawfulness of the applicants’ detention on 11 June 2010 / No violation as regards the lawfulness of the applicants’ detention from 11 June 2010 until 20 May 2011 / Violation as regards the lawfulness of the second applicant’s detention from 29 November 2012 until 20 December 2012; Article 5-2, Right to be informed promptly of the reasons of one’s arrest – No violation; Article 5-4, Right to judicial review of detention – Violation; Article 4 of Protocol No. 4, Prohibition of collective expulsion of aliens – No violation). ....465**

**ECHR, *H.S. and Others v. Cyprus*, no. 41753/10 et al., Chamber judgment of 21 July 2015 (Article 5-4, Right to judicial review of detention – Violation; Article 5-1, Right to liberty and security – Violation; Article 5-1 (f), Lawful arrest or detention with a view to deportation or extradition – No violation in respect of nine of the applicants / Violation in respect of the remaining five applicants; Article 5-2, Right to be informed promptly of the reasons of one’s arrest – No violation; Article 4 of Protocol No. 4, Prohibition of collective expulsion of aliens – No violation). ....465**

**ECHR, *K.F. v. Cyprus*, no. 41858/10, Chamber judgment of 21 July 2015 (Article 5-1, Right to liberty and security, Violation as regards the lawfulness of the applicant’s detention on 11 June 2010 / No violation as regards the lawfulness of the applicant’s detention from 11 June 2010 until 20 April 2011; Article 5-2, Right to be informed promptly of the reasons of one’s arrest – No violation; Article 5-4, Right to judicial review of detention – Violation; Article 4 of Protocol No. 4, Prohibition of collective expulsion of aliens – No violation). ....465**

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. ....465

**116. ECHR, *G.S. v. Georgia*, no. 2361/13, Chamber judgment of 21 July 2015 (Article 8, Right to respect for private and family life – Violation). The applicant, relying on the Hague Convention on the Civil Aspects of International Child Abduction of 1980, successfully complained about the refusal of the Georgian courts to order the return of her son to Ukraine. ....468**

**117. ECHR, *Khlaifia and Others v. Italy*, no. 16483/12, Chamber judgment of 1 September 2015 (Article 3, Prohibition of torture and inhuman or degrading treatment – No violation, in respect of the conditions of detention on board the ships / 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, Right to be informed promptly of the reasons of one’s arrest – Violation; Article 5-4, Right to judicial review of detention – Violation; Article 13, Right to an effective remedy, taken in conjunction with Articles 3 and 4 of Protocol No. 4 – Violation). The applicants, Tunisian nationals, successfully alleged, *inter alia*, that their asylum in detention centres on Lampedusa during the Arab spring of 2011 and their repatriation to Tunisia had been unlawful (see also the Grand Chamber judgment, case no. 155). ....471**

**118. ECHR, *Sõro v. Estonia*, no. 22588/08, Chamber judgment of 3 September 2015 (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. ....476**

**119. ECHR, *L.M. and Others v. Russia*, nos. 40081/14, 40088/14 and 40127/14, Chamber judgment of 15 October 2015 (Article 2, Right to life – Violation; Article 3, Prohibition of**

**torture and inhuman or degrading treatment – Violation; Article 5-1, Right to liberty and security – Violation; Article 5-4, Right to judicial review of detention – Violation; Article 34, Right of individual application – Violation).** 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. ....479

**120. ECHR, *Perinçek v. Switzerland*, no. 27510/08, Grand Chamber judgment of 15 October 2015 (Article 10, Freedom of expression - Violation).** The Grand Chamber upheld the Chamber judgment (case no. 84). The applicant, a Turkish politician, successfully argued that he had been wrongfully convicted by the Swiss courts for having publicly expressed the view at conferences in Switzerland that the mass deportations and massacres suffered by the Armenians in the Ottoman Empire in 1915 and the following years had not amounted to genocide describing the Armenian genocide as an “international lie”. .....483

**121. ECHR, *Vasiliauskas v. Lithuania*, no. 35343/05, Grand Chamber judgment of 20 October 2015 (Article 7, No punishment without law – Violation).** The applicant, a former officer in the State security services of the Lithuanian Soviet Socialist Republic, successfully argued that his conviction in 2004 for acts of genocide on Lithuanian partisans in 1953, 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. ....489

**122. ECHR, *G.S.B. v. Switzerland*, no. 28601/11, Chamber judgment of 22 December 2015 (Article 8, Right to respect for private and family life – No violation; Article 14, Prohibition of discrimination, taken in conjunction with Article 8 – No violation).** The applicant, a Saudi and United States of America (USA) national living in the USA, complained a breach of his privacy when his Swiss bank had transferred his bank account details to the USA authorities for tax purposes, but the Court, interpreting the Convention in line with the Vienna Convention on the Law of Treaties of 1969 with regard to the cooperation agreement signed between Switzerland and the USA, held that there had been no violation of the applicant’s rights. ....494

**123. ECHR, *M.D. and M.A. v. Belgium*, no. 58689/12, Chamber judgment of 19 January 2016 (Article 3, Prohibition of torture and inhuman or degrading treatment – Violation).** The applicants, a Russian couple of Chechen origin, had fled Russia after a deadly family dispute and after receiving several warnings that certain people were looking for them. Before the Court they successfully argued that their expulsion from Belgium back to Russia would put them at real risk of ill-treatment. ....498

**124. ECHR, *Sow v. Belgium*, no. 27081/13, Chamber judgment of 19 January 2016 (Article 3, Prohibition of torture and inhuman or degrading treatment – 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 her country of origin, unsuccessfully argued that her expulsion back to Guinea would put her at risk of ill-treatment through, *inter alia*, re-excision. ....500

**125. ECHR, *L.E. v. Greece*, no. 71545/12, Chamber judgment of 21 January 2016 (Article 4, Prohibition of slavery and forced labour – Violation; Article 6-1, Right to a fair trial – 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 Greek authorities for the purposes of granting her the status of a victim of human trafficking, had been unreasonable. ....501

**126. ECHR, *R. v. Russia*, no. 11916/15, Chamber judgment of 26 January 2016 (Article 3, Prohibition of torture and inhuman or degrading treatment – Violation in the event of Mr R.’s removal to Kyrgyzstan / Violation with regard to ill-treatment / Violation with regard to**

**ineffective investigation; Article 5-4, Right to judicial review of detention – 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 put him at risk of ill-treatment considering his membership of a particularly vulnerable ethnic group.....505

**127. ECHR, *Mozer v. the Republic of Moldova and Russia*, no. 11138/10, Grand Chamber judgment of 23 February 2016 (Article 3, Prohibition of inhuman and degrading treatment- Violation by Russia/ No violation by the Republic of Moldova; Article 5-1, Right to liberty and security- Violation by Russia/ No violation by the Republic of Moldova; Article 8, Right to respect for private and family life- Violation by Russia/ No violation by the Republic of Moldova; Article 9, Freedom of thought, conscience and religion- Violation by Russia/ No violation by the Republic of Moldova; Article 13, Right to an effective remedy, in conjunction with Articles 3, 8 and 9- Violation by Russia/ No violation by the Republic of Moldova).** The case concerned the detention of a man suspected of fraud, as ordered by the courts of the self-proclaimed “Moldavian Republic of Transdniestria” (the “MRT”). The applicant, a Moldovan national, complained, among other things, that he had been arrested and detained unlawfully by the “MRT authorities” and that his complaints fell within the jurisdiction of both Moldova, as that region was recognised under public international law as part of Moldova’s territory and Russia, as the state which had effective control over the unrecognised entity at issue. ....507

**128. ECHR, *Pajić v. Croatia*, no. 68453/13, Chamber judgment of 23 February 2016 (Article 14, Prohibition of discrimination taken in conjunction with Article 8- Violation).** The case concerned the complaint by a national of Bosnia and Herzegovina, who is in a stable same-sex relationship with a woman living in Croatia, of having been discriminated against on the grounds of her sexual orientation when applying for a residence permit in Croatia. ....513

**129. ECHR, *Nasr and Ghali v. Italy*, no. 44883/09, Chamber judgment of 23 February 2016 (With regard to Mr Nasr: Article 3, Prohibition of torture and inhuman or degrading treatment – 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 – Violation; Article 8 – Violation; Article 13 read in conjunction with Articles 3 and 8 – Violation).** The applicants, one of which was an Egyptian national enjoying political asylum in Italy, successfully argued that their abduction by the Central Intelligence Agency (CIA) of the United States of America with the cooperation of Italian officials and subsequent secret detention in Egypt had violated their rights under the Convention. ....516

**130. ECHR, *K.J. v. Poland*, no. 30813/14, Chamber judgment of 1 March 2016 (Article 8, Right to respect for private and family life - Violation).** The applicant sought the return of his child to the United Kingdom from Poland relying on the Hague Convention on the Civil Aspects of International Child Abduction of 1980. ....523

**131. ECHR, *Arlewin v. Sweden*, no. 22302/10, Chamber judgment of 1 March 2016 (Article 6-1, Right of access to a court – 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 the content of a transborder television programme service accusing the applicant of organised crime. The Court interpreted the Brussels I Regulation and the EU Audiovisual Media Services Directive in its judgment.....526

**132. ECHR, *F.G. v. Sweden*, no. 43611/11, Grand Chamber judgment of 23 March 2016 (Article 2, Right to life, and, Article 3, Prohibition of torture and inhuman or degrading treatment – No violation on account of F.G.’s political past in Iran, if he were deported / Violation if F.G. returned without an assessment of the consequences of his religious conversion).** The applicant, an Iranian asylum seeker who had converted to Christianity, argued that

an expulsion would put him at real risk of being persecuted and punished or sentenced to death owing to his political past and his conversion to Christianity. In its assessment the Court made reference to the EU Qualification Directive, pertinent CJEU jurisprudence as well as UNHCR Guidelines in respect of a first-instance determination of eligibility for international protection.....529

**133. ECHR, *Tabbane v. Switzerland*, no. 41069/12, Decision of 24 March 2016 (Articles 6-1, Right of access to a court and right to a fair hearing- Inadmissible; Article 13, Right to an effective remedy- Inadmissible).** The applicant, a Tunisian businessman, in exercise of his contractual freedom, signed an arbitration agreement with a French company, and had expressly and freely waived the possibility of submitting disputes to an ordinary court and agreeing to have all disputes settled before the International Court of Arbitration in Geneva.....534

**134. ECHR, *Sakir v. Greece*, no. 48475/09, Chamber judgment of 24 March 2016 (Article 3, Prohibition of inhuman or degrading treatment- Violation; Article 13, Right to an effective remedy- Violation).** The applicant, an Afghan national living in Athens, was physically assaulted in 2009 in the centre of Athens. He had left his country of origin for fear of persecution on account of his political convictions and entered Greece without a residence permit. After the attack and his subsequent hospitalisation, he was detained pending expulsion due to lack of residence permit. He successfully complained, among other things, that the national authorities had failed to meet their obligation to conduct an effective investigation into the attack. ....537

**135. ECHR, *R.B. v. Hungary*, no. 64602/12, Chamber judgment of 12 April 2016 (Articles 8, Right to respect for private and family life- Violation).** The case concerned the complaint by the applicant, a Hungarian woman of Roma origin, that she had been subjected to racist insults and threats by participants in an anti-Roma march and that the authorities had failed to investigate the racist verbal abuse. ....541

**136. ECHR, *Unite the Union v. the United Kingdom*, no. 65397/13, Decision of 3 May 2016 (Article 11, Freedom of association- Inadmissible).** The applicant trade union claimed that the respondent state failed to comply with its positive obligation derived from the right to freedom of association, as the statutory body in charge of collective bargaining in the agricultural sector had been abolished by governmental legislation. ....544

**137. ECHR, *Karácsony and Others v. Hungary*, nos. 42461/13 and 44357/13, Grand Chamber judgment of 17 May 2016 (Article 10, Freedom of expression- Violation).** The case concerned fines imposed on Hungarian MPs from two opposition parties who had disrupted parliamentary proceedings by protesting against two bills being debated in Parliament. The applicants complained that the decisions to fine them for their conduct during the parliamentary session had violated their right to freedom of expression and that they had not had a remedy by which to challenge the disciplinary measures taken against them.....546

**138. ECHR, *Avotiņš v. Latvia*, no. 17502/07, Grand Chamber judgment of 23 May 2016 (Article 6-1, Right to a fair trial – No violation).** The applicant complained that in issuing a declaration of enforceability in respect of a judgment from the Cypriot courts, allegedly given in breach of his defence rights, the Latvian Supreme Court had infringed his right to a fair trial. The Court examined the 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.....551

**139. ECHR, *Biao v. Denmark*, no. 38590/10, Grand Chamber judgment of 24 May 2016 (Article 14, Prohibition of discrimination read in conjunction with Article 8- Violation).** The case concerned the complaint by a naturalised Danish citizen of Togolese origin, Ousmane Biao, and his Ghanaian wife that they could not settle in Denmark as the Danish authorities refused to grant them family reunion. In its assessment, the Court took into consideration relevant EU law provisions and

case-law, leading to the conclusion that the requirements of the domestic law were discriminatory.....557

**140. ECHR, *Beortegui Martinez v. Spain*, no. 36286/14, Chamber judgment of 31 May 2016 (Article 3, Prohibition of torture and inhuman or degrading treatment – Violation on account of the investigation conducted by the national authorities / No violation as regards the alleged ill-treatment).** The applicant complained that there had been no effective investigation into his complaint of having been ill-treated while held incommunicado in police custody. The Court 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.....562

**141. ECHR, *R.D. v. France*, no. 34648/14, Chamber judgment of 16 June 2016 (Article 3, Prohibition of torture and inhuman or degrading treatment – 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. ....566

**142. ECHR, *Nait-Liman v. Switzerland*, no. 51357/07, Chamber judgment of 21 June 2016 (Article 6, Right to a fair trial – No violation).** Following the refusal of the Swiss civil courts to examine the applicant’s 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 of torture under international law, had not violated the applicant’s rights. ....568

**143. ECHR, *Al-Dulimi and Montana Management Inc. v. Switzerland*, no. 5809/08, Grand Chamber judgment of 21 June 2016 (Article 6-1, Right to a fair trial – Violation). The Grand Chamber upheld the Chamber judgment (case no. 82).** 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. As the resolution did not contain any clear or explicit wording excluding the possibility of judicial supervision of the measures taken for its implementation, this was to be understood as authorising the courts of the respondent State to exercise sufficient scrutiny so that any arbitrariness could be avoided. 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. ....571

**144. ECHR, *Baka v. Hungary*, no. 20261/12, Grand Chamber judgment of 23 June 2016 (Article 6-1, Right to access to a court- Violation; Article 10, Freedom of expression- Violation).** The applicant, Mr Baka, President of the Hungarian Supreme Court alleged that his mandate had been prematurely terminated following his criticism of legislative reforms. He further complained that he had been denied access to a court to defend his right in relation to the premature termination of his mandate as President of the Supreme Court, since the measure resulted from legislation at constitutional level and was therefore not subject to any form of judicial review, including by the Constitutional Court.....577

**145. ECHR, *J.K. and Others v. Sweden*, no. 59166/12, Grand Chamber judgment of 23 August 2016 (Article 3, Prohibition of torture and inhuman or degrading treatment – Violation, if the order for the applicants’ deportation to Iraq were implemented).** The applicants, an Iraqi married couple and their sons who had applied for asylum in Sweden, successfully argued that if the order for their deportation to Iraq was implemented, it would put them at risk of persecution and ill-treatment by Al-Qaeda. Given that it had been established that the applicants had been subjected to ill-treatment by al-Qaeda while still in Iraq, the Grand Chamber reversed the Chamber judgment (case

no. 107) and held that there was a strong indication that the applicants would continue to be at risk from non-State actors if deported. ....582

**146. ECHR, *Ibrahim and Others v. the United Kingdom*, nos. 50541/08, 50571/08, 50573/08 and 40351/09, Grand Chamber judgment of 13 September 2016 (Article 6-1 and Article 6-3-c, Right to a fair trial and right to legal assistance - No Violation with respect to Mr Ibrahim, Mr Mohammed and Mr Omar / Violation with respect to Mr Abdurahman).** The applicants were arrested on suspicion of having lit three of the four bombs which failed to explode on the London transport system on 21 July 2005. They complained before the Court about the temporary delay in providing them with access to a lawyer and the admission at their subsequent trials of statements made in the absence of lawyers. ....586

**147. ECHR, *Mustafić-Mujić and Others v. the Netherlands*, no. 49037/15, Chamber decision of 30 August 2016 (Article 2, Right to life - Inadmissible).** The applicants, relatives of men killed in the Srebrenica massacre of July 1995, complained that the Netherlands authorities had wrongly refused to investigate and prosecute three Dutch servicemen who were members of the UN peacekeeping force in Bosnia at the time for allegedly sending their relatives to their probable death by ordering them to leave the safety of the UN peacekeepers' compound after the Bosnian Serb forces had overrun Srebrenica and its environs. ....592

**148. ECHR, *B.A.C. v. Greece*, no. 11981/15, Chamber judgment of 13 October 2016 (Article 8, Right to respect for private and family life – Violation; Article 8 in conjunction with Article 13, Right to an effective remedy – Violation; Article 3, Prohibition of torture and inhuman or degrading treatment, in conjunction with Article 13 - Violation if Mr B.A.C. were returned to Turkey).** The Court found in particular that the failure by the authorities to determine the applicant's asylum application for a period of more than 14 years without any justification had breached the positive obligations inherent in his right to respect for his private life. Furthermore, while waiting for a decision on his asylum application, the applicant's legal status remained uncertain, thus putting him in danger of being returned to Turkey, where there was a substantial risk that he might be subjected to treatment contrary to Article 3. ....596

**149. ECHR, *Radunović and Others v. Montenegro*, nos. 45197/13, 53000/13 and 73404/13, Chamber judgment of 25 October 2016 (Article 6-1, Right of access to a court - Violation).** The applicants, Montenegrin nationals employed by the United States Embassy in Montenegro but later dismissed from their posts, successfully argued that the national courts' refusal to examine their ensuing claims because of sovereign immunity violated their rights under the Convention. ....600

**150. ECHR, *Kamenica and Others v. Serbia*, no. 4159/15, Chamber decision of 27 October 2016 (Article 3, Prohibition of torture and inhuman or degrading treatment- Inadmissible; Article 6, Right to a fair trial- Inadmissible; Article 13, Right to an effective remedy- Inadmissible).** The case concerned 67 applicants, all nationals of Bosnia and Herzegovina, who claimed that they had been unable to pursue criminal complaints lodged with the Serbian Office of the War Crimes Prosecutor against their alleged ill-treatment in detention camps on Serbian territory during the war in Bosnia and Herzegovina as the statute of limitations prevented the prosecution of any of the alleged acts of ill-treatment as anything else than as war crimes. ....601

**151. ECHR, *Naku v. Lithuania and Sweden*, no. 26126/07, Chamber judgment of 8 November 2016 (Article 6-1, Right of access to a court - Violation by Lithuania / Inadmissible against Sweden).** The applicant, a Lithuanian national who worked at the Swedish Embassy in Vilnius for 14 years, argued that she had been unable to challenge her dismissal from the embassy before Lithuanian courts, as her Swedish employer had successfully invoked jurisdictional immunity. ....602

**152. ECHR, *Magyar Helsinki Bizottság v. Hungary*, no. 18030/11, Grand Chamber judgment of 8 November 2016 (Article 10, Freedom of expression- Violation).** The case

concerned the authorities' refusal to provide an NGO with information relating to the work of ex officio defence counsel, as the authorities had classified that information as personal data that was not subject to disclosure under Hungarian law. The Court in its assessment referred to international and EU legislation regarding data protection. ....604

**153. ECHR, *Muradyan v. Armenia*, no. 11275/07, Chamber judgment of 24 November 2016 (Article 2, Right to life - Violation).** The applicant, an Armenian national, successfully claimed that his son, who was at the time serving in a military base in the (unrecognised) "Nagorno Karabakh Republic", had died as a result of ill-treatment by his superiors as well as of the failure to provide him with adequate medical assistance. The Court established that Armenia exercised effective control over Nagorno Karabakh and the surrounding territories and that the death and the ensuing investigation therefore fell within the jurisdiction of Armenia. ....608

**154. ECHR, *Paposhvili v. Belgium*, no. 41738/10, Grand Chamber judgment of 13 December 2016 (Article 3, Prohibition of torture and inhuman or degrading treatment – Violation; Article 8, Right to respect for private and family life - Violation).** The applicant, a seriously ill Georgian national living in Brussels, successfully argued that his removal to Georgia would violate his rights under the Convention. The Court found, reversing the Chamber judgment (case no. 86), that in the absence of any assessment by the domestic authorities of the risk facing Mr Paposhvili, in the light of the information concerning his state of health and the existence of appropriate treatment in Georgia, the information available to those authorities had been insufficient for them to conclude that the applicant, if returned to Georgia, would not have run a real and concrete risk of treatment contrary to Article 3. ....613

**155. ECHR, *Khlaifia and Others v. Italy*, no. 16483/12, Grand Chamber judgment of 15 December 2016 (Article 5-1, Right to liberty and security – Violation; Article 5-2, Right to be informed promptly of the reasons of one's arrest – Violation; Article 5-4, Right to judicial review of detention – Violation; Article 3, Prohibition of torture and inhuman or degrading treatment – No violation; Article 4 of Protocol No. 4, Prohibition of collective expulsion of aliens – No violation; Article 13, Right to an effective remedy, taken in conjunction with Article 3 – Violation; Article 13 taken in conjunction with Article 4 of Protocol No. 4 – No violation).** The applicants, Tunisian nationals, successfully alleged, *inter alia*, that their asylum in detention centres on Lampedusa and on ships in Palermo harbour (Sicily) during the Arab spring of 2011 had been unlawful. The Grand Chamber reversed, however the Chamber judgment (case no. 117), in finding that the applicant's repatriation to Tunisia had not amounted to a collective expulsion in violation of Article 4 of Protocol No. 4. ....617

**156. ECHR, *Shioshvili and Others v. Russia*, no. 19356/07, Chamber judgment of 20 December 2016 (Article 3, Prohibition of torture and inhuman or degrading treatment – Violation; Article 13, Right to an effective remedy, taken in conjunction with Article 3 - Violation; Article 2 of Protocol No. 4, Freedom of movement – Violation; Article 4 of Protocol No. 4, Prohibition of collective expulsion - Violation).** The applicants, Georgian nationals settled in Russia, successfully complained that they had been collectively expelled from Russia, but then prevented from leaving the country for almost two weeks whilst being exposed to very poor conditions by the Russian authorities. ....624

**157. ECHR, *J. and Others v. Austria*, no. 58216/12, Chamber judgment of 17 January 2017 (Article 4, Prohibition of forced labour- No violation; Article 3, Prohibition of inhuman or degrading treatment-No violation).** The case concerned the Austrian authorities' investigation into an allegation of human trafficking as two Filipino nationals filed a criminal complaint against their employers in Austria concerning their treatment in the United Arab Emirates which they claimed had continued during a short stay in Vienna. The local authorities found that they did not have jurisdiction over the alleged offences committed abroad and decided to discontinue the investigation. The Court found that there had been no obligation under the European Convention for States to provide for universal jurisdiction over trafficking offences committed abroad. ....628

**158. ECHR, *Döner and Others v. Turkey*, no. 29994/02, Chamber judgment of 7 March 2017 (Article 5, Right to liberty- Violation; Article 10, Freedom of expression- Violation).** The applicants, 20 Turkish nationals, lived in Istanbul and their children attended different public elementary schools. After submitting petitions requesting that their children be taught in Kurdish, criminal proceedings were brought against them for aiding and abetting the PKK (Workers' Party of Kurdistan) by participating in its strategy of carrying out non-violent acts of civil disobedience, aimed at leaving the State in a difficult position in the international arena. They complained, among others, that they had been subjected to criminal proceedings for using their constitutional right to file a petition, despite the absence of any provisions in domestic law criminalizing such conduct. ....632

**159. ECHR, *K2 v. the United Kingdom*, no. 42387/13, Chamber decision of 9 March 2017 (Article 8, Right to private and family life- Inadmissible; Article 14 taken together with Article 8- Prohibition of discrimination- Inadmissible).** The applicant, who was suspected of taking part in terrorism-related activities in Somalia and for this reason he was deprived of his UK citizenship and barred from re-entering the country, claimed that these decisions had violated his right to respect for private and family life and had been discriminatory. The Court noted that the applicant would not be left stateless by the loss of UK citizenship (as he had Sudanese citizenship), and the interference to his private and family life caused by the deprivation of citizenship was limited.....634

**160. ECHR, *Ilias and Ahmed v. Hungary*, no. 47287/15, Chamber judgment of 14 March 2017 (Article 5-1, Right to liberty and security- Violation; Article 5-4, Right to judicial review of detention-Violation; Article 3, Prohibition of torture and inhuman or degrading treatment-Violation; Article 13, Right to an effective remedy-Violation taken together with Article 3, Prohibition of torture and inhuman or degrading treatment- No violation).** The applicants, two Bangladeshi asylum-seekers, successfully claimed that their border-zone detention in Hungary had amounted to violation of their liberty and security, as they had effectively been detained without any formal, reasoned decision and without appropriate judicial review and that their removal from Hungary to Serbia, insofar as they had no effective guarantees to protect them from exposure to a real risk of being subjected to inhuman or degrading treatment in case of a chain- refoulement to Greece.....638

**161. ECHR, *Mitrović v. Serbia*, no. 52142/12, Chamber judgment of 21 March 2017 (Article 5-1, Right to liberty and security- Violation).** The applicant, a Bosnia and Herzegovina national, was arrested and imprisoned for over two years by the Serbian authorities on the basis that he had been convicted of a crime in 1994 by the courts of the “Republic of Serbian Krajina” – an internationally unrecognised entity, composed of a territory that is now in the Republic of Croatia – and still had time left to serve in his sentence. He successfully claimed that he had been deprived of his liberty as his conviction had been issued by a court of an internationally unrecognised entity, and the judgment had never been formally recognized by the Serbian courts. ....642

**162. ECHR, *Z.A. and Others v. Russia*, nos. 61411/15, 61420/15, 61427/15 and 3028/16, Chamber judgment of 21 March 2017 (Article 3, Prohibition of torture and inhuman or degrading treatment-Violation; Article 5-1, Right to liberty and security- Violation).** The applicants, four individuals from Iraq, the Palestinian\*\* territories, Somalia and Syria, successfully claimed that their confinement in the transit zone of Moscow’s Sheremetyevo Airport, which had not been of their own choosing, had amounted to a deprivation of liberty as well as inhuman and degrading treatment, since there was no legal basis for it under domestic law and the conditions of detention were unacceptable.....645

**163. ECHR, *Škorjanec v. Croatia*, no. 25536/14, Chamber judgment of 28 March 2017 (Article 3, Prohibition of inhuman or degrading treatment in conjunction with Article 14, Prohibition of discrimination- Violation).** The applicant, a Croatian national, complained to Court of a lack of an effective procedural response of the Croatian authorities in relation to a racially motivated act of violence against her. In June 2013, two men racially abused the applicant’s partner on the basis of his Roma origin, before attacking both him and the applicant herself. She maintained

that domestic law and practice was deficient, as it did not provide protection against discriminatory violence for individuals who were victims due to their association with another person. ....648

**164. ECHR, *Chowdury and Others v. Greece*, no. 21884/15, Chamber judgment of 30 March 2017 (Article 4-2, Prohibition of forced labour-Violation).** The case concerned 42 Bangladeshi nationals who did not have work permits and were subjected to forced labour. The Court found, firstly, that the applicants' situation was one of human trafficking and forced labour, and specified that exploitation through labour was one aspect of trafficking in human beings and that the State had failed in its obligations to prevent this, to protect the victims, to conduct an effective investigation into the offences committed and to punish those responsible for the trafficking. ....651

**165. ECHR, *Nagmetov v. Russia*, no. 35589/08, Grand Chamber judgment of 30 March 2017 (Article 2, Right to life-Violation).** The case concerned the issue of whether an award of just satisfaction could be made in the absence of a properly made "claim". The Court found in particular that where a "claim" had not been properly made in compliance with its Rules of Court, it remained empowered to afford, in a reasonable and restrained manner, just satisfaction on account of non-pecuniary damage arising in the exceptional circumstances of a given case. ....655

**166. ECHR, *Thimothawes v. Belgium*, no. 39061/11, Chamber judgment of 4 April 2017 (Article 5-1, Right to liberty and security-No violation).** The applicant, an Egyptian asylum-seeker, unsuccessfully claimed that his five-month detention at the Belgian border violated his right to liberty. The Court found in particular that where a legal provision depriving a person of his liberty originated in international law, only the domestic courts were empowered to interpret it, pursuant to the supranational provisions in question. ....660

**167. ECHR, *Güzelyurtlu and Others v. Cyprus and Turkey*, no. 36925/07, Chamber judgment of 4 April 2017 (Article 2, Right to life- procedural obligation, investigation- Violation by Cyprus; Article 2, Right to life- procedural obligation, investigation- Violation by Turkey).** The applicants, relatives of three Cypriot nationals of Turkish Cypriot origin, complained that both the Cypriot and Turkish authorities (including those of the "Turkish Republic of Northern Cyprus") failed to co-operate and conduct an effective investigation into the killing of their relatives, in violation of their right to life. The Court found that both Governments had not been prepared to make any compromise on their positions and find middle ground, despite various options put forward, including by the United Nations. ....663

**168. ECHR, *Tagayeva and Others v. Russia*, nos. 26562/07, 14755/08, 49339/08, 49380/08, 51313/08, 21294/11 and 37096/11, Chamber judgment of 13 April 2017 (Article 2, Right to life-Violation, violation of its procedural obligations and violation due to serious shortcomings in planning; Article 13, Right to an effective remedy- No violation; Article 46, Binding force and implementation of judgments).** The case was brought by 409 Russian nationals who had either been taken hostage and/or injured in the incident, or are family members of those taken hostage, killed or injured in the September 2004 terrorist attack on a school in Beslan, North Ossetia (Russia). All of the applicants maintained that the State had failed in its obligation to protect the victims from the known risk to life and that there had been no effective investigation into the events. ....667

**169. ECHR, *Harkins v. the United Kingdom*, no. 71537/14, Grand Chamber decision of 10 July 2017 (Article 3, Prohibition of inhuman and degrading treatment- Inadmissible; Article 6, Right to a fair trial-Inadmissible).** The Grand Chamber upheld the Chamber judgment (case no.66). The applicant, a British national, unsuccessfully claimed that his extradition to the USA would violate his right to a fair trial and it would expose him to inhuman or degrading treatment, as, if convicted in Florida, he would face a mandatory sentence of life in prison without the possibility of parole. ....673

**170. ECHR, *Belkacem v. Belgium*, no. 34367/14, Chamber decision of 20 July 2017 (Article 10, Freedom of expression- Incompatible as contrary to the spirit of the Convention).** The applicant, the leader and spokesperson of the organisation "Sharia4Belgium", which was dissolved in

2012, unsuccessfully claimed that his right to freedom of expression had been violated. The Court observed that defending Sharia while calling for violence to establish it could be regarded as “hate speech”, and that each Contracting State was entitled to oppose political movements based on religious fundamentalism.....677

**171. ECHR, *Khlebik v. Ukraine*, no.2945/16, Chamber judgment of 25 July 2017 (Article 6-1, Right to a fair trial within a reasonable time- No violation, Article 5, Right to liberty and security- Inadmissible).** The applicant, a Ukrainian national who had been convicted of several offences by a court in the Luhansk Region in 2013, unsuccessfully claimed that his right to a fair trial had been violated, as the domestic courts were unable to examine his appeal against his conviction, because his case file was blocked in an area that was no longer under the Ukrainian Government’s control.....680

**172. ECHR, *Bărbulescu v. Romania*, no. 61496/08, Grand chamber judgment of 5 September 2017 (Article 8, Right to respect for private and family life- Violation).** The applicant, a Romanian national, claimed that his employer’s decision to terminate his contract after monitoring his electronic communications and accessing their contents was based on a breach of his privacy and that domestic courts failed to protect his right to respect for his private life and correspondence. The Court in its judgment particularly referred to international and European standards of data protection, such as International Labour Office Code of Practice on the Protection of Workers’ Personal Data and Recommendation CM/Rec (2015)5 of the Committee of Ministers of the Council of Europe.....683

**173. ECHR, *Falkauskienė v. Lithuania*, no. 42307/09, Chamber decision of 21 September 2017 (Article 1 of Protocol No. 1, Protection of property- Inadmissible; Article 6-1, Right of access to court- Inadmissible).** The applicant, a Lithuanian national, complained that it was impossible for her to recover money that she had deposited with a bank operating in Lithuania in 1991, following the country’s independence in 1990, violating thus her right to protection of property. Moreover, she claimed that her right of access to court was violated by the excessive court fees in the civil proceedings. ....687

**174. ECHR, *N.D. and N.T. v. Spain*, nos. 8675/15 and 8697/15, Chamber judgment of 3 October 2017 (Article 4 of Protocol No. 4, Prohibition of collective expulsion of aliens- Violation; Article 13, Right to an effective remedy, taken together with Article 4 of Protocol No. 4- Violation).** The case concerned the immediate return to Morocco of two sub-Saharan migrants who had attempted to enter Spanish territory illegally at the Melilla enclave on the North-African coast without any previous administrative or judicial decision. The Court concluded that it amounted to collective expulsion with a clear link to the fact that they were prevented from having access to a remedy before the removal. ....690

**175. ECHR, *Burmych and Others v. Ukraine*, nos. 46852/13 et al., Grand Chamber judgment of 12 October 2017 (Article 6-1, Right to a fair hearing within a reasonable time- Violation; Article 13, Right to an effective remedy- Violation; Article 1 of Protocol No. 1, Protection of property- Violation; Article 37-1, Striking out applications).** The Court found that the present cases were part and parcel of the execution procedure set out in the *Ivanov* pilot judgment and they should be transmitted to the Committee of Ministers in its capacity as the body responsible for ensuring that all persons affected by the systemic problem found in the pilot judgment obtain justice and compensation. The issue in this case was namely the non-enforcement or delayed enforcement of domestic court decisions, combined with the absence of effective domestic remedies in respect of such shortcomings.....694

**176. ECHR, *Ilgar Mammadov v. Azerbaijan (No. 2)*, no. 919/15, Chamber judgment of 16 November 2017 (Article 6-1, Right to a fair trial- Violation).** The case concerned the criminal proceedings brought against a prominent Azerbaijani opposition politician, Ilgar Mammadov. The Court found that there had been a violation of his right to a fair trial as the domestic courts had either not addressed or remained silent about a number of inconsistencies in the evidence used to convict the

applicant. This is the second case he has brought before the Court; the first concerned his arrest and pre-trial detention following the same events (see case no 88). .....700

**177. ECHR, *Merabishvili v. Georgia*, no. 72508/13, Grand Chamber judgment of 28 November 2017 (Article 5-1, Right to liberty and security- No violation; Article 5-3, Entitlement of a detainee to trial within a reasonable time or to release pending trial- No violation with regard to his initial placement in pre-trial detention/ Violation at least from 25 September 2013 onwards, his pre-trial detention had ceased to be based on sufficient grounds; Article 18 taken in conjunction with Article 5, Limitation on use of restrictions on rights- Violation).** The case concerned the arrest and pre-trial detention of a former Prime Minister of Georgia, Mr. Merabishvili, and his complaint that there had been ulterior purposes behind these measures. Namely, he alleged that the arrest and pre-trial detention had aimed to remove him from the political scene and that the Chief Public Prosecutor had attempted to use his detention as leverage to pressure him to provide information about the foreign bank accounts of the former President of Georgia, Mr. Saakashvili and about the death in 2005 of the former Prime Minister, Zurab Zhvania. The Court in its judgment referred to relevant European law provisions on the exploitation of power and to the case law of the Inter-American Court of Human Rights. ....705

**178. ECHR, *X v. Germany*, no. 54646/17, Chamber decision of 30 November 2017 (Article 3, Prohibition of torture and of inhuman or degrading treatment- Inadmissible, Article 13, Right to an effective remedy- Inadmissible; Article 8, Right to respect for private and family life- Inadmissible).** The applicant, a Russian national living in Germany, unsuccessfully claimed that his deportation to Moscow exposed him to a real risk of being subjected to inhuman or degrading treatment .....713

**179. ECHR, *Ribač v. Slovenia*, no. 57101/10, Chamber judgment of 5 December 2017 (Article 14, Prohibition of discrimination, taken together with Article 1 of Protocol No. 1, Protection of property- Violation).** The applicant was a citizen of Serbia within the Socialist Federal Republic of Yugoslavia (SFRY) but has been residing in Slovenia since 1964 and served as an officer in the Yugoslav People's Army until 1991. He successfully claimed that the refusal of the Slovenian authorities to grant him an old-age pension between November 1998 and April 2003 on the grounds that he had not had Slovenian citizenship was discriminatory and violated his right to property.....716

**180. ECHR, *S.F. and Others v. Bulgaria*, no. 8138/16, Chamber judgment of 7 December 2017 (Article 3, Prohibition of torture and inhuman or degrading treatment- Violation in respect of the three children).** The case concerned a complaint brought by an Iraqi family about the conditions in which they had been kept in immigration detention for a few days when trying to cross Bulgaria on their way to Western Europe in 2015, as they successfully claimed that it amounted to inhuman and degrading treatment.....717

**181. ECHR, *D.L. v. Austria*, no. 34999/16, Chamber judgment of 7 December 2017 (Article 2, Right to life- No violation; Article 3, Prohibition of torture and inhuman or degrading treatment- No violation).** The applicant, a Serbian national, unsuccessfully claimed that his extradition from Austria to Kosovo\* would put his life at great risk and expose him to inhuman or degrading treatment there since the Kosovo\* authorities were either unwilling or unable to protect him.....718

**182. ECHR, *López Elorza v. Spain*, no. 30614/15, Chamber judgment of 12 December 2017 (Article 3, Prohibition of torture and inhuman or degrading treatment- No violation).** The applicant, a Venezuelan and Colombian national, unsuccessfully complained that his extradition from Spain to the United States of America would expose him to treatment incompatible with the European Convention as it would put him at risk of being sentenced to life imprisonment without parole. ....719

**183. ECHR, *Joannou v. Turkey*, no. 53240/14, Chamber judgment of 12 December 2017 (Article 1 of Protocol No. 1, Protection of property- Violation).** The applicant, a British and

Cypriot national, successfully claimed that the length of proceedings before the Immovable Property Commission, concerning compensation for her property, which is located in the “Turkish Republic of Northern Cyprus”, was excessive and thus in breach of her right to property. ....721

**184. ECHR, *Chiragov and Others v. Armenia*, no. 13216/05, Grand Chamber judgment of 12 December 2017 (Article 41, Just Satisfaction- Awarded).** The Court unanimously held that the Armenian Government had to give just satisfaction in respect of pecuniary and non-pecuniary damage to each of the six applicants, Azerbaijani refugees, as 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 Nagorno-Karabakh conflict. The Court underlined the responsibility of the two States concerned to find a resolution to the Nagorno-Karabakh conflict on the political level. ....726

**185. ECHR, *Sargsyan v. Azerbaijan*, no. 40167/06, Grand Chamber judgment of 12 December 2017 (Article 41, Just Satisfaction- Awarded).** The Court unanimously held that that the Azerbaijani Government had to give just satisfaction in respect of pecuniary and non-pecuniary damage to the applicant, an Armenian refugee, after having been forced to flee from his home in the Shahumyan region of Azerbaijan in 1992 during the conflict over Nagorno-Karabakh and had since been denied the right to return to his village and to have access to and use his property there. The Court underlined the responsibility of the two States concerned to find a resolution to the Nagorno-Karabakh conflict on the political level. ....726

**186. ECHR, *A. v. Switzerland*, no. 60342/16, Chamber judgment of 19 December 2017 (Article 2, Right to life- No violation; Article 3, Prohibition of torture and inhuman or degrading treatment- No violation).** The applicant, an Iranian asylum-seeker, alleged that his conversion to Christianity put him at a real risk of being killed or ill-treated if he were to be deported to Iran. ....730

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All references to Kosovo\* and Palestine\*\* in this document should be understood as follows:

\* Kosovo, whether to the territory, institutions or population, shall be understood in full compliance with United Nations Security Council Resolution 1244 and without prejudice to the status of Kosovo;

\*\* Palestine references shall not be understood as recognition of a State of Palestine and is without prejudice to the individual positions of Council of Europe member States on this issue.

1. **ECHR, *Vilvarajah and Others v. the United Kingdom*, nos. 13447/87, 13448/87, 13165/87 et al., Chamber judgment of 30 October 1991 (Article 3, Prohibition of torture and inhuman or degrading treatment – No violation; Article 13, Right to an effective remedy – No violation).** The applicants, Sri Lankan asylum seekers in the United Kingdom, unsuccessfully claimed that if removed to Sri Lanka they would face a real risk of treatment contrary to Article 3. The Court observed that Contracting States had the right, as a matter of well-established international law and subject to their treaty obligations, to control the entry, residence and expulsion of aliens. It further noted that the right to political asylum was not contained in either the Convention or its Protocols. The decision by Contracting States to expel an asylum seeker may nevertheless give rise to an issue under Article 3 but in the instant case substantial grounds had not been established for believing that the applicants would be exposed to a real risk of being subjected to torture or inhuman or degrading treatment on their return to Sri Lanka.

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

### **September-October 1991**

Judgment 30.10.1991

### **Article 3**

#### **Expulsion**

#### **I. ARTICLE 3 OF THE CONVENTION**

##### **A. Applicability of Article 3 in expulsion cases**

While the right to political asylum is not contained in the Convention or its Protocols, the decision by Contracting States to expel an asylum seeker may give rise to an issue under Article 3 where substantial grounds have been shown for believing that he faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment.

##### **B. Application to particular circumstances**

###### **1. General approach**

In determining whether substantial grounds have been shown for believing the existence of a risk of Article 3 treatment, the Court will assess the issue in the light of all the material placed before it or, if necessary, material obtained *proprio motu*.

The risk must be assessed primarily with reference to those facts which were known or ought to have been known to the State at the time of the expulsion, although subsequent information may be of value in confirming or refuting the State's assessment. The Court's examination of the existence of the risk must be a rigorous one.

###### **2. Assessment in the present case**

Substantial grounds have not been established for believing that the applicants would be exposed to a real risk of being subjected to Article 3 treatment on their return to Sri Lanka in February 1988. By that time there was an improvement in the situation in the north and east of Sri Lanka. Moreover,

under a UNHCR voluntary repatriation programme large numbers of Tamils were repatriated voluntarily to Sri Lanka.

The evidence concerning the applicants' background and the general unsettled situation does not establish that their personal position was any worse than the generality of other Tamils or other young male Tamils who were returning to their country. A mere possibility of ill-treatment in such circumstances is not in itself sufficient to give rise to a breach of Article 3.

As regards the second, third and fourth applicants, there existed no special distinguishing features in their cases that could or ought to have enabled the Secretary of State to foresee that they would be ill-treated on their return. In addition, the removal of the fourth and fifth applicants did not expose them, by this fact alone, to a real risk of treatment beyond the threshold of Article 3.

Conclusion: no breach (eight votes to one).

## **II. ARTICLE 13 OF THE CONVENTION**

In the present case judicial review proceedings provided an effective degree of control over administrative decisions in asylum cases. The courts are able to review the Secretary of State's refusal to grant asylum with a view to determining whether it is tainted with illegality, irrationality or procedural impropriety. They have also stressed their special responsibility to subject such administrative decisions to the most anxious scrutiny, where an applicant's life or liberty may be at risk.

Conclusion: no breach (seven votes to two).

2. **ECHR, *Drozd and Janousek v. France and Spain*, no. 12747/87, Plenary Court judgment of 26 June 1992 (Article 6-1, Right to a fair trial – No jurisdiction of the Court; Article 5-1, Right to liberty and security – No violation).** The applicants, who had been tried before courts in Andorra operated by seconded judges from France and Spain, unsuccessfully claimed that their alleged lack of a fair trial before courts in Andorra was the responsibility of France and Spain. They further claimed that their detention in France following convictions in these proceedings was unlawful in the absence of a legal basis permitting the enforcement on French territory of criminal convictions pronounced in Andorra.

### **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

### **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).

## **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 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).

3. **ECHR, *Loizidou v. Turkey* (preliminary objections), no. 15318/89, Grand Chamber judgment of 23 March 1995 (Restrictions *ratione loci* to the right of individual application).** The applicant, a Cypriot national, complained, *inter alia*, of continued denial of access to her property by Turkey. This judgment on preliminary objections dealt, in particular, with the validity of territorial restrictions Turkey had declared with regard to the competence of the Commission and Court to hear cases against it.

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

### March 1995

Judgment 23.3.1995 [GC]

### Article 1

#### Jurisdiction of states

Jurisdiction of Turkey in case concerning access to property in northern Cyprus

### Article 35

#### Article 35-3

#### Ratione temporis

Restrictions *ratione temporis* des déclarations turques relatives à la Convention: *preliminary objection joined to the merits*

## I. STANDING OF THE APPLICANT GOVERNMENT

The applicant Government have been recognised by the international community as the Government of the Republic of Cyprus.

*Conclusion:* their *locus standi* as the Government of a High Contracting Party not in doubt.

## II. ALLEGED ABUSE OF PROCESS

Since objection not raised before the Commission the Turkish Government is estopped from raising it before the Court in so far as it applies to the applicant.

In so far as objection is directed to the applicant Government, the Court notes that this Government have referred the case to the Court *inter alia* because of concern for the rights of the applicant and other citizens in the same situation. Such motivation not an abuse of Court's procedures.

*Conclusion:* objection rejected (unanimously).

## III. THE TURKISH GOVERNMENT'S ROLE IN THE PROCEEDINGS

Not within the discretion of a Contracting Party to characterise its standing in the proceedings before the Court in the manner it sees fit. Case originates in a petition made under Article 25 against Turkey in her capacity as a High Contracting Party and has been referred to the Court under Article 48 (b) by another High Contracting Party.

*Conclusion:* Turkey is the respondent party in this case.

#### **IV. SCOPE OF THE CASE**

The applicant Government have confined themselves to seeking a ruling on the complaints under Article 1 of Protocol No. 1 and Article 8, in so far as they have been declared admissible by the Commission, concerning access to the applicant's property.

Not necessary to give a general ruling on the question whether it is permissible to limit a referral to the Court to some of the issues on which the Commission has stated its opinion.

*Conclusion:* only the above complaints are before the Court.

#### **V. OBJECTIONS *RATIONE LOCI***

##### **A. Whether the facts alleged by the applicant are capable of falling within the jurisdiction of Turkey under Article 1 of the Convention**

Court is not called upon at the preliminary objections stage to examine whether Turkey is actually responsible. This falls to be determined at the merits phase. Its enquiry is limited to determining whether the matters complained of are capable of falling within the "jurisdiction" of Turkey even though they occur outside her national territory.

The concept of "jurisdiction" under Article 1 is not restricted to the national territory of the High Contracting Parties. Responsibility may also arise when as a consequence of military action, whether lawful or unlawful, a Contracting Party exercises effective control of an area outside its national territory.

Not disputed that the applicant was prevented by Turkish troops from gaining access to her property.

*Conclusion:* facts alleged by the applicant are capable of falling within Turkish "jurisdiction" within the meaning of Article 1 (sixteen votes to two).

##### **B. Validity of the territorial restrictions attached to Turkey's Article 25 and 46 declarations**

Court has regard to the special character of the Convention as a treaty for the collective enforcement of human rights; the fact that it is a living instrument to be interpreted in the light of present-day conditions. In addition, its provisions are to be interpreted and applied so as to make its safeguards effective.

Court seeks to ascertain the ordinary meaning given to Articles 25 and 46 in their context and in the light of their object and purpose. Regard also had to subsequent practice in the application of the treaty.

If Articles 25 and 46 were to be interpreted as permitting restrictions (other than of a temporal nature) States would be enabled to qualify their consent under the optional clauses. This would severely weaken the role of the Commission and Court and diminish the effectiveness of the Convention as a constitutional instrument of European public order. The consequences for the enforcement of the Convention would be so far-reaching that a power should have been expressly provided for. No such provision in either Article 25 or 46.

The subsequent practice of Contracting Parties of not attaching restrictions *ratione loci* or *ratione materiae* confirms the view that these are not permitted.

Not contested that Article 46 of the Convention was modelled on Article 36 of the Statute of the International Court of Justice. However, the fundamental difference in the role and purpose of the respective tribunals, coupled with the existence of a practice of unconditional acceptance, provides a compelling basis for distinguishing Convention practice from that of the International Court.

Finally, the application of Article 63 § 4, by analogy, does not provide support for the claim that a territorial restriction is permissible.

### **C. Validity of the Turkish declarations under Articles 25 and 46**

Court does not consider that the issue of the severability of the invalid parts of Turkey's declarations can be decided by reference to the statements of her representatives expressed subsequent to the filing of the declarations. Turkey must have been aware, in view of the consistent practice of Contracting Parties, that the impugned clauses were of questionable validity.

Court finds that the impugned restrictions can be separated from the remainder of the text, leaving intact the acceptance of the optional clauses.

*Conclusion:* the territorial restrictions are invalid but the declarations under Articles 25 and 46 contain valid acceptances of the competence of the Commission and Court (sixteen votes to two).

## **VI. OBJECTION *RATIONE TEMPORIS***

The correct interpretation and application of the restrictions *ratione temporis*, in the Turkish declarations under Articles 25 and 46, and the notion of continuing violations of the Convention, raise difficult legal and factual questions. On the present state of the file, Court does not have sufficient elements enabling it to decide these questions.

*Conclusion:* objection joined to the merits of the case (unanimously).

4. **ECHR, *Chahal v. the United Kingdom*, no. 22414/93, Grand Chamber judgment of 15 November 1996 (Article 3, Prohibition of torture and inhuman or degrading treatment – Violation; Article 5-1, Right to liberty and security – No violation; Article 5-4, Right to judicial review of detention - Violation).** The United Kingdom sought to remove a Sikh separatist to India for national security reasons. The applicant contended that he would face serious violations of his rights under Article 3 if deported. The Court held that, unlike the possibility provided by the United Nations Convention on the Status of Refugees to expel a refugee on grounds of national security or public order, the protection against ill-treatment under Article 3 was absolute in expulsion cases, irrespective of the victim's conduct.

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

#### **November 1996**

Judgment 15.11.1996 [GC]

#### **Article 3**

##### **Expulsion**

Order for deportation to India of Sikh separatist for national security reasons: deportation would constitute a violation

#### **Article 5**

##### **Article 5-1**

##### **Lawful arrest or detention**

##### **Procedure prescribed by law**

Detention for six years pending deportation: no violation

##### **Article 5-4**

##### **Procedural guarantees of review**

##### **Review of lawfulness of detention**

Adequacy of judicial review: violation

### **I. ARTICLE 3 OF THE CONVENTION**

#### **A. Applicability in expulsion cases**

Expulsion may engage responsibility of State under Article 3 where substantial grounds shown for believing there would be real risk to deportee of torture or inhuman or degrading treatment or punishment in receiving country.

## **B. Cases involving alleged danger to national security**

Article 3 provides absolute prohibition of torture - in expulsion cases, if substantial grounds shown for believing deportee would be at risk, his conduct cannot be material consideration.

## **C. Application to particular circumstances**

### 1. Point of time for assessment of risk

Material time that of Court's consideration of case.

### 2. Assessment of risk

Government proposed to return first applicant, well-known supporter of Sikh separatism, to airport of his choice in India - evidence relating to fate of Sikh militants outside State of Punjab therefore of particular relevance.

Court persuaded by evidence corroborated from different objective sources that until mid-1994 elements of Punjab police accustomed to act without regard to human rights of suspected Sikh militants, including pursuing them outside home State - no evidence of change of regime within Punjab police - despite recent improvement in human rights situation in Punjab and efforts of Indian authorities to bring about reform, problems persist with regard to observance of human rights by certain members of security forces in Punjab and elsewhere in India - against this background, assurances of the Indian Government inadequate guarantee of safety - applicant's high profile likely to make him target of hard-line elements in security forces.

*Conclusion:* violation, in the event of decision to deport to India being implemented (twelve votes to seven).

## **II. ARTICLE 5 § 1 OF THE CONVENTION**

All that Article 5 § 1 (f) requires is that "action is being taken with a view to deportation" - immaterial whether detention can be reasonably considered necessary or whether underlying decision to expel justified.

However, if deportation proceedings not prosecuted with due diligence, detention will cease to be permissible - domestic proceedings commenced 16 August 1990 and ended 3 March 1994 - given exceptional circumstances and detailed consideration required by courts and executive, period not excessive.

In view of length of applicant's detention, necessary to consider whether sufficient guarantees against arbitrariness existed -in this context, advisory panel including experienced judicial figures which reviewed national security evidence in full, provided adequate guarantee that there were prima facie grounds for believing applicant to be security threat and thus that executive did not act arbitrarily in ordering his detention.

*Conclusion:* no violation (thirteen votes to six).

## **III. ARTICLE 5 § 4 OF THE CONVENTION**

Since Article 5 § 4 provides *lex specialis* in relation to more general requirements of Article 13, Court must consider it first.

Article 5 § 4 guarantees right to judicial review of sufficient width as to bear on conditions essential for "lawful" detention under Article 5 § 1.

Domestic courts not provided with information relating to national security and thus unable to review whether decision to detain applicant justified - given procedural short-comings of advisory panel, it could not be considered "court" for purposes of Article 5 § 4.

Court recognises that use of confidential material may be unavoidable where national security at stake - however, national authorities cannot be free from effective judicial control whenever they choose to assert that national security involved - technique can be employed to accommodate legitimate security concerns and individual procedural justice.

*Conclusion:* violation (unanimously).

#### **IV. ARTICLE 8 OF THE CONVENTION**

Given finding of violation of Article 3, not necessary to decide hypothetical question whether there would be violation of Article 8 in event of expulsion to India.

*Conclusion:* not necessary to consider complaint (seventeen votes to two).

#### **V. ARTICLE 13 OF THE CONVENTION**

Judicial review and advisory panel procedure inadequate remedies for Article 3 complaint since could not review decision to deport with reference solely to question of risk to applicant, leaving aside national security considerations.

No need to consider complaints of breaches of Articles 5 and 8 in conjunction with 13 in view of findings that Article 5 § 4 violated and Article 8 complaint hypothetical.

*Conclusion:* violation (unanimously).

#### **VI. ARTICLE 50 OF THE CONVENTION**

A. Non-pecuniary damage: findings of violation sufficient just satisfaction.

B. Costs and expenses: reasonable legal costs awarded.

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

5. **ECHR, *Loizidou v. Turkey*, no. 15318/89, Grand Chamber judgment of 18 December 1996 (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 her property since the continuing division of the territory of Cyprus. She 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

#### **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 - 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).

6. **ECHR, *Guerra and Others v. Italy*, no. 14967/89, Grand Chamber judgment of 19 February 1998 (Article 8, Right to respect for private and family life – Violation).** The applicants, who lived nearby a chemical processing factory which emitted toxic chemicals into the air, successfully claimed based on Directive 82/501/EEC that the failure to provide the local population with information about the risk factors and how to proceed in the event of an accident at the factory, had breached their right to respect for 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

### **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).

7. **ECHR, *Waite and Kennedy v. Germany* and *Beer and Regan v. Germany*, nos. 26083/94 and 28934/95, Grand Chamber judgment of 18 February 1999 (Article 6-1, Right of access to a court – No violation).** The applicants, former employees of the European Space Agency (ESA), unsuccessfully argued that the denial by the German employment tribunals to hear their employment dispute due to the ESA's jurisdictional immunity had breached their Convention right of access to a tribunal.

**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.

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 **Cafilisch** (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** ("The former Yugoslav Republic of Macedonia"),  
 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 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.

**8. ECHR, *Matthews v. the United Kingdom*, no. 24833/94, Grand Chamber judgment of 18 February 1999 (Article 3 of Protocol No. 1, Right to free elections - Violation).**

The applicant, a resident of Gibraltar, was refused registration to vote at the elections for the European Parliament, as the franchise had been limited to the United Kingdom, excluding its dependent territories such as Gibraltar. The Court concluded that the United Kingdom was responsible for securing the rights guaranteed by Article 3 of Protocol No. 1 in Gibraltar regardless of whether the elections were purely domestic or European.

**ECHR 88 (1999)**  
**18.2.1999**

**Press release issued by the Registrar**

In a judgment delivered at Strasbourg on 18 February 1999 in the case of **Matthews v. the United Kingdom** (application no. 24833/94), the European Court of Human Rights held by 15 votes to two that there had been a violation of Article 3 of Protocol No. 1 (right to participate in elections to choose the legislature) to the European Convention on Human Rights.

1. Principal facts

The applicant, Ms Denise Matthews, a British citizen, is a resident of Gibraltar. She was born in 1975.

In April 1994 she applied to be registered as a voter in the elections to the European Parliament. She was told that under the terms of the EC Act on Direct Elections of 1976 Gibraltar was not included in the franchise for those elections.

2. Procedure and composition of the Court

The application was lodged with the European Commission of Human Rights on 18 April 1994. Having declared the application admissible, the Commission adopted a report on 29 October 1997 in which it expressed the opinion that there had been no violation of Article 3 of Protocol No. 1 (12 votes to 5). The Commission referred the case to the Court on 26 January 1998.

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 a Grand Chamber of 17 judges, composed as follows:

Luzius **Wildhaber**, (Swiss), *President*,  
 Elisabeth **Palm**, (Swedish),  
 Luigi **Ferrari Bravo** (Italian),  
 Gaukur **Jörundsson** (Icelandic),  
 Georg **Ress** (German),  
 Ireneu **Cabral Barreto** (Portuguese),  
 Jean-Paul **Costa** (French),  
 Willi **Fuhrmann** (Austrian),  
 Karel **Jungwiert** (Czech),  
 Marc **Fischbach** (Luxemburger),  
 Nina **Vajić** (Croatian),  
 John **Hedigan** (Irish),  
 Wilhelmina **Thomassen** (Dutch),

Margarita **Tsatsa-Nikolovska** ("The former Yugoslav Republic of Macedonia"),  
 Tudor **Pantiru** (Moldovan),  
 Kristaq **Traja** (Albanian), *Judges*,  
 Sir John **Freeland** (British), *ad hoc Judge*,

and also Maud **de Boer-Buquicchio**, *Deputy Registrar*.

### 3. Summary of the judgment

#### **Complaint**

The applicant claimed that the absence of elections in Gibraltar to the European Parliament was in violation of her right to participate in elections to choose the legislature under Article 3 of Protocol No. 1 to the Convention. She also alleged a violation of Article 14 of the Convention (freedom from discrimination in the enjoyment of Convention rights) on the ground that she was entitled to vote in European Parliament elections anywhere in the European Union where she lived except in Gibraltar.

#### **Decision of the Court**

It was common ground that Article 3 of Protocol No. 1 applied in Gibraltar.

The Court first considered whether the United Kingdom could be held responsible for the lack of elections to the European Parliament in Gibraltar. It noted that acts of the European Community as such could not be challenged before it as the European Community was not a Contracting Party. However, notwithstanding the transfer of competences to the European Community, Contracting States remained responsible for ensuring that Convention rights were guaranteed. Contracting States were responsible under the Convention and its Protocols for the consequences of international treaties entered into subsequent to the applicability of the Convention guarantees. Moreover legislation emanating from the legislative process of the European Community affected the population of Gibraltar in the same way as legislation which entered the domestic legal order exclusively via the Gibraltar House of Assembly. There was accordingly no reason why the United Kingdom should not be required to secure the rights set out in Article 3 of Protocol No. 1 in respect of European legislation. It followed that the United Kingdom was responsible for securing the rights guaranteed by Article 3 of Protocol No. 1 regardless of whether the elections were purely domestic or European.

The Court then considered whether Article 3 of Protocol No. 1 was applicable to an organ such as the European Parliament and whether that body had the characteristics of a "legislature" in Gibraltar. The Court observed that the word "legislature" in Article 3 did not necessarily mean the national Parliament and that elections to the European Parliament could not be excluded from the ambit of Article 3 merely on the ground that it was a supranational, rather than a purely domestic representative organ. The Court examined the powers of the European Parliament in the context of the European Community and concluded that the Parliament was sufficiently involved both in the specific legislative processes leading to the passage of certain types of legislation and in the general democratic supervision of the activities of the European Community to constitute part of the legislature of Gibraltar for the purposes of Article 3 of Protocol No. 1.

The Court finally addressed the question whether the absence of European Parliamentary elections in Gibraltar was compatible with Article 3. It emphasised that the choice of the electoral system by which the free expression of the opinion of the people in the choice of the legislature was ensured was a matter in which States enjoyed a wide margin of appreciation. However, in the case before it the applicant had been denied any opportunity to express her opinion in the choice of members of the European Parliament, despite the fact that, as the Court had found, legislation that emanated from the European Community formed part of the legislation in Gibraltar and the applicant was directly affected by it. The very essence of the applicant's right to vote to choose the legislature, as guaranteed

under Article 3 of Protocol No. 1, had been denied. There had accordingly been a violation of that provision.

The Court was of the view that it was not necessary to consider the complaints under Article 14 of the Convention, and awarded the applicant approximately £45,000 by way of fees and expenses.

9. **ECHR, *Streletz, Kessler and Krenz v. Germany*, nos. 34044/96, 35532/97 & 44801/98, and, *K.-H.W. v. Germany*, no. 37201/97, Grand Chamber judgments of 22 March 2001 (Article 7-1, No punishment without law – No violation; Article 14, Prohibition of discrimination, taken in conjunction with Article 7 – No violation).** The applicants, senior officials of the former German Democratic Republic (“GDR”) in the first case and a border guard of the GDR’s National People’s Army at the border between the two German States with respect to the second case, were sentenced to terms of imprisonment for intentional homicide for their responsibility for the deaths of a number of people who had tried to flee from the GDR across the intra-German border between 1971 and 1989. 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 convictions by the German courts subsequent to the German reunification had therefore breached the principle of *nullum crimen sine lege*.

## 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

*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 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. 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.

(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.

10. ECHR, *Cyprus v. Turkey*, no. 25781/94, Grand Chamber judgment of 10 May 2001 (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 and inhuman or degrading treatment – 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 – Violation; Article 8 – Violation, Article 13 – 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 violations in question. The Court concluded that the allegations in question had fallen under the jurisdiction of Turkey and thus entailed its responsibility.

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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.

### 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.

## 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 **Caflich** (Swiss),  
 Willi **Fuhrmann** (Austrian),  
 Karel **Jungwiert** (Czech),  
 Marc **Fischbach** (Luxemburger),  
 Boštjan **Zupančič** (Slovenian),  
 Nina **Vajić** (Croatian),  
 John **Hedigan** (Irish),  
 Margarita **Tsatsa-Nikolovska** ("The former Yugoslav Republic of Macedonia"),  
 Tudor **Panțiru** (Moldovan),  
 Egils **Levits** (Latvian),  
 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, 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 (judgment of 18 December 1996, Reports of Judgments and Decisions 1996-VI, §§ 52-56). 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 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.

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' 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, Panțîru, Levits, Kovler, Fuad and Marcus-Helmons expressed partly dissenting opinions, which are annexed to the judgment.

11. **ECHR, *Prince Hans-Adam II of Liechtenstein v. Germany*, no. 42527/98, Grand Chamber judgment of 12 July 2001 (Article 6-1, Right of access to a court – 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. The Court rejected this claim stating that the limitation on German courts' jurisdiction to review confiscation measures against German external assets for reparation pursuant to the Convention on the Settlement of Matters Arising out of the War and the Occupation signed by France, the United States of America, the United Kingdom and the Federal Republic of Germany on 26 May 1952 was not abolished despite the reunification of Germany.

**ECHR 526 (2001)**  
**12.07.2001**

**Communiqué du Greffier**  
*(Available only in French)*

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

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**, *jurisconsulte, 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.

12. **ECHR, *McElhinney v. Ireland*, no. 31253/96, Grand Chamber judgment of 21 November 2001 (Article 6-1, Right of access to a court – No violation).** The applicant, an Irish national, unsuccessfully attempted to claim compensation before Irish courts 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 subsequently assaulted the applicant. The applicant's claims were declared inadmissible after the United Kingdom invoked the doctrine of sovereign immunity. The Court 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*,  
 Elisabeth **Palm** (Swedish),  
 Christos **Rozakis** (Greek),  
 Luigi **Ferrari Bravo** (Italian),

Gaukur **Jörundsson** (Icelandic),  
 Lucius **Cafilich** (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** ("The former Yugoslav Republic of Macedonia"),  
 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 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.

13. **ECHR, *Fogarty v. the United Kingdom*, no. 37112/97, Grand Chamber judgment of 21 November 2001 (Article 6-1, Right of access to a court – No violation; Article 14, Prohibition of discrimination, taken in conjunction with Article 6-1 – No violation).** The applicant, a former employee of the United States Embassy in the United Kingdom, brought claims before British courts against her former employer after the embassy had refused to rehire her. Her case was set aside after the embassy invoked immunity from proceedings. The Court, having regard to rules of public international law, considered that in conferring immunity on the United States, 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.

### 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 **Cafilisch** (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** ("The former Yugoslav Republic of Macedonia"),  
 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 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.

14. **ECHR, *Al-Adsani v. the United Kingdom*, no. 35763/97, Grand Chamber judgment of 21 November 2001 (Article 3, Prohibition of torture and inhuman or degrading treatment – No violation; Article 6-1, Right of access to a court – No violation).** The applicant brought a civil claim for compensation for torture allegedly committed by Kuwaiti 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 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 **Cafilisch** (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** ("The former Yugoslav Republic of Macedonia"),  
 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 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.

15. **ECHR, *Banković and Others v. Belgium and Others*, no. 52207/99, Grand Chamber decision of 12 December 2001 (Article 1 - No State jurisdiction).** 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.
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**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**.

#### 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 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.

16. **ECHR, *Čonka v. Belgium*, no. 51564/99, Chamber judgment of 5 February 2002 (Article 5-1, Right to liberty and security – Violation; Article 5-2, Right to be informed promptly of the reasons of one’s arrest – Violation; Article 5-4, Right to judicial review of detention – Violation; Article 4 of Protocol No. 4, Prohibition of the collective expulsion of aliens – Violation; Article 13, Right to an effective remedy – No violation when taken in conjunction with Article 3, Prohibition of torture and inhuman or degrading treatment / Violation when taken in conjunction with Article 4 of Protocol No. 4).** The applicants, Slovakian nationals of Romani origin seeking asylum in Belgium, successfully claimed that the Belgian authorities had lured them to attend the police station under a false pretext in order to facilitate their deportation. The Court found that, even as regards aliens who were in breach of the immigration rules, a conscious decision by the authorities to facilitate or improve the effectiveness of a planned operation for the expulsion of aliens by misleading them about the purpose of a notice so as to make it easier to deprive them of their liberty was not compatible with Article 5. Furthermore, at no stage in the period between the service of the notice on the applicant to attend the police station and their expulsion had the procedure afforded sufficient guarantees demonstrating that the personal circumstances of each of those concerned had been genuinely and individually taken into account which breached Article 4 of Protocol No. 4.

**ECHR 069 (2002)**  
**5.2.2002**

**Press release issued by the Registrar**

The European Court of Human Rights notified a judgment in writing today in the case of **Čonka v. Belgium** (no. 51564/99).

(The judgment is not final.)

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;
- unanimously, that there had been **no violation of Article 5 § 2** (right to be informed of the reasons for arrest) of the Convention;
- unanimously, that there had been a **violation of Article 5 § 4** (right to take proceedings by which lawfulness of detention shall be decided);
- by four votes to three, that there had been a violation of **Article 4 of Protocol No. 4** (prohibition of the collective expulsion of aliens);
- unanimously, that there had been **no violation of Article 13** (right to an effective remedy) **taken together with Article 3** (prohibition of inhuman or degrading treatment);
- by four votes to three, that there had been a **violation of Article 13 taken together with Article 4 of Protocol No. 4**.

Under Article 41 (just satisfaction) of the Convention, the Court awarded the applicants 10,000 euros for non-pecuniary damage and 9,000 euros for legal costs and expenses.

## 1. Principal facts

The applicants, Ján Čonka and Mária Čonková and their children, Nad'a Čonková and Nikola Čonková, are Slovakian nationals of Romany origin.

In November 1998 they left Slovakia for Belgium, where they requested political asylum on the ground that they had been violently assaulted on several occasions by skinheads in Slovakia. On 18 June 1999 the Commissioner-General for Refugees and Stateless Persons upheld a decision of the Minister of the Interior declaring their applications for asylum inadmissible and the applicants were required to leave the territory within five days.

On 3 August 1999 the applicants lodged applications with the *Conseil d'État* for judicial review of the decision of 18 June 1999 and for a stay of execution under the ordinary procedure. They also applied for legal aid.

On 23 September 1999 the *Conseil d'État* dismissed the applications for legal aid on the ground that they had not been accompanied by the requisite means certificate and invited the applicants to pay the court fees within fifteen days.

In September 1999 the Ghent police sent a notice to a number of Slovakian Romany families, including the applicants, requiring them to attend the police station on 1 October 1999. The notice stated that their attendance was required to enable the files concerning their applications for asylum to be completed.

At the police station the applicants were served with a fresh order to leave the territory and a decision for their removal to Slovakia and their detention for that purpose. A Slovaki speaking interpreter was present when they were arrested.

They were then taken with other Romany families to the Steenokkerzeel Closed Transit Centre, near Brussels. On 5 October 1999 they and some 70 other refugees of Romany origin whose requests for asylum had also been turned down were taken to Melsbroek military airport, and put on a plane for Slovakia.

## 2. Procedure and composition of the Court

The application was lodged with the Court on 4 October 1999 and declared partly admissible on 13 March 2001.

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

Jean-Paul **Costa** (French), *President*,  
Willi **Fuhrmann** (Austrian),  
Pranas **Kūris** (Lithuanian),  
Karel **Jungwiert** (Czech)  
Nicolas **Bratza** (British),  
Kristaq **Traja** (Albanian), *judges*,  
Jan **Velears** (Belgian), *ad hoc judge*

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

### 3. Summary of the judgment

#### **Complaints**

Relying on Articles 5 and 13 of the Convention and Article 4 of Protocol No. 4, the applicants complained, in particular, about the circumstances of their arrest and expulsion to Slovakia.

#### **Decision of the Court**

##### **Article 5 § 1**

Although the Court by no means excluded its being legitimate for the police to use ploys in order, for instance, to counter criminal activities more effectively, acts whereby the authorities sought to gain the trust of asylum seekers with a view to arresting and subsequently deporting them may be found to contravene the general principles stated or implicit in the Convention.

In that regard, there was every reason to consider that while the wording of the notice was “unfortunate”, it had not been the result of inadvertence; on the contrary, it had been deliberately chosen to secure the compliance of the largest possible number of recipients. It followed that, even as regards aliens who were in breach of the immigration rules, a conscious decision by the authorities to facilitate or improve the effectiveness of a planned operation for the expulsion of aliens by misleading them about the purpose of a notice so as to make it easier to deprive them of their liberty was not compatible with Article 5. Consequently, there had been a violation of Article 5 § 1.

##### **Article 5 § 2**

The Court observed that on their arrival at the police station the applicants had been informed of the reasons for their arrest and of the available remedies. A Slovakian-speaking interpreter had also been present. Even though those measures by themselves were not in practice sufficient to allow the applicants to exercise certain remedies, the information thus furnished to them nonetheless satisfied the requirements of Article 5 § 2. Consequently, there had been no violation of that provision.

##### **Article 5 § 4**

The Court identified a number of factors which undoubtedly had made an appeal to the committals division less accessible. These included the fact that the information on the available remedies handed to the applicants on their arrival at the police station had been printed in tiny characters, in a language they did not understand. Only one interpreter had been available to assist the large number of Romany families who attended the police station in understanding the verbal and written communications addressed to them and although he had been present at the police station, he had not stayed with them at the closed centre. In those circumstances, the applicants had undoubtedly had little prospect of being able to contact a lawyer from the police station with the help of the interpreter and, although they could have contacted a lawyer by telephone from the closed centre, they would no longer have been able to call upon the interpreter’s services; despite those difficulties, the authorities had not offered any form of legal assistance at either the police station or the centre.

Furthermore – and this factor was decisive in the eyes of the Court – the applicants’ lawyer had only been informed of the events in issue and of his clients’ situation at 10.30 p.m. on Friday 1 October 1999, such that any appeal to the committals division would have been pointless because, had he lodged an appeal with the division on 4 October, the case could not have been heard until 6 October, a day after the applicants’ expulsion on 5 October. Thus, the applicants’ lawyer had been unable to lodge an appeal with the committals division. Consequently, there had been a violation of Article 5 § 4.

#### **Article 4 of Protocol No. 4**

The Court noted that the detention and deportation orders had been issued to enforce an order to leave the territory that had been made solely on the basis of section 7, paragraph 1, (2) of the Aliens Act, and the only reference to the personal circumstances of the applicants was to the fact that their stay in Belgium had exceeded three months. In particular, the document made no reference to their application for asylum or to the decisions on that issue. In those circumstances and in view of the large number of persons of the same origin who had suffered the same fate as the applicants, the Court considered that the procedure followed did not enable it to eliminate all doubt that the expulsion might have been collective.

That doubt was reinforced by a series of factors: firstly, prior to the applicants' deportation, the political authorities concerned had announced that there would be operations of that kind and given instructions to the relevant authority for their implementation; secondly, all the aliens concerned had been required to attend the police station at the same time; thirdly, the orders served on them requiring them to leave the territory and for their arrest had been couched in identical terms; fourthly, it had been very difficult for the aliens to contact a lawyer; lastly, the asylum procedure had not been completed.

In short, at no stage in the period between the service of the notice on the aliens to attend the police station and their expulsion had the procedure afforded sufficient guarantees demonstrating that the personal circumstances of each of those concerned had been genuinely and individually taken into account. In conclusion, there had been a violation of Article 4 of Protocol No 4.

#### **Article 13**

In the instant case, the *Conseil d'État* had been called upon to examine the merits of the applicants' complaints in their application for judicial review. Having regard to the time which the examination of the case would take and the fact that they were under threat of expulsion, the applicants had also made an application for a stay of execution under the ordinary procedure, although the Government said that that procedure was ill-suited to the circumstances of the case. They considered that the applicants should have used the extremely urgent procedure.

The Court was bound to observe, however, that an application for a stay of execution under the ordinary procedure was one of the remedies which, according to the document setting out the Commissioner-General's decision of 18 June 1999, had been available to the applicants to challenge that decision. As, according to that decision, the applicants had had only five days in which to leave the national territory, an application for a stay under the ordinary procedure did not of itself have suspensive effect and the *Conseil d'État* had forty-five days in which to decide such applications, the mere fact that that application had been mentioned as an available remedy had, to say the least, been liable to confuse the applicants.

An application for a stay of execution under the extremely urgent procedure was not suspensive either. In that connection, the Court pointed out that the requirements of Article 13, and of the other provisions of the Convention, took the form of a guarantee and not of a mere statement of intent or a practical arrangement. However, it appeared that the authorities were not required to defer execution of the deportation order while an application under the extremely urgent procedure was pending, not even for a minimum reasonable period to enable the *Conseil d'État* to decide the application. Further, the onus was in practice on the *Conseil d'État* to ascertain the authorities' intentions regarding the proposed expulsions and to act accordingly, but there did not appear to be any obligation on it to do so. Lastly, it was merely on the basis of internal directions that the registrar of the *Conseil d'État*, acting on the instructions of a judge, contacted the authorities for that purpose, and there was no indication of what the consequences might be should he omit to do so. Ultimately, the alien had no guarantee that the *Conseil d'État* and the authorities would comply in every case with that practice, that the *Conseil d'État* would deliver its decision, or even hear the case, before his expulsion, or that

the authorities would allow a minimum reasonable period of grace. Each of those factors made the implementation of the remedy too uncertain to enable the requirements of Article 13 to be satisfied. In conclusion, the applicants had not had a remedy available that satisfied the requirements of Article 13 to air their complaint under Article 4 of Protocol No. 4. Accordingly, there had been a violation of Article 13 of the Convention.

Judge Velaers expressed a partly concurring and partly dissenting opinion and Judge Jungwiert, joined by Judge Kūris, a dissenting opinion, which are annexed to the judgment.

17. **ECHR, *M.C. v. Bulgaria*, no. 39272/98, Chamber judgment of 4 December 2003 (Article 3, Prohibition of torture and inhuman or degrading treatment – 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 of cases of sexual violence, the Court referred to the jurisprudence of the International Criminal Tribunal for the former Yugoslavia (ICTY) 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 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

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 **Zagrebelky** (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 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.

18. **ECHR, *Assanidze v. Georgia*, no. 71503/01, Grand Chamber judgment of 8 April 2004 (Article 5-1, Right to liberty and security – Violation; Article 6-1, Right to a fair trial – Violation; Article 10, Freedom of expression – No violation).** The applicant, a Georgian national, was held in custody in the Ajarian Autonomous Republic within Georgia despite a presidential pardon and an acquittal by the Supreme Court of Georgia of the offences upon which his conviction had been based. He 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.

**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.

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 Adjarian 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 **Caflich** (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 **Ugrekheldze** (Georgian),  
 Vladimiro **Zagrebelsky** (Italian),  
 Antonella **Mularoni** (San Marinese), *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 Adjarian 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 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**

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**

To 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.

**19. ECHR, *Ilaşcu and Others v. Moldova and Russia*, no. 48787/99, Grand Chamber judgment of 8 July 2004 (Article 1 – State jurisdiction of Moldova and Russia; Article 3, Prohibition of torture and inhuman or degrading treatment – No violation by Moldova / Violation by Russia on account of the ill-treatment inflicted on Mr. Ilaşcu and the conditions of his detention while under the threat of execution; Article 3 – Violation by Moldova and Russia on account of the ill-treatment inflicted on Mr. Ilaşcu, Mr Leşco and Mr Petrov-Popa and the conditions of their detention; Article 5-1, Right to liberty and security – No violation by Moldova on account of Mr Ilaşcu's detention / Violation by Moldova on account of the detention of the other applicants / Violation by Russia on account of the detention of all applicants; Article 34, Right of individual application / Violation by Moldova and Russia).** 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 Transdniestria, by people bearing the insignia of the former USSR's Fourteenth Army, prosecuted and sentenced for anti-Soviet activities, and, subsequently, incarcerated. The Court considered that the Moldovan Government did not exercise authority over the part of its territory which was under the effective control of the so-called "Moldavian Republic of Transdniestria" (MRT). However, even in the absence of effective control, Moldova still had a positive obligation under Article 1 to take the measures that were in its power and were in accordance with international law to secure to the applicants the rights guaranteed by the Convention. The Court further found that there was a continuous and uninterrupted link of responsibility on the part of Russia for the applicants' fate based on its continued policy of support for the MRT regime and collaboration with it, and due to the fact that 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.

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**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 Ivanţoc 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 Ivanţoc and the conditions in which he had been detained;
- 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.

## 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 1963 respectively. Mr Ilaşcu acquired Romanian nationality in 2000, as did Mr Leşco 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 Transdniestria, 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 Transdniestrian 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 **Panţiru** (Moldovan),  
 Egil **Levits** (Latvian)  
 Anatoli **Kovler** (Russian),  
 Elisabet **Fura-Sandström** (Swedish), *judges*,

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

### 3. Summary of the judgment

#### **Complaints**

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 Transdnistria 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 Transdnistrian region. However, even in the absence of effective control over the Transdnistrian 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 Transdnistrian 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 fought with and on behalf of the Transdniestrian 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 Transdniestrian 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 Transdniestria, 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 Transdniestria 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 Transdniestrian 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

#### *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 Ivanțoc*

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.

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.

20. **ECHR, *Issa and Others v. Turkey*, no. 31821/96, Chamber judgment of 16 November 2004, (Article 1 – No State jurisdiction).** The applicants, Iraqi nationals, 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 1995.
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**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.

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 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 **Ugrekheldze** (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 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.

21. **ECHR, *Mamatkulov and Askarov v. Turkey*, nos. 46827/99 and 46951/99, Grand Chamber judgment of 4 February 2005 (Article 3, Prohibition of torture and inhuman or degrading treatment – No violation; Article 6, Right to a fair trial – Inadmissible concerning the extradition proceedings in Turkey / No violation concerning the criminal proceedings in Uzbekistan; Article 34, Right of individual application – Violation).** The applicants, two Uzbek nationals living in Turkey, alleged unsuccessfully that their extradition to Uzbekistan, despite of an interim measure issued by the Court, had put them at real risk of being tortured or ill-treated. They 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.

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 Bakırköy 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),  
Lucius **Caflich** (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 **Pavlovschi** (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 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.

22. **ECHR, *Manoilescu and Dobrescu v. Romania and Russia*, no. 60861/00, Chamber decision of 15 March 2005 (Article 6-1, Right to a fair trial – Inadmissible; Article 1 of Protocol No. 1, Protection of property - Inadmissible).** The applicants were heirs of property that had been nationalised by the Romanian State and assigned first to the Embassy of the USSR in Romania and, subsequently, to the Embassy of the Russian Federation. The Romanian courts had ordered the return of the property to the applicants but this decision had not been enforced due to the principle of immunity of a State’s diplomatic or consular missions from enforcement measures.

**ECHR 131 (2005)**  
**15.3.2005**

**Press release issued by the Registrar**

A Chamber of the European Court of Human Rights has declared inadmissible the application lodged in the case of **Manoilescu and Dobrescu v. Romania and Russia** (application no. 60861/00).

The applicants

Ion Aurel Manoilescu and Alexandra Maria Dobrescu are Romanian nationals, born in 1941 and 1921 respectively. Mr Manoilescu lives in Dithmarschen (Germany) and Ms Dobrescu lives in Paris.

Summary of the facts

The applicants are both heirs of A.D. In 1929 A.D. purchased a plot of ground measuring 6,650 m<sup>2</sup> in Snagov, near Bucharest, on which he had a house built. He died in prison in 1963 while serving a sentence of 20 years’ imprisonment, imposed in 1950 for subversive activity against the State. Following an application by the General Prosecutor to have the judgment set aside, A.D.’s conviction was quashed in 1995 and he was acquitted.

In April 1945, during the Second World War, and again in May 1947, A.D.’s building was requisitioned; on the first occasion it was placed at the disposal of the Soviet authorities’ Allied Control Mission, and on the second occasion it was assigned to the Soviet directorate of external trade. In 1950 A.D.’s building was nationalised by the Romanian State and was assigned to the Embassy of the USSR in Romania.

By an order of 1962, the Romanian Council authorised an exchange of buildings between the Romanian and Soviet States. The building in dispute was exchanged for a villa situated in Bucharest, which the Soviet State had acquired in application of the decision taken at the Potsdam Conference to transfer German assets situated in Romanian territory to the Russian authorities.

In 1996 the applicants brought proceedings in order to obtain restitution of the building in dispute. On 18 June 1997 the relevant administrative committee ordered that the property be restored to them, and this decision was upheld on 12 January 1998 by a judgment of the Buftea first-instance court which, in the absence of an appeal, became final.

The applicants attempted on several occasions to oblige the Romanian authorities to enforce the decision of 18 June 1997 which had ordered that the building be restored to them. At the close of proceedings brought against the Snagov Town Hall and the Ilfov County Council, the Bucharest Court of Appeal dismissed their appeal in a final judgment of 25 February 2000. In particular, it noted that the building was now the property of the Russian Federation, legal successor to the former USSR, and

that, consequently, the appeal lodged by the applicants could not be brought against the Romanian authorities.

The building is currently assigned to officials from the Russian Embassy in Romania.

## Complaints

Relying on Article 5 (right to liberty and security) of the European Convention on Human Rights, the applicants alleged that A.D.'s imprisonment had been unlawful and complained that they had not been awarded any compensation in their capacity as his heirs. In addition, relying on Article 6 § 1 (right to a fair hearing), they alleged that the proceedings before the Romanian courts had been unfair and complained that they had been unable to obtain execution of the administrative decision in their favour, which had constituted an infringement of their right to a hearing. Finally, they maintained that the fact of being unable to obtain restitution of the property in question had infringed their right to peaceful enjoyment of their possessions, in violation of Article 1 of Protocol No. 1 (protection of property) to the Convention.

## Procedure

The application was lodged on 7 August 2000.

## Decision of the Court

*With regard to Romania*

### Article 5

The events in issue occurred prior to Romania's ratification of the European Convention on Human Rights, namely 20 June 1994. Consequently, the Court was not competent to examine the complaints submitted under Article 5, which it declared inadmissible.

### Article 6 § 1

*Regarding the unfairness of the proceedings to obtain execution of the judgment of 18 June 1997*

The Court considered that the proceedings at issue, considered in their entirety, were fair within the meaning of Article 6 § 1 of the Convention. Accordingly, it declared this complaint inadmissible.

*Regarding the impossibility of obtaining execution of the decision of 18 June 1997*

In the instant case, the disputed property, which was assigned to officials from the Russian Embassy in Romania, constituted "premises of the mission", within the meaning of Article 1 of the Vienna Convention on Diplomatic Relations. It was clear that the failure to execute the decision of 18 June 1997 resulted from the Romanian courts' wish not to infringe the rights which Russia enjoyed over the disputed property. Although implied, this constituted recognition of the principle of the Russian State's diplomatic immunity on Romanian territory.

All the international legal texts which addressed State immunity established the general principle that, subject to certain strictly delimited exceptions, foreign States enjoyed immunity from execution on the territory of the State concerned. This protection for foreign States was stronger with regard to properties belonging to their diplomatic and consular missions. Such protection was enshrined in particular in the Vienna Convention on Diplomatic Relations, the relevant resolution of the Institute of International Law, the European Convention on State Immunity and the United Nations Convention on Jurisdictional Immunities of States and Their Property.

Accordingly, the Court declared the complaint inadmissible as being manifestly ill-founded.

**Article 1 of Protocol No. 1**

The Court noted that the applicants' claim against the Romanian State amounted to a possession within the meaning of the Convention. However, given the circumstances of the case, it did not doubt that the failure to take enforcement measures was "in the public interest", namely the need to avoid disrupting relations between Romania and Russia and to facilitate the optimal running of that foreign State's diplomatic mission in Romania.

Admittedly, the failure over several years to enforce the decision in the applicants' favour must have caused them a feeling of injustice and frustration, but nonetheless they had not lost their claim against the Romanian State. Thus, for example, they could apply under the law of 10 February 2001 to obtain, if not restitution in kind of the property, which they would appear to have unsuccessfully attempted through an application to the Ilfov Prefecture, then at least the adoption of equivalent compensatory measures.

In those circumstances, the Court held that this complaint was manifestly ill-founded and declared it inadmissible.

*With regard to Russia*

In the present case, it was clear that the applicants did not come under the jurisdiction of Russia. That State had exercised no jurisdiction over the applicants; it had not been a party in the civil action brought by them, nor had it taken part in the proceedings, which had been held exclusively in Romanian territory. The Romanian courts were the only courts to exercise sovereign power with regard to the applicants, and the Russian authorities had no powers of review, direct or indirect, over decisions and judgments given in Romania.

For this reason, the situation complained of by the applicants could not be imputed to Russia, nor could that State be criticised for failing to take positive measures to guarantee the rights asserted by the applicants. Consequently, the Court declared this part of the application inadmissible.

As to the applicants' argument that the property at issue had been transmitted unlawfully to Russia, the Court noted that those events had occurred in 1962, in other words prior to the date on which Russia ratified the Convention, namely 5 May 1998. Accordingly, the Court was not competent to examine this complaint, which it declared inadmissible.

23. ECHR, *Shamayev and Others v. Georgia and Russia*, no. 36378/02, Chamber judgment of 12 April 2005 (Concerning Georgia: Article 2, Right to life – No violation, as regards Mr Aziev; Article 3, Prohibition of torture and inhuman or degrading treatment or punishment – No violation, as regards the five extradited applicants; Article 2 – No violation, as regards the 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 judicial review 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 prison clashes; 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, Right of individual application – Violation, as regards Mr Shamayev, Mr Aziev, Mr Khadjiev and Mr Vissitov; Concerning Russia: Article 38-1-a, Obligation to furnish all necessary facilities for the adversarial examination of the case – Violation; Article 34, Right of individual application – Violation, as regards the five applicants extradited to Russia and the two applicants arrested by the Russian authorities). The applicants, 13 Russian and Georgian nationals of Chechen origin, unsuccessfully claimed, *inter alia*, that their extradition to Russia, where capital punishment had not been abolished, exposed them to a real danger of death or torture.

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;
- 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 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 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.

*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 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.

24. **ECHR, *Öcalan v. Turkey*, no. 46221/99, Grand Chamber judgment of 12 May 2005, (Article 5-4, Right to judicial review of detention – 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 taken together with 6-3-b, Right to adequate time and facilities for the preparation of one’s 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 – No violation; Article 3, Prohibition of torture and inhuman or degrading treatment or punishment – No violation concerning the implementation of the death penalty; Article 3 – Violation concerning the imposition of the death penalty following an unfair trial; Article 3 – 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, Right of individual application – 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 for instigating terrorist acts and founding an armed gang in order to destroy the integrity of the Turkish State. He was taken on board an aircraft at Nairobi airport in Kenya under disputed circumstances, arrested on the plane by Turkish officials and flown to Turkey to face a trial presided 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:

- 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.

### 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.

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 **Caflich** (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),  
 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 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 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.

### **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.

**25. ECHR, *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Sirketi v. Ireland*, no. 45036/98, Grand Chamber judgment of 30 June 2005 (Article 1 of Protocol No. 1, Protection of property – No violation).** The applicant, an airline charter company (“Bosphorus Airlines”) registered in Turkey, had leased two aircraft from a Federal Republic of Yugoslavia (“FRY”) airline in 1992. When the planes landed in Ireland for maintenance work, they were seized by the Irish authorities in application of a European Community Regulation implementing the United Nations sanctions regime against the FRY. The Court was called upon to examine the responsibility for the alleged Convention violation that should fall upon Ireland when it implemented legal obligations flowing from its membership of the European Community (EC). 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.

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**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.

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 **Zagrebelky** (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 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.

26. **ECHR, *N v. Finland*, no. 38885/02, Chamber judgment of 26 July 2005 (Article 3, Prohibition of torture and inhuman or degrading treatment – 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.

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 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.

27. **ECHR, *Siliadin v. France*, no. 73316/01, Chamber judgment of 26 July 2005 (Article 4, Prohibition of slavery and forced labour - Violation).** The applicant, a Togolese national and minor upon her arrival in France, was forced to work as a housemaid in two French households, for fifteen hours a day, seven days a week without pay, holidays or possession of her identity documents. The Court noted that, in addition to the Convention, numerous international treaties had as their aim the protection of human beings from slavery, servitude and forced or compulsory labour. In accordance with modern standards and trends in that area, the Court considered that States were under an obligation to penalise and punish any act aimed at maintaining a person in a situation incompatible with Article 4.

**ECHR 415(2005)  
26.7.2005**

**Press release issued by the Registrar**

The European Court of Human Rights has today notified in writing a judgment in the case of **Siliadin v. France** (application no. 73316/01). The Court held unanimously that there had been a **violation of Article 4** (prohibition of servitude) of the European Convention on Human Rights.

Under Article 41 (just satisfaction) of the Convention, the Court awarded the applicant 26,209.69 euros (EUR) for costs and expenses. As Ms Siliadin had made no claim for compensation in respect of damage sustained, the Court made no award. (The judgment is available only in French.)

1. Principal facts

The applicant, Siwa-Akofa Siliadin, is a Togolese national who was born in 1978 and lives in Paris.

In January 1994 the applicant, who was then fifteen and a half years old, arrived in France with a French national of Togolese origin, Mrs D. The latter had undertaken to regularise the girl's immigration status and to arrange for her education, while the applicant was to do housework for Mrs D. until she had earned enough to pay her back for her air ticket. The applicant effectively became an unpaid servant to Mr and Mrs D. and her passport was confiscated.

In around October 1994 Mrs D. "lent" the applicant to a couple of friends, Mr and Mrs B., to help them with household chores and to look after their young children. She was supposed to stay for only a few days until Mrs B. gave birth. However, after her child was born, Mrs B. decided to keep the applicant on. She became a "maid of all work" to the couple, who made her work from 7.30 a.m. until 10.30 p.m. every day with no days off, giving her special permission to go to mass on certain Sundays. The applicant slept in the children's bedroom on a mattress on the floor and wore old clothes. She was never paid, but received one or two 500-franc notes, the equivalent of 76.22 EUR, from Mrs B.'s mother.

In July 1998 Ms Siliadin confided in a neighbour, who informed the Committee against Modern Slavery, which reported the matter to the prosecuting authorities. Criminal proceedings were brought against Mr and Mrs B. for wrongfully obtaining unpaid or insufficiently paid services from a vulnerable or dependent person, an offence under Article 225-13 of the Criminal Code, and for subjecting that person to working or living conditions incompatible with human dignity, an offence under Article 225-14 of the Code.

The defendants were convicted at first instance and sentenced to, among other penalties, 12 months' imprisonment (seven of which were suspended), but were acquitted on appeal on 19 October 2000. In

a judgment of 15 May 2003 Versailles Court of Appeal, to which the case had subsequently been referred by the Court of Cassation, found Mr and Mrs B. guilty of making the applicant, a vulnerable and dependent person, work unpaid for them but considered that her working and living conditions were not incompatible with human dignity.

It accordingly ordered them to pay the applicant the equivalent of EUR 15,245 in damages.

In October 2003 an employment tribunal awarded the applicant a sum that included EUR 31,238 in salary arrears.

## 2. Procedure and composition of the Court

The application was lodged on 17 April 2001 and declared partly admissible on 1 February 2005. A hearing took place in public in the Human Rights Building, Strasbourg, on 3 May 2005.

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

Ireneu **Cabral Barreto** (Portuguese), *President*,  
 Jean-Paul **Costa** (French),  
 Riza **Türmen** (Turkish),  
 Karel **Jungwiert** (Czech),  
 Volodymyr **Butkevych** (Ukrainian),  
 Antonella **Mularoni** (San Marinese),  
 Elisabet **Fura-Sandström** (Swedish), *judges*,

and also Stanley **Naismith**, *Deputy Section Registrar*.

## 3. Summary of the judgment

### **Complaint**

Relying on Article 4 (prohibition of forced labour) of the European Convention on Human Rights, the applicant submitted that French criminal law did not afford her sufficient and effective protection against the “servitude” in which she had been held, or at the very least against the “forced and compulsory” labour she had been required to perform, which in practice had made her a domestic slave.

### **Decision of the Court**

#### **As to the applicability of Article 4 and the positive obligations arising from it**

The Court considered that Article 4 of the Convention enshrined one of the fundamental values of the democratic societies which make up the Council of Europe. It was one of those Convention provisions with regard to which the fact that a State had refrained from infringing the guaranteed rights did not suffice to conclude that it had complied with its obligations; it gave rise to positive obligations on States, consisting in the adoption and effective implementation of criminal-law provisions making the practices set out in Article 4 a punishable offence.

#### **As to the violation of Article 4**

The Court noted that, in addition to the Convention, numerous international treaties had as their aim the protection of human beings from slavery, servitude and forced or compulsory labour. As the Parliamentary Assembly of the Council of Europe had pointed out, although slavery was officially abolished more than 150 years ago, “domestic slavery” persisted in Europe and concerned thousands of people, the majority of whom were women. In accordance with modern standards and trends in that

area, the Court considered that States were under an obligation to penalise and punish any act aimed at maintaining a person in a situation incompatible with Article 4.

In order to classify the state in which the applicant was held, the Court noted that Ms Siliadin had worked for years for Mr and Mrs B., without respite, against her will, and without being paid. The applicant, who was a minor at the relevant time, was unlawfully present in a foreign country and was afraid of being arrested by the police. Indeed, Mr and Mrs B. maintained that fear and led her to believe that her status would be regularised.

In those circumstances, the Court considered that Ms Siliadin had, at the least, been subjected to forced labour within the meaning of Article 4 of the Convention.

The Court had then to determine whether the applicant had also been held in slavery or servitude.

With regard to slavery, although the applicant had been deprived of her personal autonomy, the evidence did not suggest that she had been held in slavery in the proper sense, in other words that Mr and Mrs B. had exercised a genuine right of ownership over her, thus reducing her to the status of an object. Accordingly, the Court held that it could not be considered that Ms Siliadin had been held in slavery in the traditional sense of that concept.

As to servitude, that was to be regarded as an obligation to provide one's services under coercion, and was to be linked to the concept of "slavery". In that regard, the Court noted that the forced labour imposed on the applicant lasted almost 15 hours a day, seven days a week. Brought to France by a relative of her father's, Ms Siliadin had not chosen to work for Mr and Mrs B. As a minor, she had no resources and was vulnerable and isolated, and had no means of subsistence other than in the home of Mr and Mrs B., where she shared the children's bedroom.

The applicant was entirely at Mr and Mrs B.'s mercy, since her papers had been confiscated and she had been promised that her immigration status would be regularised, which had never occurred. Nor did Ms Siliadin, who was afraid of being arrested by the police, have any freedom of movement or free time. In addition, as she had not been sent to school, despite the promises made to her father, the applicant could not hope that her situation would improve and was completely dependent on Mr and Mrs B.

In those circumstances, the Court considered that Ms Siliadin, a minor at the relevant time, had been held in servitude within the meaning of Article 4.

Accordingly, it fell to the Court to determine whether French legislation had afforded the applicant sufficient protection in the light of the positive obligations incumbent on France under Article 4. In that connection, it noted that the Parliamentary Assembly had regretted in its Recommendation 1523(2001) that "none of the Council of Europe member states expressly [made] domestic slavery an offence in their criminal codes". Slavery and servitude were not as such classified as criminal offences in the French criminal-law legislation.

Mr and Mrs B., who were prosecuted under Articles 225-13 and 225-14 of the Criminal Code, were not convicted under criminal law. In that connection, the Court noted that, as the Principal Public Prosecutor had not appealed on points of law against the Court of Appeal's judgment of 19 October 2000, an appeal to the Court of Cassation was made only in respect of the civil aspect of the case and Mr and Mrs B.'s acquittal thus became final. In addition, according to a report drawn up in 2001 by the French National Assembly's joint committee on the various forms of modern slavery, those provisions of the Criminal Code were open to very differing interpretation from one court to the next.

In those circumstances, the Court considered that the criminal-law legislation in force at the material time had not afforded the applicant specific and effective protection against the actions of which she had been a victim. It emphasised that the increasingly high standard being required in the area of the

protection of human rights and fundamental liberties correspondingly and inevitably required greater firmness in assessing breaches of the fundamental values of democratic societies.

Consequently, the Court concluded that France had not fulfilled its positive obligations under Article 4.

28. **ECHR, *Xenides-Arestis v. Turkey*, no. 46347/99, Chamber judgment of 22 December 2005 (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 continuing division of Cyprus as a result of Turkish military operations since August 1974 prevented her from accessing and enjoying her home and property in Northern Cyprus.
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**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.

### 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.

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 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.

- 29. ECHR, *Kolk and Kislyiy v. Estonia*, nos. 23052/04 and 24018/04, Chamber decision of 17 January 2006 (Article 7, No punishment without law – Inadmissible).** The applicants were sentenced to eight years' suspended imprisonment with a probation period of three years for having participated in the deportation of the civilian population from the occupied Republic of Estonia to remote areas of the Soviet Union in 1949. They complained that their conviction for 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 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 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*.

- 30. ECHR, *Treska v. Albania and Italy*, no. 26937/04, Chamber decision of 29 June 2006 (Article 6-1, Right of access to a court - Inadmissible; Article 1 of Protocol No. 1, Protection of property - Inadmissible).** The applicants were allocated property rights over a villa by final decisions of the judicial and administrative authorities in Albania. The villa had been unlawfully confiscated from their father by the regime in 1950. Meanwhile, however, the property title had been transferred to the Italian Government through an inter-State agreement by which Italy purchased the property to be the private residence of the Italian Ambassador in Albania.

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

### July-August 2006

Decision 29.6.2006 [Section III]

#### Article 6

#### Civil proceedings

#### Article 6-1

#### Access to court

State's refusal, on grounds of State immunity, to request enforcement of decisions restoring to the applicants their property assigned to a foreign Embassy: *inadmissible*

#### Article 1 of Protocol No. 1

#### Article 1 para. 1 of Protocol No. 1

Peaceful enjoyment of possessions

State's refusal, on grounds of State immunity, to request enforcement of decisions restoring to the applicants their property assigned to a foreign Embassy: *inadmissible*

The applicants, two Albanian nationals, were allocated by final decisions of the judicial and administrative authorities, property rights over a villa in Albania, which had been unlawfully confiscated from their father without compensation, the right to recover it, and an order of restitution. Meanwhile, however, the property title had been transferred to the Italian Government through an inter-State agreement by which Italy purchased the property. The building was assigned to be the private residence of the Italian Ambassador in Albania. The applicants instituted proceedings in order to recover possession of their property, but the competent Albanian Court held that it did not have jurisdiction to deal with the case. The Embassy was ordered to pay the applicants a monthly rental fee for use of the plot of land by a final and binding Albanian decision, but failed to comply with the judgment. The Albanian authorities did not act in order to have the final decision enforced. The Albanian Constitutional Court dismissed the applicants' appeal, the reason being that the immunity of the Italian Embassy and the inviolability of its premises gave rise to a circumstance where the Court's decision could not be enforced in practice. The Italian courts rejected the applicants' request for the validation of the Albanian judgment which had decided on the Embassy's obligation to pay them a rental fee.

*Complaint under Article 1 Protocol No. 1 against Italy:* The applicants complained of the Albanian authorities' refusal to execute the court decision in their favour and to take enforcement measures. Italy did not exercise any jurisdiction over the applicants; the proceedings in issue were conducted exclusively in Albanian territory; the Albanian courts were the only bodies with sovereign power over the applicants; and the Italian authorities had no direct or indirect influence over the decisions and judgments delivered in Albania. Hence, Italy's responsibility cannot be engaged: *incompatible ratione personae*.

*Complaint under Article 6(1) against Albania:* The property allocated to the applicants is assigned to be the private residence of the Italian Ambassador in Albania and accordingly constitutes "premises of mission" within the meaning of the Vienna Convention on Diplomatic Relation. Regard being had to the rules of international law on sovereign immunity, the Albanian Government cannot be required to override against their will the rule of State immunity, which is designed to ensure the optimum functioning of diplomatic missions and to promote comity and good relations between sovereign States. Hence, the decisions in which the national courts refused to order the administrative authorities to take measures of constraint with regard to the property possessed by the Italian Embassy in Albania can be regarded as a justified restriction on the applicants' right of access to a court: *manifestly ill-founded*.

*Complaint under Article 1 Protocol No 1 against Albania:* Italy had notified the Albanian authorities that it had title to the building in issue, which title has not been invalidated by any final judicial decision. No domestic court has invalidated the applicants' title to the properties in issue, which title cannot expire with the passing of time; on the contrary, it can be converted into a title for future compensation to be paid pursuant to the domestic law relating to the compensation of former owners. Hence, the Albanian authorities' failure to take steps to restore to the applicants' possession of the property - on grounds of "public-interest" directly linked to observance of the principle of State immunity - did not upset the requisite fair balance: *manifestly ill-founded*.

31. **ECHR, *Weber and Saravia v. Germany*, no. 54934/00, Chamber decision of 29 June 2006 (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 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 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 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.*

32. **ECHR, *Iosub Caras v. Romania*, no. 7198/04, Chamber judgment of 27 July 2006 (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 Hague Convention on the Civil Aspects of International Child Abduction of 1980 since the court had refused to grant a request to stay those proceedings.

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**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.

33. **ECHR, *Dacosta Silva v. Spain*, no. 69966/01, Chamber judgment of 2 November 2006 (Article 5-1-a, Right to liberty and security - Violation).** The applicant, a member of the Civil Guard, complained that the deprivation of his liberty in form of a six days' house arrest by his hierarchical superiors in disciplinary proceedings did not amount to a lawful detention of a person after conviction by a competent court. The Court held that the Spanish reservation in respect of Articles 5 and 6 of the Convention concerning the armed forces' disciplinary rules, did not apply to the Civil Guard's disciplinary rules, which had been introduced by a law that post-dated the reservation.
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### **Information Note on the Court's case-law No. 91**

#### **November 2006**

Judgment 2.11.2006 [Section V]

#### **Article 5**

#### **Article 5-1-a**

#### **After conviction**

Disciplinary punishment of house arrest imposed on a member of the Civil Guard by his superior:  
*violation*

*Facts:* The applicant, a member of the Civil Guard, on learning that one of his close relatives was seriously ill, and after informing the duty officer, left for his parents' home, where he stayed for nine days. His immediate superior then imposed on him the disciplinary penalty of six days' house arrest for being absent from the barracks without leave. Appeals by the applicant against that decision were all dismissed.

*Law:* The Spanish reservation in respect of Articles 5 and 6 of the Convention, which concerned the armed forces' disciplinary rules, did not apply to the Civil Guard's disciplinary rules, which had been introduced by a law that post-dated the reservation. House arrest constituted a form of deprivation of liberty within the meaning of Article 5. The penalty in question, ordered by the applicant's immediate superior, had been immediately enforceable. The lodging of an appeal against it had not suspended its enforcement. The applicant's superior had not been independent from the Civil Guard's hierarchy or from other higher authorities. Accordingly, the disciplinary proceedings over which he had presided had been devoid of the judicial safeguards required by Article 5(1)(a). Consequently, the house arrest imposed on the applicant had not constituted a form of lawful detention "after conviction by a competent court".

*Conclusion:* violation (unanimously).

34. **ECHR, *Markovic and Others v. Italy*, no. 1398/03, Grand Chamber judgment of 14 December 2006 (Article 6, Right to a fair trial – No violation).** The applicants, all nationals of Serbia and Montenegro, were close relatives of persons killed in an air strike on the headquarters of Radio Televizije Srbije (RTS) in Belgrade by the North Atlantic Trade Organization (NATO) alliance during the Kosovo\* conflict resulting in 16 deaths. They unsuccessfully claimed that they had been denied access to Italian courts to claim compensation based on the extensive Italian participation in the acts in question.

**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.

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 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 **Caflich** (Swiss),  
 Ireneu **Cabral Barreto** (Portuguese)  
 Karel **Jungwiert** (Czech),  
 John **Hedigan** (Irish),  
 Margarita **Tsatsa-Nikolovska** (citizen of “The former Yugoslav Republic of Macedonia”),  
 Mindia **Ugrekheldze** (Georgian),  
 Anatoli **Kovler** (Russian),  
 Vladimiro **Zagrebelky** (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 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.

35. **ECHR, *Behrami and Behrami v. France and Saramati v. France, Germany and Norway*, nos. 71412/01 and 78166/01, Grand Chamber decision of 31 May 2007 (Article 1 – No State jurisdiction).** One son of the first applicants died and the second suffered serious injury due to an unexploded cluster bomb in Kosovo\*. The second applicant complained of his extrajudicial detention and subsequent failure to a fair hearing when he was detained by KFOR, the NATO peacekeeping operation force in Kosovo\*. All applicants placed the responsibility for their alleged violations on Contracting Parties of the Convention.

**ECHR 356 (2007)**

**31.5.2007**

**Press release issued by the Registrar**

The **Grand Chamber** of the European Court of Human Rights has today (4 p.m. local time) held a public hearing in the Human Rights Building, Strasbourg, to deliver its decision on admissibility in the cases of: **Behrami and Behrami v. France** (application no. 71412/01) and **Saramati v. France, Germany and Norway** (no. 78166/01).

The Court has:

- unanimously, struck out the Saramati application concerning Germany; and,
- by a majority, declared inadmissible the remainder of the Saramati application and the case Behrami and Behrami v. France.

Summary of the Facts

***Behrami and Behrami***

The applicants are Agim Behrami, born in 1962, and his son, Bekir Behrami, born in 1990. Both live in the municipality of Mitrovica, Kosovo\*, in the then Federal Republic of Yugoslavia (FRY) (now the Republic of Serbia). Agim Behrami also applied on behalf of another of his sons, Gadaf Behrami, born in 1988, who is now deceased.

At the relevant time (March 2000) Mitrovica was within the sector of Kosovo\* for which a multinational brigade led by France was responsible; it was one of four brigades making up the international security force (KFOR) presence in Kosovo\*, mandated by UN Security Council (UNSC) Resolution 1244 of June 1999 (Resolution No. 1244 provided for the establishment of KFOR under UN auspices with “substantial NATO participation” under “unified command and control”. Each multinational brigade had a national commander, with disciplinary powers over the troops, who applied national rules of engagement. However, KFOR command retained operational control and command of the brigades).

On 11 March 2000 Gadaf and Bekim Behrami were playing with some other boys in the hills in the Sipolje area of Mitrovica. They found a number of undetonated cluster bombs, which had been dropped during the bombardment of FRY by NATO in 1999, and began playing with them. One of the children threw a bomb into the air; it detonated and killed Gadaf Behrami. Bekim Behrami was also seriously injured and later had numerous eye operations.

The UN Interim Administration for Kosovo\* (UNMIK) - mandated by the same Resolution 1244 – investigated the incident and reported, on 18 March 2000, that Gadaf Behrami had died from numerous injuries following a cluster bomb explosion and that the incident amounted to “an unintentional homicide committed by imprudence”.

On 22 May 2000 Agim Behrami was informed that no criminal prosecution was to be brought because the bomb did not explode during the NATO bombardment. He was also informed that he had the right to pursue a criminal prosecution within eight days.

On 25 October 2001 Agim Behrami complained to the Kosovo\* Claims Office that France had not respected the provisions (concerning de-mining) of Resolution 1244. The claim was ultimately rejected on the ground that mine clearance had been the responsibility of the UN since 5 July 1999.

### ***Saramati***

The applicant is Ruzhdi Saramati who was born in 1950. He is from Kosovo\* and of Albanian origin.

In April 2001 the applicant was arrested by UNMIK police and later detained. On 23 May 2001 a prosecutor filed an indictment accusing the applicant of attempted murder, causing serious bodily harm, unlawful possession of weapons or exploding substances, causing minor bodily injury and violent behaviour. He appealed successfully against a further detention order and was released.

On 13 July 2001 he was arrested by two UNMIK police officers. The applicant initially submitted that it was a German KFOR officer who orally issued the arrest order and informed him that he was being arrested by order of the KFOR Commander (COMKFOR), a Norwegian officer at that time. He was taken to a KFOR camp under escort by American KFOR soldiers. On 14 July 2001 the COMKFOR authorised the applicant's further detention for 30 days.

On 26 July 2001, and in response to a letter from the applicant's representatives taking issue with the legality of his detention, the KFOR Legal Adviser advised that KFOR had the authority to detain under Resolution 1244 as it was necessary "to maintain a safe and secure environment" and to protect KFOR troops. KFOR had information concerning the applicant's involvement with armed groups operating in the border region between Kosovo\* and "The former Yugoslav Republic of Macedonia" and was satisfied that the applicant represented a threat to the security of KFOR and to those residing in Kosovo\*.

On 11 August 2001 the applicant's detention was again extended.

On 6 September 2001 the applicant's case was transferred to the district court for trial. During each trial hearing from 17 September 2001 to 23 January 2002 the applicant's representatives requested his release and the trial court responded that his detention was the responsibility of KFOR. On 3 October 2001 a French General became the COMKFOR.

On 23 January 2002 the applicant was convicted of attempted murder under Article 30 § 2(6) of the Criminal Code of Kosovo\* in conjunction with Article 19 of the Criminal Code of the FRY. On 26 January 2002 he was transferred by KFOR to the UNMIK detention facilities in Pristina.

On 9 October 2002 the Supreme Court of Kosovo\* quashed the applicant's conviction and his case was sent for re-trial to Pristina District Court. His release from detention was ordered. A re-trial has yet to be fixed.

### **Complaints**

#### ***Behrami and Behrami***

The applicants alleged that Gadaf Behrami's death and Bekir Behram's injuries were caused by the failure of the French KFOR troops to mark and/or defuse the un-detonated cluster bombs which KFOR had known to be present on the site in question. They relied on Article 2 (right to life) of the European Convention on Human Rights.

### ***Saramati***

The applicant complained under Article 5 (right to liberty and security) and Article 13 (right to an effective remedy) of the Convention, about his detention by KFOR between 13 July 2001 and 26 January 2002. He further complained under Article 6 § 1 (right to a fair trial) that he did not have access to court and, under Article 1 (obligation to respect human rights), that France, Germany and Norway had failed to guarantee the Convention rights of individuals living in Kosovo\*.

### **Procedure**

The application in the case of *Behrami and Behrami v. France* was lodged with the European Court of Human Rights on 28 September 2000 and the application in the case of *Saramati v. France, Germany and Norway*, on 28 September 2001. On 13 June 2006 the Chamber of the Court dealing with the cases relinquished jurisdiction in favour of the Grand Chamber, under Article 302 of the Convention.

### **Decision of the Court**

#### Withdrawal of Saramati case against Germany

Mr Saramati initially claimed that a German KFOR officer had been involved in his arrest and also referred to the fact that Germany was the lead nation in the multinational force in the southeast.

The German Government responded that, despite detailed investigations, they had not been able to establish any involvement of a German KFOR officer in Mr Saramati's arrest.

Mr Saramati maintained that he had made his submission in good faith, but that he was unable to produce any objective supporting evidence. He also considered that German KFOR control of the relevant sector was insufficient as a ground to bring him within the jurisdiction of Germany. He therefore asked to withdraw his case against Germany.

Finding that respect for human rights did not require a continued examination of Mr Saramati's case against Germany (Article 37 § 1), the Court decided to strike out the case as far as it concerned Germany.

#### Admissibility

The Court observed that the applicants in *Behrami and Behrami* complained about the impugned inaction of KFOR troops and that Mr Saramati complained about his detention by, and on the orders of, KFOR. The President of the Court agreed that the parties' submissions to the Grand Chamber could be limited to the admissibility of the cases.

The Court considered that the question raised by the cases was, less whether the States concerned exercised extra-territorial jurisdiction in Kosovo\* but, far more centrally, whether the European Court of Human Rights was competent to examine under the European Convention on Human Rights (the Convention) those States' contribution to the relevant civil and security presence exercising control of Kosovo\*.

The Court considered that issuing detention orders fell within the security mandate of KFOR and that the supervision of de-mining fell within the mandate of UNMIK. It went on to ascertain whether the impugned action of KFOR (detention of Mr Saramati) and inaction of UNMIK (the alleged failure to de-mine in the *Behrami* case) could be attributed to the UN. In that respect, the Court first established that Chapter VII of the UN Charter could provide a framework for the delegation of the UNSC's security powers to KFOR and of its civil administration powers to UNMIK. Since KFOR was exercising lawfully delegated Chapter VII powers of the UNSC and since UNMIK was a subsidiary organ of the UN created under Chapter VII, the impugned action and inaction was, in principle,

“attributable” to the UN which had a legal personality separate from that of its member states and was not a Contracting Party to the Convention.

The Court then considered whether it was competent to review the acts of the States in question carried out on behalf of the UN and, more generally, as to the relationship between the Convention and the UN acting under Chapter VII of its Charter.

The Court first observed that nine of the 12 original signatory parties to the Convention in 1950 had been members of the UN since 1945, that the great majority of the Contracting Parties joined the UN before they signed the Convention and that all Contracting Parties were members of the UN. Indeed, one of the aims of the Convention was the collective enforcement of rights in the Universal Declaration of Human Rights of the General Assembly of the UN. More generally, the Convention had to be interpreted in the light of any relevant rules and principles of international law applicable in relations between its Contracting Parties.

The primary objective of the UN was the maintenance of international peace and security. While it was equally clear that ensuring respect for human rights represented an important contribution to achieving international peace, the fact remained that the UNSC had primary responsibility, as well as extensive means under Chapter VII, to fulfil that objective, notably through the use of coercive measures. The responsibility of the UNSC was unique and had evolved as a counterpart to the prohibition, now customary international law, on the unilateral use of force. In the applicants’ cases, Chapter VII allowed the UNSC to adopt coercive measures in reaction to an identified conflict considered to threaten peace, namely UNSC Resolution 1244 establishing UNMIK and KFOR.

Since operations established by UNSC Resolutions under Chapter VII of the UN Charter were fundamental to the mission of the UN to secure international peace and security and since they relied for their effectiveness on support from member states, the Convention could not be interpreted in a manner which would subject the acts and omissions of Contracting Parties which were covered by UNSC Resolutions and occurred prior to or in the course of such missions, to the scrutiny of the Court. To do so would be to interfere with the fulfilment of the UN’s key mission in the field including the effective conduct of its operations. It would also be tantamount to imposing conditions on the implementation of a UNSC Resolution which were not provided for in the text of the Resolution itself. That reasoning equally applied to voluntary acts of the States concerned such as the vote of a permanent member of the UNSC in favour of the relevant Chapter VII Resolution and the contribution of troops to the security mission: such acts might not have amounted to obligations flowing from membership of the UN but they remained crucial to the effective fulfilment by the UNSC of its Chapter VII mandate and, consequently, by the UN of its imperative peace and security aim.

The Court went on to find the present cases to be clearly distinguishable from its earlier judgment in the Bosphorus case, on which the applicants had relied. It was distinguished in terms of the responsibility of the respondent States under Article 1 and of the Court’s competence *ratione personae* (the impugned acts and omissions of KFOR and UNMIK could not be attributed to the respondent States and, moreover, did not take place on the territory of those States or by virtue of a decision of their authorities). The Bosphorus case was also distinguishable because there was, in any event, a fundamental distinction between the international organisation/international cooperation at issue in the Bosphorus case and those at issue in the present cases: UNMIK was a subsidiary organ of the UN created under Chapter VII and KFOR was exercising powers lawfully delegated under Chapter VII of the Charter by the UNSC. As such, their actions were directly attributable to the UN, an organisation of universal jurisdiction fulfilling its afore-mentioned imperative collective security objective.

In light of that conclusion, the Court considered that it was not necessary to examine the remaining submissions of the parties on the admissibility of the application, including on the competence of the Court to examine complaints against the States concerned about extra-territorial acts or omissions and

on whether the applicants had exhausted any effective remedies available to them within the meaning of Article 35 § 1 of the Convention.

36. **ECHR, *Jorgic v. Germany*, no. 74613/01, Chamber judgment of 12 July 2007 (Article 6-1, Right to a fair trial – 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 convicted by a German court in 1995 of committing acts of genocide in 1992, claimed the German courts' lack of jurisdiction to try this crime. The Court 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 Convention and by the case-law of the International Criminal Tribunal for Yugoslavia (ICTY). 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).

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. 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 Doboje 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

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.

37. **ECHR, *Hirschhorn v. Romania*, no. 29294/02, Chamber judgment of 26 July 2007 (Article 6-1, Right of access to a court – Violation; Article 1 of Protocol No. 1, Protection of property – Violation).** The applicant, a French national who formerly owned a building in Bucharest before it was nationalised by Romania and then leased to the United States of America, successfully claimed that his Convention rights had been violated when the national authorities had failed to comply with a ruling restoring the building to his possession invoking diplomatic immunity of the tenant organisation.
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**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.

38. ECHR, *Berić and Others v. Bosnia and Herzegovina*, nos. 36357/04, 36360/04, 38346/04, 41705/04, 45190/04, 45578/04, 45579/04, 45580/04, 91/05, 97/05, 100/05, 101/05, 1121/05, 1123/05, 1125/05, 1129/05, 1132/05, 1133/05, 1169/05, 1172/05, 1175/05, 1177/05, 1180/05, 1185/05, 20793/05 and 25496/05, Chamber decision of 16 October 2007 (Article 1 – No State jurisdiction). The High Representative for Bosnia and Herzegovina removed the applicants from all their public and political positions and barred them indefinitely from holding any such positions and from standing for election. The applicants complained, *inter alia*, that they had not had an “effective remedy before a national authority” to go against the measures imposed on them.

## Information Note on the Court’s case-law No. 101

### October 2007

Decision 16.10.2007 [Section IV]

#### Article 35

#### Article 35-3

#### Ratione personae

Applicants’ removal from public functions by a decision of the High Representative for Bosnia and Herzegovina whose authority derives from UN Security Council Resolutions: *inadmissible*

#### Article 1

#### Responsibility of states

Decisions of the High Representative for Bosnia and Herzegovina whose authority derives from UN Security Council Resolutions: *inadmissible*

The applicants were holders of various public functions in Republika Srpska, one of the two entities within Bosnia and Herzegovina. In 2004 the High Representative for Bosnia and Herzegovina – an international administrator monitoring the implementation of the Dayton Peace Agreement whose office had been endorsed by the UN Security Council in 1995 – removed the applicants from all their public and political party positions for “obstructing international law by assisting in evading justice individuals indicted by the ICTY”. An ensuing decision by the Constitutional Court ordering the domestic authorities to secure an effective remedy in respect of removals from office by the High Representative was rendered devoid of any practical effect by his subsequent statement that his decisions, pursuant to his international mandate, were not justiciable by the courts of Bosnia and Herzegovina or its entities.

The applicants complained under the criminal limb of Article 6 and under Articles 11 and 13 of the Convention about the High Representative’s measures and the lack of an effective remedy in that respect.

*Inadmissible*: Having identified a “threat to international peace and security” within the meaning of Article 39 of the UN Charter, the UN Security Council had delegated to an informal group of States actively involved in the peace process in Bosnia and Herzegovina (“the Peace Implementation Council”) the establishment of the office of the High Representative. The High Representative was to

report directly to the PIC and was authorised, *inter alia*, to remove from office public officials considered to have violated legal commitments of the Dayton Peace Agreement. However, pursuant to the relevant provisions of the UN Charter, in delegating its powers through Resolution 1031, the Security Council retained effective overall control. The Court therefore considered that in the applicants' cases the High Representative had been exercising lawfully delegated Chapter VII powers of the UN Security Council and that the impugned actions regarding the applicants had been "attributable" to the UN within the meaning of the relevant provisions of international law. Attempting to establish a review mechanism in respect of the High Representative's decisions could therefore not have changed the nature of those acts without a prior approval by the High Representative himself. The Court noted, moreover, that the impugned decisions had had immediate effect and had not required any procedural steps by the domestic authorities. As to whether Bosnia and Herzegovina could nevertheless be held liable for the impugned acts, the Court recalled its reasoning in *Behrami and Behrami and Saramati v. France, Germany and Norway* ((dec.) [GC] nos. 71412/01 and 78166/01, 2 May 2007; see Information Note no. 97), which concerned acts performed by KFOR and UNMIK in Kosovo\* under the aegis of the UN. The Court considered that the reasoning outlined in those cases also applied to the acceptance of an international civil administration in its territory by a respondent State: incompatible *ratione personae*.

39. **ECHR, *Stoll v. Switzerland*, no. 69698/01, Grand Chamber judgment of 10 December 2007 (Article 10, Freedom of expression – No violation).** The applicant, a journalist, had disclosed in the press a confidential report by the Swiss ambassador to the United States of America 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 to Holocaust victims for unclaimed assets deposited in Swiss bank accounts. He 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.

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 **Ugrekheldze** (Georgian),  
 Anatoli **Kovler** (Russian),  
 Vladimiro **Zagrebelky** (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.

## 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.

- 40. ECHR, *Islamic Republic of Iran Shipping Lines v. Turkey*, no. 40998/98, Chamber judgment of 13 December 2007 (Article 1 Protocol No. 1, Protection of property – Violation).** 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 the use 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,

given the courts' refusal of the applicant's compensation claim, the interference with the applicant's property rights had been disproportionate.

*Conclusion:* violation (unanimously).

41. **ECHR, *Saadi v. Italy*, no. 37201/06, Grand Chamber judgment of 28 February 2008 (Article 3, Prohibition of torture and inhuman or degrading treatment – 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.

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.

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),  
 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 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.

**42. ECHR, *N. v. the United Kingdom*, no. 26565/05, Grand Chamber judgment of 25 May 2008 (Article 3, Prohibition of torture and inhuman or degrading treatment – No violation).** The applicant, a HIV-/AIDS-positive of Ugandan nationality living in London, unsuccessfully claimed that to return her to Uganda would cause her suffering and lead to her early death.

**ECHR 376 (2008)**  
**27.5.2008**

**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 **N. v. the United Kingdom** (application no. 26565/05).

The Court held, by 14 votes to three, that, if N. were to be sent back to Uganda from the United Kingdom, **there would be no violation of Article 3** (prohibition of inhuman or degrading treatment) of the European Court of Human Rights.

1. Principal facts

The applicant, N., is a Ugandan national who was born in 1974 and lives in London. She has AIDS. The case concerned N's allegation that her return to Uganda would cause her suffering and lead to her early death, because of her illness.

N. came to the United Kingdom on 28 March 1998 under an assumed name. She was seriously ill, and was admitted to hospital.

On 31 March 1998 solicitors lodged an asylum application on her behalf, claiming that she had been ill-treated and raped by the National Resistance Movement in Uganda and was in fear of her life and safety if she were returned.

By November 1998, the applicant was diagnosed as having two AIDS-defining illnesses, and as being extremely advanced from an HIV point of view; her CD4 count was 20 cells/mm<sup>3</sup>, reflecting considerable immunosuppression. The report stated that, without active treatment, her prognosis was “appalling” and put her life expectancy at less than 12 months should she be forced to return to Uganda, where there was “no prospect of her getting adequate therapy”.

The United Kingdom Secretary of State refused the applicant's asylum claim on 28 March 2001, finding that her claims were not credible, that there was no evidence that the Ugandan authorities were interested in her, that treatment of AIDS in Uganda was comparable to any other African country, and that all the major anti-viral drugs were available in Uganda at highly subsidised prices. The applicant appealed.

On 10 July 2002 her appeal was dismissed concerning the asylum refusal, but allowed in relation to Article 3 of the Convention.

The Secretary of State appealed against the Article 3 finding, contending that all the AIDS drugs available under the National Health Service in the United Kingdom could also be obtained locally in Uganda, and most were also available at a reduced price through Unfunded projects and from bilateral AIDS donor funded programmes. The applicant's return would not, therefore, be to a “complete absence of medical treatment”, and so would not subject her to “acute physical and mental suffering”.

The Immigration Appeal Tribunal allowed the appeal on 29 November 2002 and found: “Medical treatment is available in Uganda for the [applicant’s] condition even though the Tribunal accepts that the level of medical provision in Uganda falls below that in the United Kingdom”.

The applicant appealed unsuccessfully to the Court of Appeal and the House of Lords.

## 2. Procedure and composition of the Court

The application was lodged with the European Court of Human Rights on 22 July 2005. On 22 May 2007 the Chamber relinquished jurisdiction in favour of the Grand Chamber, under Article 301 of the Convention. A hearing took place in public in the Human Rights Building, Strasbourg, on 26 September 2007.

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

Jean-Paul **Costa** (French), *President*,  
 Nicolas **Bratza** (British),  
 Peer **Lorenzen** (Danish),  
 Françoise **Tulkens** (Belgian),  
 Josep **Casadevall** (Andorran),  
 Giovanni **Bonello** (Maltese),  
 Ireneu **Cabral Barreto** (Portuguese)  
 Boštjan M. **Zupančič** (Slovenian),  
 Rait **Maruste** (Estonian),  
 Snejana **Botoucharova** (Bulgarian),  
 Stanislav **Pavlovschi** (Moldovan),  
 Javier **Borrego Borrego** (Spanish),  
 Khanlar **Hajiyev** (Azerbaijani),  
 Ljiljana **Mijović** (citizen of Bosnia and Herzegovina),  
 Dean **Spielmann** (Luxemburger),  
 Renate **Jaeger** (German),  
 Mark **Villiger** (Swiss), *judges*,

and also Michael **O’Boyle**, *Deputy Registrar*.

## 3. Summary of the judgment

### Complaint

The applicant claimed that to return her to Uganda would cause her suffering and lead to her early death, which amounted to inhuman and degrading treatment. She relied on Article 3 and 8 (right to respect for private and family life).

### Decision of the Court

#### Article 3

The Court resumed its case-law concerning expulsion cases where the applicant claimed to be at risk of suffering a violation of Article 3 on the grounds of ill-health, noting that it had not found such a violation since its judgment in *D v. the United Kingdom* (application no. 30240/96) on 21 April 1997, where “very exceptional circumstances” and “compelling humanitarian considerations” were at stake. In the *D.* case the applicant was critically ill and appeared to be close to death, could not be guaranteed any nursing or medical care in his country of origin and had no family there willing or able to care for him or provide him with even a basic level of food, shelter or social support.

The Court recalled that aliens who were subject to expulsion could not in principle claim any entitlement to remain in the territory of one of the States which had ratified the European Convention on Human Rights (a Contracting State) in order to continue to benefit from medical, social or other forms of assistance and services provided by the expelling State. The fact that the applicant's circumstances, including her or his life expectancy, would be significantly reduced if s/he were to be removed from the Contracting State was not sufficient in itself to give rise to breach of Article 3. The decision to remove an alien who was suffering from a serious mental or physical illness to a country where the facilities for the treatment of that illness were inferior to those available in the Contracting State might raise an issue under Article 3, but only in a very exceptional case, where the humanitarian grounds against the removal were compelling, such as in the case *D*.

Although many of the rights it contained had implications of a social or economic nature, the Convention was essentially directed at the protection of civil and political rights. Furthermore, inherent in the whole of the Convention was a search for a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights. Advances in medical science, together with social and economic differences between countries, meant that the level of treatment available in the Contracting State and the country of origin might vary considerably. Article 3 did not place an obligation on the Contracting State to alleviate such disparities through the provision of free and unlimited health care to all aliens without a right to stay within its jurisdiction. A finding to the contrary would place too great a burden on the Contracting States.

Finally, the Court observed that, although the applicant's case concerned the expulsion of a person with an HIV and AIDS-related condition, the same principles had to apply to the expulsion of any person afflicted with any serious, naturally occurring physical or mental illness which might cause suffering, pain and reduced life expectancy and require specialised medical treatment which might not be so readily available in the applicant's country of origin or which might be available only at substantial cost.

Although the applicant applied for, and was refused, asylum in the United Kingdom, she did not complain before the Court that her removal to Uganda would put her at risk of deliberate, politically motivated, ill-treatment. Her claim under Article 3 was based solely on her serious medical condition and the lack of sufficient treatment available for it in her home country.

In 1998 the applicant was diagnosed as having two AIDS defining illnesses and a high level of immunosuppression. As a result of the medical treatment she had received in the United Kingdom her condition was now stable. She was fit to travel and would remain fit as long as she continued to receive the basic treatment she needed. The evidence before the national courts indicated, however, that if the applicant were to be deprived of her current medication her condition would rapidly deteriorate and she would suffer ill-health, discomfort, pain and death within a few years.

According to information collated by the World Health Organisation, antiretroviral medication was available in Uganda, although, through lack of resources, it was received by only half of those in need. The applicant claimed that she would be unable to afford the treatment and that it would not be available to her in the rural area from which she came. It appeared that she had family members in Uganda, although she claimed that they would not be willing or able to care for her if she were seriously ill.

The United Kingdom authorities had provided the applicant with medical and social assistance at public expense during the nine-year period it had taken for her asylum application and claims under Articles 3 and 8 of the Convention to be determined by the domestic courts and the European Court. However, that did not in itself entail a duty on the part of the United Kingdom to continue to provide for her.

The Court accepted that the quality of the applicant's life, and her life expectancy, would be affected if she were returned to Uganda. Currently, however, the applicant was not critically ill. The rapidity of the deterioration which she would suffer and the extent to which she would be able to obtain access to medical treatment, support and care, including help from relatives, involved a certain degree of speculation, particularly in view of the constantly evolving situation as regards the treatment of HIV and AIDS worldwide.

Concluding that the applicant's case did not disclose "very exceptional circumstances", the Court found that the implementation of the decision to remove her to Uganda would not give rise to a violation of Article 3.

### **Article 8**

The Court held, by 14 votes to three, that it was not necessary to examine the applicant's complaint under Article 8.

Judges Tulkens, Bonello and Spielmann expressed a joint dissenting opinion, which is annexed to the judgment.

43. **ECHR, *Korbely v. Hungary*, no. 9174/02, Grand Chamber judgment of 19 September 2008 (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.

## 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 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.

44. **ECHR, *Demir and Baykara v. Turkey*, no. 34503/97, Grand Chamber judgment of 12 November 2008 (Article 11, Freedom of assembly and association – Violation).** The case concerned a successful challenge to the failure by the Turkish courts to recognise the applicants' rights, as municipal civil servants, to form trade unions and to enter into collective agreements as enshrined in conventions of the International Labour Organisation (ILO), which were, by virtue of the Turkish Constitution, directly applicable in domestic law.

**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 Tm 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 Tm 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.

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 Tm 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 Tm 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.

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 **Pavlovschi** (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*,

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 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 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.

45. **ECHR, *Sergey Zolotukhin v. Russia*, no. 14939/03, Grand Chamber judgment of 10 February 2009 (Article 4 of Protocol No. 7, Right not to be tried or punished twice – Violation).** The applicant complained that, after he had already served a three days’ detention for minor disorderly acts under the Code of Administrative Offences, he had been tried again in criminal proceedings for the same offence in violation of the *ne bis in idem* principle.

**ECHR 95(2009)**  
**10.2.2009**

**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 **Sergey Zolotukhin v. Russia** (application no. 14939/03).

The Court held unanimously that there had been a **violation of Article 4 of Protocol No. 7** (right not to be tried or punished twice) of the European Convention on Human Rights.

Under Article 41 (just satisfaction) of the Convention, the Court awarded the applicant 1,500 euros (EUR) in respect of non-pecuniary damage and EUR 9,000 for costs and expenses. (The judgment is available in English and French.)

**1. Principal facts**

Sergey Aleksandrovich Zolotukhin is a Russian national who was born in 1966 and lives in Voronezh (Russia).

The case concerns administrative and criminal proceedings brought against Mr Zolotukhin in 2002 for disorderly conduct.

On 4 January 2002 Mr Zolotukhin was arrested for bringing his girlfriend into a military compound without authorisation. He was then taken to the Voronezh Leninskiy district police station. According to the police report the applicant, who was drunk, behaved insolently, used obscene language and attempted to escape. On the same day the Gribanovskiy District Court found the applicant guilty of “minor disorderly acts” under Article 158 of the Code of Administrative Offences and sentenced him to three days’ detention.

Subsequently, criminal proceedings were brought against the applicant under Article 213 § 2 (b) of the Criminal Code in relation to his disorderly conduct before the police report was drawn up, and under Articles 318 and 319 of the Criminal Code in relation to his threatening and insulting behaviour during and after the drafting of the report. He was remanded in custody on 24 January 2002. On 2 December 2002 the same district court found the applicant guilty of the charges under Article 319 of the Criminal Code. He was, however, acquitted of the charges under Article 213, as the court found that his guilt had not been proven to the standard required in criminal proceedings.

**2. Procedure and composition of the Court**

The application was lodged with the European Court of Human Rights on 22 April 2003 and declared partly admissible on 8 September 2005.

In its Chamber judgment of 7 June 2007, the Court held unanimously that there had been a violation of Article 4 of Protocol No. 7.

On 5 September 2007 the Government requested that the case be referred to the Grand Chamber under Article 431 (referral to the Grand Chamber) and on 12 November 2007 the panel of the Grand Chamber accepted that request.

The President of the Court gave the Human Rights Training Institute of the Paris Bar Association leave to intervene as a third party in the Court's proceedings, under Article 36 § 2 of the Convention (third party intervention) and Rule 44 § 2 of the Rules of Court.

A hearing took place in public in the Human Rights Building, Strasbourg, on 26 March 2008.

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

Jean-Paul **Costa** (France), *President*,  
Nicolas **Bratza** (United Kingdom),  
Françoise **Tulkens** (Belgium),  
Josep **Casadevall** (Andorra),  
Corneliu **Bîrsan** (Romania),  
Karel **Jungwiert** (Czech Republic),  
Anatoly **Kovler** (Russia)  
Elisabeth **Steiner** (Austria),  
Stanislav **Pavlovschi** (Moldova),  
Egbert **Myjer** (Netherlands),  
Dragoljub **Popović** (Serbia),  
Isabelle **Berro-Lefèvre** (Monaco),  
Päivi **Hirvelä** (Finland),  
Giorgio **Malinverni** (Switzerland),  
Luis **López Guerra** (Spain),  
Mirjana **Lazarova Trajkovska** ("The former Yugoslav Republic of Macedonia"),  
Ledi **Bianku** (Albania), *judges*,

and also Michael **O'Boyle**, *Deputy Registrar*.

### 3. Summary of the judgment

#### **Complaint**

Relying on Article 4 of Protocol No. 7 (right not to be tried or punished twice) of the European Convention on Human Rights, Mr Zolotukhin complained that, after having already served three days' detention for disorderly conduct as a result of administrative proceedings against him, he had been detained and tried again for the same offence in criminal proceedings.

#### **Decision of the Court**

The Court reiterated that Article 4 of Protocol No. 7 imposed a prohibition on trying or punishing an individual twice in criminal proceedings for the same offence.

As to the existence of a "criminal charge" for the purposes of that Article, the Court, upholding the Chamber's findings, took the view that although the proceedings instituted against the applicant before the Gribanovskiy District Court on 4 January 2002 were classified as administrative in national law, they were to be equated with criminal proceedings on account, in particular, of the nature of the offence and the severity of the penalty.

As to whether the offences were the same, the Court noted that it had adopted a variety of approaches in the past, placing the emphasis either on identity of the facts irrespective of their legal characterisation, on the legal classification, accepting that the same facts could give rise to different

offences, or on the existence or otherwise of essential elements common to both offences. Taking the view that the existence of these different approaches was a source of legal uncertainty which was incompatible with the fundamental right guaranteed by Article 4 of Protocol No. 7, the Court decided to define in detail what was to be understood by the term “same offence” for the purposes of the Convention.

After examining the scope of the right not to be tried and punished twice as set forth in other international instruments, in particular the United Nations Covenant on Civil and Political Rights, the European Union’s Charter of Fundamental Rights and the American Convention on Human Rights, the Court stated that Article 4 of Protocol No. 7 should be construed as prohibiting the prosecution or trial of an individual for a second offence in so far as it arose from identical facts or facts that were “substantially” the same as those underlying the first offence. This guarantee came into play where a new set of proceedings was instituted after the previous acquittal or conviction had acquired the force of *res judicata*.

In the instant case the Court considered that the facts underlying the two sets of administrative and criminal proceedings against the applicant differed in only one element, namely the threat to use violence against a police officer, and should therefore be regarded as substantially the same.

As to whether there had been a duplication of proceedings, the Court upheld the Chamber’s conclusions, finding that the judgment in the “administrative” proceedings sentencing the applicant to three days’ detention amounted to a final decision, as no ordinary appeal lay against it in domestic law. The Court further stressed that the fact that the applicant had been acquitted in the criminal proceedings had no bearing on his claim that he had been prosecuted twice for the same offence, nor did it deprive him of his victim status, as he had been acquitted not on account of the breach of his rights under Article 4 of Protocol No. 7, but solely on the ground of insufficient evidence against him.

The Court concluded that the proceedings instituted against the applicant under Article 213 § 2 (b) of the Criminal Code concerned essentially the same offence as that of which he had already been convicted under Article 158 of the Code of Administrative Offences, and that he had therefore been the victim of a breach of Article 4 of Protocol No. 7.

46. **ECHR, *Andrejeva v. Latvia*, no. 55707/00, Grand Chamber judgment of 18 February 2009 (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 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.

**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 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),  
 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.

47. **ECHR, *A. and Others v. the United Kingdom*, no. 3455/05, Grand Chamber judgment of 19 February 2009 (Article 15, Derogation in times of emergency – disproportionate measure; Article 3, Prohibition of torture and inhuman or degrading treatment – No violation; Article 3 taken in conjunction with Article 13, Right to an effective remedy – No violation; Article 5-1, Right to liberty and security – Violation; Article 5-4, Right to judicial review of detention - Violation; Article 5-5, Right to compensation for unlawful detention – Violation).** The United Kingdom passed the Anti-terrorism, Crime and Security Act 2001 in the aftermath of the terrorist attacks in the United States of America the same year. The act enabled the detention of non-nationals suspected of being international terrorists even when they were not charged with any crime and when their deportation was impossible at that moment. The United Kingdom Government had notified a derogation from Article 5-1 under Article 15 but the Court found that the derogating measures had been disproportionate in that they had discriminated unjustifiably between nationals and non-nationals.

**ECHR 127(2009)**  
**19.2.2009**

**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 **A. and Others v. the United Kingdom** (application no. 3455/05).

The case concerned the applicants' complaints that they were detained in high security conditions under a statutory scheme which permitted the indefinite detention of non-nationals certified by the Secretary of State as suspected of involvement in terrorism.

The Court held unanimously that there had been:

- **no violation of Article 3** (prohibition of torture and inhuman or degrading treatment) taken alone or in conjunction with **Article 13** (right to an effective remedy) of the European Convention on Human Rights in respect of all the applicants, except the Moroccan applicant whose complaints under these articles were declared inadmissible;
- a **violation of Article 5 § 1** (right to liberty and security) of the Convention in respect of all the applicants, except the Moroccan and French applicants who had elected to leave the United Kingdom, since it could not be said that the applicants were detained with a view to deportation and since, as the House of Lords had found, the derogating measures which permitted their indefinite detention on suspicion of terrorism discriminated unjustifiably between nationals and non-nationals;
- a **violation of Article 5 § 4** (right to have lawfulness of detention decided by a court) in respect of two of the Algerian applicants, the stateless and Tunisian applicants, because they had not been able effectively to challenge the allegations against them; and,
- a **violation of Article 5 § 5** in respect of all the applicants, except the Moroccan and French applicants, on account of the lack of an enforceable right to compensation for the above violations.

The Court made awards under Article 41 (just satisfaction) which were substantially lower than those which it had made in past cases of unlawful detention, in view of the fact that the detention scheme was devised in the face of a public emergency and as an attempt to reconcile the need to protect the United Kingdom public against terrorism with the obligation not to send the applicants back to

countries where they faced a real risk of ill-treatment. The Court therefore awarded, to the six Algerian applicants 3,400 euros (EUR), EUR 3,900, EUR 3,800, EUR 3,400, EUR 2,500 and EUR 1,700, respectively; to the stateless and Tunisian applicants EUR 3,900, each; and to the Jordanian applicant, EUR 2,800. The applicants were jointly awarded EUR 60,000 for legal costs. (The judgment is available in English and French.)

## 1. Principal facts

The applicants are 11 individuals, six are of Algerian nationality; four are, respectively, of French, Jordanian, Moroccan and Tunisian nationality; and, one, born in a Palestinian\*\* refugee camp in Jordan, is stateless.

Following the al'Qaeda attacks of 11 September 2001 on the United States of America, the British Government considered that the United Kingdom was a particular target for terrorist attacks, such as to give rise to a "public emergency threatening the life of the nation" within the meaning of Article 15 of the European Convention on Human Rights (derogation in time of emergency). The Government believed that the threat came principally from a number of foreign nationals present in the United Kingdom, who were providing a support network for extremist Islamist terrorist operations linked to al'Qaeda. These individuals could not be deported because there was a risk that each would be ill-treated in his country of origin in breach of Article 3 of the Convention. The Government considered that it was necessary to create an extended power permitting the detention of foreign nationals, where the Secretary of State reasonably believed that the person's presence in the United Kingdom was a risk to national security and reasonably suspected that the person was an "international terrorist". Since the Government considered that this detention scheme might not be consistent with Article 5(1) of the Convention (right to liberty), on 11 November 2001 they issued a notice of derogation under Article 15 of the Convention to the Secretary General of the Council of Europe. The notice set out the provisions of Part 4 of the Anti-Terrorism, Crime and Security Act 2001 ("the 2001 Act"), including the power to detain foreign nationals certified as "suspected international terrorists" who could not "for the time being" be removed from the United Kingdom.

Part 4 of the 2001 Act came into force on 4 December 2001 and was repealed in March 2005. During the lifetime of the legislation 16 individuals, including the 11 applicants, were certified and detained. Six of the applicants were detained on 19 December 2001; the others were detained on various dates up until October 2003. They were initially detained at Belmarsh Prison in London. The Moroccan and French applicants were released as they elected to leave the United Kingdom in December 2001 and March 2002, respectively. Three of the applicants, following a deterioration in their mental health (including a suicide attempt), were transferred to Broadmoor Secure Mental Hospital. Another applicant was released on bail in April 2004, under conditions equal to house arrest, because of serious concerns over his mental health.

The decision to certify each applicant under the 2001 Act was subject to review every six months before the Special Immigration Appeals Commission (SIAC); each applicant appealed against the Secretary of State's decision to certify him. In determining whether the Secretary of State had had reasonable grounds for suspecting that each applicant was an "international terrorist" whose presence in the United Kingdom gave rise to a risk to national security, SIAC used a procedure which enabled it to consider both evidence which could be made public ("open material") and sensitive evidence which could not be disclosed for reasons of national security ("closed material"). The detainee and his legal representatives were given the open material and could comment on it in writing and at a hearing. The closed material was not disclosed to the detainee or his lawyers but to a "special advocate", appointed on behalf of each detainee by the Solicitor General. In addition to the open hearings, SIAC held closed hearings to examine the secret evidence, where the special advocate could make submissions on behalf of the detainee as regards procedural matters, such as the need for further disclosure, and as to the substance and reliability of the closed material. However, once the special advocate had seen the closed material he could not have any contact with the detainee or his lawyers,

except with the leave of the court. On 30 July 2002 SIAC upheld the Secretary of State's decision to certify each of the applicants. However, it also found that, since the detention regime applied only to foreign nationals, it was discriminatory and in breach of the Convention.

The applicants also brought proceedings in which they challenged the fundamental legality of the November 2001 derogation. These proceedings were eventually determined by the House of Lords on 16 December 2004. It held that there was an emergency threatening the life of the nation but that the detention scheme did not rationally address the threat to security and was therefore disproportionate. The House of Lords found, in particular, that there was evidence that United Kingdom nationals were also involved in terrorist networks linked to al'Qaeda and that the detention scheme under Part 4 of the 2001 Act discriminated unjustifiably against foreign nationals. The House of Lords therefore made a declaration of incompatibility under the Human Rights Act and quashed the derogation order.

Part 4 of the 2001 Act remained in force, however, until it was repealed by Parliament in March 2005. As soon as the applicants still in detention were released, they were made subject to control orders under the Prevention of Terrorism Act 2005. Control orders impose various restrictions on those reasonably suspected of involvement in terrorism, regardless of nationality.

In August 2005, following negotiations commenced towards the end of 2003 to seek from the Algerian and Jordanian Governments assurances that the applicants would not be ill-treated if returned, the Government served Notices of Intention to Deport on the six Algerian applicants and Jordanian applicant. These applicants were taken into immigration custody pending removal to Algeria and Jordan. In April 2008 the Court of Appeal ruled that the Jordanian applicant could not lawfully be extradited to Jordan, because it was likely that evidence obtained by torture could be used against him there at trial. The case was decided by the House of Lords on 18 February 2009.

## 2. Procedure and composition of the Court

The application was lodged with the European Court of Human Rights on 21 January 2005. The Chamber to which the case was assigned decided to relinquish jurisdiction to the Grand Chamber<sup>2</sup> on 11 September 2007. The Grand Chamber held a public hearing in the case on 21 May 2008.

The President granted leave to two London-based non-governmental organisations, Liberty and Justice, to intervene in the proceedings as third parties.

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),  
 Françoise **Tulkens** (Belgium),  
 Josep **Casadevall** (Andorra),  
 Giovanni **Bonello** (Malta),  
 Ireneu **Cabral Barreto** (Portugal),  
 Elisabeth **Steiner** (Austria),  
 Lech **Garlicki** (Poland),  
 Khanlar **Hajiyev** (Azerbaijan),  
 Ljiljana **Mijović** (Bosnia and Herzegovina),  
 Egbert **Myjer** (the Netherlands),  
 David Thór **Björgvinsson** (Iceland),  
 George **Nicolaou** (Cyprus),  
 Ledi **Bianku** (Albania),  
 Nona **Tsotsoria** (Georgia),  
 Mihai **Poalelungi** (Moldova), *judges*,

and also Michael **O'Boyle**, *Deputy Registrar*.

### 3. Summary of the judgment

#### **Complaints**

The applicants complained before the Court that their indefinite detention in high security conditions amounted to inhuman or degrading treatment. They also alleged that the detention scheme was unlawful and discriminatory and that the derogation was disproportionate. Furthermore, although their detention was declared to be in breach of domestic law, they were unable to bring any proceedings in the United Kingdom to claim compensation or bring about their release. Lastly, the applicants complained that during their appeals against certification before SIAC they had only limited knowledge of the case against them and a limited possibility to challenge it. The applicants relied on Articles 3 (prohibition of torture and inhuman or degrading treatment), 5 (right to liberty and security), 6 (right to a fair trial), 13 (right to an effective remedy) and 14 (prohibition of discrimination).

#### **Decision of the Court**

##### **Article 3 taken alone or in conjunction with Article 13**

The Court, while acutely conscious of the difficulties faced by States in protecting their populations from terrorist violence, stressed that Article 3 enshrines one of the most fundamental values of democratic societies. Even in the most difficult of circumstances, such as the fight against terrorism, and irrespective of the conduct of the person concerned, the European Convention prohibits in absolute terms torture and inhuman or degrading treatment and punishment.

The uncertainty and fear of indefinite detention had to have caused the remaining ten applicants anxiety and distress, as it would virtually any detainee in their position.

Furthermore, it was probable that the stress had been sufficiently serious and enduring to affect the mental health of certain of the applicants.

It could not, however, be said that the applicants had been without any prospect or hope of release. In particular, they had been able to bring proceedings to challenge the legality of the detention scheme under the 2001 Act and had been successful before SIAC, on 30 July 2002, and the House of Lords on 16 December 2004. In addition, each applicant had been able to bring an individual challenge to the decision to certify him and SIAC had been required by statute to review the continuing case for detention every six months. The Court did not, therefore, consider that the applicants' situation had been comparable to an irreducible life sentence, which would have given rise to an issue under Article 3.

Each detained applicant had also had at his disposal the remedies available to all prisoners under administrative and civil law to challenge conditions of detention, including any alleged inadequacy of medical treatment. The applicants had not attempted to make use of those remedies and had not therefore complied with the requirement under Article 35 of the Convention to exhaust domestic remedies. It followed that the Court could not take the conditions of detention into account in forming an assessment of the applicants' claims.

In those circumstances, the Court found that the applicants' detention had not reached the high threshold of inhuman and degrading treatment for which a violation of Article 3 could be found.

As concerned the applicants' complaint that they had not had effective domestic remedies for their Article 3 complaints, the Court recalled in particular that Article 13 did not guarantee a remedy

allowing a challenge to primary legislation before a national authority on the ground of being contrary to the Convention.

In conclusion, therefore, the Court found that there had been no violation of Article 3, taken alone or in conjunction with Article 13.

It declared the Moroccan applicant's complaints under Articles 3 and 13 inadmissible because he had been detained for only a few days.

### **Articles 5 § 1 and 15**

#### Whether the applicants had been lawfully detained in accordance with Article 5 § 1 (f)

The Court recalled that Article 5 enshrined a fundamental human right, namely the protection of the individual against arbitrary interference by the State with his or her right to liberty, and that that guarantee applied to "everyone", regardless of nationality.

Subparagraph (f) of Article 5 § 1 permits the State to control the liberty of aliens in an immigration context and the Government contended that the applicants had been lawfully detained as persons "against whom action is being taken with a view to deportation or extradition".

The Court found no violation in respect of the Moroccan and French applicants, who had been detained for only short periods before electing to leave the United Kingdom. However, concerning the remaining nine applicants, the Court did not consider that the United Kingdom Government's policy of keeping the possibility of deporting the applicants "under active review" had been sufficiently certain or determinative to amount to "action ... being taken with a view to deportation". One of the principal assumptions underlying the derogation notice, the 2001 Act and the decision to detain the applicants had been that they could not be removed or deported "for the time being". There was no evidence that, during the period of those nine applicants' detention, there had been any realistic prospect of their being expelled without them being put at real risk of ill-treatment. Indeed, the first applicant is stateless and the Government had not produced any evidence to suggest that there had been another state willing to accept him. Nor had the Government apparently entered into negotiations with Algeria or Jordan, with a view to seeking assurances that the applicants who were nationals of those States would not be ill-treated if returned, until the end of 2003. No such assurance was received until August 2005. Their detention had not, therefore, fallen within the exception to the right to liberty set out in paragraph 5 § 1(f). That conclusion had also been, expressly or impliedly, reached by a majority of the members of the House of Lords.

It was, instead, clear from the terms of the derogation notice and Part 4 of the 2001 Act that the applicants had been certified and detained because they had been suspected of being "international terrorists". Internment and preventive detention without charge are incompatible with the fundamental right to liberty under Article 5 § 1, in the absence of a valid derogation under Article 15. The Court therefore considered whether the United Kingdom's derogation had been valid.

#### Whether the United Kingdom had validly derogated from its obligations under Article 5 § 1

In the unusual circumstances of the case, where the House of Lords had examined the issues relating to the State's derogation and concluded that there had been a public emergency threatening the life of the nation but that the measures taken in response had not been strictly required by the exigencies of the situation, the Court considered that it would be justified in reaching a contrary conclusion only if it found that the House of Lords' decision was manifestly unreasonable.

#### Whether there had been a "public emergency threatening the life of the nation"

Before the domestic courts, the Secretary of State had provided evidence to show the existence of a threat of serious terrorist attacks planned against the United Kingdom. Additional closed evidence had been provided before SIAC. All the national judges had accepted that danger to have been credible. Although no al'Qaeda attack had taken place within the territory of the United Kingdom at the time when the derogation had been made, the Court did not consider that the national authorities could be criticised for having feared such an attack to be imminent. A State could not be expected to wait for disaster to strike before taking measures to deal with it. Moreover, the danger of a terrorist attack had, tragically, been shown by the bombings and attempted bombings in London in July 2005 to have been very real.

While it was striking that the United Kingdom had been the only Convention State to have lodged a derogation in response to the danger from al'Qaeda, the Court accepted that it had been for each Government, as the guardian of their own people's safety, to make its own assessment on the basis of the facts known to it. Weight had, therefore, to be attached to the judgment of the United Kingdom's Government and Parliament, as well as the views of the national courts, who had been better placed to assess the evidence relating to the existence of an emergency.

Accordingly, the Court, like the majority of the House of Lords, held that there had been a public emergency threatening the life of the nation.

#### Whether the derogating measures had been strictly required by the exigencies of the situation

The question whether the measures were strictly required was ultimately a judicial decision, particularly in a case such as the present where the applicants had been deprived of their fundamental right to liberty over a long period of time. Having regard to the careful way in which the House of Lords had approached the issues, it could not be said that inadequate weight had been given to the views of the Government or Parliament on this question.

The Court considered that the House of Lords had been correct in holding that the extended powers of detention were not to be seen as immigration measures, where a distinction between nationals and non-nationals would be legitimate, but instead as concerned with national security. Part 4 of the 2001 Act had been designed to avert a real and imminent threat of terrorist attack which, on the evidence, had been posed by both nationals and non-nationals. The choice by the Government and Parliament of an immigration measure to address what had essentially been a security issue had resulted in a failure adequately to address the problem, while imposing a disproportionate and discriminatory burden of indefinite detention on one group of suspected terrorists. As the House of Lords had found, there was no significant difference in the potential adverse impact of detention without charge on a national or on a non-national who in practice could not leave the country because of fear of torture abroad.

The Government had argued before the Court that it had been legitimate to confine the detention scheme to non-nationals, to take into account the sensitivities of the British Muslim population in order to reduce the chances of recruitment among them by extremists. However, the Government had not provided the Court with any evidence to suggest that British Muslims had been significantly more likely to react negatively to the detention without charge of national rather than foreign Muslims reasonably suspected of links to al'Qaeda. The system of control orders, put in place by the Prevention of Terrorism Act 2005, did not discriminate between national and non-national suspects.

Similarly, as concerned the argument that the State could better respond to the terrorist threat if it were able to detain its most serious source, namely non-nationals, the Court had not been provided with any evidence which could persuade it to overturn the conclusion of the House of Lords that the difference in treatment had been unjustified. Indeed, the national courts, including SIAC, which saw both the open and the closed material, had not been convinced that the threat from non-nationals had been significantly more serious than that from nationals.

In conclusion, therefore, the Court, like the House of Lords, found that the derogating measures had been disproportionate in that they had discriminated unjustifiably between nationals and non-nationals. It followed that there had been a violation of Article 5 § 1 in respect of all but the Moroccan and French applicants.

#### **Article 5 § 4**

Since the Moroccan and French applicants were already at liberty, having elected to leave the United Kingdom, by the time the various proceedings to determine the lawfulness of the detention under the 2001 Act had commenced, the Court declared those two applicants' complaints under Article 5 § 4 inadmissible.

The remaining applicants complained that the procedure before SIAC was unfair because the evidence against them was not fully disclosed.

Where a person is detained on the basis of an allegedly reasonable suspicion of unlawful behaviour, the guarantee of procedural fairness under Article 5 § 4 requires him to be given an opportunity effectively to challenge the allegations. This generally requires disclosure of the evidence against him. However, in cases where there is a strong public interest in keeping some of the relevant evidence secret, for example to protect vulnerable witnesses or intelligence sources, it is possible to place restrictions on the right to disclosure, as long as the detainee still has the possibility effectively to challenge the allegations against him.

The Court's starting point in the present case was that, as the national courts found and it accepted, during the period of the applicants' detention the activities and aims of the al'Qaeda network had given rise to a "public emergency threatening the life of the nation". During the relevant time, therefore, there was considered to be an urgent need to protect the population of the United Kingdom from terrorist attack and a strong public interest in obtaining information about al'Qaeda and its associates and in maintaining the secrecy of the sources of such information.

Balanced against these important public interests, however, was the applicants' rights under Article 5 § 4 to procedural fairness in their appeals to SIAC. It was, therefore, essential that as much information about the allegations and evidence against each applicant was disclosed as was possible without compromising national security or the safety of others. Where full disclosure was not possible, the difficulties this caused had to be counterbalanced in such a way that each applicant still had the possibility effectively to challenge the case against him.

The Court considered that SIAC, which was a fully independent court and which could examine all the relevant evidence, both closed and open, was best placed to ensure that no material was unnecessarily withheld from the detainee. The special advocate provided an important, additional safeguard through questioning the State's witnesses on the need for secrecy and through making submissions to the judge regarding the case for additional disclosure. On the material before it, the Court had no basis to find that excessive and unjustified secrecy had been employed in respect of any of the applicants' appeals or that there had not been compelling reasons for the lack of disclosure in each case.

Even where all or most of the underlying evidence had remained undisclosed, if the allegations contained in the open material had been sufficiently specific, it should have been possible for the applicant to provide his representatives and the special advocate with information with which to refute them, without his having to know the detail or sources of the evidence which formed the basis of the allegations. Where, however, the open material consisted purely of general assertions and SIAC's decision to uphold the certification and maintain the detention had been based solely or to a decisive degree on closed material, the procedural requirements of Article 5 § 4 would not be satisfied.

The Court noted that the open material against four of the Algerian applicants and the Jordanian applicant had included detailed allegations about, for example, the purchase of specific telecommunications equipment, possession of specific documents linked to named terrorist suspects and meetings with named terrorist suspects with specific dates and places. Those allegations had been sufficiently detailed to permit the applicants effectively to challenge them. Accordingly, there had been no violation of Article 5 § 4 in respect of those five applicants.

The principal allegations against the stateless applicant and one of the two remaining Algerian applicants had been that they had been involved in fund-raising for terrorist groups linked to al'Qaeda. These allegations were supported by open evidence, such as evidence of large sums of money moving through a bank account or of money raised through fraud. However, in each case the evidence which had allegedly provided the link between the money raised and terrorism had not been disclosed to either applicant. Those applicants had not therefore been in a position effectively to challenge the allegations against them, in violation of Article 5 § 4.

The open allegations in respect of the Tunisian and remaining Algerian applicant had been of a general nature principally that they had been members of named extremist Islamist groups linked to al'Qaeda. SIAC observed in its judgments dismissing each of these applicants' appeals that the open evidence had been insubstantial and that the evidence on which it relied against them had largely to be found in the closed material. Again, therefore, the Court found that those applicants had not been in a position to effectively challenge the allegations against them, in violation of Article 5 § 4.

#### **Article 5 § 5**

The Court noted that the above violations could not give rise to an enforceable claim for compensation by the applicants before the national courts. It followed that there had been a violation of Article 5 § 5 in respect of all but the Moroccan and French applicants.

#### **Other complaints**

Given the above findings, the Court held that it was not necessary to examine the applicants' complaints under Article 5 § 1 taken in conjunction with either Articles 13 or 14 or under Article 5 § 4 concerning the applicants' complaints that the House of Lords had been unable to make a binding order for their release. In addition, having already examined the issues relating to the use of special advocates, closed hearings and lack of full disclosure in the proceedings before SIAC, it also held that it was not necessary to examine the applicants' complaints under Article 6.

**48. ECHR, *Opuz v. Turkey*, no. 33401/02, Chamber judgment of 9 June 2009 (Article 2, Right to life – Violation; Article 3, Prohibition of torture and inhuman or degrading treatment - Violation; Article 14, Prohibition of discrimination, read in conjunction with Articles 2 and 3 - Violation).** The applicant, a Turkish national, was subjected to serious acts of domestic violence by her husband, who finally shot her mother death. Before the Court she successfully alleged that the Turkish authorities failed to protect the life of her mother and that they were negligent in the face of the repeated violence, death threats and injury to which she herself was subjected to. Having regard to the provisions of more specialised international legal instruments in the field, such as the Convention for the Elimination of Discrimination Against Women of 1979 (CEDAW) and the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women of 1994 (the Belém do Pará Convention), the Court concluded that the violence suffered by the applicant and her mother could be regarded as gender-based, which constituted a form of discrimination against women. The overall unresponsiveness of the judicial system and impunity enjoyed by the aggressors, as found in the applicant's case, indicated that there was insufficient commitment to take appropriate action to address domestic violence in Turkey.

**ECHR 455(2009)  
09.06.2009**

**Press release issued by the Registrar**

The European Court of Human Rights has today notified in writing its **Chamber** judgment in the case of **Opuz v. Turkey** (application no. 33401/02) concerning the Turkish authorities' failure to protect the applicant and her mother from domestic violence.

The Court held unanimously that:

- there had been a **violation** of **Article 2** (right to life) of the European Convention on Human Rights in respect of the applicant's mother who was killed by the applicant's ex-husband despite the fact that the domestic authorities had been repeatedly alerted about his violent behaviour;
- there had been a **violation** of **Article 3** (prohibition of torture and of inhuman and degrading treatment) on account of the authorities' failure to protect the applicant against her ex-husband's violent and abusive behaviour; and,
- there had been a **violation** of **Article 14** (prohibition of discrimination) read in conjunction with Articles 2 and 3 on account of the violence suffered by the applicant and her mother having been gender-based, which amounted to a form of discrimination against women, especially bearing in mind that, in cases of domestic violence in Turkey, the general passivity of the judicial system and impunity enjoyed by aggressors mainly affected women.

Under Article 41 (just satisfaction) of the Convention, the Court awarded the applicant 30,000 euros (EUR) in respect of non-pecuniary pecuniary damage and EUR 6,500 for costs and expenses.

**1. Principal facts**

The applicant, Nahide Opuz, is a Turkish national who was born in 1972 and lives in Diyarbakır (Turkey). In 1990 Ms Opuz started living with H.O., the son of her mother's husband. Ms Opuz and

H.O. got married in November 1995 and had three children in 1993, 1994 and 1996. They had serious arguments from the beginning of their relationship and are now divorced.

Between April 1995 and March 1998 there were four incidents of H.O.'s violent and threatening behaviour which came to the notice of the authorities. Those incidents involved several beatings, a fight during which H.O. pulled out a knife and H.O. running the two women down with his car. Following those assaults the women were examined by doctors who testified in their reports to various injuries, including bleeding, bruising, bumps, grazes and scratches. Both women were medically certified as having sustained life-threatening injuries: the applicant as a result of one particularly violent beating; and, her mother following the assault with the car.

Criminal proceedings were brought against H.O. on three of those occasions for death threats, actual, aggravated and grievous bodily harm and attempted murder. As regards the knife incident, it was decided not to prosecute for lack of evidence. H.O. was twice remanded in custody and released pending trial.

However, as the applicant and her mother withdrew their complaints during each of those proceedings, the domestic courts discontinued the cases, their complaints being required under Article 456 § 4 of the Criminal Code to pursue any further. The proceedings concerning the car incident were nevertheless continued in respect of the applicant's mother, given the seriousness of her injuries, and H.O. was convicted to three months' imprisonment, later commuted to a fine.

On 29 October 2001 the applicant was stabbed seven times by H.O. and taken to hospital. H.O. was charged with knife assault and given another fine of almost 840,000 Turkish lira (the equivalent of approximately EUR 385) which he could pay in eight instalments. In his statement to the police he claimed that he and his wife, who frequently argued about her mother interfering in their marriage, had had an argument which had got out of hand.

Following that incident, the applicant's mother requested that H.O. be detained on remand, maintaining that on previous occasions her and her daughter had had to withdraw their complaints against him due to his persistent pressure and death threats.

In April 1998, October and November 2001 and February 2002 the applicant and her mother filed complaints with the prosecution authorities about H.O.'s threats and harassment, claiming that their lives were in immediate danger and requesting that the authorities take immediate action such as H.O.'s detention. In response to those requests for protection, H.O. was questioned and his statements taken down; he was then released.

Finally, on 11 March 2002 the applicant's mother, having decided to move to Izmir with her daughter, was travelling in the removal van when H.O. forced the van to pull over, opened the passenger door and shot her. The applicant's mother died instantly.

In March 2008 H.O. was convicted for murder and illegal possession of a firearm and sentenced to life imprisonment. Released pending the appeal proceedings, he claims that he killed the applicant's mother because his honour had been at stake as she had taken his wife and children away from him and had led his wife into an immoral way of life.

In April 2008 the applicant filed another criminal complaint with the prosecution authorities in which she requested the authorities to take measures to protect her as, since his release, her ex-husband had started threatening her again, via her new boyfriend. In May and November 2008 the applicant's representative informed the European Court of Human Rights that no such measures had been taken and the Court requested an explanation. The authorities have since taken specific measures to protect the applicant, notably by distributing her ex-husband's photograph and fingerprints to police stations with the order to arrest him if he was spotted near the applicant's place of residence.

In the meantime, Law no. 4320 of the Family Protection Act entered into Force in Turkey which provides for specific measures for protection against domestic violence.

## 2. Procedure and composition of the Court

The application was lodged with the European Court of Human Rights on 15 July 2002 and was examined for admissibility and merits at the same time.

Third-party comments were received from Interights which was given leave to intervene in the Court's proceedings under Article 36 § 2 of the Convention (third party intervention) and Rule 44 § 2 of the Rules of Court.

A hearing was held in public in the Human Rights Building, Strasbourg, on 7 October 2008.

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

Josep **Casadevall** (Andorra), *President*,  
 Elisabet **Fura-Sandström** (Sweden),  
 Corneliu **Bîrsan** (Romania),  
 Alvina **Gyulumyan** (Armenia),  
 Egbert **Myjer** (the Netherlands),  
 Ineta **Ziemele** (Latvia),  
 Işıl **Karakaş** (Turkey), *judges*,

and also Santiago **Quesada**, *Section Registrar*.

## 3. Summary of the judgment

### Complaints

The applicant alleged that the Turkish authorities failed to protect the right to life of her mother and that they were negligent in the face of the repeated violence, death threats and injury to which she herself was subjected. She relied on Articles 2 (right to life), 3 (prohibition of torture and inhuman or degrading treatment), 6 (right to a fair trial within a reasonable time) and 13 (right to an effective remedy). She further complained about the lack of protection of women against domestic violence under Turkish domestic law, in violation of Article 14 (prohibition of discrimination).

### Decision of the Court

#### Article 2

The Court considered that, in the applicant's case, further violence, indeed a lethal attack, had not only been possible but even foreseeable, given the history of H.O.'s violent behaviour and criminal record in respect of his wife and her mother and his continuing threat to their health and safety. Both the applicant and her mother had suffered physical injuries on many occasions and been subjected to psychological pressure and constant death threats, resulting in anguish and fear. The violence had escalated to such a degree that H.O. had used lethal weapons, such as a knife or a shotgun. The applicant's mother had become a target of the violence as a result of her perceived involvement in the couple's relationship; the couple's children could also be considered as victims on account of the psychological effects of the ongoing violence in the family home. As concerned the killing of the applicant's mother, H.O. had planned the attack, since he had been carrying a knife and a gun and had been wandering around the victim's house prior to the attack.

According to common practice in the member States, the more serious the offence or the greater the risk of further offences, the more likely it should be that the prosecution continue in the public

interest, even if victims withdrew their complaints. However, when repeatedly deciding to discontinue the criminal proceedings against H.O., the authorities referred exclusively to the need to refrain from interfering in what they perceived to be a “family matter”. The authorities had not apparently considered the motives behind the withdrawal of the complaints, despite the applicant’s mother’s statements to the prosecution authorities that she and her daughter had felt obliged to do so because of H.O.’s death threats and pressure. It was also striking that the victims had withdrawn their complaints when H.O. had been at liberty or following his release from custody.

Despite the withdrawal of the victims’ complaints, the legislative framework should have enabled the prosecuting authorities to pursue the criminal investigations against H.O. on the basis that his violent behaviour had been sufficiently serious to warrant prosecution and that there had been a constant threat to the applicant’s physical integrity. Turkey had therefore failed to establish and apply effectively a system by which all forms of domestic violence could be punished and sufficient safeguards for the victims be provided.

Indeed, the local authorities could have ordered protective measures under Law no. 4320 or issued an injunction banning H.O. from contacting, communicating with or approaching the applicant’s mother or entering defined areas. On the contrary, in response to the applicant’s mother’s repeated requests for protection, notably at the end of February 2002, the authorities, apart from taking down H.O.’s statements and then releasing him, had remained passive; two weeks later H.O. shot dead the applicant’s mother.

The Court therefore concluded that the national authorities had not shown due diligence in preventing violence against the applicant and her mother, in particular by pursuing criminal or other appropriate preventive measures against H.O.. Nor could the investigation into the killing, to which there had been a confession, be described as effective, it having lasted so far more than six years. Moreover, the criminal law system had had no deterrent effect in the present case. Nor could the authorities rely on the victims’ attitude for the failure to take adequate measures. The Turkish authorities had therefore failed to protect the right to life of the applicant’s mother, in violation of Article 2.

### **Article 3**

The Court considered that the response to H.O.’s conduct had been manifestly inadequate in the face of the gravity of his offences. The judicial decisions, which had had no noticeable preventive or deterrent effect on H.O., had been ineffective and even disclosed a certain degree of tolerance towards his acts. Notably, after the car incident, H.O. had spent just 25 days in prison and only received a fine for the serious injuries he had inflicted on the applicant’s mother. Even more striking, as punishment for stabbing the applicant seven times, he was merely imposed with a small fine, which could be paid in instalments.

Nor had Turkish law provided for specific administrative and policing measures to protect vulnerable persons against domestic violence before January 1998, when Law No. 4320 came into force. Even after that date, the domestic authorities had not effectively applied those measures and sanctions in order to protect the applicant.

Finally, the Court noted with grave concern that the violence suffered by the applicant had not in fact ended and that the authorities continued to display inaction. Despite the applicant’s request in April 2008, nothing was done until after the Court requested the Government to provide information about the protection measures it had taken.

The Court therefore concluded that there had been a violation of Article 3 as a result of the authorities’ failure to take protective measures in the form of effective deterrence against serious breaches of the applicant’s personal integrity by her ex-husband.

## Article 14

The Court first looked at the provisions related to discrimination against women and violence according to some specialised international human rights instruments, in particular the Convention for the Elimination of Discrimination Against Women and the Belem do para Convention, as well as at the relevant documents and decisions of international legal bodies, such as the United Nations Commission on Human Rights and the Inter-American Commission. It transpired from the international-law rules and principles, accepted by the vast majority of States, that the State's failure – even if unintentional - to protect women against domestic violence breached women's right to equal protection of the law.

According to reports submitted by the applicant drawn up by two leading non-governmental organisations, the Diyarbakır Bar Association and Amnesty International, and uncontested by the Government, the highest number of reported victims of domestic violence was in Diyarbakır, where the applicant had lived at the relevant time. All those victims were women, the great majority of whom were of Kurdish origin, illiterate or of a low level of education and generally without any independent source of income.

Indeed, the reports suggested that domestic violence was tolerated by the authorities and that the remedies indicated by the Government did not function effectively. Research showed that, despite Law no. 4320, when victims reported domestic violence to police stations, police officers did not investigate their complaints but sought to assume the role of mediator by trying to convince the victims to return home and drop their complaint. Delays were frequent when issuing and serving injunctions under Law no. 4320, given the negative attitude of the police officers and that the courts treated the injunctions as a form of divorce action.

Moreover, the perpetrators of domestic violence did not receive dissuasive punishments; courts mitigated sentences on the grounds of custom, tradition or honour.

The Court therefore considered that the applicant had been able to show that domestic violence affected mainly women and that the general and discriminatory judicial passivity in Turkey created a climate that was conducive to domestic violence. Bearing that in mind, the violence suffered by the applicant and her mother could be regarded as gender-based, which constituted a form of discrimination against women. Despite the reforms carried out by the Government in recent years, the overall unresponsiveness of the judicial system and impunity enjoyed by the aggressors, as found in the applicant's case, indicated that there was insufficient commitment to take appropriate action to address domestic violence. The Court therefore concluded that there had been a violation of Article 14, in conjunction with Articles 2 and 3.

## Other Articles

Given the above findings, the Court did not find it necessary to examine the same facts in the context of Articles 6 and 13.

49. **ECHR, *Varnava and Others v. Turkey*, nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90, Grand Chamber judgment of 18 September 2009 (Article 2, Right to life – Violation; Article 3, Prohibition of torture and inhuman or degrading treatment – Violation; Article 5, Right to liberty and security – Violation with respect to two of the applicants / No violation with respect to the remaining applicants).** The case concerned applications in the name and on behalf of 9 Cypriot nationals, who had disappeared during military operations carried out by the Turkish Army in northern Cyprus in 1974, and their relatives. The applicants successfully claimed that the disappeared had been detained by Turkish military forces prior to their disappearance and that the Turkish authorities had not accounted for them since.

**ECHR 668 (2009)**  
**18.09.2009**

**Press release issued by the Registrar**

**Grand chamber judgment**

**Varnava and others v. Turkey** (application nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90)

Disappearances during the 1974 conflict in Northern Cyprus

Continuing **violation of Article 2 (right to life)**

Continuing **violation of Article 3 (prohibition of inhuman or degrading treatment)**

Continuing **violation of Article 5 (right to liberty and security)**

in respect of Eleftherios Thoma and Savvas Hadjipanteli

**No violation of Article 5** in respect of the other seven missing men

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.

**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 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 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 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.

50. **ECHR, *Rantsev v. Cyprus and Russia*, no. 25965/04, Chamber judgment of 7 January 2010 (Article 2, Right to life – Violation by Cyprus / No violation by Russia; Article 4, Prohibition of slavery and forced labour – Violation by Cyprus and Russia; Article 5, Right to liberty and security – Violation by Cyprus).** The applicant's daughter was recruited from Russia to supposedly work as an artist in a cabaret in Cyprus. She abandoned her place of work and lodging three days later and died shortly after in strange and unestablished circumstances having fallen from a window of a private home. The applicant complained, *inter alia*, that no adequate investigation had been carried out by the Cypriot authorities into the death of his daughter and by the Russian authorities into his daughter's alleged trafficking in human beings for the purposes of sexual exploitation. In its judgment, the Court took note of the Council of Europe Convention on Action against Trafficking in Human Beings of 2005 as well as of other international legal instruments in the field.

**ECHR 005 (2010)**  
**07.01.2010**

**Press release issued by the Registrar**

**Chamber judgment**

**Rantsev v. Cyprus and Russia** (*application no. 25965/04*)

Cypriot and Russian authorities failed to protect 20-year old Russian cabaret artiste from human trafficking.

*Unanimously:*

**Violation of Article 2 (right to life)** for failure to conduct effective investigation by Cyprus and

**No violation** of this Article by Russia

**Violations of Article 4 (prohibition of slavery and forced labour)** by Cyprus and Russia

**Violation of Article 5 (right to liberty and security)** by Cyprus of the European Convention on Human Rights

**Principal facts**

The applicant, Mr Nikolay Rantsev, is a Russian national who was born in 1938 and lives in Svetlogorsk, Russia. He is the father of Ms Oxana Rantseva, also a Russian national, born in 1980, who died in strange and unestablished circumstances having fallen from a window of a private home in Cyprus in March 2001.

Ms Rantseva arrived in Cyprus on 5 March 2001 on an "artiste" visa. She started work on 16 March 2001 as an artiste in a cabaret in Cyprus only to abandon her place of work and lodging three days later leaving a note that she was going back to Russia. After finding her in a discotheque in Limassol some ten days later, at around 4 a.m. on 28 March 2001, the manager of the cabaret where she had worked took her to the police asking them to declare her illegal in the country and to detain her, apparently with a view to expelling her so that he could have her replaced in his cabaret. The police, after checking their database, concluded that Ms Rantseva did not appear to be illegal and refused to

detain her. They asked the cabaret manager to collect her from the police station and to return with her later that morning to make further inquiries into her immigration status. The cabaret manager collected Ms Rantseva at around 5.20 a.m.

Ms Rantseva was taken by the cabaret manager to the house of another employee of the cabaret, where she was taken to a room on the sixth floor of the apartment block. The cabaret manager remained in the apartment. At about 6.30 a.m. on 28 March 2001 Ms Rantseva was found dead in the street below the apartment. A bedspread was found looped through the railing of the apartment's balcony.

Following Ms Rantseva's death, those present in the apartment were interviewed. A neighbour who had seen Ms Rantseva's body fall to the ground was also interviewed, as were the police officers on duty at Limassol police station earlier that morning when the cabaret manager had brought Ms Rantseva from the discotheque. An autopsy was carried out which concluded that Ms Rantseva's injuries were the result of her fall and that the fall was the cause of her death. The applicant subsequently visited the police station in Limassol and requested to participate in the inquest proceedings. An inquest hearing was finally held on 27 December 2001 in the applicant's absence. The court decided that Ms Rantseva died in strange circumstances resembling an accident, in an attempt to escape from the apartment in which she was a guest, but that there was no evidence to suggest criminal liability for her death.

Upon a request by Ms Rantseva's father, after the body was repatriated from Cyprus to Russia. Forensic medical experts in Russia carried out a separate autopsy and the findings of the Russian authorities, which concluded that Ms Rantseva had died in strange and unestablished circumstances requiring additional investigation, were forwarded to the Cypriot authorities in the form of a request for mutual legal assistance under treaties in which Cyprus and Russia were parties. The request asked, *inter alia*, that further investigation be carried out, that the institution of criminal proceedings in respect of Ms Rantseva's death be considered and that the applicant be allowed to participate effectively in the proceedings.

In October 2006, Cyprus confirmed to the Russian Prosecution Service that the inquest into Ms Rantseva's death was completed on 27 December 2001 and that the verdict delivered by the court was final. The applicant has continued to press for an effective investigation into his daughter's death.

The Cypriot Ombudsman, the Council of Europe's Human Rights Commissioner and the United States State Department have published reports which refer to the prevalence of trafficking in human beings for commercial sexual exploitation in Cyprus and the role of the cabaret industry and "artiste" visas in facilitating trafficking in Cyprus.

### Complaints, procedure and composition of the Court

Relying on Articles 2, 3 (prohibition of torture and inhuman and degrading treatment), 4, 5 and 8 (right to private and family life), Mr Rantsev complained about the investigation into the circumstances of the death of his daughter, about the failure of the Cypriot police to take measures to protect her while she was still alive and about the failure of the Cypriot authorities to take steps to punish those responsible for her death and ill-treatment. He also complained under Articles 2 and 4 about the failure of the Russian authorities to investigate his daughter's alleged trafficking and subsequent death and to take steps to protect her from the risk of trafficking. Finally, he complained under Article 6 of the Convention about the inquest proceedings and an alleged lack of access to court in Cyprus.

The application was lodged with the European Court of Human Rights on 26 May 2004.

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

Christos **Rozakis** (Greece), *President*,  
 Anatoly **Kovler** (Russia),  
 Elisabeth **Steiner** (Austria),  
 Dean **Spielmann** (Luxembourg),  
 Sverre Erik **Jebens** (Norway)  
 Giorgio **Malinverni** (Switzerland),  
 George **Nicolaou** (Cyprus), *judges*,

and Søren **Nielsen**, *Section Registrar*.

## **Decision of the Court**

### **Unilateral declaration by Cyprus**

The Cypriot authorities made a unilateral declaration acknowledging that they had violated Articles 2, 3, 4, 5 and 6 of the Convention, offering to pay pecuniary and non-pecuniary damages to the applicant, and advising that on 5 February 2009 three independent experts had been appointed to investigate the circumstances of Ms Rantseva's death, employment and stay in Cyprus and the possible commission of any unlawful act against her.

The Court reiterated that as well as deciding on the particular case before it, its judgments served to elucidate, safeguard and develop the rules instituted by the Convention. It also emphasised its scarce case law on the question of the interpretation and application of Article 4 to trafficking in human beings. It concluded that, in light of the above and the serious nature of the allegations of trafficking in the case, respect for human rights in general required it to continue its examination of the case, notwithstanding the unilateral declaration of the Cypriot Government.

### **Admissibility**

The Court did not accept the Russian Government's submission that they had no jurisdiction over, and hence no responsibility for, the events to which the application pertained as it found that if trafficking occurred it had started in Russia and that a complaint existed against Russia's failure to investigate properly the events which occurred on Russian territory. It declared the applicant's complaints under Article 2, 3, 4 and 5 admissible.

### **Right to life**

As regards Cyprus, the Court considered that the chain of events leading to Ms Rantseva's death could not have been foreseen by the Cypriot authorities and, in the circumstances, they had therefore no obligation to take practical measures to prevent a risk to her life.

However, a number of flaws had occurred in the investigation carried out by the Cypriot authorities: there had been conflicting testimonies which had not been resolved; no steps to clarify the strange circumstances of Ms Rantseva's death had been made after the verdict of the court in the inquest proceedings; the applicant had not been advised of the date of the inquest and as a result had been absent from the hearing when the verdict had been handed down; and although the facts had occurred in 2001 there had not yet been a clear explanation as to what had happened. There had therefore been a violation of Article 2 as a result of the failure of the Cypriot authorities to investigate effectively Ms Rantseva's death.

As regards Russia, the Court concluded that there it had not violated Article 2 as the Russian authorities were not obliged themselves to investigate Ms Rantseva's death, which had occurred outside their jurisdiction. The Court emphasised that the Russian authorities had requested several times that Cyprus carry out additional investigation and had cooperated with the Cypriot authorities.

**Freedom from ill-treatment**

The Court held that any ill-treatment which Ms Rantseva may have suffered before her death had been inherently linked to her alleged trafficking and exploitation and that it would consider this complaint under Article 4.

**Failure to protect from trafficking**

Two non-governmental organisations, Interights and the AIRE Centre, made submissions before the Court arguing that the modern day definition of slavery included situations such as the one arising in the present case, in which the victim was subjected to violence and coercion giving the perpetrator total control over the victim.

The Court noted that, like slavery, trafficking in human beings, by its very nature and aim of exploitation, was based on the exercise of powers attaching to the right of ownership; it treated human beings as commodities to be bought and sold and put to forced labour; it implied close surveillance of the activities of victims, whose movements were often circumscribed; and it involved the use of violence and threats against victims. Accordingly the Court held that trafficking itself was prohibited by Article 4. It concluded that there had been a violation by Cyprus of its positive obligations arising under that Article on two counts: first, its failure to put in place an appropriate legal and administrative framework to combat trafficking as a result of the existing regime of artiste visas, and, second, the failure of the police to take operational measures to protect Ms Rantseva from trafficking, despite circumstances which had given rise to a credible suspicion that she might have been a victim of trafficking. In light of its findings as to the inadequacy of the Cypriot police investigation under Article 2, the Court did not consider it necessary to examine the effectiveness of the police investigation separately under Article 4.

There had also been a violation of this Article by Russia on account of its failure to investigate how and where Ms Rantseva had been recruited and, in particular, to take steps to identify those involved in Ms Rantseva's recruitment or the methods of recruitment used.

**Deprivation of liberty**

The Court found that the detention of Ms Rantseva for about an hour at the police station and her subsequent confinement to the private apartment, also for about an hour, did engage the responsibility of Cyprus. It held that the detention by the police following the confirmation that Ms Rantseva was not illegal had no basis in domestic law. It further held that her subsequent detention in the apartment had been both arbitrary and unlawful. There was therefore a violation of Article 5 § 1 by Cyprus.

The Court rejected the applicant's other complaints.

Under Article 41 (just satisfaction) of the Convention, the Court held that Cyprus had to pay the applicant 40,000 euros (EUR) in respect of non-pecuniary damage and EUR 3,150 for costs and expenses, and that Russia had to pay him EUR 2,000 in respect of non-pecuniary damages.

51. **ECHR, *Al-Saadoon and Mufdhi v. the United Kingdom*, no. 61498/08, Chamber judgment of 2 March 2010 (Article 3, Prohibition of torture and inhuman or degrading treatment or punishment – Violation; Article 6, Right to a fair trial – No violation; Article 13, Right to an effective remedy – Violation; Article 34, Right of individual application – 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**

**Chamber judgment**

**Al-Saadoon & Mufdhi v. the United Kingdom** (application no. 61498/08)

Transferring two Iraqi nationals from United Kingdom detention facilities to the Iraqi authorities breached the convention.

*Unanimously:*

**Violation of Article 3 (prohibition of inhuman or degrading treatment)**

*and by six votes to one:*

**Violation of Articles 13 (right to an effective remedy) and 34 (right to individual petition)**

of the European Convention on Human Rights

**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 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*.

## **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 (Protocol No. 6 was signed by the UK on 27 January 1999, ratified on 20 May 1999 and entered into force in respect of the UK on 1 June 1999; Protocol No. 13 was signed by the UK on 3 May 2002, ratified on 10 October 2003 and entered into force in respect of the UK on 1 February 2004). 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.

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.

52. **ECHR, *Cudak v. Lithuania*, no. 15869/02, Grand Chamber judgment of 23 March 2010 (Article 6-1, Right of access to a court – Violation).** The applicant, a Lithuanian employee of the Polish embassy in Lithuania, successfully argued that to deny her a hearing for alleged sexual harassment in the workplace after the embassy invoked its immunity had amounted to a violation of her Convention rights.

**ECHR 241 (2010)**  
**23.03.2010**

**Press release issued by the Registrar**

**Grand Chamber judgment**

**Cudak v. Lithuania** (application no. 15869/02)

Lithuanian authorities breached the European Convention on Human Rights when declining to hear a sexual harassment complaint by an employee of the Polish embassy in Vilnius.

*Unanimously*

**Violation of Article 6 § 1 (right of access to a court)** of the European Convention of Human Rights

**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:

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.

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.

53. **ECHR, *Medvedyev and Others v. France*, no. 3394/03, Grand Chamber judgment of 29 March 2010 (Article 5-1, Right to liberty and security – Violation; Article 5-3, Right to be brought promptly before a judge – No violation).** The applicants, crew members of a Cambodian-registered cargo vessel 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 navy prior to conviction.
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**ECHR 259 (2010)**

**29.03.2010**

**Press release issued by the Registrar**

**Grand Chamber judgment**

**Medvedyev and Others v. France** (no 3394/03)

Ship's crew-members were unlawfully detained on the high seas but brought promptly before a judicial authority in France.

**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.

**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.

54. **ECHR, *Kononov v. Latvia*, no. 36376/04, Grand Chamber judgment of 17 May 2010 (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 for having allegedly executed several civilians, unsuccessfully complained that the acts of which he had been accused of did not, at the time of their commission, constitute an offence under either domestic or international law.

**ECHR 390 (2010)**  
**17.05.2010**

**Press release issued by the Registrar**

**Grand Chamber Judgment**

**Kononov v. Latvia** (Application n° 36376/04)

Vasily Kononov's conviction of war crimes during Second World War found **not to have violated article 7 (no punishment without law)** of the European Convention on Human Rights.

**Principal facts**

Vasily 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")(The 1961 Criminal Code replaced the existing 1926 Criminal Code of Soviet Russia which had been introduced by decree in 1940 when Latvia became part of the Union of Soviet Socialist republics, "USSR"). 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 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*,

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.

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.

55. **ECHR, *Van Anraat v. Netherlands*, no. 65389/09, Chamber decision of 6 July 2010 (Article 6-1, Right to a fair trial – Inadmissible; Article 7-1, No punishment without law – Inadmissible).** The applicant, convicted of war crimes by a domestic court for supplying chemicals to Iraq between 1984 and 1988 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, the 1949 Geneva Conventions as well as the United Nations General Assembly had condemned their use, declared the application inadmissible.

**ECHR 578 (2010)**  
**20.07.2010**

**Press release issued by the Registrar**

The applicant, **Frans Cornelis Adrianus van Anraat**, is a Netherlands national who was born in 1942. He is currently serving a sentence of imprisonment in Zoetermeer Prison (the Netherlands).

**Principal facts**

Adrianus van Anraat was a businessman. Between April 1984 and August 1988 he bought and then supplied to the Iraqi Government more than 1100 metric tons of the chemical thiodiglycol – which is used to produce the chemical commonly known as mustard gas. After 1984 he was the Iraqi Government’s sole supplier of the chemical.

Mustard gas is known to have been used by the Iraqi military against Iranian armed forces and civilians during the Iran-Iraq War (1980-1988) and in attacks against the Kurdish population of northern Iraq. One such attack, carried out on the town of Halabja in March 1988, killed thousands of civilians and injured thousands more. Among those later considered primarily responsible were Saddam Hussein, President of Iraq from 1979 to 2003, and Ali Hassan Abd al-Majid al-Tikriti, Secretary General of the Ba’ath Party in northern Iraq from 1987 to 1989, nicknamed “Chemical Ali”.

Mr van Anraat was tried in the Netherlands for supplying chemicals including thiodiglycol to Iraq as well as materials and advice for the manufacture of chemical weapons, in violation of international law. The charges referred to several provisions of domestic legislation, including section 8 of the War Crimes Act (section 8).

He was convicted by the Netherlands Court of Appeal of being an accessory to war crimes proscribed by section 8; that is to violations of the “laws and customs of war” committed by Saddam Hussein, Ali Hassan al-Majid al-Tikriti and another/others in a) a non-international or international conflict, as regards gas attacks on the Kurdish population of northern Iraq in Halabja and elsewhere and b) in an international conflict, as regards gas attacks on Iran and in border areas of Iraq adjoining Iran. The Court of Appeal defined “laws and customs of war” as customary international law, in particular the prohibition of the use of chemical weapons, poison or poisonous weapons, the use of asphyxiating or poisonous gases, the prohibition of the infliction of unnecessary suffering and the prohibition of attacks targeting civilians and combatants indiscriminately; the court cited the Geneva Gas Protocol of 1925 and the four 1949 Geneva Conventions. Mr van Anraat was sentenced to 17 years’ imprisonment.

The applicant lodged an unsuccessful appeal on points of law with the Supreme Court.

The Procurator General to the Supreme Court submitted an advisory opinion, to which Mr van Anraat responded, with a new argument, that Saddam Hussein and Ali Hassan al-Majid al-Tikriti were protected by the principle of sovereign immunity as members of the government of a sovereign State. Since they were beyond the jurisdiction of the Netherlands courts, he should not have been tried as an accessory.

On 30 June 2009 the Supreme Court dismissed the appeal on points of law.

### Complaints, procedure and composition of the Court

The applicant complained under Article 6 (right to a fair hearing) of the European Convention on Human Rights that the Supreme Court had failed to answer his argument that, since Saddam Hussein and Ali Hassan al-Majid al-Tikriti were beyond the jurisdiction of the Netherlands courts, he ought not to have been convicted as their accessory. He also complained under Article 6 or Article 7 (no punishment without law) of the Convention that section 8 of the War Crimes Act, in referring to international law, did not comply with the requirement that criminal acts be described with sufficient precision (*lex certa*).

The application was lodged on 4 December 2009.

The decision on admissibility was given on 6 July 2010 by a Chamber composed as follows:

Josep **Casadevall** (Andorra), *President*,  
 Elisabet **Fura** (Sweden),  
 Corneliu **Bîrsan** (Romania),  
 Alvina **Gyulumyan** (Armenia),  
 Egbert **Myjer** (Netherlands),  
 Ineta **Ziemele** (Latvia),  
 Ann **Power** (Ireland), *judges*,

and also Santiago **Quesada**, *Section Registrar*.

### Decision of the Court

#### Article 6

##### Jurisdiction of the Netherlands Court

The Court noted that Mr van Anraat's argument about sovereign immunity was not contained in his statement of grounds of appeal; it was made for the first time in his written response to the Procurator General's advisory opinion, at the final stage of the proceedings before the Supreme Court gave judgment. It was not a requirement of "adversarial proceedings" for a defendant to be allowed to submit fresh arguments that had no bearing on any point contained in the advisory opinion itself. In the circumstances of his case, with the applicant making use of the opportunity offered to submit an entirely new argument at the latest possible stage of proceedings, Article 6 § 1 did not compel the Supreme Court to provide a reasoned response.

In addition, had Mr van Anraat wished the Supreme Court to reconsider or refine its case-law, there had been nothing to prevent him from raising that issue sooner.

The Court therefore declared that complaint manifestly ill-founded.

## Article 7

### Legal certainty

The applicant argued: that the Supreme Court ought not to have found that the vagueness of section 8 was “inevitable”, that “customs of war” was too general and imprecise a term and that the 1925 Geneva Protocol no longer reflected the reality of contemporary warfare. He submitted that the use by Iraq of mustard gas as a weapon of war could not be seen as morally or legally different from the use of napalm (an incendiary weapon) by United States forces during the Vietnam War and that it was insignificant in comparison with the possession of nuclear weapons by a small number of States and their actual use in anger in 1945. In those circumstances, he argued, he could not have been expected to realise at the time of the Iran-Iraq war that his business activities were illegal.

The Court noted that incendiary and nuclear weapons were subject to separate regimes not relevant to Mr van Anraat’s case; his comparison of mustard gas with napalm and nuclear weapons was therefore irrelevant to the case before the Court. The Court could consider only whether the applicant was held guilty of a “criminal offence” on account of acts which constituted a “criminal offence under national or international law” at the time when they were committed.

The Court found that, at the time when the applicant supplied thiodiglycol to the Iraqi Government, a norm of customary international law existed prohibiting the use of mustard gas as a weapon of war in an international conflict.

When the applicant was committing the acts which ultimately led to his prosecution, there was nothing unclear about the criminal nature of the use of mustard gas either against an enemy in an international conflict or against a civilian population in border areas affected by an international conflict. Therefore, the applicant could reasonably have been expected to be aware of the state of the law and, if need be, to take appropriate advice.

The Court therefore declared that complaint manifestly ill-founded.

56. **ECHR, *Neulinger und Shuruk v. Switzerland*, no. 41615/07, Grand Chamber judgment of 6 July 2010 (Article 8, Right to respect for private and family life – Violation if the return order were enforced).** The applicants of Swiss nationality, a mother and her son aged seven, alleged that the son's return to his father in Israel pursuant to the Hague Convention on the Civil Aspects of International Child Abduction of 1980 would violate their rights under the Convention. The first applicant had feared that her son would be taken by his father to an ultra-orthodox community abroad following which she had pursued an order by an Israeli court imposing a ban on the child's removal from Israel until he attained his majority. She subsequently left secretly Israel for Switzerland with her son. The Swiss Federal Court ordered the child's return to Israel.

**ECHR 540 (2010)**  
**06.07.2010**

**Press release issued by the Registrar**

**Grand Chamber Judgment**

**Neulinger and Shuruk v. Switzerland** (application no. 41615/07)

Return of a boy abducted by his mother would not be in his interest and would breach the convention

**Violation of Article 8 (right to respect for private and family life)** of the European Convention on Human Rights if the return order were enforced

Principal facts

The applicants, Isabelle Neulinger and her son Noam Shuruk, are Swiss nationals who were born in 1959 and 2003 respectively and live in Lausanne (Switzerland, Canton of Vaud). In 1999 Ms Neulinger settled in Israel where she married Shai Shuruk in 2001. Their son, Noam, was born in Tel Aviv in 2003. Fearing that Noam would be taken by his father to a "Chabad-Lubavitch" community – she described the Lubavitch movement as ultra-orthodox, radical and known for its zealous proselytising – Ms Neulinger applied to the Tel Aviv Family Court, which in 2004 imposed a ban on Noam's removal from the country until he attained his majority. She was awarded temporary custody and guardianship was to be exercised by both parents jointly. The father's access rights were subsequently restricted on account of his threatening behaviour.

In February 2005 the parents divorced and in June Ms Neulinger secretly left Israel for Switzerland with her son. In a decision of 30 May 2006, issued following an application by the child's father, the Tel Aviv Family Court observed that Noam was habitually resident in Tel Aviv and that the parents had joint guardianship. The court held that the child's removal from Israel without the father's consent was wrongful within the meaning of Article 3 of the Hague Convention on the Civil Aspects of International Child Abduction of 25 October 1980 ("the Hague Convention").

In a decision of 29 August 2006 the father's application for his son's return to Israel was dismissed by the Lausanne District Justice of the Peace on the ground that there was a grave risk that the child's return to Israel would expose him to physical or psychological harm or otherwise place him in an intolerable situation. The Vaud Cantonal Court dismissed the father's appeal, confirming that this case was an exception to the principle of the child's prompt return, in accordance with Article 13, sub-paragraph (b), of the Hague Convention.

On 16 August 2007 the Swiss Federal Court allowed the father's appeal, on the ground that the Article in question had been wrongly applied, and ordered Ms Neulinger to return the child to Israel.

In February 2009 the applicants provided the European Court of Human Rights with the certificate of a doctor who had examined Noam in 2005, and several times since then, indicating that "an abrupt return to Israel without his mother would constitute a significant trauma and a serious psychological disturbance for this child".

In a provisional-measures order of 29 June 2009 the Lausanne District Court, at the request of Ms Neulinger, decided that Noam should live at his mother's address in Lausanne, suspended the father's right of access in respect of his son and granted parental authority to the mother, so as to allow her to renew the child's identity papers.

### Complaints, procedure and composition of the Court

The applicants relied, in particular, on Article 8 of the European Convention on Human Rights, submitting that Noam's return to Israel would constitute an unjustified interference with their right to respect for their family life.

The application was lodged with the European Court of Human Rights on 26 September 2007. In a judgment of 8 January 2009, the Court held, by four votes to three, that there had been no violation of Article 8. On 5 June 2009 the case was referred to the Grand Chamber at the applicants' request. A Grand Chamber hearing took place in the Human Rights Building, in Strasbourg, on 7 October 2009.

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

Jean-Paul **Costa** (France), *President*,

Nicolas **Bratza** (the United Kingdom),

Peer **Lorenzen** (Denmark),

Françoise **Tulkens** (Belgium),

Josep **Casadevall** (Andorra),

Ireneu **Cabral Barreto** (Portugal),

Corneliu **Bîrsan** (Romania),

Boštjan M. **Zupančič** (Slovenia),

Elisabet **Fura** (Sweden),

Egbert **Myjer** (the Netherlands),

Danutė **Jočienė** (Lithuania),

Isabelle **Berro-Lefèvre** (Monaco),

Päivi **Hirvelä** (Finland),

Giorgio **Malinverni** (Switzerland),

András **Sajó** (Hungary),

Nona **Tsotsoria** (Georgia),

Zdravka **Kalaydjieva** (Bulgaria), *judges*,

and also Vincent **Berger**, *Jurisconsult*.

## Decision of the Court

### Article 8

The Grand Chamber found, like the Chamber, that Noam's mother had removed him from Israel "wrongfully". Under Israeli law the principle of guardianship – which included the right to determine the child's place of residence – was comparable to custody rights under the Hague Convention, which had therefore been breached, because guardianship was to be exercised by both parents jointly. In addition, the mother had removed the child in breach of an order prohibiting his removal from Israel that had been made by the domestic court at her own request, and the removal rendered illusory, in practice, the possible exercise by the father of his right of access. She had thus committed an abduction for the purposes of the Hague Convention and the Swiss Federal Court's order for the child's return therefore had a sufficient legal basis. The Grand Chamber shared the Chamber's opinion that the order pursued the legitimate aim of protecting the rights and freedoms of Noam and his father, which the parties had not denied.

In ascertaining whether a fair balance between the competing interests at stake – those of the child, of the parents, and of public order – had been struck, the child's best interests had to be the primary consideration. This consisted in maintaining his ties with his family but also ensuring his development in a sound environment. The concept of the child's best interests was inherent in the Hague Convention, which in principle required the prompt return of the abducted child unless there was a grave risk that the child's return would expose him to physical or psychological harm. It was not the Court's task to take the place of the competent authorities in examining whether Noam would be exposed to such harm if he returned to Israel, but to ascertain whether the domestic courts had respected Article 8 of the European Convention on Human Rights, particularly taking into account the child's best interests. The Court noted in this connection that those courts had not been unanimous, first dismissing then allowing the father's appeal. According to the experts' reports there would be a risk for Noam in the event of his return to Israel, and in any event, in the view of the courts, he could return only with his mother so as to avoid significant trauma.

The Court was prepared to accept that in the present case the return order remained within the margin of appreciation afforded to national authorities in such matters. Nevertheless, if such a measure was enforced a certain time after the child's abduction, that might undermine the pertinence of the Hague Convention, it being essentially an instrument of a procedural nature and not a human rights treaty. Moreover, according to that instrument, a child's return could not be ordered if he was settled in his new environment. Noam had Swiss nationality and had arrived in the country at the age of two. According to the applicants he had settled well there, attending a municipal secular day nursery and a State-approved private Jewish day nursery. He now went to school in Switzerland and spoke French. Even though he was at an age (7 years old) where he still had a certain capacity for adaptation – as the Chamber had pointed out –, the fact of being uprooted again would probably have serious consequences for him.

The Court noted that restrictions had been imposed by the Israeli courts on the father's right of access. Moreover, the applicants had submitted, without being contradicted by the Swiss Government, that Noam's father had remarried and only a few months later had divorced his pregnant wife, who had

subsequently brought proceedings against him for failure to pay maintenance. The Court doubted that such circumstances, assuming they were established, would be conducive to Noam's well-being and development. In addition, whilst the Chamber had found no reason to doubt the credibility of the Israeli authorities' assurances concerning the risk of criminal sanctions against Ms Neulinger, the Grand Chamber observed that according to a letter of April 2007 from the Israeli Central Authority, the possibility of her not being prosecuted would depend on a number of conditions such as respect for the father's right of supervised access, pending any further decision. Criminal proceedings could not therefore be ruled out entirely and if Ms Neulinger were to be imprisoned that situation would not be in Noam's best interests, his mother being the only person to whom he related. In the event of her imprisonment, it was doubtful whether the father would have the capacity to take care of the child, whom he had not seen since his departure, in view of his past conduct and limited financial resources. Ms Neulinger – a Swiss national and therefore entitled to remain in the country – was not therefore totally unjustified in refusing to return to Israel.

In the light of all the foregoing considerations, particularly the more recent developments in the applicants' situation, as indicated in the provisional-measures order of 2009, the Court was not convinced that it would be in the child's best interests for him to return to Israel. As to the mother, she would sustain a disproportionate interference with her right to respect for her family life if she were forced to return to Israel. Consequently, the Court held, by 16 votes to one, that there would be a violation of Article 8 in respect of both applicants if the decision ordering Noam's return to Israel were to be enforced.

#### **Article 6 § 1**

The Grand Chamber unanimously confirmed the Chamber's finding that the complaint under Article 6 § 1 constituted one of the essential points of the complaint under Article 8 and that it was not necessary to examine it separately.

#### **Article 41**

By way of just satisfaction, the Court ordered Switzerland to pay the applicants a total of 15,000 euros jointly for costs and expenses.

#### **Separate opinions**

Judge Lorenzen expressed a concurring opinion joined by Judge Kalaydjieva. Judges Cabral Barreto and Malinverni each expressed a concurring opinion. Judges Jočienė, Sajó and Tsotsoria expressed a joint separate opinion and Judge Zupančič expressed a dissenting opinion. These opinions are annexed to the judgment.

57. **ECHR, *Mangouras v. Spain*, no. 12050/04, Grand Chamber judgment of 28 September 2010 (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 thus causing a major environmental disaster, 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.
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**ECHR 698 (2010)**  
**28.09.2010**

**Press release issued by the Registrar**

**Grand Chamber judgment**

**Mangouras v. Spain** (application no. 12050/04)

The bail set for the release of the captain of a ship which caused an ecological disaster was not excessive.

*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 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.

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

Jean-Paul **Costa** (France), *President*,  
 Christos **Rozakis** (Greece),  
 Nicolas **Bratza** (United Kingdom),  
 Peer **Lorenzen** (Denmark),  
 Françoise **Tulkens** (Belgium),  
 Giovanni **Bonello** (Malta),  
 Ireneu **Cabral Barreto** (Portugal),  
 Nina **Vajić** (Croatia),  
 Anatoly **Kovler** (Russia),  
 Elisabeth **Steiner** (Austria),  
 Ljiljana **Mijović** (Bosnia and Herzgovina),  
 David Thór **Björgvinsson** (Iceland),  
 Mark **Villiger** (Liechtenstein),  
 George **Nicolaou** (Cyprus),  
 Ledi **Bianku** (Albania),  
 Mihai **Poalelungi** (Moldova), *Judges*,  
 Alejandro **Saiz Arnaiz** (Spain), *ad hoc Judge*,

and also Michael **O'Boyle**, *Deputy Registrar*.

## 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.

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

58. **ECHR, *M.S.S. v. Belgium and Greece*, no. 30696/09, Grand Chamber judgment of 21 January 2011 (Article 3, Prohibition of torture and inhuman or degrading treatment – Violations by Greece and Belgium; Article 13, Right to an effective remedy, taken together with Article 3 – Violation by Greece and Belgium).** The case concerned the expulsion of an asylum seeker to Greece by Belgian authorities in application of the EU Dublin II Regulation. The applicant alleged, *inter alia*, that the conditions of his detention and living in Greece amounted to treatment contrary to Article 3.

**ECHR 043 (2011)**

**21.01.2011**

**Press release issued by the Registrar**

In today's **Grand Chamber** judgment in the case **M.S.S. v. Belgium and Greece** (application no. 30696/09), which is final, 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 or punishment)** of the European Convention on Human Rights by Greece both because of the applicant's detention conditions and because of his living conditions in Greece;

**A violation of Article 13 (right to an effective remedy) taken together with Article 3** by Greece because of the deficiencies in the asylum procedure followed in the applicant's case;

**A violation of Article 3** by Belgium both because of having exposed the applicant to risks linked to the deficiencies in the asylum procedure in Greece and because of having exposed him to detention and living conditions in Greece that were in breach of Article 3;

**A violation of Article 13 taken together with Article 3** by Belgium because of the lack of an effective remedy against the applicant's expulsion order.

The case concerned the expulsion of an asylum seeker to Greece by the Belgian authorities in application of the EU Dublin II Regulation.

**Principal facts**

The applicant, M.S.S., an Afghan national, left Kabul early in 2008 and, travelling via Iran and Turkey, entered the European Union (EU) through Greece.

On 10 February 2009, he arrived in Belgium, where he applied for asylum. By virtue of the "Dublin II" Regulation (an EC Regulation under which EU Member States are required to determine, based on hierarchy of criteria, which Member State is responsible for examining an asylum application lodged on their territory), the Belgian Aliens Office submitted a request for the Greek authorities to take charge of the asylum application. While the case was pending, the UNHCR sent a letter to the Belgian Minister for Migration and Asylum Policy criticising the deficiencies in the asylum procedure and the conditions of reception of asylum seekers in Greece and recommending the suspension of transfers to Greece. In late May 2009, the Aliens Office nevertheless ordered the applicant to leave the country for Greece, where he would be able to submit an application for asylum. The Aliens Office received no answer from the Greek authorities within the two-month period provided for by the Regulation, which it treated as a tacit acceptance of its request. It argued that Belgium was not the country

responsible for examining the asylum application under the Dublin II Regulation and that there was no reason to suspect that the Greek authorities would fail to honour their obligations in asylum matters.

The applicant lodged an appeal with the Aliens Appeals Board, arguing that he ran the risk of detention in Greece in appalling conditions, that there were deficiencies in the asylum system in Greece and that he feared ultimately being sent back to Afghanistan without any examination of the reasons why he had fled that country, where he claimed he had escaped a murder attempt by the Taliban in reprisal for his having worked as an interpreter for the air force troops stationed in Kabul.

His application for a stay of execution having been rejected, the applicant was transferred to Greece on 15 June 2009. On arriving at Athens airport, he was immediately placed in detention in an adjacent building, where, according to his reports, he was locked up in a small space with 20 other detainees, access to the toilets was restricted, detainees were not allowed out into the open air, were given very little to eat and had to sleep on dirty mattresses or on the bare floor. Following his release and issuance of an asylum seeker's card on 18 June 2009, he lived in the street, with no means of subsistence.

Having subsequently attempted to leave Greece with a false identity card, the applicant was arrested and again placed in the detention facility next to the airport for one week, where he alleges he was beaten by the police. After his release, he continued to live in the street, occasionally receiving aid from local residents and the church. On renewal of his asylum seeker's card in December 2009, steps were taken to find him accommodation, but according to his submissions no housing was ever offered to him.

### Complaints, procedure and composition of the Court

The applicant alleged that the conditions of his detention and his living conditions in Greece amounted to inhuman and degrading treatment in violation of Article 3, and that he had no effective remedy in Greek law in respect of his complaints under Articles 2 (right to life) and 3, in violation of Article 13. He further complained that Belgium had exposed him to the risks arising from the deficiencies in the asylum procedure in Greece, in violation of Articles 2 and 3, and to the poor detention and living conditions to which asylum seekers were subjected there, in violation of Article 3. He further maintained that there was no effective remedy under Belgian law in respect of those complaints, in violation of Article 13.

The application was lodged with the European Court of Human Rights on 11 June 2009. On 12 June 2009, the applicant's request for an interim measure under Rule 39 of the Rules of Court to have his transfer to Greece suspended was rejected. On 2 July 2009 it was decided to apply Rule 39 against Greece, to the effect that he would not be deported to Afghanistan pending the outcome of the proceedings before the Court.

On 16 March 2010 the Chamber to which the case had been allocated relinquished jurisdiction in favour of the Grand Chamber and on 1 September 2010 a public hearing was held. The Governments of the Netherlands and the United Kingdom, the Council of Europe Commissioner for Human Rights and the UNHCR were given leave to intervene in the oral proceedings as third parties. Written observations were also received from those parties and from the Centre for Advice on Individual Rights in Europe ("the Aire Centre"), Amnesty International and the Greek Helsinki Monitor.

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),  
 Elisabet **Fura** (Sweden),  
 Khanlar **Hajiyev** (Azerbaijan),  
 Danutė **Jočienė** (Lithuania),  
 Dragoljub **Popović** (Serbia),  
 Mark **Villiger** (Liechtenstein),  
 András **Sajó** (Hungary),  
 Ledi **Bianku** (Albania),  
 Ann **Power** (Ireland),  
 Işıl **Karakaş** (Turkey),  
 Nebojša **Vučinić** (Montenegro), *Judges,*

and also Michael **O'Boyle**, *Deputy Registrar.*

Decision of the Court

### **Article 3: detention conditions in Greece**

While the Court did not underestimate the burden currently placed on the States forming the external borders of the EU by the increasing influx of migrants and asylum seekers and the difficulties involved in receiving them at major international airports, that situation could not absolve Greece of its obligations under Article 3, given the absolute character of that provision.

When the applicant arrived in Athens from Belgium, the Greek authorities had been aware of his identity and of the fact that he was a potential asylum seeker. In spite of that, he was immediately placed in detention, without any explanation being given. The Court noted that various reports by international bodies and non-governmental organisations of recent years confirmed that the systematic placement of asylum seekers in detention without informing them of the reasons was a widespread practice of the Greek authorities. The applicant's allegations that he was subjected to brutality by the police during his second period of detention were equally consistent with numerous accounts collected from witnesses by international organisations, in particular the European Committee for the Prevention of Torture (CPT). Findings by the CPT and the UNHCR also confirmed the applicant's allegations about the unsanitary conditions and the overcrowding in the detention centre next to Athens international airport.

Despite the fact that he was kept in detention for a relatively short period of time, the Court considered that the conditions of detention experienced by the applicant in the holding centre had been unacceptable. It found that, taken together, the feeling of arbitrariness, inferiority and anxiety he must have experienced, as well as the profound effect such detention conditions indubitably had on a person's dignity, constituted degrading treatment. In addition, as an asylum seeker he was particularly vulnerable, because of his migration and the traumatic experiences he was likely to have endured. The Court concluded that there had been a violation of Article 3.

### **Article 3: living conditions in Greece**

Article 3 did not generally oblige Member States to give refugees financial assistance to secure for them a certain standard of living. However, the Court considered that the situation in which the applicant had found himself was particularly serious. In spite of the obligations incumbent on the Greek authorities under their own legislation and the EU Reception Directive, he spent months living in extreme poverty, unable to cater for his most basic needs - food, hygiene and a place to live - while in fear of being attacked and robbed. The applicant's account was supported by the reports of a

number of international bodies and organisations, in particular the Council of Europe Commissioner for Human Rights and the UNHCR.

The authorities had not duly informed the applicant of any accommodation possibilities. A document notifying him of the obligation to go to the police headquarters to register his address could not reasonably be understood as an instruction to let the authorities know that he had nowhere to stay. In any event, the Court did not see how the authorities could have failed to assume that the applicant was homeless. The Government themselves acknowledged that there were fewer than 1,000 places in reception centres to accommodate tens of thousands of asylum seekers. That data considerably reduced the weight of the Greek Government's argument that the applicant's situation was a consequence of his inaction.

The situation of which the applicant complained had lasted since his transfer to Greece in June 2009 and was linked to his status as an asylum seeker. Had the authorities examined his asylum request promptly, they could have substantially alleviated his suffering. It followed that through their fault he had found himself in a situation incompatible with Article 3. There had accordingly been a violation of that provision.

### **Article 13 taken together with Article 2 and 3 (Greece)**

It was undisputed between the parties that the situation in Afghanistan had posed and continued to pose a widespread problem of insecurity. As regards the risks to which the applicant would be exposed in that country, it was in the first place for the Greek authorities to examine his request. The Court's primary concern was whether effective guarantees existed to protect him against arbitrary removal.

While Greek legislation contained a number of such guarantees, for a few years the UNHCR, the European Commissioner for Human Rights and other organisations had repeatedly and consistently revealed that the relevant legislation was not being applied in practice and that the asylum procedure was marked by major structural deficiencies. They included: insufficient information about the procedures to be followed, the lack of a reliable system of communication between authorities and asylum seekers, the lack of training of the staff responsible for conducting interviews with them, a shortage of interpreters and a lack of legal aid effectively depriving asylum seekers of legal counsel. As a result, asylum seekers had very little chance of having their applications seriously examined. Indeed, a 2008 UNHCR report showed a success rate at first instance of less than 0.1%, compared to the average success rate of 36.2% in five of the six EU countries which, along with Greece, received the largest number of applications. The organisations intervening as third parties had regularly denounced forced returns of asylum seekers by Greece to high-risk countries.

The Court was not convinced by the Greek Government's argument that the applicant was responsible for the inaction of the authorities because he had not reported to the police headquarters within a three-day time-limit as prescribed in a document he had received. Like many other asylum-seekers, as revealed by the reports, he had misinterpreted that convocation to the effect that its only purpose was to declare an address, which he did not have. To date, the authorities had not offered the applicant a real and adequate opportunity to defend his application for asylum.

As regards the applicant's opportunity of applying to the Greek Supreme Administrative Court for judicial review of a potential rejection of his asylum request, the Court considered that the authorities' failure to ensure communication with him and the difficulty in contacting a person without a known address made it very uncertain whether he would learn the outcome of his asylum application in time to react within the prescribed time-limit. In addition, although the applicant clearly could not pay for a lawyer, he had received no information concerning access to organisations offering legal advice. Added to that was the shortage of lawyers in the list drawn up for the legal aid system which rendered the system ineffective in practice. Moreover, according to information supplied by the Commissioner

for Human Rights, uncontested by the Greek Government, the average duration of appeals to the Supreme Administrative Court was more than five years, which was additional evidence that such an appeal was not accessible enough and did not remedy the lack of guarantees in the asylum procedure.

In view of those deficiencies, the Court concluded that there had been a violation of Article 13 taken in conjunction with Article 3. In view of that finding it further considered that there was no need for it to examine the complaints lodged under Article 13 taken in conjunction with Article 2.

### **Article 2 and 3: The Belgian authorities' decision to expose the applicant to the asylum procedure in Greece**

The Court considered that the deficiencies of the asylum procedure in Greece must have been known to the Belgian authorities when they issued the expulsion order against the applicant and he should therefore not have been expected to bear the entire burden of proof as regards the risks he faced by being exposed to that procedure. The UNHCR had alerted the Belgian Government to that situation while the applicant's case was pending. While the Court in 2008 had found in another case that removing an asylum seeker to Greece under the Dublin II Regulation did not violate the Convention (*K.R.S. v. the United Kingdom* (decision)(32733/08) of 2 December 2008), numerous reports and materials had been compiled by international bodies and organisations since then which agreed as to the practical difficulties involved in the application of the Dublin system in Greece. Belgium had initially issued the expulsion order solely on the basis of a tacit agreement by the Greek authorities and had proceeded to execute that order without any individual guarantee given by those authorities at a later stage, although under the Regulation Belgium could have made an exception and refused the applicant's transfer.

Against that background, it had been up to the Belgian authorities not merely to assume that the applicant would be treated in conformity with the Convention standards but to verify how the Greek authorities applied their legislation on asylum in practice, which they had failed to do. The applicant's transfer by Belgium to Greece had thus given rise to a violation of Article 3. Having regard to that conclusion the Court found that there was no need to examine the complaints under Article 2.

### **Article 3: The Belgian authorities' decision to expose the applicant to the detention and living conditions in Greece**

The Court had already found the applicant's conditions of detention and living conditions in Greece to be degrading. These facts had been well known and freely ascertainable from a wide number of sources before the transfer of the applicant. In that view, the Court considered that by transferring the applicant to Greece, the Belgian authorities knowingly exposed him to detention and living conditions that amounted to degrading treatment, in violation of Article 3.

### **Article 13 taken together with Article 2 and 3 (Belgium)**

As regards the complaint that there was no effective remedy under Belgian law by which the applicant could have complained against the expulsion order, the Belgian Government had argued that a request for a stay of execution could be lodged before the Aliens Appeals Board "under the extremely urgent procedure". That procedure suspended the execution of an expulsion measure for a maximum of 72 hours until the Board had reached a decision.

However, the Court found that the procedure did not meet the requirements of the Court's case-law that any complaint that expulsion to another country would expose an individual to treatment prohibited by Article 3 be closely and rigorously scrutinised, and that the competent body had to be able to examine the substance of the complaint and afford proper redress. Having regard to the Aliens Appeals Board's examination of cases, which was mostly limited to verifying whether those concerned had produced concrete proof of the damage that might result from the alleged potential

violation of Article 3, the applicant would have had no chance of success. There had accordingly been a violation of Article 13 taken in conjunction with Article 3. The Court further considered that there was no need to examine the complaints under Article 13 taken in conjunction with Article 2.

#### **Article 46 (Binding force and execution of judgments)**

The Court considered it necessary to indicate some individual measures required for the execution of the judgment in respect of the applicant, without prejudice to the general measures required to prevent other similar violations in the future. It was incumbent on Greece, without delay, to proceed with an examination of the merits of the applicant's asylum request that met the requirements of the Convention and, pending the outcome of that examination, to refrain from deporting the applicant.

#### **Article 41**

Under Article 41 (just satisfaction) of the Convention, the Court held that Greece was to pay the applicant 1,000 euros (EUR) in respect of non-pecuniary damage and EUR 4,725 in respect of costs and expenses. It further held that Belgium was to pay the applicant EUR 24,900 in respect of non-pecuniary damage and EUR 7,350 in respect of costs and expenses.

#### **Separate opinions**

Judges Rozakis and Villiger each expressed a concurring opinion. Judge Sajó expressed a partly concurring and partly dissenting opinion. Judge Bratza expressed a partly dissenting opinion. These opinions are annexed to the judgment.

- 59. ECHR, *Zylkov v. Russia*, no. 5613/04, Chamber judgment of 21 June 2011 (Article 6-1, Right to access to a tribunal – Violation).** The applicant, a Russian national with permanent residence in Lithuania, had applied for child allowance payable by the Russian Federation to parents with minors at the Russian Embassy in Vilnius (Lithuania). His attempts to challenge the decision refusing the payment before the Russian courts remained in vain. The domestic court found that he should have lodged his claim with a court in Lithuania without explaining how their view that the matter was to be considered by a foreign court complied 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.

*Conclusion:* violation (unanimously).

Article 41: EUR 1,500 in respect of non-pecuniary damage.

60. **ECHR, *Sabeh El Leil v. France*, no. 34869/05, Grand Chamber judgment of 29 June 2011 (Article 6, Right of access to a court – 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 against his dismissal.
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**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),  
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.

**61. ECHR, *Al-Jedda v. the United Kingdom*, no. 27021/08, Grand Chamber judgment of 7 July 2011 (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 United Kingdom 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.

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**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.

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.

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),  
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 (stating: "in the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail"), 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 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.

62. **ECHR, *Al-Skeini and Others v. the United Kingdom*, no. 55721/07, Grand Chamber judgment of 7 July 2011 (Article 1 – State jurisdiction affirmed; Article 2, Right to life – Violation).** The applicants, Iraqi nationals whose relatives had been killed by British forces in Basrah in 2003, successfully claimed that the United Kingdom 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.

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 Engagement. 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.

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 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.

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).

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),  
 Françoise **Tulkens** (Belgium),  
 Josep **Casadevall** (Andorra),

Dean **Spielmann** (Luxembourg),  
 Giovanni **Bonello** (Malta),  
 Elisabeth **Steiner** (Austria),  
 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 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 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**

Judges Rozakis and Bonello expressed concurring opinions which are annexed to the judgment.

63. **ECHR, *AO Neftyanaya Kompaniya Yukos v. Russia*, no. 14902/04, Chamber judgment of 20 September 2011 (Article 6-1 and 6-3-b, Right to a fair trial: adequate time and facilities for the preparation of one's defence – Violation; Article 1 of Protocol No. 1, Protection of property – Violation regarding the imposition and calculation of penalties in the 2000-2001 tax assessments / No violation regarding the rest of the 2000-2003 tax assessments / Violation regarding the enforcement proceedings; Article 14, Prohibition of discrimination, in conjunction with Article 1 of Protocol No. 1 – No violation; Article 18, Limitation on use of restrictions on rights, in conjunction with Article 1 of Protocol No. 1 – No violation).** The applicant, a company registered in the Russian Federation, partially successfully complained of irregularities in the proceedings concerning its tax liability for the tax year 2000 and about the unlawfulness and lack of proportionality of the 2000-2003 tax assessments and their subsequent enforcement. (See also the Chamber judgment on just satisfaction, case no. 94).

**ECHR 146 (2011)**  
**20.09.2011**

**Press release issued by the Registrar of the Court**

The European Court of Human Rights has today issued its **Chamber** judgment in the case **AO Neftyanaya Kompaniya YUKOS v. Russia** (application no. 14902/04).

The case concerned the tax and enforcement proceedings brought against the Russian oil company, AO Neftyanaya Kompaniya YUKOS, (YUKOS), which led to its liquidation.

In its judgment, which is not final and which does not deal with the question of the award of damages and costs, the Court held:

By six votes to one, that the case was **admissible**;

By six votes to one, that there had been a **violation of Article 6 §§ 1 and 3 (b) (right to a fair trial)** of the European Convention on Human Rights, concerning the 2000 tax assessment proceedings against YUKOS, because it had insufficient time to prepare its case before the lower courts;

By four votes to three, that there had been a **violation of Article 1 of Protocol No. 1 (protection of property)** to the Convention, concerning the 2000-2001 tax assessments, regarding the imposition and calculation of penalties;

Unanimously, that there had been **no violation of Article 1 of Protocol No. 1**, concerning the rest of the 2000-2003 tax assessments;

Unanimously, that there had been no violation of **Article 14 (prohibition of discrimination), in conjunction with Article 1 of Protocol No. 1** concerning whether YUKOS had been treated differently from other companies;

By five votes to two, that there had been a **violation of Article 1 of Protocol No. 1**, in that the enforcement proceedings were disproportionate;

Unanimously, that there had been **no violation of Article 18 (limitation on use of restriction on rights), in conjunction with Article 1 of Protocol No. 1**, concerning whether the Russian authorities had misused the legal proceedings to destroy YUKOS and seize its assets; and,

Unanimously, that the question of the application of Article 41 (just satisfaction) was not ready for decision.

### Principal facts

The applicant, OAO Neftyanaya kompaniya YUKOS, (YUKOS), was an oil company and one of Russia's largest and most successful businesses. Registered in Nefteyugansk, in the Khanty-Mansi Autonomous Region of Russia, it was fully state-owned until 1995-6, when it was privatised.

In late 2002, YUKOS became the subject of a series of tax audits and tax proceedings, as a result of which it was found guilty of repeated tax fraud, in particular for using an illegal tax evasion scheme involving the creation of sham companies in 2000-2003.

On 15 April 2004 proceedings were started against YUKOS concerning the 2000 tax year and it was prevented from disposing of certain assets pending the outcome of the case.

On 26 May 2004 Moscow City Commercial Court ordered it to pay a total of 99,375,110,548 roubles (RUB) (approximately 2,847,497,802 Euros (EUR)) in taxes, interest and penalties. Its judgment became available on 28 May 2004. YUKOS appealed and the appeal proceedings began on 18 June 2004. On 29 June 2004 the appeal court dismissed the company's complaints, including those about irregularities in the procedure and lack of time to prepare its defence.

On 7 July 2004 YUKOS filed an unsuccessful cassation appeal against the 26 May and 29 June 2004 judgments and simultaneously challenged those judgments by way of supervisory review before the Russian Supreme Commercial Court. YUKOS claimed, among other things, that the case against it was time-barred; according to Article 113 of the Russian Tax Code, a taxpayer was only liable to pay penalties for a tax offence for a period of three years, which ran from the day after the end of the relevant tax term.

The Presidium of the Supreme Commercial Court (Presidium) sought an opinion from the Constitutional Court, which confirmed, on 14 July 2005, that the three-year time limit under Article 113 should apply. However, where a taxpayer had impeded tax supervision and inspections, the running of the time-limit stopped once the tax audit report had been produced. On the basis of that ruling, on 4 October 2005 the Presidium dismissed YUKOS's appeal, finding that the case was not time-barred, because YUKOS had actively impeded the relevant tax inspections and the Tax Ministry's tax audit report for 2000 had been served on YUKOS on 29 December 2003, that was, within three years.

In April 2004 the Russian authorities also brought enforcement proceedings, as a result of which: YUKOS's assets located in Russia were attached, its domestic bank accounts partly frozen and the shares of its Russian subsidiaries seized.

On 2 September 2004 the Tax Ministry found YUKOS had used essentially the same tax arrangement in 2001 as in 2000. On the ground that it had recently been found guilty of a similar offence, the penalty imposed was doubled.

Overall: for the 2001 tax year, YUKOS was ordered to pay RUB 132,539,253,849.78 (approximately EUR 3,710,836,129); for 2002, RUB 192,537,006,448.58 (around EUR 4,344,549,434); and, for 2003, RUB 155,140,099,967.37 (around EUR 4,318,143,482).

YUKOS was also required to pay bailiffs an enforcement fee, calculated as 7% of the total debt, the payment of which could not be suspended or rescheduled.

It was required to pay all those amounts within very short deadlines and it made numerous unsuccessful requests to increase the time available to pay.

On 20 July 2004 the Ministry of Justice announced the forthcoming sale of OAO Yuganskneftegaz, YUKOS's main production (and therefore most valuable) subsidiary. On 19 December 2004, 76.79% of the shares in OAO Yuganskneftegaz were auctioned, to cover YUKOS's tax liability. Two days earlier, bailiffs had calculated YUKOS's consolidated debt as RUB 344,222,156,424.22 (EUR 9,210,844,560.93).

YUKOS was declared insolvent on 4 August 2006 and liquidated on 12 November 2007.

### Complaints, procedure and composition of the Court

The application was lodged with the Court on 23 April 2004 and declared partly admissible on 29 January 2009. A Chamber hearing in the case was held on Thursday 4 March 2010.

YUKOS complained of irregularities in the proceedings concerning its tax liability for the 2000 tax year and about the unlawfulness and lack of proportionality of the 2000-2003 tax assessments and their subsequent enforcement. It maintained that the enforcement of its tax liability had been deliberately orchestrated to prevent it from repaying its debts; in particular, the seizure of its assets pending litigation had prevented it from repaying the debt. It also complained about: the 7% enforcement fee; the short timelimit for voluntary compliance with the 2000-2003 tax assessments; and, the forced sale of OAO Yuganskneftegaz. YUKOS further argued that the courts' interpretation of the relevant laws had been selective and unique, since many other Russian companies had also used domestic tax havens. It submitted that the authorities had tolerated and even endorsed the "tax optimisation" techniques it had used. It further argued that the legislative framework had allowed it to use such techniques.

YUKOS relied on Article 6, Article 1 of Protocol No. 1 and Articles 1 (obligation to respect human rights), 13 (right to an effective remedy), 14, 18 and 7 (no punishment without law).

Under Article 41, YUKOS claimed: EUR 81 billion and a daily interest payment of EUR 29,577,848 for pecuniary damage, "no less than 100,000 euros" for non-pecuniary damage and EUR 171,444.60 for costs and expenses.

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

Christos **Rozakis** (Greece), *president*,  
 Nina **Vajić** (Croatia),  
 Khanlar **Hajiyev** (Azerbaijan),  
 Dean **Spielmann** (Luxembourg),  
 Sverre Erik **Jebens** (Norway),  
 Giorgio **Malinverni** (Switzerland), *judges*,  
 Andrey **Yuryevich Bushev** (Russia), *ad hoc judge*,

and also Søren **Nielsen**, *section registrar*.

### Decision of the Court

#### Admissibility

The Court considered whether the case was inadmissible under Article 35 § 2 of the Convention, according to which it cannot deal with applications which are substantially the same as a matter which has already been submitted to another international body and which contain no relevant new information.

The Court found that the proceedings before the Permanent Court of Arbitration in the Hague brought by YUKOS's majority shareholders and proceedings brought under bilateral investment treaties by

groups of YUKOS's minority shareholders were not "substantially the same" as today's case. The claimants in those arbitration proceedings were YUKOS's shareholders acting as investors, and not YUKOS itself, which at that time was still an independent legal entity. The Court further noted that today's case had been introduced and maintained by YUKOS in its own name. Consequently, the parties in those arbitration proceedings and in today's case were different and the two matters not "substantially the same" within the meaning of Article 35 § 2 (b). The Court therefore held, by six votes to one, that it was not barred from examining the merits of today's case.

### **Article 6 §§ 1 and 3 (b)**

Concerning the 2000 tax assessment proceedings, the Court found a violation of Article 6 §§ 1 and 3 (b) because:

- YUKOS did not have sufficient time to study the case file (at least 43,000 pages) at first instance (four days); and,
- the short interval (21 days) between the end of the proceedings before the first instance court (the judgment became available on 28 May 2004) and the beginning of the appeal proceedings (18 June 2004), restricted YUKOS's ability to advance its arguments and, more generally, to prepare for the appeal hearings (by shortening the statutory time-limit by nine days).

However, it did not find: that the action against YUKOS was arbitrary or unfair; that arbitrary or unfair conduct restrictions had been imposed by the courts on YUKOS's counsel during the hearings; that Moscow City Court had given its judgment without studying the evidence; or, that YUKOS's access to a cassation appeal was unfairly restricted.

### **Article 1 of Protocol No. 1**

#### 2000-2001 tax assessments

Noting that the tax assessment proceedings against YUKOS were criminal in character, the Court recalled that only law could define a crime and its corresponding penalty and that laws had to be accessible and foreseeable. The decision of 14 July 2005 changed the applicable rules on the statutory time-bar by introducing an exception which affected the outcome of the 2000 tax assessment proceedings.

YUKOS's conviction under Article 122 of the Tax Code in the 2000 tax assessment proceedings also laid the basis for finding it liable for a repeat offence, which doubled the penalties due in the 2001 tax assessment proceedings.

The Court therefore found that there had been a violation of Article 1 of Protocol No. 1 regarding the imposition and calculation of the penalties concerning the 2000-2001 tax assessments for two reasons, the retroactive change in the rules on the applicable statutory time-limit and the consequent doubling of the penalties due for the 2001 tax year.

#### Other tax assessments 2000-2003.

The Court observed that the rest of the 2000-2003 tax assessments were lawful, pursued a legitimate aim (securing the payment of taxes) and were a proportionate measure. They were not particularly high and nothing suggested that the rates of the fines or interest payments imposed an individual or disproportionate burden on YUKOS. The Court therefore found no violation of Article 1 of Protocol No. 1 regarding the rest of the 2000-2003 tax assessments.

### Enforcement proceedings

The Court noted that the enforcement of the debt resulting from the 2000-2003 tax assessments involved: the seizure of YUKOS's assets; an enforcement fee amounting to 7% of the total debt; and, the forced sale of OAO Yuganskneftegaz. Those measures constituted an interference with YUKOS's rights under Article 1 of Protocol No. 1.

Throughout the proceedings, the actions of the various authorities involved had had a lawful basis and the legal provisions in question were sufficiently precise and clear to meet Convention standards.

The Court noted that YUKOS was one of the largest taxpayers in Russia and that it had been suspected and subsequently found guilty of running a tax evasion scheme from 2000-2003. It seemed clear that YUKOS had had no cash funds in its domestic accounts to pay its tax debts immediately, and in view of the nature and scale of the debt, it was unlikely that any third party would have agreed to assist it with a loan or some form of security. Given the scale of the tax evasion, the sums involved for the years 2000-2003, the fact, under Russian law, that they were payable almost at once after the production of the respective execution writ, and taking into account the Court's previous findings regarding the fines for the years 2000 and 2001, it was questionable whether, at the time when the Russian authorities decided to seize and auction OAO Yuganskneftegaz, YUKOS was solvent within the meaning of section 3 of the Russian Insolvency (Bankruptcy) Act, which generally expected the solvent debtor to repay its debts "within three months of the date on which compliance should have occurred".

The crux of YUKOS's case was essentially the speed with which it was required to pay and the speed with which the auction had been carried out.

The Court considered that the Russian authorities were obliged to take careful and explicit account of all relevant factors in the enforcement process, but that they had failed to do so. In particular, none of their various decisions mentioned or discussed in any detail possible alternative methods of enforcement. That was of the utmost importance when striking a balance between the interests concerned, given that the sums that were already owed by YUKOS in July 2004 made it rather obvious that choosing to auction OAO Yuganskneftegaz first was capable of dealing a fatal blow to YUKOS's ability to survive the tax claims and to stay in business.

The Court accepted that the bailiffs were bound to follow the applicable Russian legislation which might have limited the available options in the enforcement procedure. Nonetheless, the bailiffs still had a decisive level of freedom of choice, concerning whether or not YUKOS stayed afloat. The Court did not find the choice of OAO Yuganskneftegaz entirely unreasonable, especially in view of the overall amount of the tax-related debt and the pending as well as probable claims against YUKOS. However, it considered that, before definitely deciding to sell the asset that was YUKOS's only hope of survival, the authorities should have given very serious consideration to other options, particularly as YUKOS's domestic assets had been attached by court order and were readily available and YUKOS did not seem to object or to have objected to their sale.

The Court further noted that the 7% enforcement fee was a fixed rate which the authorities apparently refused to reduce, and that it had to be paid even before YUKOS could begin repaying the main debt. In the circumstances of the case, the sum to be paid was completely out of proportion to the expected or actual amount of the enforcement expenses. Because of its rigid application, it contributed very seriously to YUKOS's demise.

The authorities were also unyieldingly inflexible as to the pace of the enforcement proceedings, acting very swiftly and constantly refusing to concede to YUKOS's demands for additional time. Such a lack of flexibility had a negative overall effect on the conduct of the enforcement proceedings against YUKOS.

Given the pace of the enforcement proceedings, the obligation to pay the full enforcement fee and the authorities' failure to take proper account of the consequences of their actions, the Court found that the Russian authorities had failed to strike a fair balance between the legitimate aims sought and the measures employed, in violation of Article 1 of Protocol No. 1.

#### **Article 14**

The Court reiterated that nothing in the case file suggested that YUKOS's tax arrangements during the years 2000-2003, taken in their entirety, including the use of fraudulently-registered trading companies, were known to the tax authorities or the national courts or that they had previously upheld them as lawful. It therefore could not be said that the authorities passively tolerated or actively endorsed them.

YUKOS had failed to show that other Russian taxpayers used or continued to use the same or similar tax arrangements and that it was singled out. It was found to have employed a tax arrangement of considerable complexity, involving, among other things, the fraudulent use of trading companies registered in domestic tax havens. That was not simply the use of domestic tax havens, which might have been legal.

The Court therefore concluded that there had been no violation of Article 14, taken in conjunction with Article 1 of Protocol No. 1.

#### **Article 18**

The Court found that YUKOS's debt in the enforcement proceedings resulted from legitimate actions by the Russian Government to counter the company's tax evasion.

Noting, among other things, YUKOS's allegations that its prosecution was politically motivated, the Court accepted that the case had attracted massive public interest. However, apart from the violations found, there was no indication of any further issues or defects in the proceedings against YUKOS which would have enabled the Court to conclude that Russia had misused those proceedings to destroy YUKOS and take control of its assets.

The Court therefore found no violation of Article 18, taken in conjunction with Article 1 of Protocol No. 1, on account of the alleged disguised expropriation of YUKOS's property and the alleged intentional destruction of YUKOS itself.

#### **Other Articles**

The Court found that there was no need to examine the same facts separately under Articles 7 and 13.

#### **Separate opinions**

Judges Jebens expressed a partly dissenting opinion; and Judge Bushev expressed a partly dissenting opinion, joined in part by Judge Hajiyeu. Those opinions are annexed to the judgment.

64. **ECHR, *Ahorugeze v. Sweden*, no. 37075/09, Chamber judgment of 27 October 2011 (Article 3, Prohibition of torture and inhuman or degrading treatment – No violation; Article 6, Right to a fair trial – No violation).** Following the relevant case-law of the Special Court for Sierra Leone and the International Criminal Tribunal for Rwanda (ICTR) the Court found that the extradition of the applicant, a Rwandan national and genocide suspect, from Sweden to Rwanda would not put him at risk of ill-treatment or 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 final, 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 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 he 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.

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.

65. **ECHR, *Othman (Abu Qatada) v. the United Kingdom*, no. 8139/09, Chamber judgment of 17 January 2012 (Article 3, Prohibition of torture and inhuman or degrading treatment – 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, successfully claimed that his planned deportation from the United Kingdom to Jordan would put him at a real risk of a grossly unfair trial amounting to a flagrant denial of justice due to widespread use of evidence obtained through torture before Jordanian courts.

**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 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 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.

**66. ECHR, *Harkins and Edwards v. the United Kingdom*, no. 9146/07, Chamber judgment of 17 January 2012 (Article 3, Prohibition of torture and inhuman or degrading treatment or punishment – Inadmissible with regard to a risk of the imposition of the death penalty / No violation concerning a sentence of life imprisonment without the possibility of parole).** The applicants were indicted in the United States for murder, among other offences. They alleged that if extradited from the United Kingdom they would face a real risk of being convicted to the death penalty or a life sentence without parole in the United States.

## Information Note on the Court's case-law No. 148

### January 2012

Judgment 17.1.2012 [Section IV]

#### Article 3

#### Degrading punishment

#### Inhuman punishment

#### Extradition

Proposed extradition to United States where applicants faced trial on charges carrying whole life sentences without parole: extradition would not constitute a violation

*Facts* – Both applicants faced extradition from the United Kingdom to the United States where, they alleged, they risked the death penalty or life imprisonment without parole. The first applicant, Mr Harkins, was accused of killing a man during an attempted armed robbery, while the second applicant, Mr Edwards, was accused of intentionally shooting two people, killing one and injuring the other, after they had allegedly made fun of him. The US authorities provided assurances that the death penalty would not be applied in their cases and that the maximum sentence they risked was life imprisonment.

#### *Law* – Article 3

(a) *Death penalty* – The Court reiterated that in extradition matters it was appropriate for a presumption of good faith to be applied to a requesting State which had a long history of respect for democracy, human rights and the rule of law, and which had longstanding extradition arrangements with Contracting States. The Court also attached particular importance to prosecutorial assurances concerning the death penalty. In both applicants' cases, clear and unequivocal assurances had been given by the United States Government and the prosecuting authorities. These were sufficient to remove any risk that either applicant would be sentenced to death if extradited.

*Conclusion*: inadmissible (manifestly ill-founded).

(b) *Life imprisonment without parole* – The Court began with some general remarks, based on its case-law, concerning the proper approach to Article 3 in extradition cases. It did not accept the three distinctions the majority of the House of Lords had made in the leading domestic case of *Wellington (R (Wellington) v. Secretary of State for the Home Department* [2008] UKHL 72. In that case, the House of Lords dismissed an appeal in which Mr Wellington had argued that his extradition to the United States on murder charges would expose him to a risk to inhuman and degrading treatment in

the form of a sentence of life imprisonment without parole.) (the first distinction being between extradition cases and other cases of removal from the territory of a Contracting State; the second between torture and other forms of ill-treatment; and the third between the assessment of the minimum level of severity required in the domestic context and that required in the extra-territorial context). As to the first distinction, the question whether there was a real risk of treatment contrary to Article 3 in another State could not depend on the legal basis for the removal and it would not be appropriate to apply different tests depending on whether the case concerned extradition or another form of removal. As to the second, since a prospective assessment was required in the extra-territorial context, it was not always possible to determine whether potential ill-treatment in a receiving State would be sufficiently severe to qualify as torture and the Court normally refrained from considering that question in cases where it found a real risk of intentionally inflicted ill-treatment in the receiving State. As for the third distinction made by the House of Lords – the assessment of the minimum level of severity required in the domestic context and that required in the extra-territorial context – the Court noted that in the twenty-two years since its *Soering* judgment (*Soering v. the United Kingdom*, no. 14038/88, 7 July 1989), in an Article 3 case it had never undertaken an examination of the proportionality of a proposed extradition or other form of removal from a Contracting State and had, to that extent, to be taken to have departed from the balancing approach contemplated by paragraphs 89 and 110 of that judgment. Nevertheless, it was true that the Court was very cautious in finding that removal from the territory of a Contracting State would be contrary to Article 3. In particular, save for cases involving the death penalty, it had only very rarely found that there would be a violation of Article 3 if an applicant were to be removed to a State which had a long history of respect for democracy, human rights and the rule of law.

As regards cases concerning a sentence of life imprisonment without the possibility of parole, the Court noted, as in *Vinter and Others* (*Vinter and Others v. the United Kingdom*, nos. 66069/09, 130/10 and 3896/10, 17 January 2012, Information Note no. 148), that unless the sentence was grossly disproportionate, an Article 3 issue would arise for a sentence (whether mandatory or discretionary) of life imprisonment without the possibility of parole only when it could be shown (i) that the applicant's continued imprisonment could no longer be justified on any legitimate penological grounds and (ii) that the sentence was irreducible de facto and de iure. The Court noted, however, that while not per se incompatible with the Convention, a mandatory sentence of life imprisonment without the possibility of parole was much more likely to be grossly disproportionate than any other type of life sentence, especially if the sentencing court was required to disregard mitigating factors which were generally understood as indicating a significantly lower level of culpability on the part of the defendant, such as youth or severe mental health problems.

The sentences faced by the two applicants were not grossly disproportionate. Although the first applicant's prospective sentence was mandatory and so required greater scrutiny than other forms of life sentence, the Court noted that he was over eighteen at the time of the alleged crime and had not been diagnosed with a psychiatric disorder; moreover, the killing had taken place in the course of an armed robbery, which was a most serious aggravating factor. As to the second applicant, he faced, at most, a discretionary sentence of life imprisonment without parole that would be imposed only after consideration by the trial judge of all relevant aggravating and mitigating factors, and after the applicant's conviction for a premeditated murder in which another man was also shot in the head and injured. Further, since the applicants had not yet been convicted, still less begun serving a sentence, they had not shown that, upon extradition, their incarceration in the United States would not serve any legitimate penological purpose. Only if and when they were in a position to show that their continued detention no longer served such a purpose could an Article 3 issue arise and, even then, it was by no means certain that the United States authorities would refuse to use their powers to commute the sentence and order release on parole.

Accordingly, neither applicant had demonstrated that there would be a real risk of treatment reaching the Article 3 threshold as a result of his sentence if he was extradited to the United States.

*Conclusion:* extradition would not constitute a violation (unanimously).

The Court also dismissed the second applicant's complaint of a violation of Article 5 § 4 of the Convention for the reasons stated in *Vinter and Others*.

67. **ECHR, *Zontul v. Greece*, no. 12294/07, Chamber judgment of 17 January 2012 (Article 3, Prohibition of torture and inhuman or degrading treatment – Violation).** The applicant, an illegal migrant of Turkish nationality, successfully complained that he had been raped with a truncheon by one of the coastguard officers supervising him. The Court expressly followed the jurisprudence of other international courts, notably the International Criminal Tribunal for the former Yugoslavia, the International Criminal Tribunal for Rwanda and the Inter-American Court of Human Rights, holding that penetration with an object amounted to an act of torture.

**ECHR 017 (2011)**

**17.01.2012**

**Press release issued by the Registrar**

In today's **Chamber** judgment in the case **Zontul v. Greece** (application no. 12294/07), which is not 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.

The case concerned an illegal migrant who complained that he had been raped with a truncheon by one of the coastguard officers supervising him, that the authorities had refused to allow him to be examined by a doctor who was on the premises, that the conditions of detention in the asylum seekers' camp had been poor, that the authorities had failed to conduct a thorough, fair and impartial investigation and that those responsible had not been adequately punished, as the Appeals Tribunal had not considered that his rape with a truncheon constituted an aggravated form of torture.

**Principal facts**

The applicant, Necati Zontul, is a Turkish national who was born in 1968 and lives in London (United Kingdom).

On 27 May 2001 he and 164 other migrants boarded a boat in Istanbul which was bound for Italy. On 30 May the vessel was intercepted by Greek coastguards and escorted to the port of Chania (Crete). The migrants were placed in a disused merchant navy training school. According to Mr Zontul, the conditions of detention there were poor and several detainees were deliberately attacked by guards. He alleged that, between 1 and 6 June 2001, several detainees had been taken into a room from which they had emerged with injuries and, in some cases, unable to walk. There had also been reports of mock executions and Russian roulette.

On 5 June 2001 Mr Zontul reported that two coastguard officers had forced him to undress while he was in the bathroom. One of them had threatened him with a truncheon and had then raped him with it. One of the applicant's fellow detainees had helped him back to the dormitory after the officers had left. In protest at that incident, the detainees had decided to go on hunger strike the following morning. Some of the coastguard officers had then burst into the dining room and gathered the detainees together, before beating them with truncheons and splashing them with water and a product resembling eau de cologne. One of the detainees had been made to "jump like a rabbit".

On 6 June 2001 the commanding officer of the coastguard service, who had not been present during the events, ordered an investigation after hearing the detainees' account. Mr Zontul was asked to identify the officer who had raped him, but his request to be examined by a doctor who was on the premises was refused. However, the doctor examined the detainees who claimed to have been beaten,

and noted that 16 of them had injuries consistent with their account of events. Five of them were admitted to hospital.

On 8 June the Minister of Merchant Shipping confirmed that an internal administrative inquiry had been started. On 10 June the migrants were transferred to the former airport in Chania, where they were visited by representatives of the organisation Médecins du Monde. On 12 June Mr Zontul and three other migrants were invited to give evidence in the internal administrative inquiry, with an interpreter present. When Mr Zontul was shown a copy of his statement a year later, he saw that the rape of which he had spoken had been recorded as a “slap” and “use of psychological violence”, that the facts had been summarised inaccurately and that he was reported as saying that he did not want to see the coastguard officers punished. In July 2001 the migrants received documents certifying their status as asylum seekers, tickets for travel to Athens and five drachmas each. During a bus transfer Mr Zontul escaped from the convoy and made his own way to Athens.

On 14 August 2001 a senior coastguard officer submitted the report of the administrative inquiry. The report was based on the evidence given by officer D., who said that he had struck Mr Zontul lightly on the buttocks with his truncheon and had not reported the incident, which he regarded as insignificant. The report accepted D.’s evidence as credible, given that there had been no mention of any injury to Mr Zontul in the infirmary’s patient records.

The file was forwarded to the public prosecutor at the Chania Naval Tribunal, who on 3 October 2001 ordered the commencement of criminal proceedings against five coastguard officers. In a decision of 13 December 2002 the Committals Division of the Naval Tribunal committed six officers for trial on charges of causing bodily injury, impairing health, unlawful physical or psychological violence and undermining human dignity. With regard to officer D., the Committals Division considered that his conduct had humiliated and debased the applicant and constituted a violent assault on the latter’s human and sexual dignity. The trial was twice adjourned.

On 15 November 2003 Mr Zontul contacted the Greek Ombudsman. The latter wrote to the Minister of Merchant Shipping asking him to order a fresh disciplinary inquiry as the first inquiry had not taken into consideration the rape of the applicant by one of the coastguard officers. The Ombudsman pointed out that the case was damaging to the image and honour of the coastguard service and cast doubt on the country’s ability to ensure respect for human rights.

In February 2004 Mr Zontul left Greece, travelling first to Turkey and then to the United Kingdom with his partner. He contacted the Greek embassy in London regularly in order to keep track of the progress of the proceedings.

On 15 October 2004 the Naval Tribunal imposed prison sentences, some of them suspended, on five coastguard officers. D. was sentenced to 30 months’ imprisonment for an offence against sexual dignity. Another officer received a sentence of one year and four months’ imprisonment for aiding and abetting the offence, while the three others were sentenced to prison terms of 18 months for abuse of authority. The coastguard officers appealed. On 20 June 2006 the Naval Appeals Tribunal held that D. had inflicted bodily injury and impaired the health of a person under his authority, had engaged in unlawful physical violence against that person and had seriously undermined his sexual dignity with the aim of punishing him. The Appeals Tribunal sentenced D. to a suspended term of six months’ imprisonment, which was commuted to a fine. V., who had admitted aiding and abetting the offence, was sentenced to five months’ imprisonment, suspended. His sentence was also commuted to a fine.

### Complaints, procedure and composition of the Court

Relying on Article 3 (prohibition of torture and inhuman or degrading treatment), the applicant complained that he had been the victim of torture, since he had been sexually abused and the authorities had refused to allow him to see a doctor who was on the premises. He also complained that

the conditions of detention in the asylum seekers' camp had been poor, that the authorities had not conducted a thorough, fair and impartial investigation and, lastly, that the Appeals Tribunal had imposed inadequate penalties on the convicted coastguard officers, as it had not considered that his rape with a truncheon amounted to an aggravated form of torture.

The application was lodged with the European Court of Human Rights on 27 February 2007.

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

Nina **Vajić** (Croatia), *President*,  
 Anatoly **Kovler** (Russia),  
 Peer **Lorenzen** (Denmark),  
 Mirjana **Lazarova Trajkovska** ("The former Yugoslav Republic of Macedonia"),  
 Julia **Laffranque** (Estonia),  
 Linos-Alexandre **Sicilianos** (Greece),  
 Erik **Møse** (Norway), *Judges*,

and also Søren **Nielsen**, *Section Registrar*.

Decision of the Court

### Article 3

The Court observed that the Naval Tribunal, like the Appeals Tribunal, had clearly established the offences of assault and rape. All the courts examining the case had noted that there had been forced penetration which had caused the applicant acute physical pain. The Court reiterated that the rape of a detainee by an official of the State was to be considered as an especially grave and abhorrent form of ill-treatment. A number of international courts – the International Criminal Tribunal for the former Yugoslavia, the International Criminal Tribunal for Rwanda and the Inter-American Court of Human Rights – had accepted that penetration with an object amounted to an act of torture. The treatment to which Mr Zontul had been subjected, in view of its cruelty and its intentional nature, had unquestionably amounted to an act of torture from the standpoint of the Convention.

As to whether a thorough and effective investigation had been carried out in the context of the proceedings brought against the coastguard officers D. and V., the Court noted that Mr Zontul's request to be examined by a doctor after the rape incident had been refused. With regard to the internal administrative inquiry, the Court considered that the report's finding that the coastguard officers' account of events appeared credible, since the applicant's case was not mentioned in the infirmary's patient records, was not satisfactory. It observed that Mr Zontul's evidence had been falsified, as the rape of which he had complained had been recorded as a "slap" and "use of psychological violence", that the events had been summarised inaccurately and that Mr Zontul had been reported as saying that he did not wish the coastguard officers to be punished.

At the same time, the Court observed that proceedings had been instituted in the criminal courts and that D. had been convicted at first instance and on appeal. The internal administrative inquiry and the criminal proceedings had been sufficiently prompt and diligent to meet the Convention standard.

Nevertheless, the penalty imposed on D. had been insufficient in view of the fact that a fundamental Convention right had been breached. Furthermore, such a penalty could not be said to have a deterrent effect nor could it be perceived as fair by the victim. The Court considered that there had been a clear lack of proportion, given the seriousness of the treatment to which the applicant had been subjected. It therefore took the view that the Greek criminal justice system, as applied in the today's case, had not had a deterrent effect such as to prevent the torture of which the applicant had been victim, nor had it provided him with adequate redress.

Because he was no longer in Greece, and in spite of his efforts to track the progress of and participate in the proceedings, Mr Zontul had not been kept informed by the Greek authorities in such a way as to enable him to exercise his rights as a civil party and claim damages. The Greek authorities had therefore failed in their duty of information. The communications from the Greek embassy in London had been confined to informing the applicant that the hearing before the Naval Appeals Tribunal had been held and that the latter had delivered its judgment. The fact that Mr Zontul had been unable to attend the trial was of particular significance given that, after being given leave during the investigation stage to join the proceedings as a civil party, he had been prevented from fully exercising all the rights conferred on civil parties by the Code of Criminal Procedure.

Accordingly, the Court held that there had been a violation of Article 3 of the Convention, on account of the acts committed and of the failure to allow Mr Zontul to be involved in the proceedings as a civil party.

#### **Article 41**

Under Article 41 (just satisfaction) of the Convention, the Court held that Greece was to pay the applicant 50,000 euros (EUR) in respect of non-pecuniary damage and EUR 3,500 in respect of costs and expenses.

68. **ECHR, *Hirsi Jamaa and Others v. Italy*, no. 27765/09, Grand Chamber judgment of 23 February 2012 (Article 1 – State jurisdiction affirmed; Article 3, Prohibition of torture and inhuman or degrading treatment – Violation; Article 4 of Protocol No. 4, Prohibition of collective expulsion 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 that they had been exposed to the risk of being subjected to ill-treatment in Libya and being repatriated to Somalia or Eritrea when sent back to Libya.

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**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 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),  
 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 organisations (international bodies and non-governmental organisations; see paragraphs 37-41 of the judgment) regarding the treatment of clandestine immigrants were corroborated by the report of the Committee for the Prevention of Torture (CPT) of 2010 (report of 28 April 2010 of the Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) of the Council of Europe after a visit to Italy).

Irregular migrants and asylum seekers, between whom no distinction was made, had been systematically arrested and detained in conditions described as inhuman by observers (the UNHCR, Human Rights watch and Amnesty International), 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, 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 (paragraph 34 of the judgment).

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* (judgment of 28.06.2011)– 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 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* (judgment of 05.02.2002) 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.

69. **ECHR, *Kurić and Others v. Slovenia*, no. 26828/06, Grand Chamber judgment of 26 June 2012 (Article 8, Right to respect of private and family life – Violation; Article 13, Right to an effective remedy, in conjunction with Article 13 – Violation; Article 14, Prohibition of discrimination, in conjunction with Article 8 - Violation).** The applicants belonged to a group of persons known as the “erased”, who had lost their status as permanent residents following Slovenia’s declaration of independence in 1991. The Court held in particular that, despite the efforts made since 1999, the Slovenian authorities had failed to remedy comprehensively and with the requisite promptness the grave consequences for the applicants of the erasure of their names from the Slovenian Register of Permanent Residents which had violated their Convention rights.

**ECHR 273 (2012)**  
**26.06.2012**

**Press release issued by the Registrar**

In today’s **Grand Chamber** judgment in the case of **Kurić and Others v. Slovenia** (application no. 26828/06), 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/or family life)** of the European Convention on Human Rights;

**a violation of Article 13 (right to an effective remedy)** in combination with Article 8 of the Convention, and;

**a violation of Article 14 (prohibition of discrimination)** in combination with Article 8.

The applicants belong to a group of persons known as the “erased”, who on 26 February 1992 lost their status as permanent residents following Slovenia’s declaration of independence in 1991, and faced almost 20 years of extreme hardship. The number of “erased” people in 1991 amounted to 25,671.

The Court held in particular that, despite the efforts made since 1999, the Slovenian authorities had failed to remedy comprehensively and with the requisite promptness the grave consequences for the applicants of the erasure of their names from the Slovenian Register of Permanent Residents.

The Court also decided to **apply the pilot-judgment procedure**, holding that the Government should, within one year, set up a compensation scheme for the “erased” in Slovenia. It decided it would adjourn examination of all similar applications in the meantime.

**Principal facts**

There are eight applicants: Mustafa Kurić and Velimir Dabetić, both stateless persons; Ana Mezga, a Croatian national; Tripun Ristanović, a citizen of Bosnia and Herzegovina; Ljubenka Ristanović, Ali Berisha and Zoran Minić, all Serbian nationals according to the Slovenian Government; and Ilfan Sadik Ademi, now a citizen of “The former Yugoslav Republic of Macedonia”.

Before 25 June 1991, the date on which Slovenia gained independence, the applicants were nationals of both the Socialist Federal Republic of Yugoslavia (“the SFRY”) and of one of its constituent

republics other than Slovenia. As nationals of the SFRY they had acquired the status of permanent residents in Slovenia, which they retained until 26 February 1992. On that date their names were erased from the Slovenian Register of Permanent Residents because they had not applied for Slovenian citizenship before the deadline of 25 December 1991. Of the 200,000 Slovenian residents who were former citizens of the SFRY, 171,132 applied for and were granted citizenship of the new Slovenian State. People who did not apply for Slovenian citizenship, or whose requests were not granted, became aliens or stateless persons illegally residing in Slovenia. According to the Slovenian Government, they were informed of their change of status. The applicants denied ever receiving notification, claiming that they had learned by chance that they had become aliens when, for example, they tried to renew their identity papers. They contended that their “erasure” had had serious and enduring consequences. Their papers were taken away from them; and some were evicted from their apartments, could not work or travel, lost their personal possessions, and lived for years in poor conditions with serious consequences for their health. Others were expelled from Slovenia.

In 1999 the Constitutional Court found unconstitutional the provisions of the Aliens Act passed on 25 June 1991 because it did not regulate the situation of the “erased”. It noted in particular that nationals of the former SFRY were in a less favourable legal position than other aliens living in Slovenia. Following that decision, on 8 July 1999, the Legal Status Act was passed in order to regulate the situation of the “erased”. However, in 2003, the Constitutional Court held that the Legal Status Act was partially unconstitutional, in particular since it failed to grant the “erased” retroactive permanent residence permits, to define the meaning of “actually residing in Slovenia” and to regulate the situation of the persons who had been deported. The amended Legal Status Act, designed to regulate the incompatibilities between the Legal Status Act and the Constitution, entered into force on 24 July 2010.

The number of former SFRY citizens who had lost their permanent residence status in 1991 amounted to 25,671. Some of the “erased” voluntarily left Slovenia and others were granted residence permits following the above-mentioned Constitutional Court decisions; some were deported. In addition, 7,899 acquired Slovenian citizenship. In 2009, 13,426 of the “erased” still did not have a regulated status in Slovenia and their current place of residence was unknown. In total, by June 2010, out of the 13,600 requests for permanent residence lodged, 12,345 had been granted. In the course of the proceedings before the Grand Chamber of the European Court of Human Rights, six applicants were granted permanent resident permits. The deadline for filing requests for permanent residence permits expires on 24 July 2013.

In July 2011 the Government submitted to the Court some 30 final judgments delivered in compensation proceedings brought by the “erased”. All the compensation claims had been dismissed, mostly for failure to comply with the prescribed time-limits.

### Complaints, procedure and composition of the Court

The applicants complained in particular that they had been arbitrarily deprived of their legal status as permanent residents. They relied in particular on Article 8 (right to respect for private and/or family life), Article 13 (right to an effective remedy) and Article 14 (prohibition of discrimination) of the European Convention on Human Rights.

The application was lodged with the European Court of Human Rights on 4 July 2006. In its Chamber judgment of 13 July 2010, the Court found that the Slovenian authorities had failed to comply with the Constitutional Court decisions concerning the “erased” people. It held, unanimously, that there had been a violation of Articles 8 and 13 of the Convention.

On 13 October 2010 the Government requested that the case be referred to the Grand Chamber and on 21 February 2011 a panel of the Grand Chamber accepted that request.

A Grand Chamber hearing was held in Strasbourg on 6 July 2011.

The Serbian Government, the Equal Rights Trust, the Peace Institute and the Legal Information Centre for Non-Governmental Organisations, the Open Society Justice Initiative and the UNHCR (Office of the United Nations High Commissioner for Refugees) were authorised to intervene as third parties (under Article 36 §§ 1 and 2 of the Convention).

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),  
 Nina **Vajić** (Croatia),  
 Dean **Spielmann** (Luxembourg),  
 Boštjan M. **Zupančič** (Slovenia),  
 Anatoly **Kovler** (Russia),  
 Elisabeth **Steiner** (Austria),  
 Isabelle **Berro-Lefèvre** (Monaco),  
 Päivi **Hirvelä** (Finland),  
 George **Nicolaou** (Cyprus),  
 Luis **López Guerra** (Spain),  
 Zdravka **Kalaydjieva** (Bulgaria),  
 Nebojša **Vučinić** (Montenegro),  
 Guido **Raimondi** (Italy),  
 Ganna **Yudkivska** (Ukraine),  
 Angelika **Nußberger** (Germany),

and also Vincent **Berger**, *Jurisconsult*.

Decision of the Court

### **Preliminary issues**

The applicants had requested the Grand Chamber to examine the complaints raised by Mr Petreš and Mr Jovanović. As the Chamber, in its judgment of 13 July 2010, had already declared those complaints inadmissible, the Grand Chamber no longer had jurisdiction to examine them.

The Slovenian Government had requested the Court (preliminary objections) to reject the applicants' complaints on the following grounds: the Convention did not protect a right to citizenship or a right to permanent residence; the events in question had taken place before the date of entry into force of the Convention in respect of Slovenia (28 June 1994); the six applicants who had been granted residence permits had lost their victim status; and the applicants had not exhausted the remedies available to them in Slovenia.

Regarding the issue of citizenship, the Grand Chamber observed that the Chamber had declared inadmissible the applicants' complaints concerning their inability to obtain Slovenian citizenship in 1991. On the second point, the Grand Chamber upheld the Chamber's findings, taking the view that the adverse effects of the "erasure" in terms of the loss of residence status constituted a "continuous" situation. As to the third point, the Grand Chamber considered that the authorities' acknowledgment of the human rights violations and the issuance of permanent residence permits to Mr Kurić, Ms Mezga, Mr Ristanović, Mr Berisha, Mr Ademi and Mr Minić did not constitute "appropriate" and "sufficient" redress at the national level. Accordingly, those applicants could still claim to be "victims" of the alleged violations.

Lastly, with regard to the exhaustion of domestic remedies, the Grand Chamber first declared inadmissible the complaints raised by Mr Dabetić and Mrs Ristanović, as they had never manifested a wish to reside in Slovenia, having omitted to take any proper legal steps in order to regularise their residence status. As to the other six applicants, the Court dismissed the Government's preliminary objection. It considered, firstly – limiting its assessment to the particular circumstances of the present case – that the applicants had been dispensed from having to lodge individual constitutional appeals in view of the overall duration of the administrative proceedings they had brought and their feelings of frustration caused by the authorities' prolonged inaction. Secondly, they had not been required to lodge a petition for an abstract review of the constitutionality of the impugned legislation, since the Constitutional Court had already delivered leading decisions in that regard in 1999 and 2003. Lastly, with regard to the amended Legal Status Act, the latter had entered into force after the applicants' complaints had been declared admissible by the Court.

### **Article 8**

The Grand Chamber reaffirmed that Article 8 was applicable to the applicants' situation, since the "erasure" and its repercussions had amounted – a fact not contested by the Government – to interference with the private or family life, or both, they had had in Slovenia at the relevant time, having built up social, cultural and economic ties in the country.

The Court first considered the issue of the legal basis for the interference. The latter had been based on the Citizenship Act and the Aliens Act, legal instruments which had been accessible to any interested persons. Nevertheless, although the applicants could have foreseen that they would be treated as aliens if they failed to apply for Slovenian nationality, they could not reasonably have expected that they would become unlawfully resident on Slovenian territory and would be subjected to such an extreme measure as their "erasure". The absence of any notification could have led them to believe that their status as residents had remained unchanged. Furthermore, the Court attached weight to the findings of the Constitutional Court in 1999, according to which the applicants had found themselves in a legal vacuum since the Aliens Act was not applicable to them. At least until 2010, the Slovenian legal system had failed to regulate clearly the situation of the "erased" and their residence status. It had taken more than seven years – until the entry into force of the Legal Status Act on 24 July 2010 – for the 2003 decision of the Constitutional Court ordering general measures to be complied with. Accordingly, the interference with the applicants' private or family life, or both, had not had sufficient legal basis.

However, given the widespread repercussions of the "erasure", the Court considered it necessary to examine also whether the measure in question had pursued a legitimate aim. On this point, it took the view that the desire to create a "corpus of Slovenian citizens", allowing citizens of the former SFRY resident in Slovenia only a short period of time in which to acquire Slovenian citizenship, had been in the interests of national security and had therefore constituted a legitimate aim.

The Court went on to examine whether the interference in question had been "necessary in a democratic society", that is, whether it had responded to a pressing social need and had been proportionate to the aim pursued. It reiterated that the Convention did not guarantee the right of an alien to enter or to reside in a particular country, but that measures restricting the right to reside in a country might, in certain cases, entail a violation of Article 8 if they created disproportionate repercussions on private or family life or both. It noted that the applicants had been deprived of the legal status that had previously given them access to a wide range of rights – including entitlement to health insurance and pension rights – and opportunities, for instance in the sphere of employment. The Court considered that the Slovenian State should have regularised the residence status of former SFRY citizens in order to ensure that failure to obtain Slovenian citizenship did not disproportionately affect the Article 8 rights of the "erased". The State had not done so, as demonstrated by the persistent problems encountered by the applicants in obtaining valid residence permits. The interference in question had therefore not been "necessary in a democratic society".

In conclusion, despite the efforts made after the Constitutional Court's decisions of 1999 and 2003 and the passing of the amended Legal Status Act, the Slovenian authorities had failed to remedy comprehensively and with the requisite promptness the blanket nature of the "erasure" and its grave consequences for the applicants.

Furthermore, in its observations submitted in its capacity as a third-party intervener, with which the other third-party interveners broadly agreed, the organisation Open Society Justice Initiative stated that at the end of 2009, according to data supplied by the UNHCR, 4,090 former SFRY citizens had been made stateless following the "erasure" of their names, and many continued to be stateless. The situation had disproportionately affected vulnerable groups such as minorities and Roma people.

### **Article 13**

Referring to its findings regarding the exhaustion of domestic remedies (under the heading "preliminary issues"), the Court found that the applicants had not had "adequate" and "effective" remedies by which to obtain redress, at the relevant time, for the alleged infringement of their right to respect for their private and family lives. It therefore held that there had been a violation of Article 13 in conjunction with Article 8.

### **Article 14**

Regard being had to the importance of the discrimination issue in the present case, the Grand Chamber considered, unlike the Chamber, that the applicants' complaint under Article 14 should be examined.

The Court found that Article 14 was applicable as there had been a difference in treatment after independence between two groups – as former SFRY citizens were treated differently from other foreigners – which were in a similar situation in respect of residence-related matters. Citizens of the former SFRY who were residing in Slovenia had found themselves in a legal vacuum, whereas "real" aliens living in the country had been able to keep their residence permits under the Aliens Act. That difference in treatment, which the Constitutional Court had pointed out in its decision of 4 February 1999, had been based on national origin and had not pursued a legitimate aim (the Court did not accept the Government's argument concerning the right to vote in the context of the 1992 parliamentary elections, see § 393 of the Judgment). The Court therefore held that there had been a violation of Article 14 in conjunction with Article 8.

### **Article 46**

While it was for the respondent State, subject to the supervision of the Committee of Ministers, to choose the means by which it would discharge its obligation under Article 46 (execution of judgments), the Court could, in exceptional cases, indicate the type of measure that might be taken in order to put an end to a situation it had found to exist.

It would be premature, in the absence of any settled domestic practice, to rule on the effectiveness of the legislative measures taken by Slovenia in recent years regarding the residence status of the "erased". Nevertheless, as the applicants had obtained no compensation and currently had little prospect of obtaining any, a shortcoming existed within the Slovenian legal order as a consequence of which the "erased" continued to be denied compensation for the infringement of their fundamental rights.

The present case was therefore suitable for the adoption of the pilot-judgment procedure, given that the situation affected a large number of persons. Although only a few similar applications were currently pending before it, the Court was mindful of the potential inflow of future cases. It therefore

indicated to the Government that it should, within one year, set up a compensation scheme for the “erased” people in Slovenia. It would adjourn examination of all similar applications in the meantime.

**Just satisfaction (Article 41)**

The Court held that Slovenia was to pay 20,000 euros (EUR) each in respect of non-pecuniary damage to Mustafa Kurić, Ana Mezga, Tripun Ristanović, Ali Berisha, Ilfan Sadik Ademi and Zoran Minić, and EUR 30,000 to the applicants jointly in respect of costs and expenses. It reserved the question of pecuniary damage for decision at a later date.

**Separate opinions**

Judge Zupančič expressed a concurring opinion. Judge Vučinić expressed a partly concurring and partly dissenting opinion. Judges Bratza, Tulkens, Spielmann, Kovler, Kalaydjieva, Vučinić and Raimondi expressed a joint partly dissenting opinion. Judge Costa expressed a partly dissenting opinion, and Judges Kovler and Kalaydjieva expressed a joint partly dissenting opinion. These opinions are annexed to the judgment.

- 70. ECHR, *Toniolo v. San Marino and Italy*, no. 44853/10, Chamber judgment of 26 June 2012 (Article 5-1, Right to liberty and security – Violation).** The applicant, an Italian national living in San Marino was arrested in San Marino following criminal proceedings brought against him in Italy. He 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 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.

- 71. ECHR, *Wallishauser v. Austria*, no. 156/04, Chamber judgment of 17 July 2012 (Article 6-1, Right of access to a court - Violation).** The applicant, a former employee of the United States Embassy in Vienna who was owed salary payments after her unlawful dismissal, successfully argued that she had been denied access to a court when the United States' authorities had invoked immunity and 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* (*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.), 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 (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). 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.

72. **ECHR, *Nada v. Switzerland*, no. 10593/08, Grand Chamber judgment of 12 September 2012 (Article 5, Right to liberty and security – Inadmissible; Article 8, Right to respect for private and family life – Violation; Article 13, Right to an effective remedy, taken in conjunction with Article 8 – Violation).** The applicant, an Italian and Egyptian national living in an Italian enclave surrounded by the Swiss Canton of Ticino, was prevented from entering or transiting through Switzerland because his name was added to a list of persons and organisations associated with Osama bin Laden and al-Qaeda annexed to a federal Ordinance in the context of the implementation by Switzerland of the United Nations Security Council counter-terrorism resolutions.

**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.

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 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 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 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.

73. **ECHR, *Djokaba Lambi Longa v. the Netherlands*, no. 33917/12 Chamber decision of 9 October 2012 (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 (ICC), 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.

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),

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* (no. 22617/07, decision of 9 June 2009) and *Blagojević v. the Netherlands* (no. 49032/07, decision of 9 June 2009), 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*).

74. **ECHR, *Catan and Others v. Moldova and Russia*, nos. 43370/04, 8252/05 and 18454/06, Grand Chamber judgment of 19 October 2012 (Article 2 of Protocol No. 1, Right to education – No violation in respect of Moldova / Violation in respect of Russia).** The applicants, children and parents from the Moldovan community in the unrecognised separatist entity “Moldavian Republic of Transdnistria”, successfully complained with respect to the Russian Federation about the effects of a language policy adopted by the separatist regime, highly dependent on Russian support, forbidding the use of the Latin alphabet in schools and the subsequent measures taken to enforce the policy.

**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 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](http://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 Transdniestrian conflict which, starting with a movement of resistance to Moldovan independence in 1989, had broken out in violent clashes between the Transdniestrian separatist forces and the Moldovan security forces in 1991. The Moldovan army was prevented from regaining control of Transdniestria 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 Transdniestria (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 Transdniestria 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 Transdniestria were not relevant to the applicants’ case, and that there was no evidence of any direct Russian 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 Transdniestria had been insignificant during the relevant period, comprising 1,000 servicemen to guard the arms store at Colbașna 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 *Ilaşcu and Others v. Moldova and Russia* of 2004 concerning the detention of four men in the "MRT" for terrorist activities allegedly committed during the Transdniestrian conflict of 1991-1992.), Transdniestria 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 Transdniestria, 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 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 Transdniestrian 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.

75. **ECHR, *El-Masri v. "The former Yugoslav Republic of Macedonia"*, no. 39630/09, Grand Chamber judgment of 13 December 2012 (Article 3, Prohibition of torture and inhuman or degrading treatment – 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).** 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 before being transferred by the Central Intelligence Agency (CIA) of the United States of America to a secret detention facility in Afghanistan, where he was further ill-treated for more than four months. He successfully argued that during his extrajudicial abduction and arbitrary detention he had been subjected to inhuman and degrading treatment on various counts. The Court further 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. Moreover, the failure by the State to carry out an effective investigation into the arguable complaints of Mr El-Masri had undermined the effectiveness of any other remedy, including a civil action for damages, in violation of Article 13.

**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 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\* (all reference to Kosovo\*, whether to the territory,

institutions or population, shall be understood in full compliance with United Nations Security Council Resolution 1244 and without prejudice to the status of 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 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. 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" (In a previous decision (*Babar Ahmad and Others v. the United Kingdom* 24027/07, 11949/08 and 36742/08 of 6 July 2010), the Court adopted the definition of "extraordinary rendition" used by the United Kingdom Intelligence and Security Committee and took it to mean "the extra-judicial transfer of persons from one jurisdiction or State to another, for the purposes of detention and interrogation outside the normal legal system, where there was a real risk of torture or cruel, inhuman or degrading treatment.").

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 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.

76. **ECHR, *Chapman v. Belgium*, no. 39619/06, Chamber decision of 5 March 2013 (Article 6-1, Right of access to a court – Inadmissible).** The applicant, a former employee of the North Atlantic Treaty Organization (NATO), was denied a judgment in his favour at the Brussels Employment Tribunal after NATO invoked jurisdictional immunity. The Court declared the application inadmissible since the applicant had omitted to make use of an effective internal remedy at his disposal before the NATO Appeal Board.
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**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.

#### **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),

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.

77. **ECHR, *Oleynikov v. Russia*, no. 36703/04, judgment of 14 March 2013 (Article 6, Right of access to a court – 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 loan 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.
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**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 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 (adopted by the United Nations General Assembly on 2 December 2004 and signed by Russia on 1 December 2006), 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.

### **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.

78. **ECHR, *Stichting Mothers of Srebrenica and Others v. the Netherlands*, no. 65542/12, Chamber decision of 11 June 2013 (Article 6, Right of access to a court – Inadmissible).** The applicants, 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 persons killed in the massacre, claimed 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 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; 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:

**Josep Casadevall** (Andorra), *President*,  
**Alvina Gyulumyan** (Armenia),  
**Corneliu Bîrsan** (Romania),  
**Ján Šikuta** (Slovakia),

Luis **López Guerra** (Spain),  
Nona **Tsotsoria** (Georgia),  
Johannes **Silvis** (the Netherlands),

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 (*Germany v. Italy: Greece intervening*, judgment of 3 February 2012. The case concerned, among other things, the question whether the Italian courts ought to have respected the immunity of Germany in cases considered by them in which compensation was claimed from Germany of damage resulting from violations of international humanitarian law by German troops in World War II. That question was answered in the affirmative by the ICJ.). 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 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.

79. **ECHR, *Wallishauser v. Austria* (No. 2), no. 14497/06, Chamber judgment of 20 June 2013 (Article 1 of Protocol No. 1, Protection of property – No violation; Article 14, Prohibition of Discrimination, taken in conjunction with Article 1 of Protocol No. 1 or Article 6 – No violation).** The applicant, an Austrian national unlawfully dismissed from her job at United States Embassy in Vienna, obtained payment of salary arrears from the United States of America in proceedings before the Austrian courts, but was ordered to pay the entire social security contributions, including the employer's share for these. She 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.
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**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**

80. **ECHR, *Maktouf and Damjanović v. Bosnia and Herzegovina*, nos. 2312/08 and 34179/08, Grand Chamber judgment of 18 July 2013 (Article 7, No punishment without law – Violation).** The applicants, two men convicted of war crimes by the Court of Bosnia and Herzegovina, successfully argued that a more stringent criminal law had been applied to them retroactively instead of the criminal law which had actually been applicable at the time they had committed the offences.
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**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 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),  
 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 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.

81. **ECHR, *Janowiec and Others v. Russia*, nos. 55508/07 & 29520/09, Grand Chamber judgment of 21 October 2013 (Article 2, Right to life – No jurisdiction *ratione temporae*; Article 3, Prohibition of torture and inhuman or degrading treatment – No violation; Article 38, Obligation to furnish all necessary facilities for the examination of the case – Violation).** The applicants, 15 Polish nationals who are relatives of 12 victims of the Katyń massacre, complained that an effective investigation had not been carried out, as instances of war crimes, 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.
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**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.

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 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 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 Katyń 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.

82. **ECHR, *Al-Dulimi and Montana Management Inc. v. Switzerland*, no. 5809/08, Chamber judgment of 26 November 2013 (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 (see also the Grand Chamber judgment, case no. 143).

**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 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** (Lithuania),  
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

#### 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 standards. 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.

- 83. ECHR, *X v. Latvia*, no. 27853/09, Grand Chamber judgment of 26 November 2013 (Article 8, Right to respect for private and family life – Violation).** The applicant, a Latvian national, successfully contested the Latvian courts' order for the return of her daughter from Latvia to Australia in application of the Hague Convention on the Civil Aspects of International Child Abduction of 1980. The child had been born out of wedlock in Australia to the applicant and an Australian father. The applicant, then the child's sole guardian, had brought her daughter to Latvia at the age of three. The Court considered that the European Convention on Human Rights and the Hague Convention had to be applied in a combined and harmonious manner, and that the best interests of the child had to be the primary consideration.

**ECHR 348 (2013)  
26.11.2013**

**Press Release issued by the Registrar of the Court**

In today's **Grand Chamber** judgment in the case of **X v. Latvia** (application no. 27853/09), which is final, the European Court of Human Rights held, by a majority, 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 procedure for the return of a child to Australia, her country of origin, which she had left with her mother at the age of three years and five months, in application of the Hague Convention on the Civil Aspects of International Child Abduction, and the mother's complaint that the Latvian courts' decision ordering that return had breached her right to respect for her family life within the meaning of Article 8 of the Convention.

The Court considered that the European Convention on Human Rights and the Hague Convention on the Civil Aspects of International Child Abduction of 25 October 1980 had to be applied in a combined and harmonious manner, and that the best interests of the child had to be the primary consideration. In the present case, it considered that the Latvian courts had not complied with the procedural requirements of Article 8, in that they had refused to take into consideration an arguable allegation of a "serious risk" to the child in the event of her return to Australia.

**Principal facts**

The applicant, X., is a Latvian national who was born in 1974, and who also obtained Australian nationality in 2007 and now lives in Australia.

In 2004, while she was living in Australia and was married, the applicant began a relationship with another man, T., and moved in with him. In 2005 she gave birth to a daughter. The birth certificate did not give the father's name. The relationship between the applicant and T. deteriorated, but they continued to live together until 17 July 2008, when the applicant left Australia for Latvia with her daughter, then aged three years and 5 months.

T. then applied to an Australian Family Court, which recognised his paternity and held that he had had joint parental responsibility since the child's birth. At the same time, the Australian authorities submitted to their Latvian counterpart a request for the child's return to Australia, in application of the Hague Convention on the Civil Aspects of International Child Abduction of 25 October 1980. In November 2008 the Latvian first-instance court ruled that the child's removal had been unlawful and

had been carried out without the consent of T., whose rights had been recognised by an Australian court. The applicant appealed against that judgment, putting forward, in particular, the child's ties with Latvia, and criticising T.'s conduct and the lack of information about her daughter's situation in the event of return. While alleging her own inability to return to live in Australia again, the applicant submitted a report, drawn up at her request by a professional, which concluded that there was a risk of psychological trauma for her child in the event of immediate separation. In January 2009 the Riga Regional Court upheld the first-instance judgment ordering the child's return to Australia. Holding that the applicant's allegations were unfounded, it stated, with regard to the risk raised in the psychological report, that it was not called upon to rule on that issue, since it concerned the merits of the custody issue, which was not part of the procedure for the child's return as foreseen by the Hague Convention. Following that judgment, T. took advantage of a chance encounter to recover his daughter and return with her to Australia. He has since exercised parental rights alone, but the applicant, who is once again living in Australia and working for a public institution, has regular contact with her daughter.

### Complaints, procedure and composition of the Court

Relying on Article 8 (right to respect for private and family life) of the Convention, the applicant alleged that she had been the victim of an infringement of her right to respect for her family life within the meaning of Article 8 of the Convention, on account of the Latvian courts' decision to order her daughter's return to Australia in application of the Hague Convention on the Civil Aspects of International Child Abduction.

The application was lodged with the European Court of Human Rights on 8 May 2009.

In its chamber judgment of 15 November 2011, the Court concluded, by a majority, that there had been a violation of Article 8. On 4 June 2012 the case was referred to the Grand Chamber at the Government's request. A hearing took place in public before the Grand Chamber in the Human Rights Building, Strasbourg, on 10 October 2012. Written observations were received from the Finnish and Czech Governments, and from the non-governmental organisation Reunite Child International Child Abduction Centre, the President having authorised them to intervene in the procedure before the Grand Chamber as third parties.

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

Dean **Spielmann** (Luxembourg), *President*,  
 Nicolas **Bratza** (United Kingdom),  
 Guido **Raimondi** (Italy),  
 Ineta **Ziemele** (Latvia),  
 Mark **Villiger** (Liechtenstein),  
 Nina **Vajić** (Croatia),  
 Khanlar **Hajiyev** (Azerbaijan),  
 Danutė **Jočienė** (Lithuania),  
 Ján **Šikuta** (Slovakia),  
 Päivi **Hirvelä** (Finland),  
 George **Nicolaou** (Cyprus),  
 Zdravka **Kalaydjieva** (Bulgaria),  
 Nebojša **Vučinić** (Montenegro),  
 Angelika **Nußberger** (Germany),  
 Julia **Laffranque** (Estonia),  
 Paulo **Pinto de Albuquerque** (Portugal),  
 Linos-Alexandre **Sicilianos** (Greece),

and also Michael **O'Boyle**, *Deputy Registrar*.

## Decision of the Court

### Article 8

The Court noted at the outset that the decision to return the child to Australia had amounted to interference with the applicant's right to respect for her private and family life. That interference had been in accordance with the law. Admittedly, the applicant submitted that the Hague Convention was not applicable in that she had been raising her daughter as a single parent at the time of her departure from Australia. The Court pointed out, however, that that issue, which was a matter solely for the domestic courts, had been expressly examined by the Latvian courts, which had noted that an Australian court had confirmed T.'s paternity and his rights in respect of the child. The Court also considered that this interference had pursued a legitimate aim, namely that of protecting the rights of the child and of her father.

With regard to the necessity of the interference, the Court reiterated that the various international texts had to be applied in a combined and harmonious manner, without conflict or opposition between the different treaties, provided that the Court was able to perform its task, which was to ensure observance of the commitments undertaken by the States Parties to the Convention, through an interpretation of the Convention which guaranteed practical and effective rights.

The Court further noted that there was a broad consensus in support of the idea that in all decisions concerning children, their best interests had to be paramount. Those interests were not the same as those of the parents and, in the context of an application for return made under the Hague Convention – which was distinct from custody proceedings – they had to be evaluated in the light of the exceptions provided for by the Hague Convention, particularly those concerning the passage of time (Article 12) and the existence of a “grave risk” (Article 13 (b)). This task fell to the national authorities, which enjoyed a margin of appreciation in fulfilling it. For its part, the Court had a supervisory role which consisted, without substituting its own assessment for that of the domestic courts, in verifying whether the decision-making process which led to the decision to return the child to the State of habitual residence had been fair and that his or her best interests had been defended.

Thus, in the light of Article 8 of the Convention, while domestic courts called on to examine an application for return were not required, contrary to what may have been submitted, to conduct an in-depth examination of the entire family situation, they had nonetheless to comply with a twofold procedural obligation: on the one hand, by examining the allegations of a “serious risk” to the child in the event of return, and demonstrating such examination through a reasoned decision on this point; and on the other, by satisfying themselves that adequate safeguards were provided in the State of habitual residence (in this case, Australia), particularly through tangible protection measures in the event of a known risk.

In the present case, the Court noted that less than a year had elapsed between the child's departure from Australia and the application for her return to that country, which would ordinarily have implied an immediate return. However, it noted that the applicant had submitted to the Riga Regional Court a certificate, prepared by a psychologist after the first-instance judgment, indicating, *inter alia*, that an immediate separation from her mother was to be ruled out on account of the likelihood of psychological trauma for the child. In the Court's opinion, it was unacceptable for the domestic courts to rule this expert report inadmissible on the ground that it concerned the merits of the custody issue rather than the application for return that was before them, and was thus not part of the proceedings in question: in fact, the psychological report drew attention to a risk of psychological trauma, directly linked to the best interests of the child, and represented an arguable allegation of a “grave risk”, which ought therefore to have been examined in the light of Article 13 (b) of the Hague Convention, as should the issue of whether it was possible for the mother to follow her daughter to Australia and to maintain contact with her. The need to comply with short timelimits, admittedly also laid down by the

Hague Convention, could not exonerate the Latvian authorities from undertaking an effective examination of such an allegation.

In conclusion, the Court held that, in refusing to examine a certificate issued by a professional which disclosed the possible existence of a “serious risk” for the child within the meaning of Article 13 (b) 4 of the Hague Convention, the Latvian authorities had failed to comply with their procedural obligations. It followed that there had been a violation of Article 8 of the Convention.

**Just satisfaction (Article 41)**

The court held that Latvia was to pay the applicant 2,000 euros (EUR) in respect of costs and expenses.

**Separate opinions**

Judges Bratza, Vajić, Hajiyeu, Šikuta, Hirvelä, Nicolaou, Raimondi and Nussberger expressed a dissenting opinion and Judge Pinto de Albuquerque expressed a concurring opinion. These separate opinions are annexed to the judgment.

84. **ECHR, *Perinçek v. Switzerland*, no. 27510/08, Chamber judgment of 17 December 2013 (Article 10, Freedom of expression – Violation).** The applicant, a Turkish politician, successfully argued that he had been wrongfully convicted by the Swiss courts for having publicly expressed the view at conferences in Switzerland that the mass deportations and massacres suffered by the Armenians in the Ottoman Empire in 1915 and the following years had not amounted to genocide describing the Armenian genocide as an “international lie” (see also the Grand Chamber judgment, case no. 120).

**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

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

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 conviction (General Comment No. 34, given in 2011, on freedom of opinion and expression under Article 19 of the International Covenant on Civil and Political Rights) 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.

85. **ECHR, *Jones and Others v. the United Kingdom*, nos. 34356/06 and 40528/06, Chamber judgment of 14 January 2014 (Article 6-1, Right of access to a court – No violation).** The applicants, four British nationals alleging to have 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 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 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.

86. **ECHR, *Paposhvili v. Belgium*, no. 41738/10, Chamber judgment of 17 April 2014 (Article 2, Right to life - No violation; Article 3 - Prohibition of torture and inhuman or degrading treatment - No violation in the event of the applicant's removal to Georgia, Article 8, Right to respect for private and family life – No violation).** The applicant, a seriously ill Georgian national living in Brussels, unsuccessfully argued that if removed to Georgia he would face a risk of premature death as well as a real risk of being subjected to inhuman or degrading treatment or punishment on the ground that the medical treatment he needed did not exist or was unavailable in Georgia (see also the Grand Chamber judgment, case no. 154).

**ECHR 110 (2014)  
17.04.2014**

**Press release issued by the Registrar**

The applicant, **Georgie Paposhvili**, is a Georgian national who was born in 1958 and lives in Brussels. The case concerned a decision to return the applicant to Georgia and ban him from re-entering Belgian territory. Mr Paposhvili arrived in Belgium on 25 November 1998, accompanied by his wife and the latter's six-year-old child. The couple subsequently had a child in August 1999 and another one in July 2006. Between 1998 and 2007 Mr Paposhvili was convicted of a number of offences, including robbery and participation in a criminal organisation. While serving his various prison sentences, Mr Paposhvili was diagnosed with a number of serious medical conditions, including chronic lymphocytic leukaemia and tuberculosis, for which he was treated in hospital. In addition, he submitted several unsuccessful applications for regularisation of his administrative status on exceptional or medical grounds. In August 2007 the Minister for the Interior issued an order for Mr Paposhvili's expulsion from Belgian territory and barred him from re-entering the country for ten years on account of the danger he posed to public order. The order became enforceable once Mr Paposhvili completed his sentence but was not in fact enforced, as he was still undergoing medical treatment. On 7 July 2010 the Aliens Office issued an order for him to leave the country, together with an order for his detention. He was transferred to a secure facility for illegal immigrants with a view to his return to Georgia and a laissez-passer was issued for that purpose. On 23 July 2010 Mr Paposhvili applied to the European Court of Human Rights for an interim measure under Rule 39 of its Rules of Court suspending his removal; the request was granted. He was subsequently released. The order for him to leave Belgian territory was postponed several times. In November 2009 his wife and her three children were granted indefinite leave to remain. Relying on Articles 2 (right to life) and 3 (prohibition of inhuman or degrading treatment) of the European Convention on Human Rights, the applicant alleged that, if deported to Georgia, he would face a risk of premature death as well as a real risk of being subjected to inhuman or degrading treatment or punishment on the ground that the medical treatment he needed did not exist or was unavailable in the country. Lastly, under Article 8 (right to respect for private and family life) of the Convention, he complained that his return to Georgia and exclusion from Belgium for 10 years would result in separation from the rest of his family, who had been granted leave to remain in Belgium.

**No violation of Article 2 or Article 3** – in the event of the applicant's being removed to Georgia

**No violation of Article 8**

**Interim measure** (Rule 39 of the Rules of Court) – not to remove the applicant – still in force until judgment becomes final or until further order.

87. **ECHR, *Cyprus v. Turkey*, no. 25781/94, Grand Chamber judgment of 12 May 2014, (Article 41, 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 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 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.

88. **ECHR, *Ilgar Mammadov v. Azerbaijan*, no. 15172/13, Chamber judgment of 22 May 2014 (Article 5-1, Right to liberty and security – Violation; Article 5-4, Right to judicial review of detention – Violation; Article 6-2, Presumption of innocence – Violation; Article 18, Limitation on use of restrictions on rights - Violation).** The applicant, an Azerbaijani opposition politician and blogger, was arrested and detained pending trial following his reports on street protests in the town of Ismayilli in January 2013. The Court considered that Mr Mammadov, who had a history of criticising the Government, had been arrested and detained without any evidence to reasonably suspect him of having committed the offence with which he was charged, namely that of having organised actions leading to public disorder. The Court concluded that the actual purpose of his detention had been to silence or punish Mr Mammadov for criticising the Government and publishing information it was trying to hide.

**ECHR 144 (2014)**  
**22.05.2014**

**Press release issued by the Registrar of the Court**

In today's **Chamber** judgment in the case of *Ilgar Mammadov v. Azerbaijan* (application no. 15172/13), which is not final, the European Court of Human Rights 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 § 4 (right to judicial review of one's detention);**

**a violation of Article 6 § 2 (presumption of innocence);** and

**a violation of Article 18 (limitation on use of restrictions on rights).**

The case concerned the arrest and detention pending trial of an opposition politician and blogger following his reports on street protests in the town of Ismayilli in January 2013.

The Court considered that Mr Mammadov, who had a history of criticising the Government, had been arrested and detained without any evidence to reasonably suspect him of having committed the offence with which he was charged, namely that of having organised actions leading to public disorder. The Court concluded that the actual purpose of his detention had been to silence or punish Mr Mammadov for criticising the Government and publishing information it was trying to hide.

**Principal facts**

The applicant, *Ilgar Eldar oglu Mammadov*, is an Azerbaijani national who was born in 1970 and lives in Baku. Having been involved in various political organisations for a number of years, he is the co-founder of an opposition party, the Republican Alternative Civic Movement ("REAL"), for which he considered running in the November 2013 presidential elections. He also maintained an Internet blog in which he commented on political issues. In particular, in November 2012, he strongly criticised members of the National Assembly for having adopted a new law introducing heavy sanctions for unauthorised public gatherings.

On 24 January 2013, Mr Mammadov travelled to the town of Ismayilli, northwest of Baku, in order to report on street riots which had broken out there the previous day. According to media reports, the protests had been triggered by an incident involving V.A., the son of the Minister of Labour and nephew of a local politician. The reports claimed that after being involved in a car accident, V.A. had

insulted and physically assaulted passengers of the other car, who were local residents. As a reaction, hundreds of local residents took to the streets and damaged property in Ismayilli thought to be owned by V.A.'s family, including a hotel.

In a joint press statement, the Ministry of Internal Affairs and the Prosecutor General's Office placed the blame for the rioting on a hotel manager and one of his family members, who had allegedly damaged local property and had incited people to riot. Also in response to the rioting, V.A.'s uncle publicly denied that the hotel which had been damaged belonged to his family.

In his blog Mr Mammadov described his impressions of the events in Ismayilli. In particular, on 25 January 2013, he reported that the events were caused by "the general tension arising from corruption and insolence" of public officials. On 28 January 2013, he reported that the hotel which had been damaged was actually owned by V.A. – referring in particular to information found on the official website of the Ministry of Culture and Tourism and on V.A.'s Facebook page – thereby contradicting directly the earlier denial by V.A.'s uncle. Within one hour after the publication of Mr Mammadov's blog post, the information cited by him was removed from these websites, but his blog entry was extensively quoted in the media.

In another joint press statement, on 29 January 2013, the Ministry of Internal Affairs and the Prosecutor General's Office stated, among other things, that two politicians, including Mr Mammadov, had made appeals to local residents in Ismayilli aimed at social and political destabilisation, and that their "illegal actions" would be investigated.

Subsequently Mr Mammadov was questioned by the prosecutor about his role in the events.

According to the record submitted by the Azerbaijani Government, the prosecutor held two face-to-face confrontations, in which two local residents stated that Mr Mammadov had told protesters to throw stones at the police. Mr Mammadov denied these statements as fabricated.

In February 2013, Mr Mammadov was charged with the offences of organising or actively participating in actions causing a breach of public order. A district court ordered his remand in custody for a period of two months, stating in particular that there was a risk he would abscond or disrupt the course of the investigation. Neither the official charges nor the order for his remand in custody mentioned the face-to-face confrontations with the local residents.

Mr Mammadov's detention was subsequently extended on several occasions and his appeals against the detention orders were rejected by the courts. In April 2013, the charges against him were changed to the offence of resistance or violence against public officials, posing a threat to their life or health, which carried a heavier sentence. In March 2014 Mr Mammadov was convicted and sentenced to seven years' imprisonment. His appeal against the conviction is pending.

Mr Mammadov's nomination as a candidate for the presidential elections was refused by the Central Electoral Commission in September 2013, stating that there were a number of invalid signatures among the voter signatures he had submitted in support of his nomination.

### Complaints, procedure and composition of the Court

Relying in particular on Article 5 §§ 1, 3 and 4 (right to liberty and security), Mr Mammadov complained in particular: that he was arrested and detained without a "reasonable suspicion" that he had committed a criminal offence; that the national courts failed to provide relevant and sufficient reasons justifying the necessity for his continued detention; and, that there was no adequate judicial review of his detention. Relying on Article 6 § 2 (presumption of innocence), he complained that his right to be presumed innocent was breached by the press statement issued by the Prosecutor General and the Ministry of Internal Affairs alleging that Mr Mammadov had illegally made appeals to local residents aimed at social and political destabilisation. Furthermore, relying in particular on Article 18

(limitation on use of restrictions on rights), he complained that his rights were restricted for purposes other than those prescribed in the Convention. He submitted that his

arrest and the criminal proceedings against him had been repressive measures aimed at removing him as a critic of the Government and a potentially serious opponent in the presidential elections.

The application was lodged with the European Court of Human Rights on 25 February 2013.

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”),  
 Erik **Møse** (Norway),  
 Ksenija **Turković** (Croatia),  
 Dmitry **Dedov** (Russia),

and also Søren **Nielsen**, *Section Registrar*.

Decision of the Court

#### Article 5 §§ 1 and 3

Concerning Mr Mammadov’s complaint that there had not been a “reasonable suspicion” against him, within the meaning of Article 5 § 1, to justify his arrest and prolonged detention, the Court first noted that the initial charge of “organising public disorder” had subsequently been replaced by a more serious charge, “mass disorder”, without a change to the description of the facts.

As regards the circumstances of his arrest, the Court found it significant that Mr Mammadov was an opposition politician, who had a history of criticising the Government in the wake of the upcoming presidential elections, and that before his arrest he had published in his blog information which showed that at least part of the official version of what had happened in Ismayilli might not be true.

Furthermore, Mr Mammadov had been charged with “organising” a riot that had already started in Ismayilli one day before his visit to the town. By all accounts, he had nothing to do with the original incident of 23 January 2013 which had triggered the protests. Moreover, the authorities’ own account of the events showed that most, if not all, of the damage caused by the rioting had taken place on the day before Mr Mammadov’s arrival. Against this background, the prosecution had essentially accused him of having – one day after the spontaneous protests had already taken place and within the two hours of his stay in Ismayilli – seized considerable control over the situation, established himself as the leader of the protestors, whom he had not known before, and had directly caused the subsequent disorder.

Mr Mammadov had consistently submitted that the prosecution had failed to produce any evidence giving rise to a reasonable suspicion that he had committed any of the crimes with which he was charged. The Court observed that the Government had not submitted any specific arguments to rebut his assertions. In particular, the prosecution’s official documents mentioned no witness statements or other specific information giving reason to suspect him of those crimes. As regards the records of Mr Mammadov’s face-to-face confrontations with the local residents, they had not been presented to the national courts and they had been submitted by the Government without any explanation as to why they were relevant to the complaint.

The Court concluded that the Government had not demonstrated that during the period under consideration Mr Mammadov had been deprived of his liberty on a “reasonable suspicion” of having committed a criminal offence. There had accordingly been a violation of Article 5 § 1.

Having regard to this finding, the Court considered it unnecessary to examine separately, in particular, whether the reasons given by the national courts for his continued detention had been based on relevant and sufficient grounds, as required by Article 5 § 3.

#### **Article 5 § 4**

Mr Mammadov's detention had been ordered and extended, on each occasion, by courts at two levels of jurisdiction. However, the courts had consistently failed to verify the reasonableness of the suspicion against him. They had repeatedly ignored Mr Mammadov's submissions in this regard, notably his argument that there were no reasons to believe that he would abscond and that he had voluntarily appeared before the prosecution as soon as he had been asked to do so. The national courts had simply copied the prosecution's written submissions and used short, vague and stereotyped formulae for rejecting his complaints. The Court therefore considered that there had been no genuine review of the lawfulness of Mr Mammadov's detention, which was sufficient to conclude that there had been a violation of Article 5 § 4.

#### **Article 6 § 2**

As regards the press statement issued by the Prosecutor General and the Ministry of Internal Affairs, the Court noted that, given that Mr Mammadov was a politician, it might have been considered reasonable for the authorities to keep the public informed of the criminal accusations against him.

However, the Court considered that the statement, assessed as a whole, had not been made with the necessary discretion. Whereas the relevant paragraph concluded by stating that Mr Mammadov's actions would be "fully and thoroughly investigated" and would "receive legal assessment", this wording was contradicted by a preceding unequivocal declaration, in the same sentence, that those actions had been "illegal". Moreover, in the same paragraph it was stated that it had been "established" that he had called on local residents to resist the police.

Having regard to the statement's wording as a whole, it could only have encouraged the public to believe that Mr Mammadov was guilty before he had been proved guilty under the law. There had accordingly been a violation of Article 6 § 2.

#### **Article 18**

The Court had already found that the charges against Mr Mammadov had not been based on a "reasonable suspicion" for the purpose of Article 5 § 1. It could be concluded from this finding that the authorities had not acted in good faith. As the Court had found under Article 5 § 1, it was significant that Mr Mammadov was an opposition politician with a history of criticising the Government, and he had nothing to do with the original incident of 23 January 2013 which had triggered the protests in Ismayilli.

Moreover, the Court considered that his arrest was linked to specific entries in his blog, in particular that of 28 January 2013, in which he shed light on information which the Government had attempted to withhold from the public. He had first been asked to appear for questioning by the prosecutor after publishing that statement. Those circumstances indicated that the actual purpose of the measures taken had been to silence or punish Mr Mammadov for criticising the Government and attempting to disseminate what he believed to be true information which the Government was trying to hide.

The Court therefore concluded that the restriction of Mr Mammadov's liberty had been applied for purposes other than bringing him before a competent legal authority on reasonable suspicion of having committed an offence. This was a sufficient basis for finding that there had been a violation of Article 18 in conjunction with Article 5.

**Just satisfaction (Article 41)**

The court held that Azerbaijan was to pay Mr Mammadov 20,000 euros (EUR) in respect of nonpecuniary damage and EUR 2,000 in respect of costs and expenses.

89. **ECHR, *Marguš v. Croatia*, no. 4455/10, Grand Chamber judgment of 27 May 2014 (Article 6-1, Right to a fair trial, and, Article 6-3-c, Right to legal assistance – No violation; Article 4 of Protocol No. 7, Right not to be tried or punished twice – 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 the *ne bis in idem* principle.

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**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 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 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.

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.

90. **ECHR, *Jelić v. Croatia*, no. 57856/11, Chamber judgment of 12 June 2014 (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 1991 and subsequently killed by the police, successfully complained that there had been no adequate investigation into the death of her husband.
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**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 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 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.

91. ECHR, *Georgia v. Russia (I)*, no. 13255/07, Grand Chamber judgment of 3 July 2014 (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 and inhuman or degrading treatment – Violation; Article 13, Right to an effective remedy – Violation; Article 38, Obligation to furnish all necessary facilities for the examination of the case – 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 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 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 relinquished 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:

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.

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 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.

92. **ECHR, *Ališić and Others v. Bosnia and Herzegovina, Croatia, Serbia, Slovenia and "The former Yugoslav Republic of Macedonia"*, no. 60642/08, Grand Chamber judgment of 16 July 2014 (With regard to Mr Šahdanović: Article 1 of Protocol No. 1, Protection of property – Violation by Serbia; Article 13, Right to an effective remedy – Violation by Serbia; With regard to Ms Ališić and Mr Sadžak: Article 1 of Protocol No. 1 – Violation by Slovenia; Article 13 – Violation by Slovenia; With regard to the other respondent States: Article 1 of Protocol No. 1 – No violation; Article 13 – 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, had been unable to retrieve money deposited by them at national banks in the former Yugoslavia since the dissolution of the country. They partially successfully claimed the successor 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 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 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' request. 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* (compatibility *ratione personae* requires the alleged violation of the Convention to have been committed by a Contracting State or to be in some way attributable to it). 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

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.

93. **ECHR, *Al Nashiri v. Poland*, no. 28761/11, and, *Husayn (Abu Zubaydah) v. Poland*, no. 7511/13, Chamber judgments of 24 July 2014 (Article 3, Prohibition of torture and inhuman or degrading treatment – 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 trial – Violation; Articles 2 and 3 taken together with Article 1 of Protocol No. 6, Abolition of the death penalty – Violation as regards Mr Al-Nashiri).** 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 (CIA) facility in Poland and later to Guantanamo Bay, alleging torture and ill-treatment, and failure to carry out a subsequent investigation into their allegations.

**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.

## 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 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 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 Pinior, 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 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.

### **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.

94. **ECHR, *Oao Neftyanaya Kompaniya Yukos v. Russia* (just satisfaction), no. 14902/04, Chamber judgment of 31 July 2014 (Article 41, Just satisfaction).** In its Chamber judgment on the merits (see case no. 63) the Court found several Convention violations concerning the tax assessment proceedings against the applicant, a company registered in the Russian Federation. In this subsequent judgment on just satisfaction the Court found that Russia was to pay 1,866,104,634 euros (EUR) in respect of pecuniary damage to the shareholders of Yukos as they had stood at the time of the company's liquidation and 300,000 euros (EUR) in respect of costs and expenses to the Yukos International Foundation.
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**ECHR 237 (2014)**

**31.07.2014**

**Press release issued by the Registrar of the Court**

In a **Chamber** judgment in the case of **Oao Neftyanaya Kompaniya Yukos v. Russia** (application no. 14902/04), adopted on 24 June 2014 and delivered today, which is not final, the European Court of Human Rights ruled on the question of the application of Article 41 (just satisfaction) of the European Convention on Human Rights.

The Court held, *by a majority*:

that Russia was to pay the shareholders of Yukos as they had stood at the time of the company's liquidation and, if applicable, their legal successors and heirs 1,866,104,634 euros (EUR) in respect of pecuniary damage; and,

that Russia had to produce, in co-operation with the Council of Europe's Committee of Ministers, within six months from the date on which the judgment became final, a comprehensive plan for distribution of the award of just satisfaction.

The Court further held, *by a majority*, that Russia was to pay EUR 300,000 in respect of costs and expenses to the Yukos International Foundation.

The Court also held, unanimously, that the finding of a violation constituted in itself sufficient just satisfaction for the non-pecuniary damage sustained by Yukos.

**Principal facts**

The case concerned the tax and enforcement proceedings brought in 2004 against the Russian oil company, OAO Neftyanaya Kompaniya Yukos (Yukos), which eventually led to its liquidation in 2007.

In its Chamber judgment on the merits (see press release), delivered on 20 September 2011, the Court found a violation of Article 6 §§ 1 and 3 (b) (right to a fair trial) of the European Convention on Human Rights concerning the tax assessment proceedings for the year 2000 against Yukos, because it had had insufficient time to prepare its case before the lower courts. The Court also found violations of Article 1 of Protocol No. 1 to the Convention (protection of property). It held that: the assessment of the penalties relating to 2000 and the doubling of the penalties for 2001 had been unlawful; and that in the enforcement proceedings against Yukos the Russian authorities had failed to strike a fair balance between the legitimate aim of these proceedings and the measures employed – in particular by being inflexible regarding the pace of the proceedings and obliging Yukos to pay excessive fees.

Since the question of just satisfaction was not ready for decision at the time of the judgment on the merits, the Court reserved it and invited the Russian Government and Yukos to submit their written observations on that issue and to notify the Court of any agreement they might reach. Yukos and the Government each filed written observations on 13 June 2012. Both parties submitted further written observations and then replied to each other's observations on 31 July 2012, 1 March and 15 May 2013.

### Procedure and composition of the Court

The application was lodged with the European Court of Human Rights on 23 April 2004. Its Chamber judgment on the merits was delivered on 20 September 2011.

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

Christos **Rozakis** (Greece), *President*,  
Dean **Spielmann** (Luxembourg),  
Nina **Vajić** (Croatia),  
Khanlar **Hajiyev** (Azerbaijan),  
Sverre Erik **Jebens** (Norway),  
Giorgio **Malinverni** (Switzerland), *Judges*, and,  
Andrey **Yuryevich Bushev** (Russia), *ad hoc Judge*,

and also Søren **Nielsen**, *Section Registrar*.

### Decision of the Court

#### **Application of Article 41 (just satisfaction award)**

As regards the violation of Article 6 on account of the haste with which the Russian courts had conducted the 2000 tax proceedings against Yukos, the Court could not speculate as to what the outcome of these proceedings might have been had the violation of the Convention not occurred. It therefore found that there was insufficient proof of a causal link between the violation found and the pecuniary damage allegedly sustained by Yukos. There was accordingly no ground for an award in this respect.

The Court found, by a majority, that Yukos had sustained pecuniary damage as a result of the violations of Article 1 of Protocol No. 1:

Yukos had paid the penalties in the tax assessment for the years 2000 and 2001 which had been found unlawful by the Court, as well as a 7% enforcement fee on these penalties. The Court assessed the amount of pecuniary damage to Yukos resulting from those payments at EUR 1,299,324,198.

Furthermore, the disproportionate character of the enforcement proceedings had significantly contributed to Yukos' liquidation – even if the liquidation had not been caused by the shortcomings in those proceedings alone, as the company alleged. In its judgment on the merits the Court had found, in particular, that the 7% enforcement fees Yukos had had to pay for the years 2000 to 2003 had been completely out of proportion to the expenses which could have possibly been expected.

The Court accepted an indication by the Russian Government, according to which an appropriate rate for the enforcement fee would have been 4%. The Court thus calculated the difference between an enforcement fee at that latter rate and the fee actually paid, and it deducted from that amount the fees for 2000 and 2001, which it had already found to be unlawful in their entirety. On that basis, the Court assessed the amount of pecuniary damage to Yukos resulting from the payments as a result of the disproportionate character of the enforcement proceedings at EUR 566,780,436.

The overall pecuniary damage therefore amounted to EUR 1,866,104,634.

Regard being had to the fact that Yukos had ceased to exist, the Court decided that this amount should be paid by the Russian Government to Yukos's shareholders and their legal successors and heirs, as the case might be, in proportion to their nominal participation in the company's stock.

The Court also held, unanimously, that the finding of a violation constituted in itself sufficient just satisfaction for the non-pecuniary damage sustained by Yukos.

Finally, the Court held, by a majority, that Russia was to pay a lump sum of EUR 300,000 in respect of costs and expenses to the Yukos International Foundation, which had been created in the Netherlands by Yukos with a view to distributing to its shareholders any funds it would receive.

#### Separate opinions

Judge Jebens expressed a concurring opinion; Judge Bushev, joined in part by Judge Hajiyev, expressed a partly dissenting opinion. These separate opinions are annexed to the judgment.

95. **ECHR, *Trabelsi v. Belgium*, no. 140/10, Chamber judgment of 4 September 2014 (Article 3, Prohibition of torture and inhuman or degrading treatment or punishment – Violation; Article 34, Right of individual application – Violation).** The applicant, a Tunisian national prosecuted for terrorism offences and facing an irreducible life sentence in the United States of America (USA), successfully argued that his extradition from Belgium to the USA, effected despite the indication of an interim measure by the Court, had breached his rights under the Convention as the US law provided for no adequate mechanism for reviewing this type of sentence.

**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.

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.

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 (*Kafkaris v. Cyprus*, no. 21906/04 (GC), § 98, 12 February 2008). Moreover, the prisoner had to be informed of the terms and conditions of this review possibility at the outset of his sentence (*Vinter and Others v. the United Kingdom*, nos. 66069/09, 130/10 and 3896/10 (GC), § 122, 9 July 2013).

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 (“discretionary” in the sense that the judge can impose a less severe sentence, ordering a set number of years' imprisonment) 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.

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.

96. **ECHR, *Pleshkov v. Romania*, no. 1660/03, Chamber judgment of 16 September 2014 (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 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 **Araci**, *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. 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.

97. **ECHR, *Hassan v. United Kingdom*, no. 29750/09, Grand Chamber judgment of 16 September 2014 (Article 1 - State jurisdiction affirmed; Article 2, Right to life – Inadmissible; Article 3, Prohibition of torture and inhuman or degrading treatment – Inadmissible; Article 5, Right to liberty and security – No violation).** The applicant's brother, an Iraqi national, had been captured and detained by British forces at Camp Bucca, a detention centre operated by United States forces in southeastern Iraq during the hostilities in 2003. After his release, the brother's dead body was found bearing marks of torture and execution. The applicant successfully claimed that his brother had been under the control of British forces for the purposes of extra-territorial jurisdiction of the Convention.
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**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.

## 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 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)**

#### 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-law (see Grand Chamber judgment *Al-Skeini and Others v. the UK*, application no. 55721/07) 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.

98. **ECHR, *Tarakhel v. Switzerland*, no. 29217/12, Grand Chamber judgment of 4 November 2014 (Article 3, Prohibition of torture and inhuman or degrading treatment – Violation).** The applicants, an Afghan couple with six children living in Lausanne (Switzerland) and seeking asylum in Switzerland, successfully argued that their return to Italy under the Dublin Regulation in the absence of individual guarantees that the applicants 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 (the Dublin system is designed to determine the Member State responsible for examining an asylum application lodged in one of the European Union Member States by a third-country national) 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 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),  
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 observed (decision in *Mohammed Hussein and Others v. the Netherlands and Italy*, 2 April 2013, no. 27725/10) 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 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.

99. **ECHR, *Jaloud v. the Netherlands*, no. 47708/08, Grand Chamber judgment of 20 November 2014 (Article 2, Right to life – Violation).** The applicant’s son, a civilian Iraqi national, was 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. The applicant 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 Chamber. 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.

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 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**

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.

**100. ECHR, *Ali Samatar and Others v. France*, nos. 17110/10 and 17301/10, and *Hassan and Others v. France*, nos. 46695/10 and 54588/10, Chamber judgments of 4 December 2014 (Article 5-1, Right to liberty and security – Violation; Article 5-3, Right to be brought promptly before a judge - Violation).** The applicants, nine persons who separately took possession of two French-registered cruise ships and their crews hostage with the intention of negotiating their release for a ransom, were arrested on Somalian waters and held in the custody of French military personnel for four and six days respectively before being taken in a military aircraft to France, where they were brought before an investigating judge and placed under judicial investigation.

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**ECHR 361 (2014)**

**04.12.2014**

**Press release issued by the Registrar**

The European Court of Human Rights has today notified its **Chamber** judgments in the cases of **Ali Samatar and Others v. France** (applications nos. 17110/10 and 17301/10) and **Hassan and Others v. France** (applications nos. 46695/10 and 54588/10).

These two cases concerned nine Somali nationals, who, having hijacked French-registered vessels off the coast of Somalia were arrested and held by the French army, then transferred to France, where they were taken into police custody and prosecuted for acts of piracy.

The European Court of Human Rights held, unanimously, that there had been:

**a violation of Article 5 § 1 (right to liberty and security)** of the European Convention on Human Rights in the case of *Hassan and Others*, as the French system applicable at the relevant time had not sufficiently guaranteed the applicants' right to their liberty; and

**a violation of Article 5 § 3 (right to liberty and security)** in both cases, as the applicants had been taken into custody for 48 hours on their arrival in France instead of being brought "promptly" before a legal authority, when they had already been deprived of their liberty for four days and some twenty hours (*Ali Samatar and Others*) and six days and sixteen hours (*Hassan and Others*).

The Court reiterated in particular that the purpose of Article 5 § 3 was to facilitate the detection of any ill-treatment and to minimise any unjustified interference with individual liberty, in order to protect the individual, by means of an automatic initial review, within a strict time-frame leaving little flexibility in interpretation. The Court's case-law to the effect that periods of two or three days before the initial appearance before a judge did not breach the promptness requirement under Article 5 § 3 was not designed to give the authorities the opportunity to intensify their investigations for the purpose of bringing formal charges against the suspects.

**Principal facts**

*Ali Samatar and Others*

The applicants in the first case are six Somali nationals: Abdurahman Ali Samatar (application no. 17110/10), born in 1984, and also Ismael Ali Samatar, Abdulqader Guled Said, Mohamed Said Hote, Abdullahi Yusuf Hersi and Daher Guled Said (application no. 17301/10), born in 1981, 1978, 1962, 1987 and 1978 respectively. They were prosecuted in France for acts of piracy committed in 2008.

On 4 April 2008 at 11.15 a.m., mid-way between the coasts of Yemen and Somalia, a cruise ship flying the French flag, the *Ponant*, was intercepted by a dozen men armed with assault rifles and

rocket launchers. They took possession of the vessel and took its crew hostage – about 30 crew members including 20 French nationals – and sailed it towards the Somali coast. At 1.30 p.m. the French Prime Minister launched the “pirate-sea” plan, mobilising all available resources in the area.

On the next day the Somali Transitional Federal Government (TFG) sent a diplomatic note to the French authorities, authorising them to enter Somali territorial waters and to take all necessary measures – including the proportionate use of force – in the context of the crisis. On 11 April, while the *Ponant* was moored off the Somali port of Garacad, the French hostages were released in return for a ransom of 2,150,000 US dollars. On the same day around noon, the six applicants were intercepted by the GIGN (intervention brigade of the French Gendarmerie) just as they were leaving Garacad in a four-wheel-drive vehicle.

The applicants were placed under French military control before being put on a military aircraft on 15 April, around 3 p.m., as soon as the Somali authorities had given their permission. The plane landed in France at around 5.15 p.m. on 16 April 2008. The suspects were taken into police custody. On the morning of 18 April they were taken before an investigating judge and placed under judicial investigation.

The Investigation Division of the Paris Court of Appeal, before which the applicants had lodged an appeal against that decision, complaining in particular that their arrest on Somali territory and their detention before their arrival in France had been unlawful, held in a judgment of 6 April 2009 that the proceedings had been lawful. They had, in particular, been conducted in the context of *ad hoc* cooperation with the Somali authorities and, taking account of the circumstances, in compliance with the requirement of promptness imposed by Article 5 of the European Convention on Human Rights. On 16 September 2009 the applicants’ appeals on points of law were dismissed by a judgment of the Court of Cassation, which found in particular that “insurmountable circumstances, characterised by a wait for the Somali authorities to agree to the transfer of the six suspects to France, justified their deprivation of liberty for about five days before their police custody was officially ordered on 16 April 2008”.

#### *Hassan and Others*

The applicants are three Somali nationals, Yacoub Mohammed Hassan, Cheik Nour Jama Mohamoud (application no. 46695/10) and Abdulhai Guelleh Ahmed (application no. 54588/10), who were born in 1983, 1979 and 1975 respectively. They were prosecuted in France for acts of piracy committed in 2008.

On 2 September 2008, off the Somali coast, the French yacht *Carré d’As* was intercepted by three men who obliged the crew, a French couple, to change course in order to join some other vessels. About ten men then boarded the yacht, which reached the Somali coast that evening. The couple were robbed of their possessions and held hostage for a ransom of two million dollars.

On 5 September 2008 the French Naval frigate *Courbet*, which was patrolling the Gulf of Aden, arrived on the scene with a team of commandos. An operation to free the hostages was launched by the French military forces. On 2 June 2008 the United Nations Security Council had adopted a resolution (1816) authorising, for a six-month period, the States cooperating with the Somali TFG in the fight against piracy to enter Somalia’s territorial waters and use all available means to repress acts of piracy and armed robbery. An attack was carried out on 16 September at 0.30 a.m. and six Somalis, including the applicants, were arrested, while they were within Somali territorial waters, and were placed under military guard on the *Courbet*. Having been taken onto the frigate at about 2 a.m. they were held on board until 1.30 p.m. on 22 September 2008. After the Somali authorities had agreed, on 21 September, to the transfer of the six Somali suspects, the applicants were then taken on that date to the Djibouti military base pending their transfer to France. They were put on a military plane on 23 September 2008 and arrived in France on the same day at around 4 p.m. They were then held in police

custody until 25 September 2008 at 2.30 p.m., after which they were brought before an investigating judge on the same day: at 5.54 p.m. in the case of Mr Yacoub Mohammed Hassan, 7.30 p.m. in that of Mr Abdulhai Guelleh Ahmed and 8.09 p.m. in that of Mr Cheik Nour Jama Mohamoud They were then placed under judicial investigation and remanded in custody after their first-appearance examination by the judge.

Ruling on appeals by the applicants, the Investigation Division of the Paris Court of Appeal dismissed their applications on 6 October 2009, finding among other things that “the only measures to have been taken were adapted, in particular, to the aims laid down in Resolution 1816” and that this was especially the case for the restriction on the suspects’ freedom of movement. The court thus held that their arrest and detention pending placement in police custody had not breached Article 5 of the European Convention on Human Rights, having regard in particular to the “wholly exceptional circumstances” of the case in temporal and geographical terms. On 17 February 2010 appeals by the four applicants on points of law were dismissed by the Court of Cassation.

### Complaints, procedure and composition of the Court

Relying on Article 5 § 1 (right to liberty and security), the applicants in the case of *Hassan and Others* alleged that their detention by the French military authorities from 16 to 23 September 2008 had no legal basis.

In both cases, relying on Article 5 § 3 (right to liberty and security), the applicants complained that they had not been “brought promptly before a judge or other officer authorised by law to exercise judicial power” after their arrest by the French army in Somali territorial waters / on Somali territory.

Mr Ahmed (*Hassan and Others*) and the applicants in the case of *Ali Samatar and Others* also complained, under Article 5 § 4 (right to have lawfulness of detention decided speedily), that they did not have access to a court to challenge the lawfulness of their arrest in Somalia or their detention until they were taken into police custody in France.

The applications were lodged with the European Court of Human Rights respectively on 15 and 16 March 2010 (*Ali Samatar and Others*) and 13 and 16 August 2010 (*Hassan and Others*).

The Greek Government were authorised to submit written comments as a third-party intervener (Article 36 § 2 of the Convention) in both cases.

The judgments were given by a Chamber of seven judges, composed as follows:

Mark **Villiger** (Liechtenstein), *President*,  
 Angelika **Nußberger** (Germany),  
 Boštjan M. **Zupančič** (Slovenia),  
 Ganna **Yudkivska** (Ukraine),  
 Vincent A. **de Gaetano** (Malta),  
 André **Potocki** (France),  
 Aleš **Pejchal** (the Czech Republic),

and also Claudia **Westerdiek**, Section Registrar.

### Decision of the Court

#### **Article 5 § 1 (*Hassan and Others*)**

The Court took the view that the applicants had undergone a “lawful arrest or detention ... effected for the purpose of bringing [them] before the competent legal authority”, within the meaning of Article 5

§ 1 (c), noting in particular that there had been “plausible reasons” to suspect them of committing offences against a French vessel and French citizens. The Court further found that the authorities had acted on the basis of Resolution 1816 adopted by the United Nations Security Council on 2 June 2008, authorising States, for a period of six months, to enter the territorial waters of Somalia for the purpose of repressing acts of piracy in a manner consistent with such action permitted on the high seas with respect to piracy under relevant international law. Having regard to Articles 101 and 105 (definition of piracy and seizure of a pirate ship) of the United Nations Convention on the Law of the Sea (Montego Bay Convention of 10 December 1982, see §§ 34 and 35 of the judgment), it found that the applicants’ detention had had a legal basis.

The Court found, however, that the applicable law at the relevant time did not meet the quality criteria laid down by its case-law. It did accept that the French authorities’ intervention in Somali territorial waters on the basis of Resolution 1816 was “foreseeable”: in the light of that Resolution, the applicants had been able to foresee, to a reasonable degree in the circumstances of the case, that by hijacking the *Carré d’As* and taking its crew hostage they might be arrested and detained by the French forces for the purposes of being brought before the French courts. It noted, however, that the law applicable at the relevant time to the situation of individuals arrested by French forces for acts of piracy on the high seas did not include any rule defining the conditions of deprivation of liberty that would be subsequently imposed on them pending appearance before the competent legal authority. The Court thus concluded that the legal system in force at the relevant time did not provide sufficient protection against arbitrary interference with the right to liberty and that there had therefore been a violation of Article 5 § 1.

### Article 5 § 3

In both cases, referring to its case-law (*Rigopoulos v. Spain* (decision, 12/01/1999), *Medvedyev and Others v. France* (Grand Chamber judgment, 29/03/2010) and *Vassis and Others v. France* (Chamber judgment, 27/06/2013), the Court was prepared to admit that “wholly exceptional circumstances” explained the length of the applicants’ detention between their arrest and their arrival in France. The French authorities had intervened off the coast of Somalia, 6,000 km from mainland France, to repress acts of piracy of which vessels flying the French flag and a number of its citizens had been victims, in an area where piracy was becoming alarmingly rife. As the Somali authorities lacked the capacity to deal with such offences and, in the present case, to ensure that the applicants stood trial, the French authorities had decided to take them back to France. There was no evidence to suggest that the transfer had taken longer than necessary, in the light of the difficulties relating to the organisation of such an operation from a sensitive area like the Horn of Africa, and given that the flight to France had been arranged in both cases as soon as the Somali authorities had given their permission.

The Court noted, however, that on their arrival in France the applicants had been taken into police custody for 48 hours rather than being brought immediately before an investigating judge. There was nothing to justify that additional delay in either of the two cases. The authorities had intervened rapidly after the hostage taking. Eleven days in the case of *Ali Samatar and Others* and at least eighteen days in *Hassan and Others* had thus passed between the decision to intervene and the applicants’ arrival in France, and the French authorities could have made use of that time to prepare for them to be brought “promptly” before the competent legal authority. The Court reiterated, in particular, that the purpose of Article 5 § 3 was to facilitate the detection of any ill-treatment and to minimise any unjustified interference with individual liberty, in order to protect the individual, by means of an automatic initial review, within a strict time-frame leaving little flexibility in interpretation. As regards the French Government’s argument that the applicants’ period in police custody had been necessary for the purposes of the investigation, the Court pointed out that its case-law to the effect that periods of two or three days before the initial appearance before a judge did not breach the promptness requirement under Article 5 § 3 was not designed to afford the authorities an opportunity to intensify their investigations for the purpose of bringing formal charges against the suspects.

Consequently, there had been a violation of Article 5 § 3 on account of the fact that on their arrival in France, the applicants, who had already been detained for four days and about twenty hours (*Ali Samatar and Others*) and six days and sixteen hours (*Hassan and Others*), had been taken into police custody rather than being brought “promptly” before a French legal authority.

#### Other complaints

As regards the complaint submitted by Mr Ahmed and the applicants in *Ali Samatar and Others* under Article 5 § 4, the Court observed that it had already examined under Article 5 § 3 the deprivation of liberty sustained by the applicants before being brought before the investigating judge and placed under judicial investigation. Pointing out that the requirements of paragraph 3 were stricter than those of paragraph 4 as regards the criterion of promptness, the Court found that it did not need to examine the facts under Article 5 § 4.

#### Just satisfaction (Article 41)

The Court held that France had to pay to each of the applicants in the case of *Hassan and Others* 5,000 euros (EUR) in respect of non-pecuniary damage, and EUR 7,272.46 to Abdulhai Guelleh Ahmed for costs and expenses, and in *Ali Samatar and Others*, EUR 2,000 to each of the applicants in respect of non-pecuniary damage, and for costs and expenses, EUR 9,000 to Abdurahman Ali Samatar, EUR 6,000 jointly to Ismael Ali Samatar, Abdulqader Guled Said, Mohamed Said Hote, Abdullahi Yusuf Hersi and Daher Guled Said, and EUR 3,000 to Abdulqader Guled Said.

- 101. ECHR, *Klausecker and Perez v. Germany*, nos. 415/07 and 15521/08, Chamber decision of 6 January 2015 (Article 6, Right of access to a court - Inadmissible).** Based on jurisdictional immunity of the international organisations in question, the applicants were denied access to German labour and civil courts to challenge their refusal of employment at the European Patent Office, in the first case, and, dismissal from the United Nations, in the second case. The Court declared both applications inadmissible. Given that Mr Klausecker had had access to an arbitration procedure offered by the EPO to protect his rights, the limitation on his access to the German courts had been proportionate and his application to the Court manifestly ill-founded. The Court noted that Germany could only be held responsible in the circumstances of the case if the protection of fundamental rights offered by the EPO was manifestly deficient. The application of Ms Perez was declared inadmissible due to non-exhaustion of local remedies.
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**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 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.

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.

- 102. ECHR, *Petropavlovskis v. Latvia*, no. 44230/06, Chamber judgment of 13 January 2015 (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.
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**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.

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 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.

**103. ECHR, *A.A. v. France & A.F. v. France*, nos. 18039/11 and 80086/13, Chamber judgment of 15 January 2015 (Article 3, Prohibition of torture and inhuman or degrading treatment – 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 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.

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.

**104. ECHR, *Gallardo Sanchez v. Italy*, no. 11620/07, Chamber judgment of 24 March 2015 (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.

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**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.

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 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.

**105. ECHR, *Ouabour v. Belgium*, no. 26417/10, Chamber judgment of 2 June 2015 (Article 3, Prohibition of torture and inhuman or degrading treatment – Violation; Article 13, Right to an effective remedy, taken in conjunction with Article 3 – No violation).** The applicant was sentenced to six years imprisonment for activity in a terrorist organisation and for criminal conspiracy. In view of his pending extradition to Morocco, he successfully alleged that 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 Ouabour 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.

**106. ECHR, *Kyriacou Tsiakkourmas and Others v. Turkey*, no. 13320/02, Chamber judgment of 2 June 2015 (Article 3, Prohibition of torture and inhuman or degrading treatment – No violation with regard to alleged ill-treatment / Violation with regard to effective investigation; Article 5-1, Right to liberty and security – No violation; Article 5-4, Right to judicial review of detention – Violation).** The first applicant, a Greek Cypriot national, 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”. He and 12 of his relatives maintained before the Court that the abduction of the first applicant from the SBAs had violated national and international law.

**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 him 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.

**107. ECHR, *J.K. and Others v. Sweden*, no. 59166/12, Chamber judgment of 4 June 2015 (Article 3, Prohibition of torture and inhuman or degrading treatment – 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 in Sweden, unsuccessfully argued that their return to Iraq would put them at risk of persecution and ill-treatment by Al-Qaeda (see also the Grand Chamber judgment, case no. 145).

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**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

- 108. ECHR, *Sargsyan v. Azerbaijan*, no. 40167/06, Grand Chamber judgment of 16 June 2015 (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 in 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 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),  
 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**

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.

### **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.

#### **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.

- 109. ECHR, *Chiragov and Others v. Armenia*, 13216/05, Grand Chamber judgment of 16 June 2015 (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.

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 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**

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.

#### **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.

#### **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.

**110. ECHR, *Manole and “Romanian Farmers Direct” v. Romania*, no. 46551/06, Chamber judgment of 16 June 2015 (Article 11, Freedom of assembly and association – No violation).** The applicants’ wish to register the union of self-employed farmers was refused by the Romanian courts. 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.

**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 Organise (adopted in 2012 and published in 2013), 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 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.

- 111. ECHR, *Delfi AS v. Estonia*, no. 64569/09, Grand Chamber judgment of 16 June 2015 (Article 10, Freedom of expression – No violation).** Interpreting and applying the European Union Directive 2000/31/EC, the Court held – contrary to the applicants’ 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.
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**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.

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" (*"avaldajad"*). 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 Convention (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 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 – 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 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 Kjølbros 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.

**112. ECHR, *Abdulla Ali v. the United Kingdom*, no. 30971/12, Chamber judgment of 30 June 2015 (Article 6-1, Right to a fair trial – No violation). The applicant alleged that, because of extensive adverse media coverage, the criminal proceedings against him for conspiring in a terrorist plot to cause explosions on aircraft using liquid bombs had been unfair.**

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**ECHR 226 (2015)  
30.06.2015**

**Press release issued by the Registrar**

In today's **Chamber** judgment in the case of **Abdulla Ali v. the United Kingdom** (application no. 30971/12) the European Court of Human Rights held, unanimously, that there had been:

**no violation of Article 6 § 1 (right to a fair trial)** of the European Convention on Human Rights.

The case concerned Mr Ali's complaint that, because of extensive adverse media coverage, the criminal proceedings against him for conspiring in a terrorist plot to cause explosions on aircraft using liquid bombs had been unfair.

Following a first trial in Mr Ali's case which had resulted in his conviction on a charge of conspiracy to murder, there had been extensive media coverage, including reporting on material which had never been put before the jury. A retrial was subsequently ordered in respect of the more specific charge of conspiracy to murder by way of detonation of explosive devices on aircraft mid-flight (on which the jury at the first trial had been unable to reach a verdict) and Mr Ali argued that it was impossible for the retrial to be fair, given the impact of the adverse publicity. His argument was rejected by the retrial judge and he was convicted at the retrial. He was sentenced to life imprisonment with a minimum term of 40 years.

The Court found in particular that the applicable legal framework in the UK for ensuring a fair trial in the event of adverse publicity had provided appropriate guidance for the retrial judge. It further found that the steps taken by the judge were sufficient. Thus, he considered whether enough time had elapsed to allow the prejudicial reporting to fade into the past before the retrial commenced and recognised the need to give careful jury directions on the importance of impartiality and of deciding the case on the basis of evidence led in court only. He subsequently gave regular and clear directions, to which Mr Ali did not object. The fact that the jury subsequently handed down differentiated verdicts in respect of the multiple defendants in the retrial proceedings supported the judge's conclusion that the jury could be trusted to be discerning and follow his instructions to decide the case fairly on the basis of the evidence led in court alone.

#### Principal facts

The applicant, Abdulla Ahmed Ali, is a British national who was born in 1980 and is currently detained at HM Prison Frankland (County Durham, England).

In August 2006 Mr Ali was arrested, along with others, in the context of a large-scale counter-terrorism operation. It was alleged that he had conspired to cause explosions on board transatlantic flights using liquid bombs.

On 8 September 2008 the jury found him guilty of conspiracy to murder but was unable to reach a verdict on the more specific charge of conspiracy to murder by way of detonation of explosive devices on aircraft mid-flight.

Following the verdict, there was extensive media coverage of the case, including reporting on material which had never been put before the jury. Soon after, the Crown Prosecution Service announced its intention to seek a retrial on the more specific charge of conspiracy to murder by way of detonation of explosive devices on aircraft mid-flight and, around mid-September 2008, the reporting ceased.

After the retrial had been announced Mr Ali sought a stay on proceedings, claiming that a fair trial was no longer possible due to the impact of adverse publicity which had occurred following the conclusion of the first trial. The request for a stay was refused in December 2008, the judge considering that sufficient time would have passed since the end of the prejudicial reporting and the commencement of the retrial to prevent any unfairness to the trial and undertaking to give clear instructions to the jury to try the case only on evidence heard in court.

The retrial started in March 2009. During jury selection, the trial judge underlined the importance of impartiality and asked questions to elicit any information which might put the impartiality of any particular jury member in doubt. Once the jury had been selected and then throughout the trial, the judge gave directions to the jury not to discuss the case with family or friends, not to read newspaper reports or watch television broadcasts about the case and not to carry out research. He emphasised in particular that the jury had to decide the case on the evidence heard in court and nowhere else. During his summing-up, the judge again reminded the jury that they should not discuss the case with anyone outside the jury and, after the jury had retired to deliberate, he reminded them each evening that they should not discuss the case outside the jury room.

Mr Ali was convicted in September 2009 of conspiracy to murder by way of detonation of explosive devices on aircraft mid-flight and was sentenced to life imprisonment with a minimum term of 40 years. Of four co-defendants retried on charges of conspiracy to murder, one was convicted and the jury were unable to reach a verdict in respect of the other three. Of six co-defendants tried on charges of conspiracy to murder by way of detonation of explosive devices on aircraft mid-flight, two were convicted, three were acquitted and the jury were unable to reach a verdict in respect of one.

Mr Ali's appeal against conviction was dismissed in May 2011. In its decision the Court of Appeal reviewed the ruling of December 2008 on the application for a stay on proceedings, agreeing with the retrial judge that, given the trial process and the time that had elapsed before the retrial, there was no risk of any bias.

#### Complaints, procedure and composition of the Court

Relying on Article 6 § 1 (right to a fair trial), Mr Ali complained that he had not received a fair trial by an impartial tribunal due to the extensive adverse media coverage between his first trial and his retrial.

The application was lodged with the European Court of Human Rights on 15 May 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),  
 Paul **Mahoney** (the United Kingdom),  
 Krzysztof **Wojtyczek** (Poland),  
 Faris **Vehabović** (Bosnia and Herzegovina),

and also Françoise **Elens-Passos**, *Section Registrar*.

## Decision of the Court

The Court recalled that it was rare that pre-trial publicity would make it impossible to have a fair trial at some future date, it generally being sufficient to have an appropriate lapse of time between the prejudicial comments in the media and the subsequent criminal proceedings, together with suitable directions to the jury.

First, the Court looked at the applicable legal framework for ensuring a fair trial in the event of adverse publicity and found that it provided appropriate guidance, which enabled a trial judge to take a variety of steps during the trial process to ensure fairness of the trial.

It accepted that the published material at issue in the case was prejudicial to Mr Ali and went on to examine whether the steps taken by the retrial judge had been sufficient to ensure fairness in Mr Ali's retrial. The Court was satisfied that the judge had taken care to underline the importance of impartiality during jury selection and that, once the jury had been selected, he had given clear directions as appropriate throughout the trial, during his summing-up and each evening after the jury had retired to deliberate. Mr Ali did not object to the selection of the jury members or the content of the judicial directions.

The Court was likewise satisfied with the reasons given by the judge in the retrial for refusing the application for a stay on proceedings and by the Court of Appeal for dismissing the appeal. It noted that when publication of the prejudicial material had commenced, the decision to pursue a retrial had not yet been made. Any members of the public exposed to the reports would not have known at that time that they would be involved in the subsequent retrial. The trial judge had considered whether sufficient time had elapsed to allow the reports to fade into the past, having carefully reviewed the content of each and every instance of reporting to which his attention had been drawn, and had recognised the need for careful jury directions, which he had subsequently given. There was nothing in the circumstances of the case to suggest that the jury could not be relied upon to follow the judge's instructions to try the case only on the evidence heard in court. The fact that the jury subsequently handed down differentiated verdicts in respect of the multiple defendants in the retrial proceedings supported the trial judge's conclusion that the jury could be trusted to be discerning and to ignore previous media reports and, consequently, decide the case fairly on the basis of the evidence led in court.

The Court concluded that it had not been shown that the adverse publicity had influenced the jury to the point of prejudicing the outcome of the proceedings and rendering Mr Ali's trial unfair. There had therefore been no violation of Article 6 § 1 in the present case.

**113. ECHR, *A.S. v. Switzerland*, no. 39350/13, Chamber judgment of 30 June 2015 (Article 3, Prohibition of torture and inhuman or degrading treatment – 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.

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**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**

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* (Grand Chamber judgment, no. 29217/12, 4 November 2014), 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 (Chamber judgment, *D. v. the United Kingdom*, no. 30240/96, 2 May 1997).

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 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.

- 114. ECHR, *V.M. and Others v. Belgium*, no. 60125/11, Chamber judgment of 7 July 2015 (Article 3, Prohibition of torture and inhuman or degrading treatment – 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.
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**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 Regulation (under this Regulation the Member States of the European Union must determine, based on hierarchy of objective

criteria, which Member State bears responsibility for examining an asylum application lodged on their territory. See §§ 100 et seq. of the *V.M. and Others* judgment). 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),  
 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 observed 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 children, 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 events, 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.

**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.

115. ECHR, *A.H. and J.K. v. Cyprus*, nos. 41903/10 and 41911/10, Chamber judgment of 21 July 2015 (Article 5-1, Right to liberty and security, – Violation as regards the lawfulness of the applicants’ detention on 11 June 2010 / No violation as regards the lawfulness of the applicants’ detention from 11 June 2010 until 20 May 2011 / Violation as regards the lawfulness of the second applicant’s detention from 29 November 2012 until 20 December 2012; Article 5-2, Right to be informed promptly of the reasons of one’s arrest – No violation; Article 5-4, Right to judicial review of detention – Violation; Article 4 of Protocol No. 4, Prohibition of collective expulsion of aliens – No violation).

ECHR, *H.S. and Others v. Cyprus*, no. 41753/10 et al., Chamber judgment of 21 July 2015 (Article 5-4, Right to judicial review of detention – Violation; Article 5-1, Right to liberty and security – Violation; Article 5-1 (f), Lawful arrest or detention with a view to deportation or extradition – No violation in respect of nine of the applicants / Violation in respect of the remaining five applicants; Article 5-2, Right to be informed promptly of the reasons of one’s arrest – No violation; Article 4 of Protocol No. 4, Prohibition of collective expulsion of aliens – No violation).

ECHR, *K.F. v. Cyprus*, no. 41858/10, Chamber judgment of 21 July 2015 (Article 5-1, Right to liberty and security, Violation as regards the lawfulness of the applicant’s detention on 11 June 2010 / No violation as regards the lawfulness of the applicant’s detention from 11 June 2010 until 20 April 2011; Article 5-2, Right to be informed promptly of the reasons of one’s arrest – No violation; Article 5-4, Right to judicial review of detention – Violation; Article 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.

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**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 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.

In the case of *A.H. and J.K.*:

**Violation of Article 5 § 1** as regards the lawfulness of the applicants' detention on 11 June 2010 (transfer to and stay at the police headquarters)

**No violation of Article 5 § 1** as regards the lawfulness of the applicants' detention from 11 June 2010 until 20 May 2011

**Violation of Article 5 § 1** as regards the lawfulness of the second applicant's detention from 29 November 2012 until 20 December 2012

**No violation of Article 5 § 2** in so far as the applicants' arrest on 11 June 2010 and their ensuing detention on the basis of the deportation and detention orders issued on that date were concerned

**Violation of Article 5 § 4**

**No violation of Article 4 of Protocol No. 4**

The Court further decided to **discontinue** the application of **Rule 39** of the Rules of Court (**interim measure**).

**Just satisfaction:** 8,000 euros (EUR) (non-pecuniary damage) and EUR 2,956 (costs and expenses) jointly to the applicants

In the case of *H.S. and Others*:

**Violation of Article 5 § 1** as regards the applicants' arrest and detention on 11 June 2010 (transfer to and stay at the police headquarters)

**No violation of Article 5 § 1** in respect of nine of the applicants: F.T., M.J., A.Hu., H.H, A.Ab., M.K., H.M., I.K. and M. Y., (applications nos. 41793/10, 41799/10, 41807/10, 41811/10, 41812/10, 41815/10, 41820/10, 41824/10 and 41919/10)

**Violation of Article 5 § 1** in respect of the remaining five applicants: H.S., A.T., A.M., M.S. and H.Sw., (applications nos. 41753/10, 41786/10, 41794/10 41796/10 and 41921/10)

**No violation of Article 5 § 2**

**Violation of Article 5 § 4**

**No violation of Article 4 of Protocol No. 4**

**Just satisfaction:** The Court dismissed the applicants' claim for just satisfaction.

In the case of *K.F.*:

**Violation of Article 5 § 1** as regards the lawfulness of the applicant's detention on 11 June 2010 (transfer to and stay at the police headquarters)

**No violation of Article 5 § 1** as regards the lawfulness of the applicant's detention from 11 June 2010 until 20 April 2011

**No violation of Article 5 § 2**

**Violation of Article 5 § 4**

**No violation of Article 4 of Protocol No. 4**

**Just satisfaction:** EUR 4,000 (non-pecuniary damage) and EUR 1,590 (costs and expenses)

The applicants' complaints under Article 3 (prohibition of inhuman or degrading treatment) and Article 13 (right to an effective remedy) were declared inadmissible in the first two cases and were struck out of the Court's list of cases in the third case.

- 116. ECHR, *G.S. v. Georgia*, no. 2361/13, Chamber judgment of 21 July 2015 (Article 8, Right to respect for private and family life – Violation).** The applicant, relying on the Hague Convention on the Civil Aspects of International Child Abduction of 1980, successfully complained about the refusal of the Georgian courts to order the return of her son to Ukraine.
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**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 in 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 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.

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

117. ECHR, *Khlaifia and Others v. Italy*, no. 16483/12, Chamber judgment of 1 September 2015 (Article 3, Prohibition of torture and inhuman or degrading treatment – No violation, in respect of the conditions of detention on board the ships / 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, Right to be informed promptly of the reasons of one’s arrest – Violation; Article 5-4, Right to judicial review of detention – Violation; Article 13, Right to an effective remedy, taken in conjunction with Articles 3 and 4 of Protocol No. 4 – Violation). The applicants, Tunisian nationals, successfully alleged, *inter alia*, that their asylum in detention centres on Lampedusa during the Arab spring of 2011 and their repatriation to Tunisia had been unlawful (see also the Grand Chamber judgment, case no. 155).

**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

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 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 CSPA (this fact was corroborated by the observations of the Extraordinary Commission of the Italian Senate and of the *Ad hoc* Sub-Committee of the Parliamentary Assembly of the Council of Europe, see paragraph 70 of the judgment). 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 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* (Grand Chamber, 23.02.2012), 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 13 (in the *De Souza Ribeiro v. France* judgment, Grand Chamber, 13.12.2012, the Court held that the effectiveness of a remedy for the purposes of Article 13 required a thorough independent assessment and an appeal with automatic suspensive effect in the following cases: a) a complaint that the expulsion of the person would expose him to a genuine risk of undergoing treatment contrary to Article 3 of the Convention and/or infringement of his right to life as protected by Article 2 of the Convention; and b) complaints under Article 4 of Protocol No. 4. The requirement of a remedy with automatic suspensive effect *vis-à-vis* the impugned measure cannot be considered as a subsidiary

measure, see *M.S.S. v. Belgium and Greece*, Grand Chamber, 21.01.2011, and *Hirsi Jamaa and Others v. Italy*, Grand Chamber, 23.02.2012). 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.

#### **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.

**118. ECHR, *Sõro v. Estonia*, no. 22588/08, Chamber judgment of 3 September 2015 (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.

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**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 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 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.

- 119. ECHR, *L.M. and Others v. Russia*, nos. 40081/14, 40088/14 and 40127/14, Chamber judgment of 15 October 2015 (Article 2, Right to life – Violation; Article 3, Prohibition of torture and inhuman or degrading treatment – Violation; Article 5-1, Right to liberty and security – Violation; Article 5-4, Right to judicial review of detention – Violation; Article 34, Right of individual application – Violation).** 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

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 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 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.

**120. ECHR, *Perinçek v. Switzerland*, no. 27510/08, Grand Chamber judgment of 15 October 2015 (Article 10, Freedom of expression - Violation).** The Grand Chamber upheld the Chamber judgment (case no. 84). The applicant, a Turkish politician, successfully argued that he had been wrongfully convicted by the Swiss courts for having publicly expressed the view at conferences in Switzerland that the mass deportations and massacres suffered by the Armenians in the Ottoman Empire in 1915 and the following years had not amounted to genocide describing the Armenian genocide as an “international lie”.

**ECHR 325 (2015)**

**15.10.2015**

**Press Release issued by the Registrar of the Court**

In today’s **Grand Chamber** judgment in the case of **Perinçek v. Switzerland** (application no. 27510/08) 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 a Turkish politician for publicly expressing the view, in Switzerland, that the mass deportations and massacres suffered by the Armenians in the Ottoman Empire in 1915 and the following years had not amounted to genocide.

Being aware of the great importance attributed by the Armenian community to the question whether those mass deportations and massacres were to be regarded as genocide, the European Court of Human Rights held that the dignity of the victims and the dignity and identity of modernday Armenians were protected by Article 8 (right to respect for private life) of the Convention. The Court therefore had to strike a balance between two Convention rights – the right to freedom of expression and the right to respect for private life –, taking into account the specific circumstances of the case and the proportionality between the means used and the aim sought to be achieved.

The Court concluded that it had not been necessary, in a democratic society, to subject Mr Perinçek to a criminal penalty in order to protect the rights of the Armenian community at stake in the case.

In particular, the Court took into account the following elements: Mr Perinçek’s statements bore on a matter of public interest and did not amount to a call for hatred or intolerance; the context in which they were made had not been marked by heightened tensions or special historical overtones in Switzerland; the statements could not be regarded as affecting the dignity of the members of the Armenian community to the point of requiring a criminal law response in Switzerland; there was no international law obligation for Switzerland to criminalise such statements; the Swiss courts appeared to have censured Mr Perinçek simply for voicing an opinion that diverged from the established ones in Switzerland; and the interference with his right to freedom of expression had taken the serious form of a criminal conviction.

**Principal facts**

The applicant, Doğu Perinçek, is a Turkish national who was born in 1942 and lives in Ankara (Turkey). He is a doctor of laws and chairman of the Turkish Workers’ Party.

In 2005 Mr Perinçek participated in three public events in Switzerland, in the course of which he expressed the view that the mass deportations and massacres suffered by the Armenians living in the Ottoman Empire from 1915 onwards had not amounted to genocide.

At a press conference held in May 2005 in Lausanne (Canton of Vaud), Mr Perinçek stated that “the allegations of the ‘Armenian genocide’ are an international lie”. According to him, “imperialists from the West and from Tsarist Russia were responsible for the situation boiling over between Muslims and Armenians. The Great Powers, which wanted to divide the Ottoman Empire, provoked a section of the Armenians, with whom we had lived in peace for centuries, and incited them to violence.”

At a conference held in July 2005 in Opfikon (Canton of Zürich) to commemorate the peace treaty concluding the First World War with respect to Turkey, after holding a speech in which he stated that “the Armenian problem ... did not even exist”, Mr Perinçek handed out copies of a tract written by him in which he denied that the events of 1915 and the following years had constituted genocide.

Finally, at a rally of the Turkish Workers’ Party held in Köniz (Canton of Bern) in September 2005, Mr Perinçek stated that “the Soviet archives confirm that at the time there were occurrences of ethnic conflict, slaughter and massacres between Armenians and Muslims. But Turkey was on the side of those defending their homeland and the Armenians were on the side of the imperialist powers and their instruments ...” He then went on to state again that “there was no genocide of the Armenians in 1915.”

The Switzerland-Armenia Association lodged a criminal complaint against Mr Perinçek on account of the statement made at the first event. The investigation was later expanded to cover the two other oral statements as well. On 9 March 2007 the Lausanne District Police Court found him guilty of the offence under Article 261 bis § 4 of the Swiss Criminal Code, holding in particular that his motives appeared to be racist and nationalistic and that his statements did not contribute to the historical debate. The court ordered him to pay 90 day-fines of 100 Swiss francs each, suspended for two years, a fine of 3,000 Swiss francs, which could be replaced by 30 days’ imprisonment, and 1,000 Swiss francs in compensation to the Switzerland-Armenia Association for non-pecuniary damage.

Mr Perinçek appealed against the judgment, seeking to have it set aside and additional investigative measures taken to establish the state of research and the positions of historians on the events of 1915 and the following years. The Criminal Cassation Division of the Vaud Cantonal Court dismissed the appeal on 13 June 2007. The Federal Court dismissed a further appeal by Mr Perinçek in a judgment of 12 December 2007.

### Complaints, procedure and composition of the Court

Mr Perinçek complained that his criminal conviction and punishment for having publicly stated that there had not been an Armenian genocide had been in breach of his right to freedom of expression under Article 10. He also complained, relying on Article 7 (no punishment without law), that the wording of Article 261 bis § 4 of the Swiss Criminal Code was too vague.

The application was lodged with the European Court of Human Rights on 10 June 2008. In a judgment of 17 December 2013 a Chamber of the Court held, by five votes to two, that there had been a violation of Article 10 of the Convention. The Swiss Government 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. A Grand Chamber hearing was held on 28 January 2015.

In the Grand Chamber proceedings, third-party comments were received from the Turkish Government, who had exercised their right to intervene in the case (Article 36 § 1 of the Convention). Third-party comments were also received from the Armenian and French Governments, who had been given leave to intervene in the written procedure (Article 36 § 2). The Armenian Government were in addition given leave to take part in the hearing. Furthermore, thirdparty comments were received from the following non-governmental organisations and persons, which had likewise been granted leave to intervene in the written procedure: (a) the Switzerland-Armenia Association; (b) the Federation of the Turkish Associations of French-speaking Switzerland; (c) the Coordinating Council of the Armenian

Organisations in France (“CCAF”); (d) the Turkish Human Rights Association, the Truth Justice Memory Centre and the International Institute for Genocide and Human Rights Studies; (e) the International Federation for Human Rights (“FIDH”); (f) the International League against Racism and Anti-Semitism (“LICRA”); (g) the Centre for International Protection; and (h) a group of French and Belgian academics.

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

Dean **Spielmann** (Luxembourg), *President*,  
 Josep **Casadevall** (Andorra),  
 Mark **Villiger** (Liechtenstein),  
 Isabelle **Berro** (Monaco),  
 Işıl **Karakaş** (Turkey),  
 Ján **Šikuta** (Slovakia),  
 Päivi **Hirvelä** (Finland),  
 Vincent A. **de Gaetano** (Malta),  
 Angelika **Nußberger** (Germany),  
 Linos-Alexandre **Sicilianos** (Greece),  
 Helen **Keller** (Switzerland),  
 André **Potocki** (France),  
 Helena **Jäderblom** (Sweden),  
 Aleš **Pejchal** (the Czech Republic),  
 Johannes **Silvis** (the Netherlands),  
 Faris **Vehabović** (Bosnia and Herzegovina),  
 Egidijus **Kūris** (Lithuania),

and also Johan **Callewaert**, *Deputy Grand Chamber Registrar*.

## Decision of the Court

As regards the scope of the case, the Court underlined that it was not required to determine whether the massacres and mass deportations suffered by the Armenian people at the hands of the Ottoman Empire from 1915 onwards could be characterised as genocide within the meaning of that term under international law; unlike the international criminal courts, it had no authority to make legally binding pronouncements on this point.

## Article 10

It was undisputed that Mr Perinçek’s conviction and punishment, together with the order to pay compensation to the Switzerland-Armenia Association, had constituted an interference with the exercise of his right to freedom of expression under Article 10. The Court did not find, as was argued by the Swiss Government, that the interference could be justified under Article 16 of the Convention, which provides that nothing in Article 10 shall be regarded as preventing the High Contracting Parties from imposing restrictions on the political activity of aliens. Article 16 had never been applied by the Court. It had to be borne in mind that clauses that permitted interference with Convention rights had to be interpreted restrictively. The Court found that Article 16 should be interpreted as only capable of authorising restrictions on activities which directly affected the political process, which had not been the case here.

The Grand Chamber of the Court agreed with the Chamber that the interference with Mr Perinçek’s right to freedom of expression had been prescribed by law within the meaning of Article 10 § 2. The Court found in particular that – despite his submissions to the contrary – he could reasonably have foreseen that his statements might result in criminal liability under Swiss law.

As regards the question whether the interference had pursued a legitimate aim, the Court was not satisfied that it had been necessary for the “prevention of disorder”. However, like the Chamber, the Grand Chamber of the Court found that the interference could be regarded as having been intended “for the protection of the ... rights of others” within the meaning of Article 10 § 2. It noted that many of the descendants of the victims of the events of 1915 and the following years, especially in the Armenian diaspora, constructed their identity around the perception that their community had been the victim of genocide. The Court thus accepted that the interference with Mr Perinçek’s rights had been intended to protect that identity and thus the dignity of present-day Armenians.

Concerning the question whether the interference had been “necessary in a democratic society” within the meaning of Article 10 § 2, the Court underlined that it was not required to determine whether the criminalisation of the denial of genocide or other historical facts might in principle be justified. It was only in a position to review whether or not the application of Article 261 bis § 4 of the Swiss Criminal Code in Mr Perinçek’s case had been in conformity with Article 10. In the light of the Court’s case-law, the dignity of Armenians was protected under Article 8 of the Convention. The Court was thus faced with the need to strike a balance between two Convention rights, taking into account the specific circumstances of the case and the proportionality between the means used and the aim sought to be achieved.

In examining the nature of Mr Perinçek’s statements, the Court did not seek to establish whether they could properly be characterised as genocide denial or justification for the purposes of the Swiss Criminal Code. That question was for the Swiss courts to determine.

Mr Perinçek, speaking at public events to like-minded supporters, had made his statements as a politician, taking part in a long-standing controversy which the Court had, in a number of cases against Turkey, already accepted as relating to an issue of public concern. He had not expressed contempt or hatred for the victims of the events of 1915 and the following years, noting that Turks and Armenians had lived in peace for centuries. He had not called the Armenians liars, used abusive terms with respect to them, or attempted to stereotype them. His strongly worded allegations had been directed against the “imperialists” and their allegedly insidious designs with respect to the Ottoman Empire and Turkey.

While in cases concerning statements in relation to the Holocaust, the Court had – for historical and contextual reasons – invariably presumed that they could be seen as a form of incitement to racial hatred, it did not consider that the same could be done in this case. The context did not require automatically to presume that Mr Perinçek’s statements relating to the 1915 events promoted a racist and antidemocratic agenda, and there was not enough evidence that this had been the case.

The Swiss courts had referred to the fact that he was a self-professed follower of Talaat Pasha, who was historically the initiator of the massacres of 1915. However, the Swiss courts had not elaborated on this point, and there was no evidence that Mr Perinçek’s membership in the so-called Talaat Pasha Committee had been driven by a wish to vilify the Armenians.

In the Court’s opinion, Mr Perinçek’s statements, read as a whole and taken in their immediate and wider context, could not be seen as a call for hatred, violence or intolerance towards the Armenians. It followed that his statements, which concerned a matter of public interest, were entitled to heightened protection under Article 10, and that the Swiss authorities had only had a limited room for manoeuvre (“margin of appreciation”) to interfere with them.

Taking into account the historical experience of a Convention State concerned by a complaint under Article 10 was particularly relevant with regard to the Holocaust. For the Court, the justification for making its denial a criminal offence lay in the fact that such denial, in the historical context of the States concerned, even if dressed up as impartial historical research, had to be considered as implying anti-democratic ideology and anti-Semitism. The Article 10 cases concerning Holocaust denial

examined by the Court had been brought against Austria, Belgium, Germany and France. The Court considered that Holocaust denial was especially dangerous in States which had experienced the Nazi horrors and which could be regarded as having a special moral responsibility to distance themselves from the mass atrocities that they had perpetrated or abetted, by, among other things, outlawing their denial. By contrast, it had not been argued that there was a direct link between Switzerland and the events that took place in the Ottoman Empire in 1915 and the following years. There was moreover no evidence that at the time when Mr Perinçek had made his statements the atmosphere in Switzerland had been tense and could have resulted in serious friction between Turks and Armenians there.

The Court did not consider that Mr Perinçek's criminal conviction in Switzerland could be justified by the situation in Turkey, whose Armenian minority was alleged to suffer from hostility and discrimination. When convicting him, the Swiss courts had not referred to the Turkish context. While the hostility of some ultranationalist circles in Turkey towards the Armenians in that country could not be denied, in particular in view of the assassination of the Turkish-Armenian writer and journalist Hrant Dink in January 2007, possibly on account of his views about the events of 1915 and the following years, this could hardly be regarded as a result of Mr Perinçek's statements in Switzerland.

While the Court was aware of the immense importance attributed by the Armenian community to the question whether the tragic events of 1915 and the following years were to be regarded as genocide, it could not accept that Mr Perinçek's statements at issue had been so wounding to the dignity of the Armenians as to require criminal law measures in Switzerland. He had referred to Armenians as "instruments" of the "imperialist powers", which could be seen as offensive. However, as could be seen from the overall tenor of his remarks, he did not draw from that conclusion that they had deserved to be subjected to atrocities or annihilation. Coupled with the amount of time that had elapsed since the events, this led the Court to the conclusion that his statements could not be seen as having the significantly upsetting effect sought to be attributed to them.

The Court observed that there was a wide spectrum of positions among the member States as regards legislation on the denial of historical events, from those States which did not criminalise such denial at all to those which only criminalised denial of the Holocaust or the denial of Nazi and communist crimes, and those which criminalised the denial of any genocide (see paragraphs 255-57 of the judgment). The Court, acknowledging this diversity, did not consider that the comparative law perspective should play a significant part in its assessment, given that there were other factors with a significant bearing on the breadth of the applicable room for manoeuvre. It was nevertheless clear that Switzerland, with its criminalisation of the denial of any genocide, without the requirement that it be carried out in a manner likely to incite violence or hatred, stood at one end of the comparative spectrum.

Moreover, there were no international treaties in force with respect to Switzerland that required in clear and explicit language the imposition of criminal penalties on genocide denial as such. It was true that Article 261 bis § 4 of the Swiss Criminal Code had been enacted in connection with Switzerland's accession to the International Convention on the Elimination of All Forms of Racial Discrimination (CERD). However, there was no indication that the clause which had served as the basis for Mr Perinçek's conviction was specifically required under the CERD, or under other international law rules, whether treaty-based or customary.

Furthermore, the Court noted that in other cases under Article 10 the interference had consisted of, for instance, a restriction on the dissemination of a publication. The very fact that Mr Perinçek had been criminally convicted was significant in that it was one of the most serious forms of interference with the right to freedom of expression.

Based on all of the above factors, the Court concluded that it had not been necessary, in a democratic society, to subject Mr Perinçek to a criminal penalty in order to protect the rights of the Armenian community at stake in this case. There had accordingly been a breach of Article 10 of the Convention.

### **Other articles**

The Court joined, by a majority, the question whether to apply Article 17 of the Convention (prohibition of abuse of rights) to its examination of the merits of the complaint under Article 10. Under Article 17, the Court can declare an application inadmissible if it considers that the applicant has relied on the provisions of the Convention to engage in an abuse of rights. It followed from the Court's finding under Article 10 that there were no grounds to apply Article 17.

Furthermore, the Court found, by a majority, that the complaint under Article 7 amounted to a restatement of the claims under Article 10. There was therefore no need for a separate examination of that complaint.

### **Article 41 (just satisfaction)**

The Court held, by a majority, that the finding of a violation of Article 10 constituted in itself sufficient just satisfaction for any non-pecuniary damage suffered by Mr Perinçek. The Court further dismissed, unanimously, the remainder of his claim for just satisfaction.

### **Separate opinions**

Judge Nußberger expressed a partly concurring and partly dissenting opinion. Judges Spielmann, Casadevall, Berro, De Gaetano, Sicilianos, Silvis and Kūris expressed a joint dissenting opinion. Judge Silvis, joined by Judges Casadevall, Berro and Kūris expressed an additional dissenting opinion. These opinions are annexed to the judgment.

**121. ECHR, *Vasiliauskas v. Lithuania*, no. 35343/05, Grand Chamber judgment of 20 October 2015 (Article 7, No punishment without law – Violation).** The applicant, a former officer in the State security services of the Lithuanian Soviet Socialist Republic, successfully argued that his conviction in 2004 for acts of genocide on Lithuanian partisans in 1953, 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.

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**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”, providing, namely, that the crime of genocide is characterised by an “intent to destroy, in whole or in part, a national, ethnical, racial or religious group, ...”). Namely, Article 99 includes political groups among the groups that could be 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 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 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.

**122. ECHR, *G.S.B. v. Switzerland*, no. 28601/11, Chamber judgment of 22 December 2015 (Article 8, Right to respect for private and family life – No violation; Article 14, Prohibition of discrimination, taken in conjunction with Article 8 – No violation).** The applicant, a Saudi and United States of America (USA) national living in the USA, complained a breach of his privacy when his Swiss bank had transferred his bank account details to the USA authorities for tax purposes, but the Court, interpreting the Convention in line with the Vienna Convention on the Law of Treaties of 1969 with regard to the cooperation agreement signed between Switzerland and the USA, held that there had been no violation of the applicant’s rights.

**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 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.

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.

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.

Therefore, there had been no violation of Article 14 in conjunction with Article 8 of the Convention.

**123. ECHR, *M.D. and M.A. v. Belgium*, no. 58689/12, Chamber judgment of 19 January 2016 (Article 3, Prohibition of torture and inhuman or degrading treatment – Violation).** The applicants, a Russian couple of Chechen origin, had fled Russia after a deadly family dispute and after receiving several warnings that certain people were looking for them. Before the Court they successfully 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.

**124. ECHR, *Sow v. Belgium*, no. 27081/13, Chamber judgment of 19 January 2016 (Article 3, Prohibition of torture and inhuman or degrading treatment – 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 her country of origin, 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.

- 125. ECHR, *L.E. v. Greece*, no. 71545/12, Chamber judgment of 21 January 2016 (Article 4, Prohibition of slavery and forced labour – Violation; Article 6-1, Right to a fair trial – 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 Greek authorities for the purposes of granting her the status of 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.

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),  
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 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.

- 126. ECHR, *R. v. Russia*, no. 11916/15, Chamber judgment of 26 January 2016 (Article 3, Prohibition of torture and inhuman or degrading treatment – Violation in the event of Mr R.’s removal to Kyrgyzstan / Violation with regard to ill-treatment / Violation with regard to ineffective investigation; Article 5-4, Right to judicial review of detention – 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 put him at risk of ill-treatment considering his membership of a particularly vulnerable ethnic group.
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### **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 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)

- 127. ECHR, *Mozer v. the Republic of Moldova and Russia*, no. 11138/10, Grand Chamber judgment of 23 February 2016 (Article 3, Prohibition of inhuman and degrading treatment- Violation by Russia/ No violation by the Republic of Moldova; Article 5-1, Right to liberty and security- Violation by Russia/ No violation by the Republic of Moldova; Article 8, Right to respect for private and family life- Violation by Russia/ No violation by the Republic of Moldova; Article 9, Freedom of thought, conscience and religion- Violation by Russia/ No violation by the Republic of Moldova; Article 13, Right to an effective remedy, in conjunction with Articles 3, 8 and 9- Violation by Russia/ No violation by the Republic of Moldova).** The case concerned the detention of a man suspected of fraud, as ordered by the courts of the self-proclaimed “Moldavian Republic of Transdniestria” (the “MRT”). The applicant, a Moldovan national, complained, among other things, that he had been arrested and detained unlawfully by the “MRT authorities” and that his complaints fell within the jurisdiction of both Moldova, as that region was recognised under public international law as part of Moldova’s territory and Russia, as the state which had effective control over the unrecognised entity at issue.

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**ECHR 074 (2016)**  
**23.02.2016**

**Press release issued by the Registrar**

The case of **Mozer v. the Republic of Moldova and Russia** (application no. 11138/10) concerned the detention of a man suspected of fraud, as ordered by the courts of the self-proclaimed “Moldavian Republic of Transdniestria” (the “MRT”).

In today’s **Grand Chamber** judgment in the case, the European Court of Human Rights held, by a majority:

that there had been **no violation of Article 3 (prohibition of inhuman and degrading treatment)** of the European Convention on Human Rights by the Republic of Moldova, and that there had been a **violation of Article 3** of the Convention by Russia;

that there had been **no violation of Article 5 § 1 (right to liberty and security)** by the Republic of Moldova, and that there had been a **violation of Article 5 § 1** by Russia;

that there had been **no violation of Article 8 (right to respect for private and family life)** by the Republic of Moldova, and that there had been a **violation of Article 8** by Russia;  
 that there had been **no violation of Article 9 (freedom of thought, conscience and religion)** by the Republic of Moldova, and that there had been a **violation of Article 9** by Russia;

that there had been **no violation of Article 13 (right to an effective remedy) in conjunction with Articles 3, 8 and 9** by the Republic of Moldova, and that there had been a **violation of Article 13 in conjunction with Articles 3, 8 and 9** by Russia.

The Court held, by a majority, that the facts complained of fell within the jurisdiction of both the Republic of Moldova and of Russia.

Although Moldova had no effective control over the acts of the “MRT” in Transdniestria, the fact that the region was recognised under public international law as part of Moldova’s territory gave rise to an obligation for the State to use all the legal and diplomatic means available to it to continue to guarantee the enjoyments of the rights under the Convention to those living there.

At the same time, the “MRT”’s high level of dependency on Russian military, economic and political support gave a strong indication that Russia continued to exercise effective control and decisive influence over the “MRT” authorities.

The Court maintained its conclusion in previous cases in finding that the “MRT courts”, which had ordered Mr Mozer’s detention, had not belonged to a judicial system operating on a constitutional and legal basis reflecting a judicial tradition compatible with the Convention during the period in question. His detention based on the orders of those courts had therefore been unlawful.

The Court concluded that the Republic of Moldova, having fulfilled its obligations in respect of Mr Mozer by making significant legal and diplomatic efforts to support him, had not violated his rights under the Convention. At the same time, having regard to its finding that Russia had exercised effective control over the “MRT” during the period in question, the Court concluded that Russia was responsible for the violations of the Convention.

#### Principal facts

The applicant, Boris Mozer, is a Moldovan national who was born in 1978. Until 2010 he lived in Tiraspol, in the “Moldovan Republic of Transdniestria” (“MRT”), an unrecognised separatist entity which split from Moldova in September 1990. Since 2011 he has been an asylum seeker in Switzerland.

In November 2008 Mr Mozer was arrested and remanded in custody for an undetermined period of time by the authorities of the self-proclaimed “MRT” on suspicion of defrauding two companies, for one of which he worked. According to his submissions, he was asked to confess to the crime, which he claims he did not commit. He signed various confessions, allegedly following threats to him and his relatives. His detention was subsequently extended on a number of occasions and his appeals against the detention orders were rejected.

In July 2010 the “Tiraspol People’s Court” convicted Mr Mozer of defrauding the two companies and sentenced him to seven years’ imprisonment, suspended for five years. It ordered his release subject to an undertaking not to leave the city. He subsequently left for medical treatment in Chişinău (Republic of Moldova). In 2011 he arrived in Switzerland. Owing to his failure to appear before the probation authorities, the “Tiraspol People’s Court”, in February 2013, ordered that the sentence – which in the meantime had been reduced to six years and six months’ imprisonment – be served in full.

Following a request from Mr Mozer’s lawyer, the Supreme Court of the Republic of Moldova, in January 2013, quashed the judgment of the “Tiraspol People’s Court” of July 2010, finding that the courts established in the “MRT” had not been created in accordance with Moldovan legislation. In May 2013, the Prosecutor General of Moldova informed Mr Mozer’s lawyer that it had initiated a criminal investigation into his unlawful detention.

Mr Mozer had been suffering from bronchial asthma, respiratory deficiency and other health problems. His medical condition worsened while in prison and he suffered several asthma attacks. According to his submissions, the cell where he was kept was very hot, humid, poorly ventilated, and it lacked access to natural light. It was overcrowded, infested with insects, and other prisoners were allowed to smoke inside the cell. For many hours he did not have access to a toilet and he was unable to dry clothes outside the cell. The quality of the food was very poor and no hygiene products were

available. Throughout his detention he did not receive the medical assistance required by his condition.

In May 2009 doctors found that Mr Mozer would have to be transferred to the respiratory department of a hospital, but that this would be impossible to arrange due to a lack of personnel to guard him during his stay there. His mother subsequently asked the “MRT Ministry of Interior” for her son’s transfer to a specialised hospital, as bronchial asthma was one of the reasons listed by this Ministry as a reason for a transfer to hospital. However, the request was refused on the ground that only convicted prisoners could be transferred to a hospital for that reason.

In February 2010, a medical board concluded that Mr Mozer’s life expectancy was not favourable and that his continued pre-trial detention appeared difficult due to the lack of staff and equipment necessary to the treatment required by his condition. Despite these findings Mr Mozer was transferred to another pre-trial detention centre, which was less well equipped than the facility where he had been staying before.

According to Mr Mozer’s submissions, he was denied any visits by his parents during the first six months of his detention. He was also denied visits by a pastor, which he had requested, in June and September 2009.

Mr Mozer’s parents made several complaints to the Moldovan authorities and the Russian Embassy in Moldova concerning their son’s condition. On 3 November 2009 the Moldovan Prosecutor General’s Office informed them that it could not intervene due to the political situation in the Transdnestrian region since 1992.<sup>2</sup> It also referred to Moldova’s reservation in respect of its inability to ensure observance of the European Convention on Human Rights in the Eastern regions of Moldova. A complaint to the Russian Embassy in Moldova was forwarded to the “MRT prosecutor’s office”. That office replied that Mr Mozer’s case was pending before the “MRT courts”, which alone were competent to deal with any complaints.

After notice of the case before the European Court of Human Rights had been given to the Moldovan and the Russian Governments, the Moldovan Deputy Prime Minister, in March 2010, wrote, in particular, to the Russian, Ukrainian and United States ambassadors to Moldova asking them to assist in securing Mr Mozer’s rights.

### Complaints, procedure and composition of the Court

Mr Mozer complained that he had been arrested and detained unlawfully by the “MRT authorities” and that he had been absent from some of the hearings concerning his detention pending trial, in violation of Article 5 §§ 1 and 4 (right to liberty and security / right to have the lawfulness of one’s detention decided speedily by a court). Relying on Article 2 (right to life) and Article 3 (prohibition of inhuman or degrading treatment), he further maintained that he had not been given the medical assistance required by his condition and that he had been held in inhuman conditions of detention. Moreover, he complained that he had been prevented from seeing his parents and his pastor, in breach of Article 8 (right to respect for private and family life) and Article 9 (freedom of thought, conscience and religion). He finally complained, in particular, that he did not have an effective remedy in respect of his complaints under articles 2, 3, 5, 8 and 9. Mr Mozer maintained that his complaints fell within the jurisdiction of both Moldova and Russia.

The application was lodged with the European Court of Human Rights on 24 February 2010. On 20 May 2014 the Chamber to which the case had been allocated relinquished jurisdiction in favour of the Grand Chamber. A Grand Chamber hearing was held on 4 February 2015.

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

Guido Raimondi (Italy), *President*,  
 Dean Spielmann (Luxembourg),  
 Işıl Karakaş (Turkey),  
 Josep Casadevall (Andorra),  
 Luis López Guerra (Spain),  
 Mark Villiger (Liechtenstein),  
 Ján Šikuta (Slovak Republic),  
 George Nicolaou (Cyprus),  
 Nebojša Vučinić (Montenegro),  
 Kristina Pardalos (San Marino),  
 Erik Møse (Norway),  
 Paul Lemmens (Belgium),  
 Paul Mahoney (the United Kingdom),  
 Johannes Silvis (the Netherlands),  
 Ksenija Turković (Croatia),  
 Dmitry Dedov (Russia) and,  
 Mihai Poalelungi (Republic of Moldova), *ad hoc Judge*,

and also Søren Prebensen, *Deputy Grand Chamber Registrar*.

Decision of the Court

Jurisdiction

The Court came to the conclusion that the facts complained of fell within the jurisdiction of both the Republic of Moldova and of Russia under Article 1 of the Convention (obligation to respect human rights). In several previous cases, the Court had reached the finding that complaints in respect of the Transdnestrian region fell within both States' jurisdiction<sup>3</sup> and there were no reasons to draw a different conclusion in Mr Mozer's case.

Although Moldova had no effective control over the acts of the "MRT" in Transdnestria, the fact that the region was recognised under public international law as part of Moldova's territory gave rise to an obligation for that State, under Article 1, to use all the legal and diplomatic means available to it to continue to guarantee the enjoyment of the rights under the Convention to those living there.

As regards Russia, the Court maintained the findings it had made in the previous cases, to the effect that the "MRT" was only able to continue to exist because of Russian military, economic and political support. In those circumstances, the region's high level of dependency on Russian support gave a strong indication that Russia continued to exercise effective control and decisive influence over the "MRT" authorities.

Article 5

The Court considered that it was primarily for Russia – as the State which had effective control over the unrecognised entity at issue – to show that the "MRT courts" complied with the principles of the Court's case-law, namely that they formed "part of a judicial system operating on a constitutional and legal basis reflecting a judicial tradition compatible with the Convention". The Court had previously found that the "MRT courts", which had ordered Mr Mozer's detention, belonged to a system which did not comply with these standards. Since to date Russia had not submitted to the Court any information which would enable it to assess whether the "MRT courts" fulfilled the necessary requirements, it was unable to verify whether the situation had changed.

Moreover, there was no reason to assume that there was a system reflecting a judicial tradition compatible with the Convention in the region, similar to the one in the remaining area of the Republic of Moldova. While Moldovan law had been subject to a thorough analysis before joining the Council of Europe in 1995 and amendments to ensure compatibility with the Convention had been proposed, no such analysis had been made of the “MRT legal system”, which had divided from the Moldovan judicial system in 1990.

Finally, the circumstances in which Mr Mozer had been arrested and the way his detention had been ordered and extended confirmed the conclusions as to the “MRT courts” incompatibility with the Convention, especially the order for his detention for an undefined period of time and the examination in his absence of the appeal against the extension of his detention.

The Court therefore concluded that its previous findings concerning the “MRT courts” were still valid as regards the period of time covered by Mr Mozer’s case. His detention based on the orders of those courts had therefore been unlawful.

The Court considered that the Moldovan Government had made significant efforts to support Mr Mozer. It noted in particular, that the authorities had made a number of appeals to other countries, notably Russia, asking them to assist in securing his rights. Furthermore, the Moldovan Supreme Court, following a request from Mr Mozer, had quashed his conviction. The Court concluded that the Republic of Moldova had fulfilled its obligations in respect of Mr Mozer. Accordingly there had been **no violation of Article 5 § 1 by Moldova.**

Having regard to its finding that Russia had exercised effective control over the “MRT” during the period in question and that Mr Mozer’s detention had been unlawful, the Court held that there had been a **violation of Article 5 § 1 by Russia.**

In view of its findings under Article 5 § 1, the Court did not consider it necessary to examine separately the complaint under Article 5 § 4.

### Article 3

As regards the complaints under Article 2 and 3, the Court noted that the doctors who had examined Mr Mozer had at no point concluded that there was an immediate risk to his life. The Court therefore did not consider that the complaints required a separate examination under Article 2.

The Court observed that although the doctors had considered Mr Mozer’s condition to be deteriorating and the specialists and equipment required to treat him to be lacking, the “MRT” authorities had not only refused to transfer him to a civilian hospital for treatment but they had also exposed him to further suffering and a more serious risk to his health by transferring him to an ordinary prison. It was indisputable that he had suffered greatly from his asthma attacks. The Court was also struck by the fact that his illness, while considered serious enough to warrant the transfer to a civilian hospital of a convicted person, had not been a ground for the transfer of a person awaiting trial. Given the lack of any explanation for the refusal to offer him appropriate treatment, the Court found that Mr Mozer’s medical assistance had not been adequately secured.

Having regard to Mr Mozer’s description of the very poor detention conditions, the Court noted that neither the Moldovan nor the Russian Government had commented on it. However, that description was largely confirmed by the reports of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) and the United Nations Special Rapporteur on visits to various detention facilities in the “MRT”. On that basis, the Court found it established that the conditions of Mr Mozer’s detention had amounted to inhuman and degrading treatment within the meaning of Article 3.

As regards the States' responsibility, the Court referred to its findings under Article 5. For the same reasons given in respect of Article 5 § 1, the Court found that there had been **no violation of Article 3 by Moldova** and that there had been a **violation of Article 3 by Russia**.

Article 8 and Article 9

On the basis of the information before it, the Court saw no reason to doubt Mr Mozer's submission that he had been completely denied visits by his parents during the first six months of his detention and that the pastor who had attempted to visit him had been denied access. It was unclear whether there was any legal basis for those restrictions and no reasons had been advanced to justify them.

The Court considered that it had not been shown that the interferences with Mr Mozer's rights under Article 8 and Article 9 had pursued a legitimate aim or had been proportionate to that aim.

For the same reasons given in respect of Article 5 § 1, the Court found that there had been **no violation of Article 8 and Article 9 by Moldova** and that there had been a **violation of Article 8 and Article 9 by Russia**.

Article 13 in conjunction with Articles 3, 5, 8 and 9

Mr Mozer had been entitled to an effective domestic remedy within the meaning of Article 13 in respect of his arguable complaints under Articles 3, 8 and 9. As to his complaint under Article 5 § 1, the Court noted that Article 5 § 4 – the separate examination of which it had not considered necessary in the circumstances of the case – was the provision on which to rely to seek judicial review of his detention. Concerning the complaints under Articles 3, 8 and 9, there was no indication that any effective remedies had been available to him in the "MRT".

The Court referred to its finding that Moldova, having no means of controlling the actions of the

"MRT" authorities, had been under an obligation to use all the legal and diplomatic means available to it to continue to guarantee to those living in the Transdnestrian region the enjoyment of the rights and freedoms defined in the Convention. It observed that Moldova had created a set of judicial, investigative and civil service authorities which worked in parallel with those created by the "MRT". While the effects of any decisions taken by those authorities could only be felt outside the Transdnestrian region, they had the function of enabling cases to be brought before the Moldovan authorities, which could then initiate diplomatic and legal steps to attempt to intervene in specific cases, in particular by urging Russia to fulfil its obligations under the Convention in its treatment of the "MRT" and the decisions taken there. In that light, the Court considered that the Republic of Moldova had thus fulfilled its obligations. Accordingly, there had been **no violation of Article 13 of by Moldova**.

The Court referred to its finding that Russia continued to exercise effective control over the "MRT". In the absence of any submission by the Russian Government as to any remedies available to Mr Mozer, the Court concluded that there had been a **violation of Article 13 in conjunction with Articles 3, 8 and 9 by Russia**.

Just satisfaction (Article 41)

The Court held that Russia was to pay Mr Mozer 5,000 euros (EUR) in respect of pecuniary damage, EUR 20,000 in respect of non-pecuniary damage and EUR 4,000 in respect of costs and expenses.

Separate opinions

Judge López Guerra expressed a concurring opinion; Judge Dedov expressed a dissenting opinion.

- 128. ECHR, *Pajić v. Croatia*, no. 68453/13, Chamber judgment of 23 February 2016 (Article 14, Prohibition of discrimination taken in conjunction with Article 8-Violation).** The case concerned the complaint by a national of Bosnia and Herzegovina, who is in a stable same-sex relationship with a woman living in Croatia, of having been discriminated against on the grounds of her sexual orientation when applying for a residence permit in Croatia.
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**ECHR 072 (2016)**  
**23.02.2016**

**Press release issued by the Registrar**

In today's Chamber judgment in the case of ***Pajić v. Croatia*** (application no. 68453/13) the European Court of Human Rights held, unanimously, that there had been:

**a violation of Article 14 (prohibition of discrimination) taken in conjunction with Article 8 (right to respect for private and family life) of the European Convention on Human Rights.**

The case concerned the complaint by a national of Bosnia and Herzegovina, who is in a stable same-sex relationship with a woman living in Croatia, of having been discriminated against on the grounds of her sexual orientation when applying for a residence permit in Croatia.

The Court found in particular that Ms Pajić had been affected by a difference in treatment between different-sex couples and same-sex couples introduced by the Aliens Act, which reserved the possibility of applying for a residence permit for family reunification to different-sex couples. The Croatian Government had not shown that that difference in treatment was necessary to achieve a legitimate aim or that it was justified by any other convincing reason.

Principal facts

The applicant, Danka Pajić, is a national of Bosnia and Herzegovina who was born in 1973 and lives in Brčko (Bosnia and Herzegovina).

In December 2011 Ms Pajić lodged a request for a residence permit in Croatia on the grounds of family reunification with her partner, Ms D.B., who was living in Sisak (Croatia). She submitted in particular that she wanted to live with D.B., with whom she had been in a relationship for two years, and with whom she was planning to establish a household and start a business. During the proceedings, the Sisak Police Department found that the two women had been in a relationship since October 2009 and that in order to maintain their relationship they had been travelling to see each other.

Ms Pajić's request was dismissed by the Sisak police department indicating that the relevant requirements under the Aliens Act had not been met. Her appeal to the Ministry of the Interior was rejected. She then lodged an action with the Zagreb Administrative Court, arguing that she had been discriminated against in comparison with different-sex couples who had a possibility to seek family reunification under the Aliens Act. The Administrative Court dismissed her action, finding in particular that, given the limited legal effects of a same-sex union, the possible existence of such a union did not represent a basis for family reunification. In May 2013 the Constitutional Court rejected Ms Pajić's constitutional complaint against that decision.

Complaints, procedure and composition of the Court

Relying on Article 14 (prohibition of discrimination) taken in conjunction with Article 8 (right to respect for private and family life) of the European Convention on Human Rights, Ms Pajić complained that she had been discriminated against on the grounds of her sexual orientation.

The application was lodged with the European Court of Human Rights on 23 October 2013.

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

Işıl **Karakaş** (Turkey), *President*,  
Nebojša **Vučinić** (Montenegro),  
Paul **Lemmens** (Belgium),  
Valeriu **Griţco** (the Republic of Moldova),  
Ksenija **Turković** (Croatia),  
Stéphanie **Mourou-Vikström** (Monaco),  
Georges **Ravarani** (Luxembourg),

and also Abel **Campos**, *Deputy Section Registrar*.

#### Decision of the Court

##### Article 14 in conjunction with Article 8

The Court noted that here was no doubt that the relationship of a same-sex couple like Ms Pajić's fell within the notion of "private life" for the purpose of Article 8. In addition, the Court came to the conclusion that the facts of the case fell within the notion of "family life" for the purpose of Article 8. Consequently, Article 14 in conjunction with Article 8 applied.

In arriving at that conclusion, the Court observed in particular that in recent years a considerable number of member States of the Council of Europe had given legal recognition to same-sex couples. In view of that evolution it would be artificial to maintain the view that, in contrast to a different-sex couple, a same-sex couple could not enjoy "family life". In a recent judgment in another case the Court had further found that there could be no basis for drawing a distinction between stable same-sex couples who lived together and those who – for professional and social reasons – did not, since the latter situation did not deprive the couples concerned of the stability which brought them within the scope of "family life". It was undisputed between the parties that Ms Pajić had maintained a stable relationship with D.B. since October 2009 and that she regularly travelled to Croatia, sometimes spending three months living together with D.B., as that was the only possibility open to her to maintain a relationship with her partner due to the relevant immigration restrictions.

As regards the question of whether Ms Pajić had been discriminated against, the Court noted that the Croatian legal system recognised both extramarital relationships of different-sex couples and same-sex couples. It thus acknowledged in general the possibility that both categories of couples were capable of forming stable committed relationships. In any case, the Court considered that a partner in a same-sex relationship, as Ms Pajić, who applied for a residence permit for family reunification so he or she could pursue the intended family life in Croatia was in a comparable situation to a partner in a different-sex extramarital relationship as regards the same intended manner of making his or her family life possible.

However, the relevant provisions of the Croatian Aliens Act essentially reserved the possibility of applying for a residence permit for family reunification to different-sex couples, married or living in an extramarital relationship. By tacitly excluding same-sex couples from its scope, the Aliens Act introduced a difference in treatment based on the sexual orientation of the persons concerned.

The Court dismissed an argument by the Croatian Government to the effect that Ms Pajić was not in a comparable situation to different-sex couples living in an extramarital relationship given that she had not been in a relationship with her partner for a period of three years. The Court pointed out that the Croatian authorities had not examined the relevant factual aspects of her situation, as they had relied on the legal impossibility, under the Aliens Act, of obtaining a residence permit for family reunification by a partner in a same-sex relationship. Moreover, the Court noted that by the time her case reached the stage of the proceedings before the Administrative Court, Ms Pajić relationship with her partner had lasted more than three years. In conclusion, she had been affected by the difference in treatment based on sexual orientation introduced by the Aliens Act.

It had therefore been for the Government to show that that difference in treatment could be justified by pursuing a legitimate aim and that there was a reasonable relationship of proportionality between the means employed and the aim sought to be realised. States had only a small room for manoeuvre (“margin of appreciation”) in cases where there was a difference in treatment based on sex or sexual orientation. Accordingly they had to show that it was necessary, in order to achieve that aim, to exclude certain categories of people – in this case, persons in a same-sex relationship – from the scope of application of the relevant domestic provisions at issue.

However, the Croatian authorities had not provided any such justification, nor had the Croatian Government, in its submissions to the Court, given any convincing reasons to justify the difference in treatment. Instead, the relevant provisions of the Aliens Act provided for a blanket exclusion of persons living in a same-sex relationship from the possibility of obtaining family reunification, which could not be considered compatible with the standards under the Convention.

The Court therefore found that there had been a violation of Article 14 conjunction with Article 8.

Just satisfaction (Article 41)

The Court held that Croatia was to pay Ms Pajić 10,000 euros (EUR) in respect of non-pecuniary damage and EUR 5,690 in respect of costs and expenses.

- 129. ECHR, *Nasr and Ghali v. Italy*, no. 44883/09, Chamber judgment of 23 February 2016 (With regard to Mr Nasr: Article 3, Prohibition of torture and inhuman or degrading treatment – 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 – Violation; Article 8 – Violation; Article 13 read in conjunction with Articles 3 and 8 – Violation).** The applicants, one of which was an Egyptian national enjoying political asylum in Italy, successfully argued that their abduction by the Central Intelligence Agency (CIA) of the United States of America with the cooperation of Italian officials and subsequent secret detention in Egypt had violated their rights under the Convention.

**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.

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, 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 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 SISM 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 SISM 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.

#### 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 Convention (*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).

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 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 arbitrary (*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).

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 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.

- 130. ECHR, *K.J. v. Poland*, no. 30813/14, Chamber judgment of 1 March 2016 (Article 8, Right to respect for private and family life - Violation).** The applicant sought the return of his child to the United Kingdom from Poland relying on the Hague Convention on the Civil Aspects of International Child Abduction of 1980.
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**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 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 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.

**131. ECHR, *Arlewin v. Sweden*, no. 22302/10, Chamber judgment of 1 March 2016 (Article 6-1, Right of access to a court – 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 the content of a transborder television programme service accusing the applicant of organised crime. The Court interpreted the Brussels I Regulation and the EU Audiovisual Media Services Directive in its judgment.

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**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 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 (2010/13/EU) and the Brussels I Regulation (Council Regulation (EC) No. 44/2001).

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 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.

- 132. ECHR, *F.G. v. Sweden*, no. 43611/11, Grand Chamber judgment of 23 March 2016 (Article 2, Right to life, and, Article 3, Prohibition of torture and inhuman or degrading treatment – No violation on account of F.G.’s political past in Iran, if he were deported / Violation if F.G. returned without an assessment of the consequences of his religious conversion).** The applicant, an Iranian asylum seeker who had converted to Christianity, argued that an expulsion would put him at real risk of being persecuted and punished or sentenced to death owing to his political past and his conversion to Christianity. In its assessment the Court made reference to the EU Qualification Directive, pertinent CJEU jurisprudence as well as UNHCR Guidelines in respect of a first-instance determination of eligibility for international protection.
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**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 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.

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 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.

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.

133. **ECHR, *Tabbane v. Switzerland*, no. 41069/12, Decision of 24 March 2016 (Articles 6-1, Right of access to a court and right to a fair hearing- Inadmissible; Article 13, Right to an effective remedy- Inadmissible).** The applicant, a Tunisian businessman, in exercise of his contractual freedom, signed an arbitration agreement with a French company, and had expressly and freely waived the possibility of submitting disputes to an ordinary court and agreeing to have all disputes settled before the International Court of Arbitration in Geneva.
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**ECHR 109 (2016)**  
**24.03.2016**

#### **Press release issued by the Registrar**

In its **decision** in the case of **Tabbane v. Switzerland** (application no. 41069/12) the European Court of Human Rights has unanimously declared the application inadmissible. The decision is final.

The case concerns a challenge to a decision settling a dispute before the International Court of Arbitration in Geneva.

The Court noted that Mr Tabbane, in exercise of his contractual freedom, signed an arbitration agreement with the Colgate company, and had expressly and freely waived the possibility of submitting disputes to an ordinary court.

The Court noted that section 192 of the Federal Law on Private International Law, which required that the parties were to agree to waive any appeal against the verdict issued by the arbitration court, reflected a choice of legislative policy corresponding to the Swiss legislature's wish to increase the attractiveness and effectiveness of international arbitration in Switzerland.

The Court held that the restriction on the right of access to a court pursued a legitimate aim, namely the development of Switzerland's position as a venue for arbitration, while respecting Mr Tabbane's contractual freedom, and could not be regarded as disproportionate.

#### **Principal facts**

The applicant, Nouredine Tabbane, is a Tunisian national who was born in 1944 and lived in El Menzah (Tunisia). The applicant having died in March 2013, his widow and three sons pursued the application.

Mr Tabbane, a Tunisian businessman, decided to enter into an industrial and commercial partnership with Colgate-Palmolive, a company incorporated under French law which has its registered office in France. To this end, an "option agreement" was signed between the parties, setting out all the financial and legal issues between them. This contract contained an arbitration clause in the event of a dispute.

On 4 August 2008 the company Colgate filed a request for arbitration against Mr Tabbane and his three sons before the International Court of Arbitration at the International Chamber of Commerce (the ICC Court). In keeping with the procedure, each of the parties appointed an arbitrator and the ICC Court appointed the third arbitrator. In accordance with the arbitration clause in the contract of 4 September 2000, it was for the three arbitrators to determine the place in which the arbitration court was to meet. It was decided that this would be Geneva.

During the procedure, Mr Tabbane asked the court of arbitration to appoint a financial expert to carry out an audit of the finances of the companies owed by him, or to let his own financial expert carry out the audit. The court of arbitration dismissed the request, finding that Colgate had already submitted financial evidence prepared by an auditor, and that it was sufficient to grant access to those auditing documents to the expert engaged by Mr Tabbane and his three sons.

On 9 March 2011 the court of arbitration delivered its final verdict and ordered Mr Tabbane and his sons to transfer all their shares to Colgate and to pay costs and the legal fees. Mr Tabbane lodged a civil-law appeal with the Federal Court in order to have that decision set aside. The Federal Court declared his appeal inadmissible on the ground that the parties had validly waived the right to appeal against any decision issued by the court of arbitration, in accordance with section 192 of the Federal Law on Private International Law.

### Complaints, procedure and composition of the Court

The application was lodged with the European Court of Human Rights on 2 July 2012.

Relying on Articles 6 § 1 (right of access to a court and right to a fair hearing) and 13 (right to an effective remedy), Mr Tabbane complained that he had been denied access to a court in Switzerland that would have enabled him to challenge the arbitration procedure. He alleged that section 192 of the Federal Law on Private International Law was not compatible with Article 6 § 1 of the Convention. Lastly, he complained that the court of arbitration's refusal to order an expert report at his request had been in breach of his right to a fair hearing.

The decision was given by a Chamber of seven, composed as follows:

Luis **López Guerra** (Spain), *President*,  
Helena **Jäderblom** (Sweden),  
Helen **Keller** (Switzerland),  
Johannes **Silvis** (the Netherlands),  
Dmitry **Dedov** (Russia),  
Pere **Pastor Vilanova** (Andorra),  
Alena **Poláčková** (Slovakia), *Judges*,

and also Stephen **Phillips**, *Section Registrar*.

### Decision of the Court

#### Article 6 § 1

The Court noted that Mr Tabbane, in exercise of his contractual freedom, had signed an arbitration agreement with the Colgate company which contained a clause on resolving potential conflicts. In entering into this arbitration agreement, Mr Tabbane had expressly and freely waived the possibility of submitting disputes to an ordinary court. There had been no indication that Mr Tabbane had acted under duress.

In interpreting the parties' wishes, the Federal Tribunal reached the conclusion that they had ruled out any appeal against the arbitration court's verdict. This waiver had been attended by minimum safeguards. Thus, Mr Tabbane had been able to select an arbitrator of his own choosing, who, in concert with the two other arbitrators, had chosen Geneva as the place of arbitration, with the result that the arbitration process was governed by Swiss law. The Court noted that the Federal Tribunal had heard Mr Tabbane, and that it had taken into account all of the objectively relevant factual and legal elements for resolving the dispute. The Federal Tribunal's judgment had been adequately reasoned, with the result that it did not appear arbitrary in any way.

With regard to the question of whether the possibility of waiving an appeal against an arbitration verdict violated Article 6 § 1 of the Convention, the Court reiterated that the Convention did not envisage the bringing of an *actio popularis* for the interpretation of the rights set out therein, or permit individuals to complain about a provision of national law simply because they considered, without having been directly affected by it, that it might contravene the Convention. The Court noted that section 192 of the Federal Law on Private International Law, which required that the parties were to agree to waive any appeal against the verdict issued by the arbitration court, reflected a choice of legislative policy corresponding to the Swiss legislature's wish to increase the attractiveness and effectiveness of international arbitration in Switzerland.

The Court concluded that the restriction on the right of access to a court pursued a legitimate aim, namely the development of Switzerland's position as a venue for arbitration, while respecting Mr Tabbane's contractual freedom, and could not be regarded as disproportionate. The very essence of Mr Tabbane's right of access to a court had not been impaired.

It followed that his complaint concerning the denial of access to a court in Switzerland in order to challenge the arbitration procedure was ill-founded and had to be rejected.

With regard to the refusal by the court of arbitration to order an expert report at Mr Tabbane's request, and the Federal Court's refusal to take account of certain of his arguments, the Court emphasised that the court of arbitration had held that Colgate had already submitted financial evidence prepared by an auditor, and that it was enough to provide the auditor privately engaged by Mr Tabbane with access to the same auditing documents as those used by Colgate's expert. Given that Mr Tabbane had had access to the documents in question, it did not appear that he had been placed at a substantial disadvantage vis-à-vis Colgate.

Mr Tabbane's complaint concerning the court of arbitration's refusal to grant his request for a court ordered expert report was manifestly ill-founded and had to be rejected.

The Court unanimously declared the application inadmissible.

- 134. ECHR, *Sakir v. Greece*, no. 48475/09, Chamber judgment of 24 March 2016 (Article 3, Prohibition of inhuman or degrading treatment- Violation; Article 13, Right to an effective remedy- Violation).** The applicant, an Afghan national living in Athens, was physically assaulted in 2009 in the centre of Athens. He had left his country of origin for fear of persecution on account of his political convictions and entered Greece without a residence permit. After the attack and his subsequent hospitalisation, he was detained pending expulsion due to lack of residence permit. He successfully complained, among other things, that the national authorities had failed to meet their obligation to conduct an effective investigation into the attack.
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**ECHR 106 (2016)**  
**24.03.2016**

**Press release issued by the Registrar**

In today's **Chamber** judgment in the case of **Sakir v. Greece** (application no. 48475/09) the European Court of Human Rights held, unanimously, that there had been:

**a violation of Article 3 (prohibition of inhuman or degrading treatment) and a violation of Article 13 (right to an effective remedy)** of the European Convention on Human Rights with regard to Mr Sakir's conditions of detention in the Aghios Panteleimon police station in Athens,

**a violation of Article 3 of the Convention** with regard to the conduct of the investigation carried out following the assault.

The case concerned an assault against Rafi Sakir in 2009 in the centre of Athens which led to his hospitalisation, and also the conditions in which he was detained in a police station after his release from hospital.

The Court found in particular that the police had not sought to ascertain from the hospital whether Mr Sakir's state of health allowed him to be placed in detention. It noted that, in spite of specific instructions from his doctors, there had been shortcomings in the manner in which his medical condition and state of vulnerability were taken into account.

The Court also found a violation of Article 13 of the Convention on account of the lack of an effective remedy to complain about the conditions of detention.

Furthermore, the Court noted shortcomings in the investigation conducted following the assault, with regard to the gathering of evidence and the questioning of witnesses. In particular, it queried the authorities' failure to shed light on whether or not A.S.'s statement was truthful and on the circumstances surrounding his statements. Finally, it noted that the authorities had failed to assess the case in the particular context of the racist incidents which frequently occurred in Athens.

**Principal facts**

The applicant, Rafi Sakir, is an Afghan national who was born in 1985 and lives in Athens.

On 27 August 2009 Mr Sakir was attacked by a group of masked individuals, dressed in black and armed with knives and metal bars, who stabbed him and beat him severely. A.S., a compatriot who was present at the scene, alerted the police and Mr Sakir was taken to hospital.

A preliminary investigation was opened and A.S. identified two individuals, A.P. and T.P., as the main assailants, but withdrew his statement a few hours later. Criminal proceedings were then brought against A.S. for his illegal entry into Greece, and also for perjury and making a false statement to a public authority. A.P. and T.P. also lodged a complaint against him for defamation. Faced with this threat, A.S. then claimed that he had not lied in his first statement. The criminal proceedings against him for perjury and defamation were ultimately abandoned, and the criminal court acquitted him of making a false statement to the public authorities.

In his witness statement, P.P., a police officer based at the Aghios Panteleimon police station, confirmed that Mr Sakir was suffering from a chest injury and had been transferred to a public hospital. He also confirmed that another witness, A.K., had described the presence of a group numbering 15 to 20 persons, who had allegedly attacked another group of foreigners on Attikis Square. P.P. stated that he and other police officers had immediately investigated the incident once A.S. had told them that A.P. and TP were among those participating in the attack. He also specified that A.S. had been taken to the police station because he had no documents indicating that he was legally resident in the country, and emphasised that his allegations to the effect that A.P. and T.P. had been wearing masks and black clothing were false.

The preliminary investigation was then closed by the police and the case file sent to the prosecutor's office, which on 17 September 2012 discontinued the proceedings on the ground that the perpetrators had not been identified.

Mr Sakir left hospital four days after the attack. Several medical certificates confirmed that he had been wounded by a pointed and sharp object, particularly on the rib cage. In the absence of a residence permit, he was immediately placed in detention in the Aghios Panteleimon police station and an expulsion procedure was opened.

On 7 December 2009 Mr Sakir lodged an asylum application and submitted a request to the Attica Aliens Sub-Directorate not to deport him. He also asked that his detention be lifted, accompanying his request with arguments against his continued detention. He argued that the authorities had placed him in detention in spite of his poor health condition on leaving hospital, and that he had received no medical care, in spite of the specific instructions given by his doctors. He also explained that he had not been invited by the police to identify the two individuals recognised by A.S.

He received no reply to his complaints and was released on 19 September 2009, with an order to leave Greece within 30 days. On 31 March 2014 the examination of his asylum claim was stopped and the claim was placed on file, having been considered as tacitly withdrawn.

Complaints, procedure and composition of the Court

Relying on Article 2 (right to life) of the Convention, Mr Sakir complained that the national authorities had failed to meet their obligation to conduct an effective investigation following the assault against him. Relying on Article 3 (prohibition of inhuman or degrading treatment), he also complained about the conditions of his detention in the Aghios Panteleimon police station and of shortcomings in his medical treatment. Lastly, relying on Article 13 (right to an effective remedy), he considered that he had not had available an effective remedy that would have enabled him to complain about his conditions of detention.

The application was lodged with the European Court of Human Rights on 10 September 2009.

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

Mirjana **Lazarova Trajkovska** ("The former Yugoslav Republic of Macedonia"), *President*,  
Ledi **Bianku** (Albania),  
Kristina **Pardalos** (San Marino),

Linos-Alexandre **Sicilianos** (Greece),  
Paul **Mahoney** (the United Kingdom),  
Aleš **Pejchal** (the Czech Republic),  
Armen **Harutyunyan** (Armenia),

and also André **Wampach**, *Deputy Section Registrar*.  
Decision of the Court

## **Article 2**

The Court accepted that Article 2 of the Convention could be applicable where an individual had been the victim of an assault which put his or her life in danger, even if he or she survived. It considered, however, that although Mr Sakir's injuries may have been serious, it did not appear from the file that his survival had been in doubt. It therefore concluded that Article 2 did not apply to this case.

## **Article 3 and 13 (with regard to the conditions of detention)**

With regard to the material conditions of detention, the Court noted that the Ombudsman had reported overcrowding in the Aghios Panteleïmon police station and highlighted the unsuitable nature of the premises. It also emphasised that the UN Special Rapporteur on Torture, visiting Greece in 2010, had noted that certain police stations, including Aghios Panteleïmon, seemed to be used as places of detention for irregular immigrants, where they were held in unsatisfactory conditions.

The Court noted that the police had not sought to ascertain from the hospital whether Mr Sakir's state of health allowed him to be placed in detention. It drew attention to shortcomings in the manner in which Mr Sakir's medical condition and state of vulnerability had been taken into account. It noted that he had been unable to take a shower or tend to his wounds, that he was still wearing the same bloodstained clothes and that the authorities had not offered him clean clothing while in detention. In spite of specific instructions from his doctors, Mr Sakir was ultimately transferred to hospital for examination only one day prior to his release. In the light of these factors, the Court concluded that there had been a violation of Article 3 of the Convention. In addition, after noting that no effective remedy had been available to enable the applicant to complain about the conditions of his detention, the Court held that there had been a violation of Article 13 in this respect.

## **Article 3 (with regard to the conduct of the investigation)**

With regard to the investigations conducted following the assault, the Court noted shortcomings with regard to the gathering of evidence; no statement had been taken from Mr Sakir during the ten days he was held in the police station. The police authorities did not even invite him to identify AP. and TP., who were accused of being among the perpetrators. Neither had any steps been taken to identify other persons who had links with extremist groups known to have committed racist attacks.

In addition, neither the police authorities nor the prosecutor had sought to establish in detail the nature and cause of the injuries inflicted on Mr Sakir, by ordering, for example, a forensic medical report, the conclusions of which could have helped to identify the perpetrators.

The Court also noted failings with regard to the questioning of witnesses by the police authorities, since the only people questioned as witnesses by the police were P.P. and A.S., although P.P. had referred in his own statement to the existence of A.K. as another eyewitness, and yet the latter was never summoned for questioning. The Court also expressed doubts about the way in which A.S. – who, as an irregular migrant, was particularly vulnerable – had been questioned. It considered that the police ought to have provided him with conditions for questioning which could have guaranteed the reliability and veracity of any information he could give. In particular, the Court queried A.S.'s withdrawal of his statement concerning A.P.'s and T.P.'s involvement in the attack, and the fact that the police authorities did not question him about this change of position. Although the charges of

perjury, defamation and making a false declaration to the public authorities against A.S. were ultimately declared unfounded, the relevant judicial authorities had taken no steps to establish *in fine* the veracity of his initial witness statement.

Finally, the Court draw attention to the general context of the case, and to the reports by international NGOs or Greek national bodies highlighting the phenomenon of racist violence in the centre of Athens, especially in the Aghios Panteleïmon district, and serious omissions on the part of the police in investigating those attacks. The Court noted that in the present case the police and judicial authorities had failed to make a connection between the assault against Mr Sakir and other similar incidents.

In the light of all these circumstances, the Court concluded that the authorities had not dealt with Mr Sakir's case in a sufficiently effective manner, in violation of Article 3 of the Convention under its procedural aspect.

**Just satisfaction (Article 41)**

As the applicant had not submitted a claim in respect of pecuniary or non-pecuniary damage, or in respect of costs and expenses, the Court considered that there was no call to award him any sum under those heads.

**135. ECHR, *R.B. v. Hungary*, no. 64602/12, Chamber judgment of 12 April 2016 (Article 8, Right to respect for private and family life- Violation).** The case concerned the complaint by the applicant, a Hungarian woman of Roma origin, that she had been subjected to racist insults and threats by participants in an anti-Roma march and that the authorities had failed to investigate the racist verbal abuse.

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**ECHR 131 (2016)  
12.04.2016**

### **Press release issued by the Registrar**

In today's **Chamber** judgment in the case of **R.B. v. Hungary** (application no. 64602/12) the European Court of Human Rights held, by a majority, that there had been:

**a violation of Article 8 (right to respect for private and family life)** of the European Convention on Human Rights on account of the inadequate investigation into the applicant's allegations of racially motivated abuse.

The case concerned the complaint by a woman of Roma origin that she had been subjected to racist insults and threats by participants in an anti-Roma march and that the authorities had failed to investigate the racist verbal abuse.

The Court considered in particular that, given that the insults and acts in question had taken place during an anti-Roma march and had come from a member of an extremely right-wing vigilante group, the authorities should have conducted the investigation in that specific context. However, they had failed to take all reasonable steps to establish the role of racist motives.

#### **Principal facts**

The applicant, Ms R.B., is a Hungarian national who was born in 1988 and lives in the village of Gyöngyöspata (Hungary).

Over a period of several days in March 2011 a civil guard association and two right-wing paramilitary groups organised marches in the Roma neighbourhood of Gyöngyöspata in the context of a demonstration held in the village by a right-wing political party. On the days of the marches there was a considerable police presence in the village. On the day of one of the marches, four men passed by Ms R.B.'s house – while she was outside in her garden with her child and several acquaintances – yelling "Go inside, you damned dirty gypsies!" One of the men threatened her and her acquaintances that he would build a house in the Roma neighbourhood "out of their blood" and stepped towards the fence swinging an axe in her direction.

In April 2011 Ms R.B. lodged a criminal complaint with the police against unknown perpetrators, alleging the offences of violence against a member of an ethnic group, harassment and attempted grievous bodily assault. The police opened an investigation on charges of violent harassment, which was later joined to criminal proceedings on charges of harassment which had been opened following a complaint lodged by the president of the local Roma minority self-governing body. The proceedings were discontinued in July 2011 on the grounds that harassment was punishable only if directed against a clearly identified person and that criminal liability could not be established on the basis of threats uttered in general.

In subsequent minor offence proceedings, which were later stayed, a number of witnesses were heard who identified several persons as having participated in the incident. Ms R.B. identified one man as the person who had threatened her. In October 2011 the prosecutor's office opened a separate investigation into the allegations of harassment on the basis of her complaint. A request by her lawyer to open an investigation into the offence of violence against a member of an ethnic group was refused by the prosecutor, finding that the use of force, an objective element of the alleged crime, could not be established. The investigation into harassment was eventually discontinued, on the grounds that none of the witness statements supported Ms R.B.'s allegation that she had been threatened. The decision was upheld in March 2012.

Subsequent private prosecution proceedings brought by Ms R.B. were eventually discontinued since she withdrew her charges for fear of reprisals.

### Complaints, procedure and composition of the Court

Relying on Article 3 (prohibition of inhuman or degrading treatment) read alone and in conjunction with Article 14 (prohibition of discrimination) of the Convention, Ms R.B. complained of the verbal abuse and threats to which she had been subjected and maintained that the authorities had failed to conduct an effective investigation into the incident. She further relied on Article 8 (right to respect for private and family life), complaining: that the authorities had failed to apply relevant, in particular criminal-law, measures against the participants of the marches, so as to protect her from racist harassment; and that the authorities had failed to investigate the racist verbal abuse.

The application was lodged with the European Court of Human Rights on 2 October 2012.

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

Vincent A. **de Gaetano** (Malta), *President*,  
 András **Sajó** (Hungary),  
 Boštjan M. **Zupančič** (Slovenia),  
 Nona **Tsotsoria** (Georgia),  
 Paulo **Pinto de Albuquerque** (Portugal),  
 Krzysztof **Wojtyczek** (Poland),  
 Gabriele **Kucsko-Stadlmayer** (Austria),

and also Françoise **Elens-Passos**, *Deputy Registrar*.

Decision of the Court

### Article 8

As regards the complaint concerning the authorities' failure to carry out an effective investigation, the central issue for the Court was that the alleged abuse which had occurred during the anti-Roma rally had been directed against Ms R.B. for her belonging to an ethnic minority. That conduct had necessarily affected her private life within the meaning of Article 8.

Ms R.B. had lodged her criminal complaint into the verbal abuse and threats less than a month after the incident, in April 2011. The police had joined her case to another criminal complaint concerning the same events and had opened an investigation into the offence of harassment, which was subsequently discontinued. A separate investigation into her allegations had been opened six months later. In the initial criminal complaint Ms R.B. had already submitted that she had been victim of a racially motivated attack, alleging that it had constituted, in particular, violence against a member of a group and harassment. Nonetheless, in the reinitiated investigation the lawenforcement authorities had again concentrated only on harassment.

When subsequently requesting to have the scope of the investigation extended to the offence of violence against a member of an ethnic group, Ms R.B.'s representative had submitted a detailed description of the events and had argued that the anti-Roma motive should have been assessed in the investigation. However, those submissions had been to no avail, the prosecutor finding that the use of force, an objective element of the alleged crime, could not be established.

Given that the insults and acts in question had taken place during an anti-Roma rally lasting for several days and had come from a member of an extremely right-wing vigilante group, the Court considered that it would have been essential for the authorities to conduct the investigation in that specific context and to take all reasonable steps to establish the role of racist motives. Moreover, the Court noted that the Hungarian criminal law, as in force at the time, namely the provisions on the offences of violence against a member of a group and incitement against a group appeared to provide an appropriate legal basis for launching a criminal investigation into alleged bias motives. However, in Ms R.B.'s case, the law-enforcement authorities had found that an objective element of the crime of violence against a member of a group could not be established and there were no grounds to pursue the investigations into that offence. The Court also observes that the provision of the Criminal Code on harassment, on which the authorities had focused, did not contain any element alluding to racist motives.

In conclusion, the manner in which the criminal law had been applied in the case had been defective, with the result that there had not been an adequate investigation into Ms R.B.'s complaint of racially motivated abuse. There had accordingly been a **violation of Article 8**.

At the same time, the Court **declared inadmissible the complaint under Article 8 concerning the authorities' inaction during the rallies** as being manifestly ill-founded, coming to the conclusion that there had been no appearance of an unreasonable response by the police to the demonstrations.

#### **Article 3 and Article 14**

The Court also declared **inadmissible Ms R.B.'s complaint under Article 3 read alone or in conjunction with Article 14** as being manifestly ill-founded. While the right-wing groups had been present in her neighbourhood for several days, they had been continuously monitored by the police. No physical confrontation had taken place between the Roma inhabitants and the demonstrators. The statements and acts by one of the demonstrators, although openly discriminatory and performed in the context of marches with intolerant overtones, had not been so severe as to cause the kind of fear, anguish or feelings of inferiority that were necessary for a complaint to fall within the scope of Article 3.

#### **Just satisfaction (Article 41)**

The Court held that Hungary was to pay Ms R.B. 4,000 euros (EUR) in respect of non-pecuniary damage and EUR 3,717 in respect of costs and expenses.

#### **Separate opinion**

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

- 136. ECHR, *Unite the Union v. the United Kingdom*, no. 65397/13, Decision of 3 May 2016 (Article 11, Freedom of association- Inadmissible).** The applicant trade union claimed that the respondent state failed to comply with its positive obligation derived from the right to freedom of association, as the statutory body in charge of collective bargaining in the agricultural sector had been abolished by governmental legislation.

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**Information Note on the Court's case-law 196  
May 2016**

***Unite the Union v. the United Kingdom (dec.) - 65397/13***

Decision 3.5.2016 [Section I]

**Article 11**

**Article 11-1**

**Freedom of association**

Alleged inability of trade union to engage in collective bargaining owing to abolition of the relevant wages council: *inadmissible*

*Facts* – The Agricultural Wages Board of England and Wales (“AWB”) was composed of employers’, workers’ and ministry representatives and had the power to make orders in respect of agricultural workers concerning minimum rates of wages, holiday entitlement and other terms of employment. It was abolished by section 72(1) of the Enterprise and Regulatory Reform Act 2013 following an extensive consultation process by the Government.

The applicant was the only significant trade union in the agricultural sector in the United Kingdom, representing around 18,000 members. In the Convention proceedings it complained that as a result of the AWB’s abolition, it had been denied the effective right to collective bargaining in the agricultural sector as, in the absence of that body, there was no effective legal mechanism for promoting or requiring collective bargaining in the sector.

*Law* – Article 11: The case concerned the extent of the respondent State’s positive obligation under Article 11, in particular, whether it was obliged to have in place a mandatory, statutory forum for collective bargaining in the agricultural sector. In this sphere and in the absence of an established consensus among the member States of the Council of Europe, the respondent State enjoyed a wide margin of appreciation in determining whether a fair balance was struck between the protection of the public interest in the abolition of the AWB and the applicant’s competing rights under Article 11.

The abolition of the AWB was preceded by research into pay and conditions in the agricultural sector and a public consultation. The consultation paper put forward a number of reasons tending to support the AWB’s abolition, all of which were relevant to the decision where the balance between the competing interests lay. In particular, it was noted that the AWB was the only outstanding wage council and that there were indications that a number of agricultural workers were already negotiating their own agreements. The financial implications of abolition on workers and farmers and the net savings in terms of the AWB’s operating costs were assessed. The human-rights implications of the proposal had also been considered.

Significantly, the applicant had not been prevented from engaging in collective bargaining. The conditions for collective agreements to be deemed to be legally enforceable in the United Kingdom – the existence of intent to be bound by the collective agreement and of an agreement in writing – did not appear unreasonable or unduly restrictive. Even accepting the applicant’s submission that voluntary collective bargaining in the agricultural sector was virtually non-existent and impractical, this was not sufficient to lead to the conclusion that a mandatory mechanism should be recognised as

a positive obligation. The applicant remained free to take steps to protect the operational interests of its members by collective action, including collective bargaining, and by engaging in negotiations to seek to persuade employers and employees to reach collective agreements and it had the right to be heard. The relevant European and international instruments, as they currently stood, did not support the view that a State's positive obligations under Article 11 extended to providing for a mandatory statutory mechanism for collective bargaining in the agricultural sector.

Bearing in mind the wide margin of appreciation in this area, the Court was not satisfied that, in deciding to abolish the AWB, the respondent Government had failed to observe their positive obligations incumbent under Article 11. It could not be said that the United Kingdom Parliament had lacked relevant and sufficient reasons for enacting the contested legislation or that the abolition of the AWB had failed to strike a fair balance between the competing interests at stake.

*Conclusion:* inadmissible (manifestly ill-founded).

**137. ECHR, *Karácsony and Others v. Hungary*, nos. 42461/13 and 44357/13, Grand Chamber judgment of 17 May 2016 (Article 10, Freedom of expression- Violation).**

The case concerned fines imposed on Hungarian MPs from two opposition parties who had disrupted parliamentary proceedings by protesting against two bills being debated in Parliament. The applicants complained that the decisions to fine them for their conduct during the parliamentary session had violated their right to freedom of expression and that they had not had a remedy by which to challenge the disciplinary measures taken against them.

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**ECHR 161 (2016)**

**17.05.2016**

**Press release issued by the Registrar**

In today's **Grand Chamber** judgment in the case of **Karácsony and Others v. Hungary** (application nos. 42461/13 and 44357/13) the European Court of Human Rights held, unanimously, that there had been:

**a violation of Article 10 (freedom of expression)** of the European Convention on Human Rights.

The case concerned fines imposed on Hungarian MPs from two opposition parties who had disrupted parliamentary proceedings by protesting against two bills being debated in Parliament.

The Court held in particular that at the relevant time there had been no provision under the domestic law enabling an MP sanctioned in disciplinary proceedings to be involved in those proceedings and to be heard.

It was noteworthy that an amendment to the Parliamentary Act, which had entered into force on 4 March 2014, now allowed a fined MP to seek a remedy and submit his or her arguments before a parliamentary commission. The necessary minimum procedural guarantees therefore appeared to have been put in place, but that amendment had not affected the applicants' situation.

The Court found that the interference with the applicants' freedom of expression had not been proportionate to the legitimate aims pursued because it had not been accompanied by adequate procedural guarantees.

**Principal facts**

The applicants, Gergely Karácsony, Péter Szilágyi, Dávid Dorosz, Rebeka Katalin Szabó, Bernadett Szél, Ágnes Osztolykán and Ms Szilvia Lengyel, are Hungarian nationals who were born between 1971 and 1985 and live in Budapest, Budakeszi and Gödöllő (Hungary). As the two applications initially lodged were similar on the facts and in law, the Court decided to join them (in accordance with Rule 42 § 1 of its Rules of Court).

At the relevant time Mr Karácsony, Mr Szilágyi, Mr Dorosz and Ms Szabó were members of parliament and of the opposition party *Párbeszéd Magyarországért* (“Dialogue for Hungary”). On 30 April 2013, during preliminary parliamentary debates, Mr Karácsony and Mr Szilágyi placed in the centre of the Chamber a large placard displaying the words “FIDESZ [the party in Government] You steal, you cheat, and you lie.” Subsequently, they placed the placard next to the Secretary of State’s seat.

The Speaker of Parliament presented a proposal to fine Mr Karácsony 50,000 Hungarian forints ((HUF); equivalent to EUR 170) and Mr Szilágyi HUF 185,520 (approximately EUR 600) for their conduct considered to be gravely offensive to parliamentary order.

On 21 May 2013, during the final vote on a tobacco-related Bill, Mr Dorosz and Ms Szabó displayed in the centre of the Chamber a large banner displaying the words “Here Operates the National Tobacco Mafia”. The Speaker proposed to fine them HUF 70,000 (approximately EUR 240) each for their conduct.

Ms Szél, Ms Oszolykán and Ms Lengyel were members of parliament and of the opposition party LMP (*Politics Can Be Different*). On 21 June 2013, when Parliament held the final vote on a Bill transferring agricultural and forestry land, Ms Lengyel protested by placing a small, golden wheelbarrow filled with soil on the table in front of the Prime Minister while Ms Szél and Ms Oszolykán unfurled a banner displaying the words “Land distribution instead of land robbery!” in front of the Speaker’s pulpit. Ms Lengyel used a megaphone to speak. The Speaker proposed to fine Ms Szél and Ms Lengyel HUF 131,400 (approximately EUR 430) each and Ms Oszolykán HUF 154,000 (approximately EUR 510) for their conduct considered to be offensive to parliamentary order.

The Speaker’s three proposals were adopted without debate in plenary session.

### Complaints, procedure and composition of the Court

Relying on Article 10 of the Convention, the applicants complained that the decisions to fine them for their conduct during the parliamentary session had violated their right to freedom of expression. They also complained, relying on Article 13 (right to an effective remedy) taken in conjunction with Article 10, that they had not had a remedy by which to challenge the disciplinary measures taken against them.

The applications were lodged with the European Court of Human Rights on 14 June and 5 July 2013.

In its two judgments delivered on 16 September 2014 the Chamber had concluded, unanimously, that there had been a violation of Article 10 and of Article 13 read in conjunction with Article 10.

On 15 December 2014 the Government requested that the case be referred to the Grand Chamber under Article 43 of the Convention (referral to the Grand Chamber) and on 16 February 2015 the panel of the Grand Chamber accepted that request. Third-party observations were received from the Czech and the United Kingdom Governments, who had been given leave to intervene in the written procedure. A hearing was held on 8 July 2015.

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

Luis **López Guerra** (Spain), *President*,  
 András **Sajó** (Hungary),  
 Mirjana **Lazarova Trajkovska** (“The former Yugoslav Republic of Macedonia”),  
 Angelika **Nußberger** (Germany),  
 Mark **Villiger** (Liechtenstein),  
 Boštjan M. **Zupančič** (Slovenia),  
 Khanlar **Hajiyev** (Azerbaijan),  
 Ján **Šikuta** (Slovakia),  
 Vincent A. **de Gaetano** (Malta),  
 Linos-Alexandre **Sicilianos** (Greece),  
 Erik **Møse** (Norway),  
 Helena **Jäderblom** (Sweden),  
 Johannes **Silvis** (the Netherlands),  
 Valeriu **Grițco** (the Republic of Moldova),  
 Ksenija **Turković** (Croatia),  
 Branko **Lubarda** (Serbia),  
 Yonko **Grozev** (Bulgaria),

and also Johan **Callewaert**, *Deputy Grand Chamber Registrar*.

Decision of the Court

### Article 10

The Court dismissed, first of all, the Government’s objection on grounds of non-exhaustion of domestic remedies. It found that a constitutional complaint could not be considered an effective remedy since, even if successful, it would not have been capable of redressing the alleged violation.

The Court observed that section 49(4) of the Parliament Act<sup>2</sup> regulated the conduct of MPs in Parliament. Members of parliament should normally be aware of the disciplinary rules which were aimed at ensuring the orderly functioning of Parliament. The Court found that the applicants, on account of their professional status of parliamentarians, must have been able to foresee, to a reasonable degree, the consequences which their conduct could entail, even if section 49(4) had never yet been applied. That provision had met the required level of precision and the interference with the applicants’ freedom of expression had been prescribed by law. In the Court’s view, the interference had pursued two legitimate aims: prevention of disruption to the work of Parliament, and thus the prevention of disorder, and protection of the rights of other members of parliament, and thus protection of the rights of others.

The Court had consistently underlined, in its case-law, the importance of freedom of expression for members of parliament. However, while the freedom of parliamentary debate was of fundamental importance in a democratic society, it was not absolute in nature. A Contracting State could make it subject to certain “restrictions” or “penalties”, and it was for the Court to give a final ruling on the compatibility of such measures with the freedom of expression enshrined in Article 10. Accordingly, the universally recognised principle of parliamentary immunity offered enhanced, but not unlimited,

protection to speech in Parliament. Parliaments were entitled to react when their members engaged in disorderly conduct disrupting the normal functioning of the legislature.

The Court reiterated that the Convention established a close nexus between an effective political democracy and the effective operation of Parliament. The exercise of free speech in Parliament had to yield on occasions to the legitimate interests of protecting the orderly conduct of parliamentary business as well as the protection of the rights of other members of parliament. The rules governing the internal operation of Parliament illustrated the well-established constitutional principle of the autonomy of Parliament. In accordance with that principle, Parliament was entitled to regulate its own internal affairs. Parliamentary autonomy extended to Parliament's power to enforce rules aimed at ensuring the orderly conduct of parliamentary business.

However, the Court observed that the discretion available to the national authorities in sanctioning speech or conduct in Parliament that could be deemed abusive, albeit very important, was not unfettered. Parliamentary autonomy should not be abused for the purpose of suppressing the freedom of expression of MPs, which lay at the heart of political debate in a democracy. The Court considered it important to protect the parliamentary minority from any abuse by the majority.

The Court thus had no difficulties in accepting that it had been necessary to react to the applicants' conduct in Parliament, which had been a matter for the House to consider in the exercise of its autonomy. However, it had to determine whether the interference had been proportionate to the legitimate aims pursued and whether the reasons adduced by the national authorities to justify it had been relevant and sufficient.

The Court considered that displaying a placard or banner in Parliament was not a conventional manner for MPs to express their views on a given subject debated in the House. Having chosen this form of conduct, the applicants had disrupted order in Parliament. The Court was satisfied that the applicants had not received sanctions for expressing their views on issues debated in Parliament, but rather for the time, place and manner in which they had done so.

The Court emphasised that the exercise of Parliament's power to sanction disorderly conduct of a member had to respect the principle of proportionality inherent in Article 10, including in its procedural aspect. Compliance with that principle required that the sanction imposed should correspond to the severity of the disciplinary breach.

Bearing in mind the wide margin of appreciation to be afforded to the Contracting States, the Court found that the present case involved disciplinary sanctions imposed on MPs in a context in which they did not dispose of basic procedural safeguards under the parliamentary procedure to contest those measures.

At the relevant time the domestic legislation had not provided for a fined MP to be involved in the relevant procedure, notably by being heard. The procedure in the applicants' case had consisted of a written proposal of the Speaker to impose fines and its subsequent adoption by the plenary without debate. Thus, the procedure had not afforded the applicants any procedural safeguards. Furthermore, two of the proposals had not contained any relevant reasons why the applicants' actions had been considered gravely offensive to parliamentary order. While the applicants could have challenged the measures proposed by the Speaker before the plenary Parliament, the Court found that this had been merely a general possibility of making a statement in Parliament or petitioning certain parliamentary

bodies – the House Committee or the Committee responsible for the interpretation of the Rules of Parliament – without any guarantee that the applicants’ arguments would be considered in the relevant disciplinary procedure. It was noteworthy that an amendment to the Parliament Act introducing the possibility for a fined MP to seek a remedy and to make representations before a parliamentary committee had entered into force on 4 March 2014 and that the necessary minimum procedural safeguards thus appeared to have been put in place. However, that amendment had not affected the applicants’ situation.

The Court considered that the impugned interference with the applicants’ right to freedom of expression had not been proportionate to the legitimate aims pursued because it had not been accompanied by adequate procedural safeguards. The Court concluded that the interference with the applicants’ right to freedom of expression had not been “necessary in a democratic society” and that, accordingly, there had been a violation of Article 10 of the Convention.

#### **Article 13 taken in conjunction with Article 10**

In the light of the Court’s finding that there had been a violation of Article 10 and having regard to the reasons underlying that finding, the Court concluded that it was not necessary to examine separately the applicants’ complaint under Article 13 read in conjunction with Article 10.

#### **Article 41 (just satisfaction)**

The Court held that Hungary was to pay EUR 170 to Mr Karácsony, EUR 600 to Mr Szilágyi, EUR 240 to Mr Dorosz, EUR 240 to Ms Szabó, EUR 430 to Ms Szél, EUR 510 to Ms Osztyokán and EUR 430 to Ms Lengyel in respect of pecuniary damage and EUR 12,000 to the applicants jointly for costs and expenses.

- 138. ECHR, *Avotiņš v. Latvia*, no. 17502/07, Grand Chamber judgment of 23 May 2016 (Article 6-1, Right to a fair trial – No violation).** The applicant complained that in issuing a declaration of enforceability in respect of a judgment from the Cypriot courts, allegedly given in breach of his defence rights, the Latvian Supreme Court had infringed his right to a fair trial. The Court examined the 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.
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**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 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

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 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 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 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.

- 139. ECHR, *Biao v. Denmark*, no. 38590/10, Grand Chamber judgment of 24 May 2016 (Article 14, Prohibition of discrimination read in conjunction with Article 8-Violation).** The case concerned the complaint by a naturalised Danish citizen of Togolese origin, Ousmane Biao, and his Ghanaian wife that they could not settle in Denmark as the Danish authorities refused to grant them family reunion. In its assessment, the Court took into consideration relevant EU law provisions and case-law, leading to the conclusion that the requirements of the domestic law were discriminatory.

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**ECHR 170 (2016)**  
**24.05.2016**

**Press release issued by the Registrar**

In today's **Grand Chamber** judgment in the case of **Biao v. Denmark** (application no. 38590/10) the European Court of Human Rights held:

by 12 votes to five, that there had been a **violation of Article 14 (prohibition of discrimination) read in conjunction with Article 8 (right to respect for private and family life)** of the European Convention on Human Rights; and,

by 14 votes to three, that there was **no need to examine the application separately under Article 8** of the European Convention taken alone.

The case concerned the complaint by a naturalised Danish citizen of Togolese origin, Ousmane Biao, and his Ghanaian wife that they could not settle in Denmark. Notably, the Danish authorities refused to grant them family reunion as the couple did not comply with the requirement under the relevant domestic law (the Aliens Act) that they must not have stronger ties with another country, Ghana in their case, than with Denmark (known as the "attachment requirement"). They also complained that an amendment to the Aliens Act in December 2003 – lifting the attachment requirement for those who held Danish citizenship for at least 28 years – resulted in a difference in treatment between those born Danish nationals and those, like Mr Biao, who had acquired Danish citizenship later in life.

The Court considered that the Government's justification for introducing the 28-year rule (namely, to ensure that there were not unintended consequences for Danish expatriates who had started a family while away and subsequently had difficulties fulfilling the attachment requirement upon their return to Denmark) was, to a large extent, based on rather speculative arguments. In particular, the question of whether a Danish national had created such strong ties with Denmark that family reunion with a foreign spouse had a prospect of being successful from an integration point of view could not depend solely on the length of nationality, whether for 28 years or less. That reasoning meant that certain elements had been overlooked in Mr Biao's case, such as the fact that, in order to obtain Danish nationality, he had resided in Denmark for at least nine years, had proved his proficiency in the Danish language and knowledge of Danish society, and had met the requirement of self-support.

The Court therefore concluded that the Government had failed to show that there were compelling or very weighty reasons unrelated to ethnic origin to justify the indirect discriminatory effect of the 28-year rule. That rule favoured Danish nationals of Danish ethnic origin, and placed at a disadvantage, or had a disproportionately prejudicial effect on persons, such as Mr Biao, who acquired Danish nationality later in life and who were of ethnic origins other than Danish.

## Principal facts

The applicants, Ousmane Biao, a Danish national of Togolese origin, and his wife, Asia Adamo Biao, a Ghanaian national, were born in 1971 and 1979 respectively and live in Malmö, Sweden. They have a son, born in Sweden in May 2004, who is Danish due to his father's nationality.

The case concerns the couple's complaint about the Danish authorities' refusal to grant them family reunion in Denmark. Mr Biao was born in Togo and lived there until the age of six when he went to live in Ghana with his uncle until the age of 21. He entered Denmark in July 1993 and, having married a Danish national in November 1994, was issued with a residence permit in 1997. He learnt Danish and had steady employment for the next five years and was granted Danish nationality in 2002. In the meantime, Mr Biao divorced in 1998. In the period from 1998 to 2003 he visited Ghana four times and during his last visit there, in February 2003, he married his current wife, Asia Adamo Biao, born and raised in Ghana.

A week after their marriage, Ms Biao requested a residence permit for Denmark, which was refused by the Aliens Authority in July 2003 and on appeal in August 2004. The authorities found in particular that the applicants did not comply with the requirement that a couple applying for family reunion must not have stronger ties with another country, Ghana in the applicants' case, than with Denmark (known as the "attachment requirement").

The High Court and the Supreme Court upheld the refusal to grant family reunion in September 2007 and January 2010, respectively. The majority of the Supreme Court found that it could be objectively justified to select a group of nationals with such strong ties to Denmark (such as expatriates) that it would be unproblematic to grant family reunion, the rationale being that it would normally be possible for the foreign spouse or cohabitant of such a person to be successfully integrated into Danish society. Furthermore, the consequences of the 28-year rule could not be considered disproportionate for Mr Biao, who had been a Danish national for only two years when he was refused family reunion.

Meanwhile in the summer of 2003, Ms Biao had entered Denmark on a tourist visa and the couple moved to Sweden in November 2003. Mr Biao maintains a job in Copenhagen and commutes every day from Malmö in Sweden.

## Complaints, procedure and composition of the Court

The case was lodged with the European Court of Human Rights on 12 July 2010.

Mr and Ms Biao complained that the decision of August 2004 refusing to grant Ms Biao a residence permit in Denmark for family reunion had breached their rights under Article 8 (right to respect for private and family life) of the Convention. The applicants also relied on Article 14 (prohibition of discrimination) in conjunction with Article 8, alleging that an amendment to the Aliens Act in December 2003 – notably the attachment requirement was lifted for those who had held Danish citizenship for at least 28 years – had resulted in a difference in treatment between those born Danish nationals and those, like Mr Biao, who had acquired Danish citizenship later in life as well as between Danish nationals of Danish origin and Danish nationals of other origin.

In its Chamber judgment of 25 March 2014 the Court held, unanimously, that there had been no violation of Article 8 and, by four votes to three, that there had been no violation of Article 14 in conjunction with Article 8.

On 24 June 2014 the applicants requested that the case be referred to the Grand Chamber under Article 43 (referral to the Grand Chamber) and on 8 September 2014 the panel of the Grand Chamber accepted that request.

“The AIRE Centre” was granted leave to intervene as a third party in the written proceedings (Article 36 § 2 of the Convention).

A Grand Chamber hearing on the case was held in public in Strasbourg on 1 April 2015.

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

Işıl **Karakaş** (Turkey), *President*,  
 Dean **Spielmann** (Luxembourg),  
 Josep **Casadevall** (Andorra),  
 Mark **Villiger** (Liechtenstein),  
 Boštjan M. **Zupančič** (Slovenia),  
 Ján **Šikuta** (Slovakia),  
 George **Nicolaou** (Cyprus),  
 Ledi **Bianku** (Albania),  
 Ganna **Yudkivska** (Ukraine),  
 Vincent A. **de Gaetano** (Malta),  
 Paulo **Pinto de Albuquerque** (Portugal),  
 André **Potocki** (France),  
 Helena **Jäderblom** (Sweden),  
 Paul **Mahoney** (the United Kingdom),  
 Ksenija **Turković** (Croatia),  
 Iulia **Motoc** (Romania),  
 Jon Fridrik **Kjølbro** (Denmark),

and also Lawrence **Early**, *Jurisconsult*.

Decision of the Court

**Article 14 (prohibition of discrimination) taken in conjunction with Article 8 (private and family life)**

In the judicial review of the application of the 28-year rule to Mr Biao and his wife, the Danish Supreme Court had found that the discrimination at issue had been based solely on the length of citizenship and that the consequences could not be considered disproportionate for Mr Biao, who had only been a Danish citizen for two years when he was refused family reunion. The Court, on the other hand, applied a different test when examining the rule, which required very weighty reasons unrelated to ethnic origin to justify a difference in treatment based exclusively on the ground of nationality.

The Court first established that the facts of the case had disclosed indirect discrimination. Notably, unlike certain categories of persons (namely, Danish-born expatriates, all other Danish-born nationals resident in Denmark and foreigners who were not Danish nationals but were born and raised in Denmark or who came to Denmark as small children and who had lawfully resided in Denmark for 28 years) who could be exonerated from the attachment requirement under the 28- year rule, Mr Biao had acquired Danish nationality later in life and could not benefit from the rule since the exception would only apply after 28 years had passed from the date on which he had become a Danish citizen. Although persons who acquired Danish nationality later in life might not in practice have to wait 28 years to be allowed family reunification, but rather three years (when a couple in the applicants’ situation would generally fulfill the attachment requirement, namely after three years of acquiring Danish nationality or after 12 years of lawful residence), that did not, in the Court’s view, remove the

fact that the application of the 28-year rule had had a prejudicial effect on Danish nationals in Mr Biao's situation. Therefore, the 28-year rule had had the indirect effect of favouring Danish nationals of Danish ethnic origin, and placing at a disadvantage, or having a disproportionately prejudicial effect on persons who, like Mr Biao, had acquired Danish nationality later in life and who were of an ethnic origin other than Danish.

As to the aim of the 28-year rule, the Court observed that the legislative process surrounding the Aliens Act showed that the Government had wished, on the one hand, to control immigration and improve integration of both resident foreigners and resident Danish nationals of foreign extraction, and, on the other, to ensure that there were not unintended consequences for Danish expatriates who had started a family while away and subsequently had difficulties fulfilling the attachment requirement upon return.

However, the Court considered that the justification for introducing the 28-year rule was, to a large extent, based on rather speculative arguments, in particular as to the time when, in general, it could be said that a Danish national had created such strong ties with Denmark that family reunion with a foreign spouse had a prospect of being successful from an integration point of view. The answer to that question could not, in the Court's view, depend solely on the length of nationality, whether for 28 years or less. Therefore, the Court could not follow the Government's argument that the consequences of the 28-year rule could not be considered disproportionate for Mr Biao because he had been a Danish national for only two years when he was refused family reunion. That line of reasoning seemed to overlook the fact that, in order to obtain Danish nationality, Mr Biao had resided in Denmark for at least nine years, had proved his proficiency in the Danish language and knowledge of Danish society, and had met the requirement of self-support. The application of the 28-year rule to Mr Biao also meant that such relevant factors as his four-year marriage to a Danish national, his participation in various courses, the fact that he worked in Denmark for more than six years and that he had had a son who was a Danish national by virtue of his father's nationality, could not be taken into account.

Indeed, some of the Government's arguments reflected negatively on the lifestyle of Danish nationals of non-Danish ethnic extraction, who, according to the Government, had a "marriage pattern" which "was to marry a person from their country of origin" and which "contributed to "the retention of these persons in a situation where they, more than others, experience problems of isolation and maladjustment in relation to Danish society." In this connection, the Court recalled that general biased assumptions or prevailing social prejudice in a particular country did not provide sufficient justification for a difference in treatment, be it on the ground of sex (as it had found in a previous Grand Chamber case<sup>2</sup>) or, as in the applicants' case, on the ground of being a naturalized national.

The Court also bore in mind the European Convention on Nationality and a certain trend towards a European standard aimed at eliminating the discriminatory application of rules in matters of nationality between nationals from birth and other nationals, including naturalised persons. Indeed, it would appear that, of the 29 member countries<sup>3</sup> studied in a comparative law survey, there were no States which, like Denmark, distinguished between different groups of their own nationals when it came to the determination of the conditions for granting family reunification. Furthermore, in European Union law on family reunification no distinction was made between those who had acquired citizenship by birth and those who had acquired it by registration or naturalisation. Moreover, various independent bodies (the European Commission against Racism and Intolerance, the Committee on the Elimination of Racial Discrimination and the Council of Europe Commissioner for Human Rights) had all expressed concern that the 28-year rule entailed indirect discrimination.

In conclusion, the Court found that the Government had failed to show that there were compelling or very weighty reasons unrelated to ethnic origin to justify the indirect discriminatory effect of the 28-year rule. That rule favoured Danish nationals of Danish ethnic origin, and placed at a disadvantage,

or had a disproportionately prejudicial effect on persons who acquired Danish nationality later in life and who were of ethnic origins other than Danish.

It followed that there had been a violation of Article 14 read in conjunction with Article 8 of the Convention in Mr Biao and his wife's case.

Given that conclusion, the Court was of the opinion that there was no need to examine separately the application under Article 8 alone.

**Article 41 (just satisfaction)**

The Court held, by 12 votes to five, that Denmark was to pay Mr and Mrs Biao 6,000 euros (EUR) in respect of non-pecuniary damage.

**Separate opinions**

Judges Villiger, Mahoney and Kjolbro expressed a joint dissenting opinion. Judge Jäderblom expressed a partly dissenting opinion, Judge Pinto de Albuquerque a concurring opinion and Judge Yudkivska a dissenting opinion. These opinions are annexed to the judgment.

**140. ECHR, *Beortegui Martinez v. Spain*, no. 36286/14, Chamber judgment of 31 May 2016 (Article 3, Prohibition of torture and inhuman or degrading treatment – Violation on account of the investigation conducted by the national authorities / No violation as regards the alleged ill-treatment).** The applicant complained that there had been no effective investigation into his complaint of having been ill-treated while held incommunicado in police custody. The Court 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).

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 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.

- 141. ECHR, *R.D. v. France*, no. 34648/14, Chamber judgment of 16 June 2016 (Article 3, Prohibition of torture and inhuman or degrading treatment – 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

**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

**142. ECHR, *Nait-Liman v. Switzerland*, no. 51357/07, Chamber judgment of 21 June 2016 (Article 6, Right to a fair trial – No violation).** Following the refusal of the Swiss civil courts to examine the applicant's 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 of torture under international law, had not violated the applicant's rights.

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**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 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 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.

- 143. ECHR, *Al-Dulimi and Montana Management Inc. v. Switzerland*, no. 5809/08, Grand Chamber judgment of 21 June 2016 (Article 6-1, Right to a fair trial – Violation).** The Grand Chamber upheld the Chamber judgment (case no. 82). 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. As the resolution did not contain any clear or explicit wording excluding the possibility of judicial supervision of the measures taken for its implementation, this was to be understood as authorising the courts of the respondent State to exercise sufficient scrutiny so that any arbitrariness could be avoided. 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.

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**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 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 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 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

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.

- 144. ECHR, *Baka v. Hungary*, no. 20261/12, Grand Chamber judgment of 23 June 2016 (Article 6-1, Right to access to a court- Violation; Article 10, Freedom of expression- Violation).** The applicant, Mr Baka, President of the Hungarian Supreme Court alleged that his mandate had been prematurely terminated following his criticism of legislative reforms. He further complained that he had been denied access to a court to defend his right in relation to the premature termination of his mandate as President of the Supreme Court, since the measure resulted from legislation at constitutional level and was therefore not subject to any form of judicial review, including by the Constitutional Court.
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**ECHR 224 (2016)**

**23.06.2016**

**Press release issued by the Registrar**

In today's **Grand Chamber** judgment in the case of **Baka v. Hungary** (application no. 20261/12) the European Court of Human Rights held that there had been:

**by 15 votes to two, a violation of Article 6 § 1 (right of access to a court) of the European Convention on Human Rights, and**

**by 15 votes to two, a violation of Article 10 (freedom of expression).**

The case concerned the premature termination of the mandate of Mr Baka, President of the Hungarian Supreme Court, following his criticism of legislative reforms and the fact that he was unable to challenge that decision before a court. His six-year term of office was brought to an end, three and a half years before its normal date of expiry, through the entry into force of the Fundamental Law (the new Constitution), which provided for the creation of the Kúria, the highest court in Hungary, to succeed and replace the Supreme Court.

The Court found, in particular, that Mr Baka had not enjoyed the right of access to a court, since the termination of his term of office resulted from the transitional measures of the new Fundamental Law, constitutional legislation that was not subject to any form of judicial review. In the Court's opinion, this lack of judicial review had resulted from legislation whose compatibility with the requirements of the rule of law was doubtful. The Court also emphasised the importance of intervention by an authority which was independent of the executive and legislative powers in respect of every decision affecting the termination of a judge's office.

The Court also held that the premature termination of Mr Baka's mandate had amounted to an interference with his right to freedom of expression, given that it resulted from the opinions and criticisms that he had expressed publicly, in his professional capacity, on matters of general interest; it defeated the purpose of maintaining the independence of the judiciary; it had undoubtedly had a chilling effect not only on Mr Baka but also on other judges and court presidents, dissuading them from participating in future in public debate on legislative reforms affecting the courts and matters concerning the independence of the judiciary; and, from a procedural perspective, the restrictions on the right to freedom of expression had not been accompanied by effective and adequate safeguards against abuse.

Principal facts

The applicant, András Baka, is a Hungarian national who was born in 1952 and lives in Budapest (Hungary).

Mr Baka, a former judge at the European Court of Human Rights (1991-2008), was elected on 22 June 2009 by the Parliament of Hungary as President of the Supreme Court of Hungary (“the Supreme Court”). He was due to serve a six-year term, due to expire on 22 June 2015. In that capacity, he was also the Head of the National Council of Justice and was under a legal duty to express his opinion on parliamentary bills affecting the judiciary. Between February and November 2011 Mr Baka criticised various legislative reforms concerning the courts, including a proposal to reduce the mandatory retirement age for judges from 70 to 62. He expressed his opinions through his spokesman, in public letters or communiqués, and in speeches to Parliament.

From April 2010 a programme of constitutional reform was undertaken in Hungary. It was in this context that, in December 2011, the Transitional Provisions of the new Hungarian Constitution (Fundamental Law of Hungary of 2011) were adopted, providing that the Kúria (the historical name for the highest court in Hungary) would be the legal successor to the Supreme Court and that the mandate of the President of the Supreme Court would terminate upon the entry into force of the Fundamental Law. As a consequence, Mr Baka’s mandate terminated on 1 January 2012 – i.e. three and a half years before its normal date of expiry. As a result, Mr Baka lost the remuneration to which a President of the Supreme Court was entitled throughout his mandate as well as some postfunction benefits.

Under the criteria for the election of the President of the new Kúria, candidates were required to have at least five years’ experience as a judge in Hungary. Time served as a judge in an international court was not counted, and this led to Mr Baka being ineligible to apply for the post of President of the new Kúria.

In December 2011 Parliament elected two candidates, namely Péter Darák and Tünde Handó, as President of the new Kúria and President of the National Judicial Office respectively. Mr Baka remained in office as president of a civil-law bench of the Kúria.

### Complaints, procedure and composition of the Court

Relying on Article 6 § 1 (right of access to a court) of the Convention, Mr Baka complained that he had been denied access to a court to defend his rights in relation to the premature termination of his mandate as President of the Supreme Court, since the measure resulted from legislation at constitutional level, and was therefore not subject to any form of judicial review, including by the Constitutional Court.

Relying on Article 10 (freedom of expression) of the Convention, Mr Baka alleged that his dismissal had resulted from the criticism publicly expressed by him, in his capacity as President of the Supreme Court and Head of the National Council of Justice, with regard to the legislative reform of the justice system.

Under Article 13 (right to an effective remedy), Mr Baka also considered that he had been deprived of an effective domestic remedy in relation to the premature termination of his mandate. Under Article 14 (prohibition of discrimination), taken together with Article 6 § 1 and Article 10, Mr Baka also submitted that he had been treated differently from his colleagues in a similar situation because he had expressed politically controversial opinions.

The application was lodged with the European Court of Human Rights on 14 March 2012. On 27 May 2014 a Chamber of the Second Section delivered a judgment. It held, unanimously, that there had

been violations of Article 6 § 1 and Article 10 of the Convention. On 27 August 2014 the Government requested that the case be referred to the Grand Chamber under Article 43 (referral to the Grand Chamber) and on 15 December 2014 the panel of the Grand Chamber accepted that request. A hearing was held on 17 June 2015.

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

Luis **López Guerra** (Spain), *President*,  
 Mirjana **Lazarova Trajkovska** (“the Former Yugoslav Republic of Macedonia”),  
 Ledi **Bianku** (Albania),  
 Ganna **Yudkivska** (Ukraine),  
 Vincent A. **De Gaetano** (Malta),  
 Angelika **Nußberger** (Germany),  
 Julia **Laffranque** (Estonia),  
 Paulo **Pinto de Albuquerque** (Portugal),  
 Linos-Alexandre **Sicilianos** (Greece),  
 Erik **Møse** (Norway),  
 Helen **Keller** (Switzerland),  
 Paul **Lemmens** (Belgium),  
 Helena **Jäderblom** (Sweden),  
 Aleš **Pejchal** (the Czech Republic),  
 Krzysztof **Wojtyczek** (Poland),  
 Faris **Vehabović** (Bosnia and Herzegovina),  
 Dmitry **Dedov** (Russia),

and also Johan **Callewaert**, *Deputy Grand Chamber Registrar*.

Decision of the Court

#### **Article 6 § 1 (right of access to a court)**

With regard to the applicability of Article 6 § 1 of the Convention, the Court noted that Mr Baka had been elected on the basis of a law<sup>2</sup> fixing the mandate of court executives at six years and containing an exhaustive list of reasons<sup>3</sup> for terminating such mandates. Of these reasons, dismissal, which was only possible in the event of demonstrated incompetence in performing managerial tasks, made it possible to terminate the mandate in advance, against that person’s will; in that event, the incumbent was entitled to seek judicial review. The Court thus considered that there existed a right for the incumbent to serve his or her full term in office. It noted that the constitutional principles regarding the independence of the judiciary and the irremovability of judges confirmed that Mr Baka’s entitlement to serve his full term had been protected. Lastly, it considered that the fact that the mandate was terminated by operation of new legislation<sup>4</sup>, which entered into force on 1 January 2012 under the new Fundamental Law, could not remove, retrospectively, the arguability of Mr Baka’s entitlement under the applicable rules in force at the time of his election.

The Court reiterated that, under its case-law<sup>5</sup>, civil servants could be excluded from the scope of Article 6 § 1 of the Convention if two conditions were met: firstly, the national law must have expressly excluded access to a court for the post or category of staff in question, and, secondly, this exclusion had to be justified on objective grounds in the State’s interest. With regard to the first condition, the Court noted that, prior to the dispute, Mr Baka had not been expressly excluded from the right of access to a court; on the contrary, domestic law expressly provided for the right to challenge a decision dismissing a court executive before the Service Tribunal. Nonetheless, Mr Baka’s access to a court had been impeded by the fact that the premature termination of his mandate had been included in the transitional provisions of the Organisation and Administration of the Courts Act and that the termination of his mandate took effect through the Transitional Provisions of the

Fundamental Law, which entered into force on 1 January 2012. He had thus been precluded from contesting that measure before the Service Tribunal, although he would have been able to do had he been dismissed under the legal framework existing when he was elected. The Court therefore considered that it had to determine whether access to a court had been excluded under domestic law before the impugned measure concerning Mr Baka had been adopted, rather than at the point of its adoption. In consequence, the Court concluded that national law had not expressly excluded access to a court for Mr Baka in order to challenge the lawfulness of the termination of his mandate. As the first condition of its case-law had not been met, the Court did not examine the second, and held that Article 6 § 1 of the Convention was applicable.

With regard to compliance with the requirements of Article 6 § 1 of the Convention, the Court noted that the premature termination of Mr Baka's term of office had not been reviewed by an ordinary tribunal or by another body exercising judicial powers, nor was it open to review. The Court considered that this lack of judicial review had resulted from legislation whose compatibility with the requirements of the rule of law was doubtful. The Court could not fail to note the growing importance which international and Council of Europe instruments, as well as the case-law of international courts and the practice of other international bodies, were attaching to procedural fairness in cases involving the removal or dismissal of judges, including intervention by an authority which was independent of the executive and legislative powers in respect of every decision affecting the termination of a judge's office. In those circumstances, the Court considered that the respondent State had impaired the very essence of Mr Baka's right of access to a court, and held that there had been a violation of Mr Baka's right of access to a court, guaranteed by Article 6 § 1 of the Convention.

#### **Article 10**

The Court noted that Mr Baka, in his professional capacity, had publicly expressed his views on various legislative reforms affecting the judiciary, especially during his speech to Parliament on 3 November 2011. Shortly after that speech, the proposals to terminate Mr Baka's mandate as President of the Supreme Court were made public and submitted to Parliament, and were adopted within a strikingly short period. On 9 November 2011 the Organisation and Administration of the Courts Bill was amended and a new criterion was introduced as regards eligibility for the post of President of the Kúria, with the result that Mr Baka became ineligible. Having regard to the sequence of events in their entirety, the Court considered that there was *prima facie* evidence of a causal link between Mr Baka's exercise of his freedom of expression and the termination of his mandate; especially since the domestic authorities had not called into question either Mr Baka's ability to exercise his functions or his professional conduct. In consequence, the Court considered that the premature termination of Mr Baka's mandate had been prompted by the views and criticisms that he had publicly expressed in his professional capacity, and concluded that the premature termination of Mr Baka's mandate had constituted an interference with the exercise of his right to freedom of expression.

With regard to the justification for the interference, the Government argued as a legitimate aim the fact that the termination of Mr Baka's mandate had been intended to guarantee the authority and impartiality of the judiciary. The Court considered that a State Party could not legitimately invoke the independence of the judiciary in order to justify a measure such as the premature termination of the mandate of a court president for reasons that had not been established by law and which were unrelated to any grounds of professional incompetence or misconduct. In the Court's view, this measure could not serve the aim of increasing the independence of the judiciary, since it was, at the same time, a consequence of the previous exercise by Mr Baka, the highest office-holder in the judiciary, of his right to freedom of expression. In those circumstances, the Court found that the premature termination of Mr Baka's mandate, rather than serving the aim of maintaining the independence of the judiciary, appeared on the contrary to be incompatible with that purpose, and concluded that the interference had not pursued a legitimate aim.

Moreover, the Court noted that Mr Baka had expressed his views and criticisms on constitutional and legislative reforms affecting the justice system, on the functioning and reform of the judicial system, the independence and irremovability of judges and the lowering of the retirement age for judges. The Court noted that Mr Baka's statements did not go beyond mere criticism from a strictly professional perspective and clearly concerned a debate on matters of public interest. Mr Baka's freedom of expression ought therefore to have been granted a high degree of protection and benefited from strict scrutiny of any interference. In addition, although Mr Baka remained in office as judge and president of a civil division of the new Kúria, he had been removed from the office of President of the Supreme Court three and a half years before the end of his term. In the Court's opinion, this situation could hardly be reconciled with the particular consideration to be given to the nature of the judicial function as an independent branch of State power, and to the principle of the irremovability of judges, which was a key element for the maintenance of judicial independence.

Against this background, the Court found that the premature removal of Mr Baka from his position as President of the Supreme Court had defeated the purpose of maintaining the independence of the judiciary. Lastly, the premature termination of Mr Baka's mandate had undoubtedly had a chilling effect and must have discouraged not only Mr Baka himself but also other judges and court presidents from participating in future in public debate on legislative reforms affecting the justice system and on issues concerning the independence of the judiciary.

With regard to the procedural aspect, the Court considered that the restrictions imposed on Mr Baka's right to freedom of expression had not been accompanied by effective and adequate safeguards against abuse.

Accordingly, the Court considered that the reasons relied on by the respondent State could not be regarded as sufficient to show that the interference with Mr Baka's freedom of expression had been necessary in a democratic society. Accordingly, it concluded that there had been a violation of Article 10 of the Convention.

### **Other articles**

Having regard to its conclusions under Article 6 § 1 and Article 10, the Court did not consider it necessary to examine separately Mr Baka's other complaints.

### **Article 41 (just satisfaction)**

The Court held that Hungary was to pay Mr Baka 70,000 euros (EUR) in respect of pecuniary and non-pecuniary damage and EUR 30,000 in respect of costs and expenses.

### **Separate opinions**

Judges Pinto de Albuquerque and Dedov expressed a joint concurring opinion. Judge Sicilianos expressed a concurring opinion. Judges Pejchal and Wojtyczek each expressed a dissenting opinion. These opinions are annexed to the judgment.

**145. ECHR, *J.K. and Others v. Sweden*, no. 59166/12, Grand Chamber judgment of 23 August 2016 (Article 3, Prohibition of torture and inhuman or degrading treatment – Violation, if the order for the applicants’ deportation to Iraq were implemented).** The applicants, an Iraqi married couple and their sons who had applied for asylum in Sweden, successfully argued that if the order for their deportation to Iraq was implemented, it would put them at risk of persecution and ill-treatment by Al-Qaeda. Given that it had been established that the applicants had been subjected to ill-treatment by al-Qaeda while still in Iraq, the Grand Chamber reversed the Chamber judgment (case no. 107) and held that there was a strong indication that the applicants would continue to be at risk from non-State actors if deported.

**ECHR 264 (2016)  
23.08.2016**

**Press Release issued by the Registrar of the Court**

In today’s **Grand Chamber** judgment in the case of **J.K. and Others v. Sweden** (application no. 59166/12) the European Court of Human Rights held, by ten votes to seven, 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 order for the applicants’ deportation to Iraq were implemented.

The case concerned three Iraqi nationals who had sought asylum in Sweden and whose deportation to Iraq had been ordered.

Accepting that the general security situation in Iraq did not as such prevent the removal of Mr J.K. and his wife and son, the Court had to assess whether their personal circumstances were such that they would face a real risk of treatment contrary to Article 3 if expelled to Iraq.

The Court noted that the applicants’ account of events was generally coherent, credible and consistent with relevant country-of-origin information available from reliable and objective sources. Given that the applicants had been subjected to ill-treatment by al-Qaeda, the Court found that there was a strong indication that they would continue to be at risk from non-State actors in Iraq. Mr J.K. belonged to a group of persons who were systematically targeted because of their relationship with the American armed forces, and it was established that he had been ill-treated until 2008.

The Court observed that the situation in Iraq had clearly deteriorated since 2011 and 2012, when the Migration Agency and the Migration Court respectively had assessed the situation and the latter had concluded that the Iraqi law-enforcement authorities were likely to be both willing and able to offer the necessary protection to those seeking it.

Against a background of a generally deteriorating security situation, marked by an increase in sectarian violence and attacks and advances by ISIS, large areas of the territory were outside the Iraqi Government’s effective control. In the light of the complex and volatile general security situation, the Court found that the Iraqi authorities’ capacity to protect citizens had to be regarded as diminished. Although the current level of protection might still be sufficient for the general public in Iraq, the situation was different for individuals belonging to a targeted group. The cumulative effect of the applicants’ personal circumstances and the Iraqi authorities’ diminished ability to protect them had to be considered to create a real risk of ill-treatment in the event of their return to Iraq.

## Principal facts

The applicants, Mr J.K. and his wife and son, are three Iraqi nationals who were born in 1964, 1965 and 2000 respectively.

Since the 1990s Mr J.K. had run his own construction and transport business with exclusively American clients, with its office at a United States military base. In October 2004 Mr J.K. was the target of a murder attempt carried out by al-Qaeda. In 2005 his brother was kidnapped by al-Qaeda members, who threatened to kill him because of Mr J.K.'s collaboration with the Americans. His brother was released in exchange for a sum of money and immediately fled from Iraq.

Mr J.K. and his wife and son fled to Jordan and stayed there until December 2006, before returning to Iraq. Their house was the target of an attempted bomb attack, the perpetrator of which was arrested by the American forces and confessed that he had been paid by al-Qaeda to kill Mr J.K. He disclosed the names of 16 people who had been designated to monitor Mr J.K. and his wife and son. The applicants moved to Syria. Al-Qaeda destroyed their home in Iraq and Mr J.K.'s business stocks.

In January 2008 Mr J.K. and his wife and son returned to Baghdad. In October 2008 Mr J.K.'s daughter died after shots were fired at their car. Mr J.K.'s business stocks were attacked four or five times by al-Qaeda members. The family remained in Baghdad but changed address several times.

On 14 December 2010 Mr J.K. applied for asylum and a residence permit in Sweden. He submitted a further application on 25 August 2011, and his wife and son did likewise on 19 September 2011. On 26 September 2011 the three applicants were given an introductory interview by the Migration Agency, and subsequently the parents were given a further interview lasting almost three and a half hours. They were assisted by State-appointed counsel.

On 22 November 2011 the Migration Agency rejected the applicants' asylum application, finding that there were no grounds to grant the family residence permits, and ordered their deportation from Sweden. On 23 April 2012 the Migration Court upheld the Migration Agency's decision. The applicants appealed to the Migration Court of Appeal, which on 9 August 2012 refused them leave to appeal.

On 29 August 2012 the applicants applied to the Migration Agency for a review of their case. They maintained that Mr J.K. was under threat from al-Qaeda because of his political activities. In support of their application they submitted video recordings of Mr J.K. being interviewed in English, a demonstration, and a television debate. On 26 September 2012 the Migration Agency refused the applicants' application. They did not appeal against that decision.

## Complaints, procedure and composition of the Court

The applicants complained that their deportation to Iraq would entail a violation of Article 3 (prohibition of torture and inhuman or degrading treatment).

The application was lodged with the European Court of Human Rights on 13 September 2012.

On 18 September 2012 the President of the Third Section of the Court decided to apply Rule 39 of the Rules of Court, indicating to the Government that the applicants should not be deported to Iraq for the duration of the proceedings before the Court.

In a Chamber judgment delivered on 4 June 2015 the Court held, by five votes to two, that the implementation of the deportation order in respect of the applicants would not give rise to a violation of Article 3.

On 25 August 2015 the applicants requested that the case be referred to the Grand Chamber under Article 43 of the Convention (referral to the Grand Chamber). On 19 October 2015 the panel of the Grand Chamber accepted that request. A hearing was held in Strasbourg on 24 February 2016.

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

Guido **Raimondi** (Italy), *President*,  
 Işıl **Karakaş** (Turkey),  
 Luis **López Guerra** (Spain),  
 Mirjana **Lazarova Trajkovska** (“The former Yugoslav Republic of Macedonia”),  
 Ledi **Bianku** (Albania),  
 Kristina **Pardalos** (San Marino),  
 Helena **Jäderblom** (Sweden),  
 Krzysztof **Wojtyczek** (Poland),  
 Valeriu **Griţco** (the Republic of Moldova),  
 Dmitry **Dedov** (Russia),  
 Iulia **Motoc** (Romania),  
 Jon Fridrik **Kjølbro** (Denmark),  
 Síofra **O’Leary** (Ireland),  
 Carlo **Ranzoni** (Liechtenstein),  
 Gabriele **Kucsko-Stadlmayer** (Austria),  
 Pere **Pastor Vilanova** (Andorra),  
 Alena **Poláčková** (Slovakia),

and also Søren **Prebensen**, *Deputy Grand Chamber Registrar*.

Decision of the Court

### Article 3

Since the applicants had not been deported, the question whether they would face a real risk of persecution upon their return to Iraq had to be examined in the light of the present-day situation. The Court noted that the Migration Agency and the Migration Court had concluded in 2011 and 2012 respectively that the security situation in Iraq was not such that there was a general need for international protection for asylum-seekers. That finding had subsequently been confirmed by its Chamber judgment delivered on 4 June 2015. Referring to a report issued by the United Kingdom Home Office in April 2015, reports by Norwegian Landinfo from 2014 and 2015 and the most recent information provided by the Migration Agency, the Government stated in their written observations that the intensity of violence in Baghdad did not give rise to a real risk of individuals being subjected to treatment breaching Article 3. The applicants maintained that the security situation in Iraq was deteriorating.

Accepting that the general security situation in Iraq did not in itself prevent the removal of Mr J.K. and his wife and son, the Court had to assess whether their personal circumstances were such that they would face a real risk of treatment contrary to Article 3 if expelled to Iraq.

The Court observed first of all that several members of the applicants’ family had been subjected to threats, mainly as a result of Mr J.K.’s activities. The Court further noted that the applicants’ account of events occurring between 2004 and 2010 was generally coherent, credible and consistent with relevant country-of-origin information available from reliable and objective sources. Given that the applicants had been subjected to ill-treatment by al-Qaeda, the Court found that there was a strong indication that they would continue to be at risk from non-State actors in Iraq.

According to various reports from reliable and objective sources, persons who had collaborated in different ways with the authorities of the occupying powers in Iraq after the war had been and continued to be targeted by al-Qaeda and other groups. The United Kingdom Home Office's Country of Origin Information Report on Iraq of December 2009 stated that civilians employed or otherwise affiliated with the Multi-National Force in Iraq were at risk of being targeted by non-State actors. Similarly, the Home Office's report of 2014 stated that persons who were perceived to collaborate or had collaborated with the current Iraqi Government and its institutions, the former American or multinational forces or foreign companies were at risk of persecution in Iraq. Mr J.K. belonged to a group of persons who were systematically targeted because of their relationship with the American armed forces, and it was established that he had been ill-treated until 2008. Mr J.K.'s contacts with the American forces had been particularly visible as his office had been situated at a United States military base. There was no support for the assumption that threats from al-Qaeda must have ceased once Mr J.K. had terminated his business relationship with the American forces. In the light of the particular circumstances of this case, the Court found that if they were returned to Iraq, Mr J.K. and his wife and son would face a real risk of continued persecution by non-State actors.

The most recent objective international human rights sources indicated that there were deficits in both the capacity and the integrity of the Iraqi security and legal system. Although the system still functioned, the shortcomings had increased since 2010. Moreover, the United States Department of State had noted that widespread corruption had exacerbated the lack of effective human rights protection and that the security forces had made only limited efforts to prevent or respond to violence. The situation in Iraq had thus clearly deteriorated since 2011 and 2012, when the Migration Agency and the Migration Court respectively had assessed the situation and the latter had found it likely that the Iraqi law-enforcement authorities were both willing and able to offer the necessary protection to those seeking it. Against a background of a generally deteriorating security situation, marked by an increase in sectarian violence and attacks and advances by ISIS, large areas of the territory were outside the Iraqi Government's effective control.

In the light of the complex and volatile general security situation, the Court found that the Iraqi authorities' capacity to protect citizens had to be regarded as diminished. Although the current level of protection might still be sufficient for the general public in Iraq, the situation was different for individuals belonging to a targeted group. The Court was therefore not convinced that the Iraqi State would be able to provide Mr J.K. and his wife and son with effective protection against threats by al-Qaeda or other private groups in the current situation. The applicants' personal circumstances and the Iraqi authorities' diminished ability to protect them had to be considered to create a real risk of ill-treatment in the event of their return to Iraq.

The Court found that substantial grounds had been shown for believing that the applicants would run a real risk of treatment contrary to Article 3 if returned to Iraq. Accordingly, the Court considered that the implementation of the deportation order in respect of them would entail a violation of Article 3.

#### **Just satisfaction (Article 41)**

The Court held, by 15 votes to two, that its finding under Article 3 constituted in itself sufficient just satisfaction for any non-pecuniary damage sustained by the applicants, and, by 12 votes to 5, that Sweden was to pay the applicant 10,000 euros in respect of costs and expenses.

#### **Separate opinion**

Judges Bianku and O'Leary each expressed a concurring opinion; Judges Jäderblom, Gričco, Dedov, Kjølbros, Kucsko-Stadlmayer and Poláčeková expressed a joint dissenting opinion; and Judge Ranzoni expressed a dissenting opinion. The opinions are annexed to the judgment.

146. **ECHR, *Ibrahim and Others v. the United Kingdom*, nos. 50541/08, 50571/08, 50573/08 and 40351/09, Grand Chamber judgment of 13 September 2016 (Article 6-1 and Article 6-3-c, Right to a fair trial and right to legal assistance - No Violation with respect to Mr Ibrahim, Mr Mohammed and Mr Omar / Violation with respect to Mr Abdurahman).** The applicants were arrested on suspicion of having lit three of the four bombs which failed to explode on the London transport system on 21 July 2005. They complained before the Court about the temporary delay in providing them with access to a lawyer and the admission at their subsequent trials of statements made in the absence of lawyers.
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**ECHR 284 (2016)**

**13.09.2016**

**Press Release issued by the Registrar of the Court**

In today's **Grand Chamber** judgment in the case of ***Ibrahim and Others v. the United Kingdom*** (applications nos. 50541/08, 50571/08, 50573/08 and 40351/09) the European Court of Human Rights held, by 15 votes to two, that there had been no violation of the rights of three applicants (Mr Ibrahim, Mr Mohammed and Mr Omar) under Article 6 §§ 1 and 3 (c) (right to a fair trial and right to legal assistance) of the European Convention on Human Rights. However, the Court held, by 11 votes to six, that there had been a breach of those provisions in respect of the fourth applicant, Mr Abdurahman. Concluding that it did not follow from the Court's finding of a violation that Mr Abdurahman had been wrongly convicted, it being impossible to speculate as to the outcome of the proceedings had there been no breach of the Convention, the Court awarded no compensation to him for pecuniary or non-pecuniary damage. An award was made for Mr Abdurahman's legal fees.

On 21 July 2005 four bombs were detonated on the London transport system but failed to explode. The perpetrators fled the scene. The first three applicants, Mr Ibrahim, Mr Mohammed and Mr Omar, were later arrested on suspicion of having detonated three of the bombs. They were questioned by the police in urgent "safety interviews" before having had access to legal advice. They were subsequently convicted of conspiracy to murder. They complained before the Court about the temporary delay in providing them with access to a lawyer and the admission at their subsequent trials of statements made in the absence of lawyers.

In respect of these applicants the Court was convinced that, at the time of their initial police questioning, there had been an urgent need to avert serious adverse consequences for the life and physical integrity of the public, namely further suicide attacks. There had therefore been compelling reasons for the temporary restrictions on their right to legal advice. The Court was also satisfied that the proceedings as a whole in respect of each of the first three applicants had been fair.

The position with regard to Mr Abdurahman, the fourth applicant, who also complained about the delay in access to a lawyer, was different. He was initially interviewed as a witness, and therefore without legal advice. However, it emerged during questioning that he had assisted a fourth bomber following the failed attack. At that point, according to the applicable code of practice, he should have been cautioned and offered legal advice. However, this was not done. After he had made a written witness statement, he was arrested, charged with, and subsequently convicted of, assisting the fourth bomber and failing to disclose information after the attacks.

In his case, the Court was not convinced that there had been compelling reasons for restricting his access to legal advice and for failing to inform him of his right to remain silent. It was significant that there was no basis in domestic law for the police to choose not to caution Mr Abdurahman at the point at which he had started to incriminate himself. The consequence was that Mr Abdurahman had

been misled as to his procedural rights. Further, the police decision could not subsequently be reviewed as it had not been recorded and no evidence had been heard as to the reasons behind it. As there were no compelling reasons, it fell to the Government to show that the proceedings were nonetheless fair. In the Court's view they were unable to do this and it accordingly concluded that the overall fairness of Mr Abdurahman's trial had been prejudiced by the decision not to caution him and to restrict his access to legal advice.

### Principal facts

The applicants in the first three applications, Muktar Said Ibrahim, Ramzi Mohammed and Yassin Omar, are Somali nationals who were born in 1978, 1981, and 1981 respectively. The applicant in the fourth application, Ismail Abdurahman, is a British national who was born in Somalia in 1982.

On 7 July 2005 suicide bombers detonated their bombs on the London transport system, killing 52 people and injuring countless more. Two weeks later, on 21 July 2005 four bombs were detonated on the London transport system but failed to explode. The perpetrators fled the scene but were later arrested.

Following the arrest of the first three applicants – Mr Ibrahim, Mr Mohammed and Mr Omar – they were temporarily refused legal assistance in order for police “safety interviews” (interviews conducted urgently for the purpose of protecting life and preventing serious damage to property) to be conducted. Under the Terrorism Act 2000, such interviews can take place in the absence of a solicitor and before the detainee has had the opportunity to seek legal advice. During the interviews the applicants denied any knowledge of the events of 21 July. At trial, they acknowledged their involvement in the events but claimed that the bombs had been a hoax and were never intended to explode. The statements made at their safety interviews were admitted at trial. They were convicted in July 2007 of conspiracy to murder and sentenced to a minimum term of 40 years' imprisonment. The Court of Appeal subsequently refused them leave to appeal against their conviction.

Mr Abdurahman, the fourth applicant, was not suspected of having detonated a bomb and was initially interviewed by the police as a witness. He started to incriminate himself by explaining his encounter with a fourth suspected bomber shortly after the attacks and the assistance he had provided to that suspect. According to the applicable code of practice, he should have been cautioned and offered legal advice at that point. However, after taking instructions from a senior officer, the police continued to question him as a witness and took a written statement from him. He was subsequently arrested and offered legal advice. In his ensuing interviews, he adopted and referred to his written statement. His witness statement was admitted as evidence at his trial. He was convicted in February 2008 of assisting the fourth bomber and of failing to disclose information about the bombings. He was sentenced to ten years' imprisonment, reduced to eight years on appeal on account of the early assistance that he had given to the police.

### Complaints, procedure and composition of the Court

Relying on Article 6 §§ 1 and 3 (c) (right to a fair trial and right to legal assistance) of the European Convention on Human Rights, the applicants complained about their lack of access to lawyers during their initial police questioning, alleging that their subsequent convictions had been unfair because of the admission at trial of the statements they had made during those police interviews.

The first three applications were lodged with the European Court of Human Rights on 22 October 2008. The fourth application, by Mr Abdurahman, was lodged on 29 July 2009.

In its Chamber judgment of 16 December 2014, the European Court of Human Rights, held, by six votes to one, that there had been no violation of Article 6 §§ 1 and 3 (c) (right to a fair trial and right to legal assistance) of the European Convention.

On 1 June 2015 the case was referred to the Grand Chamber at the request of two of the applicants (Mr Omar (application no. 50573/08) and Mr Abdurahman (application no. 40351/09)).

Fair Trials International was granted leave to intervene as a third party in the written proceedings (Article 36 § 2 of the Convention).

A Grand Chamber hearing was held on the case in Strasbourg on 25 November 2015.

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

Guido **Raimondi** (Italy), *President*,  
 András **Sajó** (Hungary),  
 Işıl **Karakaş** (Turkey),  
 Luis **López Guerra** (Spain),  
 Mirjana **Lazarova Trajkovska** (“The former Yugoslav Republic of Macedonia”),  
 Ganna **Yudkivska** (Ukraine),  
 Khanlar **Hajiyev** (Azerbaijan),  
 Nona **Tsotsoria** (Georgia),  
 Vincent A. **de Gaetano** (Malta),  
 Julia **Laffranque** (Estonia),  
 Paul **Lemmens** (Belgium),  
 Paul **Mahoney** (the United Kingdom),  
 Johannes **Silvis** (the Netherlands),  
 Dmitry **Dedov** (Russia),  
 Robert **Spano** (Iceland),  
 Iulia **Motoc** (Romania),  
 Síofra **O’Leary** (Ireland),

and also Lawrence **Early**, *Jurisconsult*.

#### Decision of the Court

Two questions had to be examined: whether there were compelling reasons for the restrictions on the applicants’ access to legal advice; and whether the proceedings as a whole were fair. If compelling reasons were shown, then the Court would take a holistic approach to the assessment of the fairness of the proceedings. If, on the other hand, there were no compelling reasons for the restrictions, then there was a presumption that the proceedings were unfair. This presumption could be rebutted by the Government if they demonstrated that, on the facts of the case, no unfairness arose.

The Court was convinced that, at the time of the first three applicants’ initial police questioning, there had been an urgent need to avert serious adverse consequences for the life and physical integrity of the public, namely further suicide attacks. It referred to the pressing duty on the authorities to protect the rights of potential and actual victims under Article 2 (the right to life), Article 3 (prohibition on torture and inhuman or degrading treatment) and Article 5 § 1 (right to liberty and security) of the Convention. The police had been operating under enormous pressure and their overriding priority had, quite properly, been investigations and interviews to obtain as a matter of urgency information on any further planned attacks and the identities of those potentially involved in the plot. The possibility of restricting access to legal advice in such exceptional circumstances recognised the unique and highly difficult conditions with which the police in London had been faced in July 2005. It was significant that in the case of the first three applicants there was a clear framework in place, set out in legislation, regulating the circumstances in which access to legal advice for suspects could be restricted and offering important guidance for operational decision-making. The restrictions were also temporary in nature, the legislation providing that they had to end as soon as the circumstances justifying them ceased to exist and that they were subject to a strict upper time-limit of 48 hours.

Lastly, the decision to limit the right to legal advice had been taken by a police officer based on the specific facts of each three applicants' cases and the decisions had been recorded. The Court was therefore satisfied that there were compelling reasons for the temporary restrictions of the first three applicants' right to legal advice.

As to whether the proceedings as a whole were fair, the Court again referred to the detailed legal framework in place. It noted that the police had adhered strictly to the law, in spite of the pressures under which they had been operating. The purpose of the safety interviews – to obtain information necessary to protect the public – had been strictly observed and it was also noteworthy that the three applicants had been formally arrested and informed of their right to silence and their right to legal advice. They had also been told the reasons for the decision to restrict their access to legal advice. There had also been procedural opportunities to allow the applicants to challenge the admission and use of the safety interview evidence. Notably, a *voir dire*, or “trial within a trial”, had taken place before the trial judge who thoroughly examined the applicants' complaints about the circumstances in which their statements had been obtained and determined whether it would be unfair to admit them. At the hearing, the applicants, represented by counsel, had been able to present evidence as to the circumstances of their questioning. In a detailed and comprehensive ruling, the trial judge had given clear reasons for his findings that the restrictions had been justified. His ruling that the statements were admissible had not prevented the applicants from then challenging the statements at trial and again before the Court of Appeal. The Court of Appeal had carefully reviewed the trial judge's approach to the admission of the evidence and found that the exercise of his discretion had been fully-informed and defendant-specific.

Furthermore, the statements had been merely one element of a substantial prosecution case against the first three applicants. In particular, there was damning scientific evidence as to the construction of the bombs, such as the fact that they contained hydrogen peroxide at a concentration which had been manually increased by the applicants and that they contained shrapnel, intended to maximise injuries upon explosion, entirely unnecessary if the bombs had been meant as a hoax. There was also extensive evidence of the three applicants' extremist views, the extensive contact between the three men from March 2005 onwards and the applicants' reactions when the devices had been detonated but had failed to explode.

Moreover, in his summing-up to the jury, the trial judge had summarised the prosecution and defence evidence in detail and carefully directed the jury on matters of law, expressly instructing them to take into account that the applicants had been questioned before having had access to legal advice and to bear in mind the possibility of innocent explanations for the lies they had told. The Court also referred to the strong public interest in preventing and punishing indiscriminate terrorist attacks, which by their very nature intend to strike fear into the hearts of innocent civilians, to cause chaos and panic, and to disrupt the proper functioning of everyday life. In conclusion, the Court was satisfied that the proceedings as a whole in respect of each of the first three applicants had been fair. There had therefore been no violation of Article 6 §§ 1 and 3 (c) of the Convention as concerned Mr Ibrahim, Mr Mohammed or Mr Omar.

However, as concerned Mr Abdurahman, the fourth applicant, the Court was not convinced that the Government had demonstrated compelling reasons for restricting his access to legal advice and failing to inform him of his right to remain silent. It was significant that there was no basis in domestic law for the police to choose not to caution Mr Abdurahman at the point at which he had started to incriminate himself. Indeed, the decision had been contrary to the applicable code of practice. The consequence was that Mr Abdurahman had been misled as to his procedural rights. Further, the police decision could not subsequently be reviewed by the British courts or by the Court to evaluate the reasons or to assess whether Mr Abdurahman's procedural rights had been taken into account, since it had not been recorded and no evidence had been heard as to the reasons behind it.

The failure to show that there were compelling reasons to restrict access to legal advice meant that there was a presumption that the proceedings in respect of Mr Abdurahman had been unfair. The burden lay on the Government to show that, on the facts, this was not the case. The Court reiterated that, unlike the first three applicants, there was no legal basis for the decision not to caution Mr Abdurahman or to offer him legal advice. Because the police had deliberately decided to keep questioning him as a witness, even though by then they considered him to be a suspect, he was not notified of his right to silence or his right to legal advice.

The Court accepted that Mr Abdurahman had had procedural opportunities to challenge the admission and use of his statement during his initial questioning. Again, a “trial within a trial” had taken place and the judge had ruled that there had not been any oppression during the interview or that anything had been done or said by the police to have made his statement unreliable. Before the trial proceedings, the trial judge had again, at the request of Mr Abdurahman, examined the circumstances in which the statement had been obtained and found that, even after having consulted his lawyer, he had not retracted his witness statement and had even based his defence at trial on what he had told the police in that statement. Nevertheless, it was striking that the trial court had not apparently heard evidence from the senior police officer who had authorised the continuation of the witness interview. As the Court had already pointed out, that meant that the trial court, and later the Court of Appeal, had been denied the opportunity to review the reasons for the decision.

Furthermore, Mr Abdurahman’s statement had been central to the prosecution’s case. Notably, it was the content of his witness statement which had first provided the grounds upon which the police had suspected him of involvement in a criminal offence, thus providing them with the framework around which they had subsequently built their case. Mr Abdurahman’s statement could therefore be considered to have formed an integral and significant part of the evidence upon which his conviction had been based.

It was also significant that, in his summing up to the jury, the trial judge had instructed the jury members to take Mr Abdurahman’s statement into account if they were satisfied that it had been freely given, that he would have said these things even if the correct procedure had been followed and that the statement was true. The Court considered that those directions had left the jury with excessive discretion as to the manner in which the statement was to be taken into account.

The Court said that great weight had to be attached to the nature of the offences in Mr Abdurahman’s case. It emphasised that the threat posed by terrorism could only be neutralised by the effective investigation, prosecution and punishment of all those involved in terrorism. However, taking into account the high threshold that applied where the presumption of unfairness arises and having regard to the cumulative shortcomings in Mr Abdurahman’s case, the Court concluded that the Government had failed to show that the overall fairness of the trial had not been irretrievably prejudiced by the decision not to caution him and to restrict his access to legal advice. There had therefore been a violation of Article 6 §§ 1 and 3 (c) of the Convention as concerned Mr Abdurahman.

#### **Article 41 (just satisfaction)**

Concluding that it did not follow from the Court’s finding of a violation that Mr Abdurahman had been wrongly convicted, it being impossible to speculate as to the outcome of the proceedings had there been no breach of the Convention, the Court dismissed his claims for pecuniary and non-pecuniary damage. Mr Abdurahman also sought almost 36,000 pounds sterling in legal fees. The Court examined the work carried out by his lawyers and decided to award 16,000 euros.

#### **Separate opinions**

Judge Mahoney expressed a concurring opinion. Judges Sajó and Laffranque expressed a joint partly dissenting, partly concurring opinion. Judges Sajó, Karakaş, Lazarova Trajkovska and De Gaetano

expressed a joint partly dissenting opinion. Judges Hajiyeu, Yudkivska, Lemmens, Mahoney, Silvis and O'Leary expressed a joint partly dissenting opinion. Judge Lemmens expressed a partly dissenting opinion. Judge Sajó expressed a dissenting opinion. These opinions are annexed to the judgment.

**147. ECHR, *Mustafić-Mujić and Others v. the Netherlands*, no. 49037/15, Chamber decision of 30 August 2016 (Article 2, Right to life - Inadmissible).** The applicants, relatives of men killed in the Srebrenica massacre of July 1995, complained that the Netherlands authorities had wrongly refused to investigate and prosecute three Dutch servicemen who were members of the UN peacekeeping force in Bosnia at the time for allegedly sending their relatives to their probable death by ordering them to leave the safety of the UN peacekeepers' compound after the Bosnian Serb forces had overrun Srebrenica and its environs.

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**ECHR 299 (2016)**  
**22.09.2016**

#### **Press Release issued by the Registrar of the Court**

In its decision in the case of **Mustafić-Mujić and Others v. the Netherlands** (application no. 49037/15) the European Court of Human Rights has unanimously declared the application inadmissible. The decision is final.

The applicants, relatives of men killed in the Srebrenica massacre of July 1995, imputed criminal responsibility to three Netherlands servicemen who were members of the UN peacekeeping force. They complained that the Netherlands authorities had wrongly refused to investigate and prosecute the servicemen for allegedly sending their relatives to their probable death by ordering them to leave the safety of the UN peacekeepers' compound after the Bosnian Serb forces had overrun Srebrenica and its environs.

The Court found that the Netherlands authorities had sufficiently investigated the incident and given proper consideration to the applicants' request for prosecutions. In relation to the investigation, the Court held that there had been extensive and repeated investigations by national and international authorities. There was no lingering uncertainty as regards the nature and degree of involvement of the three servicemen and it was therefore impossible to conclude that the investigations had been ineffective or inadequate. In relation to the decision not to prosecute – taken on the basis that it was unlikely that any prosecution would lead to a conviction – the Court rejected the applicants' complaints that that decision had been biased, inconsistent, excessive or unjustified by the facts.

#### **Principal facts**

There are four applicants in this case, all of whom are relatives of victims of the Srebrenica massacre.

The first three applicants are: Mehida Mustafić-Mujić, born in 1956, who is a national of Bosnia and Herzegovina and lives in Srebrenica (a municipality in eastern Bosnia); and her two children, Alma and Damir Mustafić, born in 1981 and 1979 respectively, who are both Netherlands nationals and live in Utrecht and Veenendaal. The fourth applicant is Hasan Nuhanović, born in 1968, who is also a national of Bosnia and Herzegovina and lives in Sarajevo.

During the 1992-95 war in Bosnia and Herzegovina, Srebrenica and its environs were designated a "safe area" by the United Nations Security Council, intended to be free from attack or any hostile act. United Nations peacekeeping troops were stationed there. In 1995 the peacekeepers were a Netherlands army battalion known as Dutchbat. They were based in a compound in the village of Potočari.

In July 1995, Bosnian Serb forces overran the "safe area". Thousands of civilians converged on the Dutchbat compound, seeking safety.

Dutchbat was ordered to withdraw, taking locally recruited UN staff with them. A list of 29 staff members was drawn up; they were to await evacuation with Dutchbat. Civilians who were not on the list were ordered to leave the Dutchbat compound.

The case concerns the deaths of Rizo Mustafić, Ibro Nuhanović and Muhamed Nuhanović on or shortly after 13 July 1995.

Rizo Mustafić, the husband and father of the first three applicants, was employed by Dutchbat as an electrician, and was included in the list of 29 who would be allowed to leave with the Netherlands forces. However, the Dutchbat non-commissioned officer in charge of locally recruited staff mistakenly ordered him to leave.

Muhamed Nuhanović was the younger brother of the applicant Hasan Nuhanović, who had been an interpreter for Dutchbat and was included on the list. He asked the Dutchbat deputy commander to also include his brother. The deputy commander refused, fearing that he would compromise the safety of legitimate UN staff members by including persons who did not meet the relevant criteria. Muhamed was therefore ordered to leave the compound.

Ibro Nuhanović was the father of Muhamed and Hasan, and had also been permitted to stay with the Dutchbat forces because he had acted as the refugees' representative in negotiations. However, when his son Muhamed was ordered to leave, Ibro chose to go with him.

In the following days, 7,000 to 8,000 Bosniac men were killed by the Bosnian Serb army and Serb paramilitaries. The victims included Rizo Mustafić, Muhamed Nuhanović and Ibro Nuhanović. On 5 July 2010, the applicants lodged a criminal complaint with the public prosecutor. They requested that a criminal investigation be launched into the actions of the Dutchbat commander, the deputy commander and the aforementioned non-commissioned officer, for their alleged complicity in genocide or war crimes committed against their family members, on the basis that those three servicemen had exposed their relatives to their likely death in full awareness of their probable fate. On 7 March 2013 the public prosecutor informed the applicants that no prosecution would be brought. The applicants lodged a complaint about the public prosecutor's decision with the Military Chamber of the Court of Appeal of Arnhem-Leeuwarden. On 29 April 2015 the Court of Appeal dismissed the complaint, finding that prosecutions were unlikely to lead to a conviction.

The applicants also filed a civil suit against the Netherlands government. After the case was dismissed at first instance, on 26 June 2012 the Court of Appeal held the government liable in tort for the damage caused by the death of the applicants' relatives.

Other domestic fact-finding investigations into the Srebrenica massacre included an individual debriefing of all Dutchbat personnel who had been present at the fall of Srebrenica; a parliamentary inquiry; and an extensive report (of which an English-language version exists) by the NIOD Institute for War, Holocaust and Genocide Studies.

The incident has also been the subject of a number of prosecutions by the International Criminal Tribunal for the Former Yugoslavia (ICTY). Several former members of the Bosnian Serb army have already been convicted and sentenced in final judgments. Radovan Karadžić, the President of Republika Srpska during the Bosnian War, has been convicted at first instance, and his case is currently under appeal. The trial of General Mladić, former head of the Bosnian Serb Army, is still ongoing.

### Complaints, procedure and composition of the Court

The application was lodged with the European Court of Human Rights on 23 October 2015.

Relying on Article 2 (right to life), the applicants complained that the Court of Appeal had failed to order the criminal prosecution of the three Netherlands servicemen, or at least a criminal investigation into their involvement in the deaths of their relatives.

The decision was given by a Chamber of seven, composed as follows:

Luis **López Guerra** (Spain), *President*,  
 Helena **Jäderblom** (Sweden),  
 Johannes **Silvis** (the Netherlands),  
 Branko **Lubarda** (Serbia),  
 Pere **Pastor Vilanova** (Andorra),  
 Alena **Poláčková** (Slovakia),  
 Georgios A. **Serghides** (Cyprus), *Judges*,

and also Fatoş **Aracı**, *Deputy Section Registrar*.

Decision of the Court

## Article 2

The Court found that the application was inadmissible. It started by making the following general points.

Firstly, the present case differed from most previous cases which the Court has had to consider under the procedural aspect of Article 2 in that the information that had become available over the years was unusually expansive and detailed and included material gleaned from official sources both international and domestic. The composite result of all these investigations was that specific and detailed official records now exist reflecting the circumstances in which the applicants' relatives had fallen into the hands of the Bosnian Serb Army and there is no lingering uncertainty as regards the nature and degree of involvement of the three Netherlands servicemen. It was therefore not possible for the Court to find that the investigations were ineffective or inadequate.

Secondly, the purpose of Article 2 was to secure the right to life. It was for this reason and this reason only that Parties to the Convention were required to put in place criminal sanctions against offences against the person and enforce them. No provision of the Convention conferred any right to "private revenge".

Thirdly, the respondent State's procedural obligation under Article 2 arising from the conflicts that engulfed the former Yugoslavia after 1991 could be discharged through its contribution to the work of the ICTY, given that the ICTY had primacy over national courts and could take over national investigations and proceedings at any stage in the interest of international justice.

The individual complaints in regard to the decision not to prosecute were addressed as follows. The Court rejected the applicants' complaints that the proceedings in the Military Chamber of the Court of Appeal had been unfairly conducted. The Court held that the presence of a serving officer on the Court of Appeal had not undermined its independence, because such officers were not subject to any military authority or discipline in that role and enjoyed the same guarantees of independence as their civilian colleagues; furthermore, there was no evidence to support the applicants' suggestion that the panel had been biased in this case. In regard to the applicants' assertion that the Court of Appeal had applied the wrong legal standard – because it had treated the three soldiers merely as potential accessories to crimes, as distinct from the principal perpetrators, rather than holding them to account as State agents – the Court found that that had been entirely appropriate, given that there was no evidence (or indeed allegation) that the Dutch soldiers had had a direct hand in the killings. Certain alleged shortcomings in the decision-making of the Public Prosecution Service had been cured by the extensive and detailed independent assessment made by the Court of Appeal itself. The Court of

Appeal had also been entitled to make the finding that a prosecution would not result in a conviction, given that it had been made in the context of assessing whether there had been sufficient evidence to justify a prosecution.

Finally, the Court found no reason to suggest that the Court of Appeal had misrepresented the facts or arguments. The finding that the Netherlands soldiers had been unaware of the extent of the imminent massacre was consistent with the findings of the ICTY. The Court of Appeal's conclusions were not inconsistent with those that had been made in the civil courts, given that the two sets of proceedings had involved different parties and different legal tests.

**148. ECHR, *B.A.C. v. Greece*, no. 11981/15, Chamber judgment of 13 October 2016 (Article 8, Right to respect for private and family life – Violation; Article 8 in conjunction with Article 13, Right to an effective remedy – Violation; Article 3, Prohibition of torture and inhuman or degrading treatment, in conjunction with Article 13 - Violation if Mr B.A.C. were returned to Turkey).** The Court found in particular that the failure by the authorities to determine the applicant's asylum application for a period of more than 14 years without any justification had breached the positive obligations inherent in his right to respect for his private life. Furthermore, while waiting for a decision on his asylum application, the applicant's legal status remained uncertain, thus putting him in danger of being returned to Turkey, where there was a substantial risk that he might be subjected to treatment contrary to Article 3.

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**ECHR 329 (2016)  
13.10.2016**

**Press Release issued by the Registrar of the Court**

In today's Chamber judgment in the case of **B.A.C. v. Greece** (application no. 11981/15) 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,

**a violation of Article 8 in conjunction with Article 13 (right to an effective remedy)** of the Convention,

and that there would be:

**a violation of Article 3 (prohibition of inhuman or degrading treatment) in conjunction with Article 13 (right to an effective remedy) if Mr B.A.C. were returned to Turkey.**

The case concerned an asylum-seeker waiting for a decision from the authorities since 2002.

The Court found in particular that the failure by the authorities to determine the applicant's asylum application for a period of more than 14 years without any justification had breached the positive obligations inherent in his right to respect for his private life. Furthermore, while waiting for a decision on his asylum application, the applicant's legal status remained uncertain, thus putting him in danger of being returned to Turkey, where there was a substantial risk that he might be subjected to treatment breaching Article 3 of the Convention.

**Principal facts**

The applicant, Mr B.A.C., is a Turkish national who was born in 1977 and lives in Athens (Greece).

While studying in Turkey (1994-1999), Mr B.A.C. became a political activist supporting pro-Communist and pro-Kurdish causes. In 2000 the Turkish authorities arrested him and charged him with undermining the constitutional order of the State.

He was held in solitary confinement and went on hunger strike for 171 days. The Turkish authorities agreed to release him in view of the deterioration in his health.

In 2002 Mr B.A.C. fled the country and sought asylum in Greece. The secretary-general of the Ministry of Public Order summarily rejected his application. However, Mr B.A.C. subsequently applied to the Consultative Asylum Committee, which expressed a favourable opinion. As a result, the Minister for Public Order was required to decide within 90 days whether or not to grant the applicant international protection. However, by the date of the application to the Court, the Minister had not taken any decision and thus had neither endorsed nor rejected the Committee's opinion.

Between 2003 and 2015 the applicant lived in Athens and reported to the police every six months to renew his asylum-seeker's card. The card was not a residence permit and thus did not confer all the rights associated with such a permit; it simply guaranteed that the asylum-seeker would not be deported and could remain in the country with "tolerated status" pending the determination of the asylum application.

In 2005 the Interpol bureau for Turkey submitted a request for the extradition of Mr B.A.C. on the basis of similar accusations to the charges brought against him in 2000. The Indictment Division of the Patras Court of Appeal unanimously rejected the request. It based its decision on the risk that in the event of his extradition the applicant might be subjected to ill-treatment on account of his political views. It also observed that the nature of the offences for which the extradition had been sought was set out in a vague and abstract manner in the Turkish authorities' request. On 26 April 2013 the Court of Cassation upheld that decision.

#### Complaints, procedure and composition of the Court

Relying on Article 8 (right to respect for private and family life), read separately and in conjunction with Article 13 (right to an effective remedy), the applicant complained of an interference with his private life in that he had lived in Greece for 12 years with an uncertain status, despite the favourable opinion expressed by the Consultative Asylum Committee. He also alleged that he did not have an effective remedy by which to complain about that state of affairs.

Relying on Article 8 in conjunction with Article 14 (prohibition of discrimination), the applicant complained that he had been discriminated against on the grounds of his nationality.

Relying on Article 3 in conjunction with Article 13, the applicant complained that he faced a real risk of being subjected to ill-treatment in the event of being returned to Turkey, since the Minister for Public Order could decide at any moment to reject his application for asylum.

The application was lodged with the European Court of Human Rights on 4 March 2015.

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

Mirjana **Lazarova Trajkovska** ("The former Yugoslav Republic of Macedonia"), *President*,  
 Kristina **Pardalos** (San Marino),  
 Linos-Alexandre **Sicilianos** (Greece),  
 Aleš **Pejchal** (the Czech Republic),  
 Robert **Spano** (Iceland),  
 Armen **Harutyunyan** (Armenia),  
 Tim **Eicke** (the United Kingdom),

and also **Abel Campos**, *Section Registrar*.

#### Decision of the Court

##### **Article 8 read separately and in conjunction with Article 13**

The Court observed that the alleged violation of Article 8 of the Convention did not stem from any removal or deportation orders but from the insecure and uncertain situation which the applicant had faced for a lengthy period, from 21 March 2002 – the date of his appeal against the rejection of his asylum application – until the delivery of the judgment in the present case.

The Court also observed that the applicant had worked in the construction sector without a work permit, because of the restrictive conditions imposed on asylum-seekers wishing to obtain one.

The Court noted that because of his uncertain status, the applicant had been unable to enrol at university as he had hoped to do, and that as the mere holder of an asylum-seeker's card, he had also been unable to open a bank account, receive a tax identification number in order to carry out a professional activity, or even obtain a driving licence.

As regards the failure by the Minister for Public Order to give a decision on the applicant's application for asylum, the Court noted that there was no justification for that ongoing state of affairs, which had lasted for more than 14 years despite the fact that the national authorities had ruled that it was necessary to grant him asylum and had rejected the request by the Turkish authorities for his extradition.

The Court therefore found that in the circumstances of the case, the competent authorities had failed to comply with their positive obligation under Article 8 of the Convention to provide an effective and accessible means of protecting the right to respect for private life through appropriate regulations ensuring that the applicant's asylum application was examined within a reasonable time in order to keep his state of uncertainty to a minimum.

Bearing in mind those conclusions, the Court held that there had also been a violation of Article 13 of the Convention in conjunction with Article 8.

Lastly, in view of its conclusion under Article 8 of the Convention, the Court found it unnecessary to carry out a separate examination under Article 14.

### **Article 3 in conjunction with Article 13**

The Court attached importance to the fact that Turkey, the country to which the applicant would be returned, was a State Party to the Convention and as such had undertaken to observe the right to life and the prohibition of inhuman and degrading treatment. However, the Court could not base its assessment on that fact alone.

The Court took into account the concrete information available to it, namely that the applicant, a pro-Kurdish left-wing militant, was accused of being part of an armed terrorist organisation and murdering the founder of another terrorist organisation.

Examining the material before it, the Court noted that in its report of 25 July 2002 the Greek Medical Rehabilitation Centre for Torture Victims had confirmed that the applicant had been tortured while imprisoned in Turkey. In addition, he had been arrested six times between 1992 and 1996 and had also been tortured on those occasions.

The Court therefore considered that the applicant had submitted conclusive evidence in support of his application for asylum in Greece, on the basis of his past treatment in Turkey, where he had been subjected to acts held to be contrary to Article 3 of the Convention, a finding confirmed by two courts and the Consultative Asylum Committee.

Since the applicant's asylum application had yet to be determined, his legal status remained uncertain, thus putting him at risk of sudden removal to Turkey without the possibility of an effective

examination of his asylum claim, even though there appeared on the face of it to be a substantial risk that he might be subjected to treatment breaching Article 3 of the Convention in that country.

Accordingly, the Court concluded that there would be a violation of Article 3 of the Convention in conjunction with Article 13 if the applicant were returned to Turkey in the absence of an assessment by the Greek authorities of his prospective personal circumstances.

**Just satisfaction (Article 41)**

The Court held that Greece was to pay the applicant 4,000 euros in respect of non-pecuniary damage.

**149. ECHR, *Radunović and Others v. Montenegro*, nos. 45197/13, 53000/13 and 73404/13, Chamber judgment of 25 October 2016 (Article 6-1, Right of access to a court - Violation).** The applicants, Montenegrin nationals employed by the United States Embassy in Montenegro but later dismissed from their posts, successfully argued that the national courts' refusal to examine their ensuing claims because of sovereign immunity violated their rights under the Convention.

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**ECHR 342 (2016)**  
**25.10.2016**

#### **Press Release issued by the Registrar of the Court**

The applicants, **Irena Radunović**, **Veselin Nenezić**, and **Ivan Gajević** are Montenegrin nationals who were born in 1982, 1967 and 1978 respectively and live in Podgorica (Montenegro). The case concerned their dismissal from positions at the US embassy, and the courts' refusal to examine their ensuing claims because of sovereign immunity.

All three applicants were employed by the US Embassy in Montenegro. Ms Radunović was a protocol specialist and translator, while Mr Nenezić and Mr Gajević were security guards. All three were dismissed from their posts.

Between November 2010 and July 2012, the three applicants brought separate civil proceedings against the US Embassy, seeking compensation. Ms Radunović sought non-pecuniary damages, while Mr Nenezić and Mr Gajević sought compensation for loss of earnings. Ms Radunović and Mr Nenezić sought reinstatement.

Between September 2011 and September 2012, the Court of First Instance in Podgorica declined jurisdiction over all of the applicants' claims (including a re-trial of Ms Radunović's claim), holding that the respondent in each case was a state and that the State had sovereign immunity from suit.

The court held that this outcome was not inconsistent with Article 6 (right to a fair trial) of the European Convention and was supported by the Vienna Convention on Diplomatic Relations (VCDR). Each of the applicants appealed.

Between November 2011 and December 2012, the High Court dismissed the applicants' appeals. It upheld the sovereign immunity defence, noting that the courts' jurisdiction was not established in law or in any international agreement. Further appeals were dismissed by the Supreme Court. Between January and July 2013, the applicants lodged separate constitutional appeals, but on 18 November 2015 the Constitutional Court dismissed those of Ms Radunović and Mr Gajević, holding in particular that the sovereign immunity defence was not inconsistent with their rights under Article 6 of the Convention. Mr Nenezić's appeal is still pending.

Relying in particular on Article 6 § 1 (access to court), Ms Radunović, Mr Nenezić and Mr Gajević complained about the domestic courts' refusal to examine their civil claims on the merits.

#### **Violation of Article 6 § 1**

Just satisfaction: EUR 19,000 to Mr Nenezić and EUR 22,000 to Mr Gajević for both pecuniary and non-pecuniary damage; EUR 3,600 to Ms Radunović for non-pecuniary damage; and EUR 6,051 to Ms Radunović and EUR 3,572.50 to each Mr Nenezić and Mr Gajević for costs and expenses.

150. ECHR, *Kamenica and Others v. Serbia*, no. 4159/15, Chamber decision of 27 October 2016 (Article 3, Prohibition of torture and inhuman or degrading treatment- Inadmissible; Article 6, Right to a fair trial- Inadmissible; Article 13, Right to an effective remedy- Inadmissible). The case concerned 67 applicants, all nationals of Bosnia and Herzegovina, who claimed that they had been unable to pursue criminal complaints lodged with the Serbian Office of the War Crimes Prosecutor against their alleged ill-treatment in detention camps on Serbian territory during the war in Bosnia and Herzegovina as the statute of limitations prevented the prosecution of any of the alleged acts of ill-treatment as anything else than as war crimes.

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A Press release issued by the Registrar or Information note is not available. Please find the complete text of the decision as published in the Court's website at <https://hudoc.echr.coe.int> .

**151. ECHR, *Naku v. Lithuania and Sweden*, no. 26126/07, Chamber judgment of 8 November 2016 (Article 6-1, Right of access to a court - Violation by Lithuania / Inadmissible against Sweden).** The applicant, a Lithuanian national who worked at the Swedish Embassy in Vilnius for 14 years, argued that she had been unable to challenge her dismissal from the embassy before Lithuanian courts, as her Swedish employer had successfully invoked jurisdictional immunity.

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**ECHR 354 (2016)**  
**08.11.2016**

### **Press Release issued by the Registrar of the Court**

The case concerned diplomatic immunity in labour relations.

The applicant, **Sniegė Naku**, is a Lithuanian national who was born in 1959 and lives in Vilnius.

She worked at the Swedish embassy in Vilnius for 14 years before being dismissed in January 2006. Recruited by the Swedish Embassy in 1992 in Lithuania on a Lithuanian contract, she initially carried out secretarial duties before being promoted to culture, information and press officer in 2001. In particular, her job description was modified – first in November 2001 and then in March and November 2005 – to reflect that she worked on culture and information matters under the guidance of Swedish diplomatic staff.

In 2004 a conflict arose between Ms Naku and her employer over her responsibilities; this conflict escalated in the autumn of 2005 when a new counsellor for cultural affairs was appointed. In November 2005 the situation culminated in Ms Naku being given a caution and two days to hand in her resignation. She went on sick leave from that point on; the leave was prolonged on a weekly basis and without interruption until March 2006. While on sick leave, she was notified of disciplinary proceedings against her for gross misconduct and was then dismissed from her post in January 2006.

Ms Naku thus brought a civil claim against the Swedish embassy before the Lithuanian courts, complaining of unlawful dismissal. In particular, she alleged that she had been dismissed while on sick leave, which was a clear breach of Lithuanian labour law. However, the Lithuanian lower courts decided to discontinue the case, accepting the embassy's request that Ms Naku's complaints not be examined on grounds of diplomatic immunity. In April 2007 the Supreme Court ultimately upheld the lower courts' conclusion, concluding that the duties which had been assigned to her – as an employee in a diplomatic representation of a foreign State – contributed to the Kingdom of Sweden's sovereign functions. Therefore, the parties were not linked by legal employment relations regulated by private law, but by legal service regulations under public law, that is to say relations for which a State may invoke diplomatic immunity.

In the meantime, the trade union for locally employed staff at the Swedish embassy, of which Ms Naku was the chair, had made several written complaints to the embassy about working conditions; the dispute received media coverage in Sweden in July 2005.

Relying in particular on Article 6 § 1 (access to court), Ms Naku alleged that she had been deprived of access to court to complain about her dismissal as her Swedish employer had invoked jurisdictional immunity and this had been upheld by the Lithuanian courts. She maintains in particular that her job description – as part of the embassy's administrative and technical personnel – showed that she had not held the kind of high-ranking position that would allow State immunity; nor could she have turned to the Swedish courts to make a claim about an employment contract which had been regulated by Lithuanian law.

**Violation of Article 6 § 1** (access to court) – by Lithuania

The Court further declared the application **inadmissible** insofar as it was lodged against Sweden

Just satisfaction: EUR 8,000 (non-pecuniary damage) and EUR 17,000 (costs and expenses)

**152. ECHR, *Magyar Helsinki Bizottság v. Hungary*, no. 18030/11, Grand Chamber judgment of 8 November 2016 (Article 10, Freedom of expression- Violation).** The case concerned the authorities' refusal to provide an NGO with information relating to the work of *ex officio* defence counsel, as the authorities had classified that information as personal data that was not subject to disclosure under Hungarian law. The Court in its assessment referred to international and EU legislation regarding data protection.

**ECHR 357 (2016)  
08.11.2016**

**Press release issued by the Registrar**

In today's **Grand Chamber** judgment in the case of **Magyar Helsinki Bizottság v. Hungary** (application no. 18030/11) the European Court of Human Rights held, by 15 votes to 2, that there had been

**a violation of Article 10 (freedom of expression)** of the European Convention on Human Rights.

The case concerned the authorities' refusal to provide an NGO with information relating to the work of *ex officio* defence counsel, as the authorities had classified that information as personal data that was not subject to disclosure under Hungarian law.

The Court noted that the information requested from the police by the applicant NGO was necessary for it to complete the study on the functioning of the public defenders' system being conducted by it in its capacity as a non-governmental human-rights organisation, with a view to contributing to discussion on an issue of obvious public interest. In the Court's view, by denying the applicant NGO access to the requested information the domestic authorities had impaired the NGO's exercise of its freedom to receive and impart information, in a manner striking at the very substance of its Article 10 rights.

The Court noted that the subject matter of the survey concerned the efficiency of the public defenders system, an issue that was closely related to the right to a fair hearing, a fundamental right in Hungarian law and a right of paramount importance under the Convention, and pointed out that the NGO had wished to explore its theory that the pattern of recurrent appointments of the same lawyers was dysfunctional.

The Court found in particular that the public defenders' privacy rights would not have been negatively affected had the applicant NGO's request for the information been granted, because although the information request had admittedly concerned personal data, it did not involve information outside the public domain.

The Court also held that the Hungarian law, as interpreted by the domestic courts, had excluded any meaningful assessment of the applicant NGO's freedom-of-expression rights, and considered that in the present case, any restrictions on the applicant NGO's proposed publication – which was intended to contribute to a debate on a matter of general interest – ought to have been subjected to the utmost scrutiny.

Lastly, the Court considered that the Government's arguments were not sufficient to show that the interference complained of had been "necessary in a democratic society" and held that, notwithstanding the discretion left to the respondent State (its "margin of appreciation"), there had not been a reasonable relationship of proportionality between the measure complained of (refusal to provide the names of the *ex officio* defence counsel and the number of times they had been appointed

to act as counsel in certain jurisdictions) and the legitimate aim pursued (protection of the rights of others).

### Principal facts

The applicant, Magyar Helsinki Bizottság (Hungarian Helsinki Committee), is a non-governmental organisation (NGO) based in Budapest. It is active in the field of monitoring the implementation of international human-rights instruments in Hungary and in related advocacy. In pursuit of a survey on the quality of defence provided by public defenders, the organisation requested from a number of police departments the names of the public defenders selected by them in 2008 and the number of appointments per lawyer involved. The organisation referred to the 1992 Data Act, arguing that the data requested constituted public information.

In 2009 the organisation brought court proceedings against two police departments which had rejected the request for information. After a first-instance judgment in favour of the organization the claim was rejected by the appeal court, which held that public defenders did not carry out a task of public interest and that therefore the release of information concerning those defenders could not be successfully demanded under the Data Act. That decision was upheld by the Supreme Court in 2010, which found that while the implementation, by defence lawyers, of the constitutional right of defence was a task of the State, the public defenders' subsequent activity was a private one and that their names did not therefore constitute public information.

### Complaints, procedure and composition of the Court

Relying on Article 10 (freedom of expression), the applicant NGO complained that the Hungarian courts' refusal to order the surrender of the information in question had amounted to a breach of its right to access to information.

The application was lodged with the European Court of Human Rights on 14 March 2011. On 26 May 2015 the Chamber relinquished jurisdiction in favour of the Grand Chamber. A hearing took place on 4 November 2015.

The British Government were authorised to intervene as a third party at the hearing and in the written procedure. Six non-governmental organisations (*Fair Trials International, Media Legal Defence Initiative, Campaign for Freedom of Information, Article 19, Access to Information*

*Programme, and Hungarian Civil Liberties Union*) were also authorised to take part in the written proceedings as third-party interveners.

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

Guido **Raimondi** (Italy), *Judge*,  
 András **Sajó** (Hungary),  
 Işıl **Karakaş** (Turkey),  
 Luis **López Guerra** (Spain),  
 Mirjana **Lazarova Trajkovska** ("the former Yugoslav Republic of Macedonia"),  
 Angelika **Nußberger** (Germany),  
 Boštjan M. **Zupančič** (Slovenia),  
 Nebojša **Vučinić** (Montenegro),  
 Kristina **Pardalos** (San Marino),  
 Ganna **Yudkivska** (Ukraine),  
 Linos-Alexandre **Sicilianos** (Greece),  
 Helen **Keller** (Switzerland),  
 André **Potocki** (France),

Aleš **Pejchal** (the Czech Republic),  
 Ksenija **Turković** (Croatia),  
 Robert **Spano** (Iceland),  
 Jon Fridrik **Kjølbro** (Denmark),

and also Lawrence **Early**, *Jurisconsult*.

## Decision of the Court

### Article 10 (freedom of expression)

The Court considered that **Article 10 § 1 of the Convention could be interpreted as including, in the circumstances of the case, a right of access to information**, specifying that where the access to information was decisive for the exercise of the right to receive and communicate information, to refuse that access could amount to an interference with the enjoyment of this right. The Court noted that the information requested from the police by the applicant NGO was necessary for it to complete the study on the functioning of the public defenders' system being conducted by it in its capacity as a non-governmental human-rights organisation, in order to contribute to discussion on an issue of obvious public interest. The Court therefore noted that by denying it access to the requested information, which was ready and available, the domestic authorities had impaired the applicant NGO's exercise of its freedom to receive and impart information, in a manner striking at the very substance of its Article 10 rights. In consequence, the Court held that **there had been an interference** with a right protected by Article 10, noting however that this interference was **prescribed by law** (section 19(4) of the Data Act) and that it **pursued the legitimate aim** of protecting the rights of others.

The Court observed that the central issue underlying the applicant NGO's grievance was that the information sought was classified by the authorities as personal data not subject to disclosure. This was so because, under Hungarian law, the concept of personal data encompassed any information that could identify an individual. Such information was not susceptible to disclosure, unless this possibility was expressly provided for by law, or the information was related to the performance of municipal or governmental (State) functions or was related to "other persons performing public duties". Since the Supreme Court's decision had excluded *ex officio* defence counsel from the category of "other persons performing public duties", there had been no legal possibility open to the applicant NGO to argue that disclosure of the information was necessary for the discharge of its "watchdog" role. The information requested had consisted of the names of public defenders and the number of times they had been appointed to act as counsel in certain jurisdictions. The request for these names, while it had admittedly constituted personal data, related predominantly to the conduct of professional activities in the context of public proceedings. In this sense, the Court considered that public defenders' professional activities could not be considered to be a private matter. In addition, the information sought did not relate to the public defenders' actions or decisions in connection with the carrying out of their tasks as legal representatives or consultations with their clients. Moreover, the Government had not demonstrated that disclosure of the information requested for the specific purposes of the applicant's inquiry could have affected the public defenders' enjoyment of their right to respect for private life within the meaning of Article 8 of the Convention.

The Court also considered that the disclosure of public defenders' names and the number of their respective appointments would not have subjected them to exposure to a degree surpassing that which they could have foreseen when registering as public defenders. There was no reason to assume that information about the names of public defenders and their appointments could not be known to the public through other means, such as information contained in lists of legal-aid providers, court hearing schedules and public court hearings, although it was clear that it was not being collated at the time of the survey. Against that background, the interests invoked by the

Government with reference to Article 8 of the Convention were not of such a nature and degree as could warrant engaging the application of that article and bringing it into play in a balancing exercise against the applicant NGO's right as protected by Article 10. Nonetheless, Article 10 did not guarantee an unlimited freedom of expression, and the protection of the private interests of public defenders constituted a legitimate aim, permitting a restriction on freedom of expression.

The Court considered that the salient question was whether the means used to protect those interests had been proportionate to the aim sought to be achieved. It noted that the subject matter of the survey concerned the efficiency of the public defenders system, an issue that was closely related to the right to a fair hearing, a fundamental right in Hungarian law and a right of paramount importance under the Convention. It emphasised that any criticism or suggested improvement to a service so directly connected to fair-trial rights had to be seen as a subject of legitimate public concern. In its intended survey, the applicant NGO had wished to explore its theory that the pattern of recurrent appointments of the same lawyers was dysfunctional, casting doubt on the adequacy of that scheme. The contention that the legal-aid scheme could be prejudiced as such because public defenders were systematically selected by the police from the same pool of lawyers – and were then unlikely to challenge police investigations in order not to be overlooked for further appointments – did indeed raise a legitimate concern. The Court had already acknowledged in the *Martin2* judgment the potential repercussions on defence rights of police-appointed lawyers. As the issue under scrutiny thus went to the very essence of a Convention right, the Court was satisfied that the applicant NGO had intended to contribute to a debate on a matter of public interest. The refusal to grant the request had effectively impaired the applicant NGO's contribution to a public debate on a matter of general interest.

The Court did not find that the privacy rights of the public defenders would have been negatively affected had the applicant NGO's request for the information been granted. Although the information request had admittedly concerned personal data, it did not involve information outside the public domain. It consisted only of information of a statistical nature about the number of times the individuals in question had been appointed to represent defendants in public criminal proceedings within the framework of the publicly funded national legal-aid scheme.

The relevant Hungarian law, as interpreted by the competent domestic courts, had excluded any meaningful assessment of the applicant's freedom-of-expression rights under Article 10 of the Convention. In the present case, however, any restrictions on the applicant NGO's proposed publication – which was intended to contribute to a debate on a matter of general interest – ought to have been subjected to the utmost scrutiny.

In consequence, the Court considered that the arguments advanced by the Government, although relevant, were not sufficient to show that the interference complained of had been "necessary in a democratic society". In particular, the Court considered that, notwithstanding the discretion left to the respondent State (its "margin of appreciation"), there had not been a reasonable relationship of proportionality between the measure complained of and the legitimate aim pursued. The Court therefore concluded that there had been a violation of Article 10 of the Convention.

#### **Just satisfaction (Article 41)**

The Court held, by 15 votes to 2, that Hungary was to pay the applicant NGO 215 euros (EUR) in respect of pecuniary damage and EUR 8,875 in respect of costs and expenses.

#### **Separate opinions**

Judges Nußberger and Keller expressed a joint concurring opinion. Judge Sicilianos expressed a concurring opinion, joined by Judge Raimondi. Judge Spano expressed a dissenting opinion, joined by Judge Kjølbrot. These opinions are annexed to the judgment.

- 153. ECHR, *Muradyan v. Armenia*, no. 11275/07, Chamber judgment of 24 November 2016 (Article 2, Right to life - Violation).** The applicant, an Armenian national, successfully claimed that his son, who was at the time serving in a military base in the (unrecognised) “Nagorno Karabakh Republic”, had died as a result of ill-treatment by his superiors as well as of the failure to provide him with adequate medical assistance. The Court established that Armenia exercised effective control over Nagorno Karabakh and the surrounding territories and that the death and the ensuing investigation therefore fell within the jurisdiction of Armenia.
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**ECHR 383 (2016)**  
**24.11.2016**

**Press Release issued by the Registrar of the Court**

The case ***Muradyan v. Armenia*** (application no. 11275/07) concerned the death of a military conscript, Suren Muradyan, based in the (unrecognised) Nagorno Karabakh Republic. His father, the applicant in the case, alleged that he had died following ill-treatment by his superiors.

In today’s **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)** of the European Convention on Human Rights as concerned both the death of Suren Muradyan as well as the related investigation.

First, the Court recalled that it had already found in previous judgments that Armenia exercised effective control over Nagorno Karabakh and the surrounding territories. Suren Muradyan’s death and the ensuing investigation therefore fell within the jurisdiction of Armenia, thus engaging Armenia’s responsibility under the European Convention.

The Court found in particular that the official explanation for Suren Muradyan’s fatal injury – a ruptured spleen – had not been plausible. While there had been sufficient evidence to suggest that Suren might have sustained that injury as a result of ill-treatment by high-ranking officers, neither the Karabakhi nor the Armenian authorities had actively pursued that line of inquiry. They had instead mostly focused their attention on a public argument that he had had with one of his military unit’s officers and concluded that his spleen, allegedly enlarged due to malaria, had erupted following accidental physical contact during that argument. The Court considered that that conclusion had not been reached following an effective and objective investigation. Indeed, the entire investigation, including all the medical expertise (notably conflicting and inconclusive explanations as to Suren’s malaria diagnosis), appeared to have been geared towards justifying the narrative that Suren’s ruptured spleen had occurred through light contact with his abdomen, even though that explanation had only been put forward two years after the incident by one of the implicated officers, whose objectivity as a witness could itself be called into question.

**Principal facts**

The applicant, Hrachya Muradyan, is an Armenian national who was born in 1956 and lives in Baghramyan village (Armenia).

Suren Muradyan was drafted into the Armenian army in June 2001 and assigned to a military unit based in the (unrecognised) Nagorno Karabakh Republic. On or around 24/25 July 2002 he started to feel unwell, having a temperature, muscle pain, headaches and nausea. Two military doctors visited him and gave him paracetamol. His condition having deteriorated, on 3 August 2002 he was

hospitalised with suspected malaria. The next day his condition worsened further: he lost consciousness and his pulse disappeared. Doctors failed to resuscitate him and his death was registered at 9.15 p.m. The results of a blood test the same day showed no trace of malaria.

The Karabkhi authorities immediately ordered a post-mortem examination, including an autopsy. The following day the examiner made his initial conclusion about the cause of death, reporting to the Karabkhi investigator that Suren Muradyan had died from internal bleeding due to a ruptured spleen and that the injury to his spleen had involved old and new bruises. The Karabkhi investigator thus decided to institute criminal proceedings for intentional infliction of grave bodily harm resulting in death.

During the subsequent inquiry, the Karabkhi investigating authorities interviewed a number of servicemen. On 7 August 2002 a group of servicemen from Suren's military unit suggested that there had been conflict between Suren and two of his officers over an allegedly stolen watch. The group of servicemen stated in particular that they had witnessed an argument between Suren and the two officers on 21 July 2002 during which one of the officers had grabbed Suren's hand and removed the watch. They also explained that Suren had, over the next few days, been taken to the office of the military unit's acting commander to reveal the identity of the person who had allegedly stolen the watch and return another watch which had also apparently been lost. The two officers were questioned a few days later and the acting commander ten days later; they denied any ill-treatment.

A further two servicemen, who had been summoned to the acting commander's office at the same time as Suren about the allegedly stolen watches, were also questioned; they stated however that they were not aware of Suren having been subjected to any ill-treatment.

The investigation into Suren Muradyan's death was then taken over by the Armenian prosecuting authorities in July 2003. Further interviews took place. In October 2003 one of the servicemen, G.M., who had also been summoned to the acting commander's office about the stolen watch/es, confirmed a statement he had made a few months earlier in which he had admitted that the acting commander had ill-treated him. In April 2004 one of the implicated officers, V.G, was questioned again; it transpired that he had not previously told the whole truth and that there had actually been some accidental contact with Suren Muradyan's abdomen during the argument of 21 July 2002. The official investigation eventually concluded that Suren Muradyan's ruptured spleen was explained by this accidental physical contact. Further medical reports were drawn up which confirmed this explanation as well as the initial suspected diagnosis of malaria; the latter was relied on to explain why Suren's spleen was enlarged and could have erupted even from light contact.

On completion of this investigation in April 2005, three defendants – officer V.G. as well as two military doctors – were indicted. The prosecutor decided, however, not to prosecute the acting commander of the military unit for beating G.M. as the commander had no criminal record and regretted his actions.

In the ensuing court proceedings officer V.G. and the two military doctors were found guilty. V.G. was sentenced to five years' imprisonment. The two military doctors were ultimately also sentenced to four years and three and a half years' imprisonment, respectively, but were granted amnesty and released.

Allegations made during the appeal proceedings by two servicemen who had been in hospital with Suren just before he died and who submitted that he had told them that he had been ill-treated by his superiors were dismissed. The Court of Appeal found, however, that these submissions were not sufficient for bringing harsher charges against officer V.G. or for remitting the case for further investigation against the other officers involved.

## Complaints, procedure and composition of the Court

Mr Muradyan alleged that his son had died as a result of ill-treatment by his superiors as well as of the failure to provide him with adequate medical assistance. He also submitted that the authorities had failed to carry out an effective investigation into the incident; indeed they had even used the entire investigative machinery to make a false account of his son's fatal injury look plausible. He relied on Article 2 (right to life), Article 3 (prohibition of inhuman or degrading treatment) and Article 13 (right to an effective remedy).

The application was lodged with the European Court of Human Rights on 12 March 2007.

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

Mirjana **Lazarova Trajkovska** ("The former Yugoslav Republic of Macedonia"), *President*,  
Ledi **Bianku** (Albania),  
Kristina **Pardalos** (San Marino),  
Aleš **Pejchal** (the Czech Republic),  
Armen **Harutyunyan** (Armenia),  
Pauliine **Koskelo** (Finland),  
Tim **Eicke** (the United Kingdom),

and also Abel **Campos**, *Section Registrar*.

## Decision of the Court

### **Jurisdiction (Article 1)**

Mr Muradyan's son had died during his compulsory military service in the armed forces of the (unrecognised) Nagorno Karabakh Republic, outside the territory of Armenia. The initial and most crucial part of the investigation into his death had been carried out not by the Armenian but by the Karabakhi authorities. The Court therefore decided to examine whether the death of Mr Muradyan's son could be considered to fall under the jurisdiction of the Armenian Government.

The Court recalled that in a recent leading case (namely, *Chiragov and Others v. Armenia*, application no. 13216/05, of 16 June 2015) it had found that Armenia exercised effective control over Nagorno Karabakh and the surrounding territories. Armenia was therefore obliged to secure in that area the rights and freedoms set out in the European Convention. Moreover, its responsibility under the Convention was not limited to the acts of its own soldiers or officials operating in Nagorno Karabakh, but extended to the acts of the local administration which survived by virtue of the Armenian military and other support.

Consequently, the Court concluded that Mr Muradyan's complaints about the death of his son and the ensuing investigation fell within the jurisdiction of Armenia, thus engaging Armenia's responsibility under the Convention.

### **Investigation into Suren Muradyan's death (procedural aspect of Article 2)**

There was no dispute between the parties that Suren Muradyan had died from a ruptured spleen. The Court, however, had doubts as to the official explanation – namely accidental contact with Suren's abdomen during an argument in public with his superiors – for that fatal injury. Indeed, while there had been sufficient evidence to suggest that Suren might have sustained that injury as a result of ill-treatment by high-ranking officers, the authorities had failed to actively pursue that line of inquiry.

The Court noted in particular a number of serious flaws in the investigation.

First, witness statements obtained from other servicemen suggested that Suren had only started to feel unwell after he had been taken on a number of occasions to the office of his military unit's acting commander, that is to say after the argument in public with his superiors. Despite this evidence, the three high-ranking officers concerned had not immediately been isolated and had only been questioned two, three and ten days later. Those officers' denial of any ill-treatment during their questioning had been readily accepted, without further inquiries.

Furthermore, as concerned the two servicemen who had been summoned to the acting commander's office at the same time as Suren, it could not be ruled out that they had not spoken of any ill-treatment when making their statements because they feared reprisals in the military unit where they were still serving. Nor had the authorities taken any protective measures – such as those servicemen's transfer to another unit – to guarantee their safety.

What was particularly striking was that the investigating authorities had given no importance to the fact that the unit's acting commander had been implicated in inflicting violence on one of the other servicemen, G.M., also summoned to his office in the context of the same story. Even when two witnesses – who had had contact with Suren in hospital shortly before he died – explicitly stated that he had told them that he had been ill-treated by three of his officers, the authorities had not changed the focus of their investigation, namely the public argument with his superiors.

Indeed, the entire investigation, including all the medical expertise (notably conflicting and inconclusive explanations as to Suren's malaria diagnosis), appeared to have been geared towards justifying the narrative that Suren's ruptured spleen had occurred through accidental contact, even though that explanation had only been put forward two years after the incident by one of the implicated officers, whose objectivity as a witness could itself be called into question.

Moreover, no attempts had been made at all to clarify whether it had been medically possible for Suren to start feeling unwell from 24 July 2002, if the injury to his spleen had been sustained on 21 July 2002 during the argument with his superiors.

Lastly, the Court could not ignore a report by the Human Rights Commissioner of the Council of Europe referring to various forms of ill-treatment in the Armenian army and non-combat deaths, as well as a lack of accountability for those issues.

The Court therefore concluded that the authorities had failed to carry out an effective investigation into the circumstances in which Suren Muradyan had sustained a ruptured spleen and died, in violation of Article 2.

### **Suren Muradyan's death (substantive aspect of Article 2)**

Having concluded that the investigation had been ineffective, the Court considered that the authorities had not provided a plausible explanation for the injury sustained by Suren Muradyan and his ensuing death, in further violation of Article 2.

### **Allegations of ill-treatment and inadequate medical assistance (Articles 2, 3 and 13)**

Given the findings under Article 2, the Court considered that there was no need to examine separately the complaints brought under Articles 2, 3 and 13 about inadequate medical assistance, Suren Muradyan's alleged ill-treatment by his superiors and the failure of the authorities to carry out an effective investigation into those allegations.

**Just satisfaction (Article 41)**

The Court held that Armenia was to pay Hrachya Muradyan 50,000 euros (EUR) in respect of non-pecuniary damage and EUR 165 for costs and expenses.

- 154. ECHR, *Paposhvili v. Belgium*, no. 41738/10, Grand Chamber judgment of 13 December 2016 (Article 3, Prohibition of torture and inhuman or degrading treatment – Violation; Article 8, Right to respect for private and family life - Violation).** The applicant, a seriously ill Georgian national living in Brussels, successfully argued that his removal to Georgia would violate his rights under the Convention. The Court found, reversing the Chamber judgment (case no. 86), that in the absence of any assessment by the domestic authorities of the risk facing Mr Paposhvili, in the light of the information concerning his state of health and the existence of appropriate treatment in Georgia, the information available to those authorities had been insufficient for them to conclude that the applicant, if returned to Georgia, would not have run a real and concrete risk of treatment contrary to Article 3.
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**ECHR 412 (2016)**  
**13.12.2016**

**Press Release issued by the Registrar of the Court**

In today's Grand Chamber judgment in the case of **Paposhvili v. Belgium** (application no. 41738/10) the European Court of Human Rights held, unanimously, that there would have been:

**a violation of Article 3 (prohibition of inhuman or degrading treatment)** of the European Convention on Human Rights if Mr Paposhvili had been removed to Georgia without the Belgian authorities having assessed the risk faced by him in the light of the information concerning his state of health and the existence of appropriate treatment in Georgia, and

**a violation of Article 8 (right to respect for private and family life)** if Mr Paposhvili had been removed to Georgia without the Belgian authorities having assessed the impact of removal on the applicant's right to respect for his family life in view of his state of health.

The case concerned an order for Mr Paposhvili's deportation to Georgia, issued together with a ban on re-entering Belgium.

The Court noted that the medical situation of Mr Paposhvili, who had been suffering from a very serious illness and whose condition had been life-threatening, had not been examined by the Belgian authorities in the context of his requests for regularisation of his residence status. Likewise, the authorities had not examined the degree to which Mr Paposhvili had been dependent on his family as a result of the deterioration of his state of health.

The Court found, in particular, that in the absence of any assessment by the domestic authorities of the risk facing Mr Paposhvili, in the light of the information concerning his state of health and the existence of appropriate treatment in Georgia, the information available to those authorities had been insufficient for them to conclude that the applicant, if returned to Georgia, would not have run a real and concrete risk of treatment contrary to Article 3 of the Convention.

The Court also found that it had been up to the national authorities to conduct an assessment of the impact of removal on Mr Paposhvili's family life in the light of his state of health. In order to comply with Article 8 the authorities would have been required to examine whether, in the light of the applicant's specific situation at the time of removal, the family could reasonably have been expected to follow him to Georgia or, if not, whether observance of Mr Paposhvili's right to respect for his family life required that he be granted leave to remain in Belgium for the time he had left to live.

## Principal facts

The applicant, Georgie Paposhvili, was a Georgian national who was born in 1958 and lived in Brussels. He died on 7 June 2016. On 20 June 2016 the applicant's wife and her three children expressed the wish to pursue the proceedings before the Court.

Mr Paposhvili arrived in Belgium on 25 November 1998, accompanied by his wife and their six-year-old child. The couple subsequently had two more children. Between 1998 and 2007 Mr Paposhvili was convicted of a number of offences, including robbery with violence and participation in a criminal organisation. While serving his various prison sentences, Mr Paposhvili was diagnosed with a number of serious medical conditions, including chronic lymphocytic leukaemia and tuberculosis, for which he received hospital treatment. He submitted several unsuccessful applications for regularisation of his residence status on exceptional or medical grounds. In August 2007 the Minister for the Interior issued a deportation order directing the applicant to leave the country, and barred him from re-entering Belgium for ten years on account of the danger he posed to public order. The order became enforceable once Mr Paposhvili had completed his sentence but was not in fact enforced, as he was undergoing medical treatment. On 7 July 2010 the Aliens Office issued an order for him to leave the country, together with an order for his detention. He was transferred to a secure facility for illegal immigrants with a view to his return to Georgia, and travel papers were issued for that purpose. On 23 July 2010 Mr Paposhvili applied to the European Court of Human Rights for an interim measure under Rule 39 of its Rules of Court suspending his removal; the request was granted. He was subsequently released. The time-limit for enforcement of the order to leave Belgian territory was extended several times. In November 2009 the applicant's wife and the three children were granted indefinite leave to remain in Belgium. Between 2012 and 2015 Mr Paposhvili was arrested on several occasions for shoplifting.

## Complaints, procedure and composition of the Court

Relying on Articles 2 (right to life) and 3 (prohibition of inhuman or degrading treatment), Mr Paposhvili alleged that substantial grounds had been shown for believing that if he had been expelled to Georgia he would have faced a real risk there of inhuman and degrading treatment and of a premature death.

Under Article 8 (right to respect for private and family life), Mr Paposhvili complained that his removal to Georgia, ordered together with a ten-year ban on re-entering Belgium, would have resulted in his separation from his family, who had been granted leave to remain in Belgium and constituted his sole source of moral support.

The application was lodged with the European Court of Human Rights on 23 July 2010. On 28 July 2010, under Rule 39 of the Rules of Court, the Court requested the Government not to remove Mr Paposhvili pending the outcome of the proceedings before the Aliens Appeals Board.

In its Chamber judgment of 17 April 2014 the European Court of Human Rights unanimously declared the application admissible and held that the enforcement of the decision to remove the applicant to Georgia would not entail a violation of Articles 2 and 3 of the Convention. The Court held by a majority that there had been no violation of Article 8 of the Convention. On 14 July 2014 Mr Paposhvili requested that the case be referred to the Grand Chamber under Article 43 of the Convention (referral to the Grand Chamber). On 20 April 2015 the panel of the Grand Chamber accepted that request. A hearing was held on 16 September 2015.

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

Guido **Raimondi** (Italy), *President*,  
 Işıl **Karakaş** (Turkey),  
 Luis **López Guerra** (Spain),

Khanlar **Hajiyev** (Azerbaijan),  
Nebojša **Vučinić** (Montenegro),  
Kristina **Pardalos** (San Marino),  
Julia **Laffranque** (Estonia),  
André **Potocki** (France),  
Paul **Lemmens** (Belgium),  
Helena **Jäderblom** (Sweden),  
Valeriu **Grițco** (the Republic of Moldova),  
Faris **Vehabović** (Bosnia and Herzegovina),  
Ksenija **Turković** (Croatia),  
Dmitry **Dedov** (Russia),  
Egidijus **Kūris** (Lithuania),  
Robert **Spano** (Iceland),  
Jon Fridrik **Kjølbro** (Denmark),

and also Johan **Callewaert**, *Deputy Grand Chamber Registrar*.

Decision of the Court

### **Article 3 (prohibition of inhuman or degrading treatment)**

The Court noted that Mr Paposhvili had been suffering from a very serious illness and that his condition had been life-threatening. He had provided detailed medical information obtained from a doctor specialising in the treatment of leukaemia and head of the haematology department in a hospital devoted entirely to the treatment of cancer. According to this information, the applicant's condition had become stable as a result of the treatment he was receiving in Belgium. This was a highly targeted treatment aimed at enabling him to undergo a donor transplant, which offered the last remaining prospect of a cure provided it was carried out within a fairly short timeframe. If the treatment being administered to Mr Paposhvili had been discontinued, his life expectancy, based on the average, would have been less than six months.

Mr Paposhvili had made two requests for regularisation of his residence status in Belgium on medical grounds, on the basis of section 9ter of the Aliens Act. His requests had been based primarily on the need to obtain appropriate treatment for his leukaemia and on the premise that he would have been unable to receive suitable care for his condition in Georgia. However, the requests had been refused by the Aliens Office on the grounds that Mr Paposhvili was excluded from the scope of section 9ter of the Act because of the serious crimes he had committed. The Aliens Appeals Board had held that, where the administrative authority had advanced grounds for exclusion, it was not necessary for it to examine the medical evidence submitted to it. With regard to the complaints based on Article 3 of the Convention, the Aliens Appeals Board had noted that the decision refusing leave to remain had not been accompanied by a removal measure, with the result that the risk of the applicant's medical treatment being discontinued in the event of his return to Georgia had been purely hypothetical. The Conseil d'État had upheld that reasoning, specifying that the medical situation of an alien who faced removal from the country and whose request for leave to remain had been refused should be assessed at the time of enforcement of the removal measure rather than at the time of its adoption.

The Court concluded that, although the Aliens Office's medical adviser had issued several opinions regarding Mr Paposhvili's state of health based on the medical certificates provided by the applicant, these had not been examined either by the Aliens Office or by the Aliens Appeals Board from the perspective of Article 3 of the Convention in the course of the proceedings concerning regularisation on medical grounds. Nor had Mr Paposhvili's medical situation been examined in the context of the proceedings concerning his removal. In the Court's view, the fact that an assessment of this kind could have been carried out immediately before the removal measure was to be enforced did not address these concerns, in the absence of any indication of the extent of such an assessment and its

effect on the binding nature of the order to leave the country. Consequently, the Court considered that in the absence of any assessment by the domestic authorities of the risk facing Mr Paposhvili, in the light of the information concerning his state of health and the existence of appropriate treatment in Georgia, the information available to those authorities had been insufficient for them to conclude that the applicant, if returned to Georgia, would not have run a real and concrete risk of treatment contrary to Article 3 of the Convention. **The Court therefore held that if Mr Paposhvili had been removed to Georgia without these factors being assessed, there would have been a violation of Article 3.**

#### **Article 8 (right to respect for private and family life)**

The Court observed that the Belgian authorities had likewise not examined the degree to which Mr Paposhvili had been dependent on his family as a result of the deterioration of his state of health. Indeed, in the context of the proceedings for regularisation on medical grounds, the Aliens Appeals Board had dismissed Mr Paposhvili's complaint under Article 8 on the ground that the decision refusing him leave to remain had not been accompanied by a removal measure. Nevertheless, the Court considered that it had been up to the national authorities to conduct an assessment of the impact of removal on Mr Paposhvili's family life in the light of his state of health; this constituted a procedural obligation with which the authorities had to comply in order to ensure the effectiveness of the right to respect for family life. In the Court's view, the Belgian authorities would have been required, in order to comply with Article 8, to examine whether, in the light of the applicant's specific situation at the time of removal, the family could reasonably have been expected to follow him to Georgia or, if not, whether observance of Mr Paposhvili's right to respect for his family life required that he be granted leave to remain in Belgium for the time he had left to live. Accordingly, **the Court held that if Mr Paposhvili had been removed to Georgia without these factors having been assessed, there would also have been a violation of Article 8 of the Convention.**

#### **Article 41 (just satisfaction)**

The Court held that its conclusion concerning Articles 3 and 8 constituted sufficient just satisfaction in respect of any non-pecuniary damage that Mr Paposhvili might have sustained. It also held that Belgium was to pay Mr Paposhvili's family 5,000 euros (EUR) in respect of costs and expenses.

#### **Separate opinion**

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

155. ECHR, *Khlaifia and Others v. Italy*, no. 16483/12, Grand Chamber judgment of 15 December 2016 (Article 5-1, Right to liberty and security – Violation; Article 5-2, Right to be informed promptly of the reasons of one’s arrest – Violation; Article 5-4, Right to judicial review of detention – Violation; Article 3, Prohibition of torture and inhuman or degrading treatment – No violation; Article 4 of Protocol No. 4, Prohibition of collective expulsion of aliens – No violation; Article 13, Right to an effective remedy, taken in conjunction with Article 3 – Violation; Article 13 taken in conjunction with Article 4 of Protocol No. 4 – No violation). The applicants, Tunisian nationals, successfully alleged, *inter alia*, that their asylum in detention centres on Lampedusa and on ships in Palermo harbour (Sicily) during the Arab spring of 2011 had been unlawful. The Grand Chamber reversed, however the Chamber judgment (case no. 117), in finding that the applicant’s repatriation to Tunisia had not amounted to a collective expulsion in violation of Article 4 of Protocol No. 4.

**ECHR 406 (2016)**  
**15.12.2016**

**Press release issued by the Registrar**

In today’s Grand Chamber judgment in the case of *Khlaifia and Others v. Italy* (application no. 16483/12) the European Court of Human Rights 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 reasons for deprivation of liberty)** of the Convention;

**a violation of Article 5 § 4 (right to a speedy decision on the lawfulness of detention);**

**no violation of Article 3 (prohibition of inhuman or degrading treatment)** as regards the conditions in the Lampedusa reception centre;

**no violation of Article 3** as regards the conditions on the ships in Palermo harbour; and

- by sixteen votes to one, that there had been **no violation of Article 4 of Protocol No. 4 to the Convention (prohibition of collective expulsion of aliens);**

- unanimously, that there had been a **violation of Article 13 (right to an effective remedy) taken together with Article 3;**

- by sixteen votes to one, that there had been **no violation of Article 13 taken together with Article 4 of Protocol No. 4.**

The case concerns the holding, in a reception centre on the island of Lampedusa then on ships in Palermo harbour (Sicily), of irregular migrants who arrived in Italy in 2011 following the “Arab Spring” events in their country, and their subsequent removal to Tunisia.

The Court observed that their deprivation of liberty without any clear and accessible basis did not satisfy the general principle of legal certainty and was incompatible with the need to protect the individual against arbitrariness. The refusal-of-entry orders issued by the Italian authorities had made no reference to the legal and factual reasons for the applicants’ detention and they had not been notified of them “promptly”. The Court lastly noted that the Italian legal system had not provided them with any remedy by which they could have obtained a judicial decision on the lawfulness of their detention.

The Court found, however, that the conditions of the applicants’ detention in the Lampedusa centre and on the ships in Palermo harbour had not constituted inhuman or degrading treatment.

As to the prohibition of the collective expulsion of aliens, the Court found that Article 4 of Protocol No. 4 did not guarantee the right to an individual interview in all circumstances. The requirements of that provision were satisfied where each alien had the possibility of raising arguments against his or her expulsion and where those arguments had been examined by the authorities of the respondent State. Having been identified on two occasions, and their nationality having been established, the applicants had had a genuine and effective possibility of raising arguments against their expulsion.

The Court lastly observed that the lack of suspensive effect of a remedy against a removal decision did not in itself constitute a violation of Article 13 where the applicants did not allege a real risk of a violation of the rights guaranteed by Articles 2 and 3 of the Convention in the destination country.

### Principal facts

The applicants, Mr Saber Ben Mohamed Ben Ali Khlaifia, Mr Fakhreddine Ben Brahim Ben Mustapha Tabal and Mr Mohamed Ben Habib Ben Jaber Sfar, are three Tunisian nationals who were born in 1983, 1987 and 1988 respectively. Mr Khlaifia lives in Om Laarass (Tunisia); Mr Tabal and Mr Sfar live in El Mahdia (Tunisia).

In September 2011 they left Tunisia with others on makeshift boats heading for the Italian coast. Their vessels were intercepted by the Italian coastguard, which escorted them to a port on the island of Lampedusa. The applicants were transferred to an Early Reception and Aid Centre (“CSPA”) on Lampedusa at Contrada Imbriacola, where the authorities proceeded with their identification. The applicants claimed to have been held in overcrowded and dirty conditions.

On 20 September 2011 a violent revolt broke out among the migrants in the CSPA. The premises were gutted by fire and the applicants were taken to a sports complex on Lampedusa. They then managed to evade police surveillance and reach the village of Lampedusa, from where, with about 1,800 other migrants, they started a demonstration through the streets of the island. After being stopped by the police, the applicants were taken first back to the reception centre and then to Lampedusa airport.

On 22 September 2011 Mr Khlaifia, Mr Tabal and Mr Sfar were flown to Palermo. After disembarking they were transferred to ships that were moored in the harbour there. Mr Khlaifia was placed on the *Vincent*, with some 190 other people, while the other applicants were put on board the *Audace* among about 150 other migrants. The applicants remained on the ships for a few days.

On 27 September 2011 Mr Tabal and Mr Sfar were taken to Palermo airport pending their removal to Tunisia; Mr Khlaifia was removed on 29 September. Before boarding the planes for Tunisia, the migrants were received by the Tunisian Consul, who, according to the applicants, merely recorded their identities in accordance with the agreement between Italy and Tunisia of April 2011. The applicants also asserted that at no time during their stay in Italy had they been issued with any document. Annexed to their observations, the Government, however, produced three refusal-of-entry orders that had been issued in respect of the applicants. Those orders were accompanied by a record indicating that the addressee had refused to sign or receive a copy. On their arrival at Tunis airport, Mr Khlaifia, Mr Tabal and Mr Sfar were released.

A number of anti-racism associations filed a complaint about the treatment to which the migrants had been subjected on board three ships in Palermo harbour. Criminal proceedings for abuse of power and unlawful arrest were opened against a person or persons unknown. In a decision of 1 June 2012 the Palermo preliminary investigations judge dropped the charges.

Two other migrants in respect of whom a refusal-of-entry order had been issued challenged those orders before the Agrigento Justice of the Peace, who annulled them. The judge observed that the complainants had been found on Italian territory on 6 May and 18 September 2011 respectively and that the orders at issue had been adopted only on 16 May and 24 September 2011. While

acknowledging that the law did not indicate any time-frame for such orders, the judge found that a measure which by its very nature restricted the freedom of the person concerned had to be taken within a reasonably short time after his or her identification, otherwise the *de facto* detention would be permitted in the absence of any reasoned decision of the authority.

### Complaints, procedure and composition of the Court

The applicants alleged that they had been deprived of their liberty in a manner that was contrary to Article 5 § 1 (right to liberty and security) of the Convention. Relying on Article 5 § 2 (right to be promptly informed of the reasons for deprivation of liberty) they complained of the lack of any communication with the Italian authorities during their confinement in Italy. Under Article 5 § 4 (right to a speedy decision on the lawfulness of detention), they alleged that they had not had any possibility of challenging the lawfulness of their deprivation of liberty. Relying on Article 3 (prohibition of inhuman or degrading treatment) they complained that the conditions in which they had been held in the reception centre on Lampedusa and on board the ships in Palermo harbour had amounted to inhuman and degrading treatment. They also submitted under Article 4 of Protocol No. 4 (prohibition of collective expulsion of aliens) that they had been subjected to collective expulsion. Lastly, relying on Article 13 (right to an effective remedy), taken together with Articles 3 and 5 and with Article 4 of Protocol No. 4, they complained that they had had no effective remedy under Italian law by which to complain of the violation of their rights.

The application was lodged with the European Court of Human Rights on 9 March 2012.

On 1 September 2015 a Chamber of the Court's Second Section delivered a judgment, finding, unanimously, that there had been a violation of Article 5 §§ 1, 2 and 4 of the Convention and no violation of Article 3 as to the conditions in which the applicants were held on board the ships *Vincent* and *Audace*. By five votes to two, the Chamber also found a violation of Article 3 of the Convention on account of the conditions in which the applicants were held in the reception centre, a violation of Article 4 of Protocol No. 4, and a violation of Article 13 of the Convention, taken together with Article 3 and with Article 4 of Protocol No. 4.

On 1 December 2015 the Government requested that the case be referred to the Grand Chamber under Article 43 (referral to the Grand Chamber) and on 1 February 2016 the panel of the Grand Chamber accepted that request. Written comments were received from four associations belonging to the Coordination Française pour le droit d'asile (French coalition for the right of asylum), and from the Centre for Human Rights and Legal Pluralism of McGill University, the AIRE Centre and the European Council on Refugees and Exiles (ECRE). A hearing was held in Strasbourg on 22 June 2016.

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

Luis **López Guerra** (Spain), *President*,  
 Guido **Raimondi** (Italy),  
 Mirjana **Lazarova Trajkovska** ("The former Yugoslav Republic of Macedonia"),  
 Angelika **Nußberger** (Germany),  
 Khanlar **Hajiyev** (Azerbaijan),  
 Kristina **Pardalos** (San Marino),  
 Linos-Alexandre **Sicilianos** (Greece),  
 Erik **Møse** (Norway),  
 Krzysztof **Wojtyczek** (Poland),  
 Dmitry **Dedov** (Russia),  
 Mārtiņš **Mīts** (Latvia),  
 Stéphanie **Mourou-Vikström** (Monaco),  
 Georges **Ravarani** (Luxembourg),

Gabriele **Kucsko-Stadlmayer** (Austria),  
Pere **Pastor Vilanova** (Andorra),  
Alena **Poláčková** (Slovakia),  
Georgios A. **Serghides** (Cyprus),

and also Johan **Callewaert**, *Deputy Grand Chamber Registrar*.

Decision of the Court

### **Article 5 § 1**

Like the Chamber, the Court accepted that the applicants' deprivation of liberty fell within subparagraph (f) of Article 5 § 1.

As Article 14 of the applicable Legislative Decree (no. 286 of 1998) could not have constituted the legal basis for the applicants' deprivation of liberty – because they had been held in a CSPA and not in a facility provided for under that instrument, an identification and removal centre (CIE) – the Court observed that the Government had put forward, as the legal basis for the applicants' stay on Lampedusa, the April 2011 bilateral agreement between Italy and Tunisia. The Court noted, however, that the full text of that agreement had not been made public and that it had not therefore been accessible to the applicants, who accordingly could not have foreseen the consequences of its application. It was thus difficult to understand how the scant information available as to the agreements entered into at different times between Italy and Tunisia could have constituted a clear and foreseeable legal basis for the applicants' detention.

The finding that the applicants' detention was devoid of legal basis in Italian law had been confirmed by the report of the Senate's Special Commission, which had noted that stays at the Lampedusa centre sometimes extended to over 20 days "without there being any formal decision as to the legal status of the person being held". It was also noted that the PACE Ad Hoc Sub-Committee had expressly recommended that the Italian authorities should "clarify the legal basis for the *de facto* detention in the reception centres in Lampedusa".

The Court observed that persons placed in a CSPA could not have the benefit of the safeguards applicable to placement in a CIE, which for its part had to be validated by an administrative decision subject to review by the Justice of the Peace. In his decision of 1 June 2012, the Palermo preliminary investigations judge had stated that the police authority had merely registered the presence of the migrants in the CSPA without ordering their placement and that the same was true for the migrants' transfer to the ships. Consequently, the applicants had not only been deprived of their liberty without a clear and accessible legal basis, they had also been unable to enjoy the fundamental safeguards of *habeas corpus*, as laid down, for example, in Article 13 of the Italian Constitution. Since the applicants' detention had not been validated by any decision, whether judicial or administrative, they had been deprived of those important safeguards, thus leading the Court to find that the provisions applying to the detention of irregular migrants were lacking in precision.

In conclusion, the applicants' deprivation of liberty had not satisfied the general principle of legal certainty and was not compatible with the aim of protecting the individual against arbitrariness. As it had not been "lawful", there had been a violation of Article 5 § 1 of the Convention.

### **Article 5 § 2**

Having already observed, under Article 5 § 1 of the Convention, that the applicants' detention had no clear and accessible legal basis in Italian law, the Court failed to see how the authorities could have informed the applicants of the legal reasons for their deprivation of liberty or thus have provided them with sufficient information to enable them to challenge the grounds for the measure before a court.

The Court had examined the relevant orders without finding any reference in them to the applicants' detention or to the legal and factual reasons for such a measure. It was also noted that the applicants had apparently been notified of those orders very belatedly. Therefore they did not satisfy the condition of "prompt" information and there had been a violation of Article 5 § 2.

#### **Article 5 § 4**

Having regard to the Court's finding under Article 5 § 2 that the legal reasons for the applicants' deprivation of liberty, both in the CSPA and on the ships, had not been notified to them, the Court concluded that the Italian legal system had not provided them with a remedy whereby they could have obtained a decision by a court on the lawfulness of their deprivation of liberty. There had thus been a violation of Article 5 § 4.

#### **Article 3**

As regards the conditions in which the applicants had been held in the Lampedusa CSPA, the Court acknowledged that this centre was not suited to stays of several days. However, two days after the arrival there of Mr Tabal and Mr Sfar, a mutiny had broken out among the migrants and the centre had been gutted by fire. It could not be presumed that the Italian authorities had been inactive or negligent, or that the migrants should have been transferred in less than two to three days. The Court further observed that the applicants did not claim that they had been deliberately ill-treated by the authorities in the centre, or that there had been insufficient food or water. The Court thus concluded that the treatment they complained of had not exceeded the level of severity required for it to fall within Article 3 of the Convention. It followed that the conditions in which the applicants had been held at the Lampedusa CSPA had not constituted inhuman or degrading treatment and had not therefore entailed a violation of Article 3.

Concerning the conditions in which they had been held on the ships *Vincent* and *Audace*, the Court noted that the applicants' allegations had not been based on any objective element other than their own testimony. The Court pointed out that the burden of proof was on the Government when allegations of ill-treatment were arguable and based on corroborating evidence, but observed that there was no such evidence in the present case.

Lastly, the Court attached decisive weight to the fact that the Government had adduced before it a judicial decision contradicting the applicants' account, namely that of the Palermo preliminary investigations judge dated 1 June 2012. As to the appeal of 28 September 2011 by Médecins sans Frontières, expressing concern and asking to be able to visit the ships, the Court noted that on that date the return of the migrants who had been held on the ships was already in progress. It followed that the conditions in which the applicants had been held on the ships *Vincent* and *Audace* did not constitute inhuman or degrading treatment. There had accordingly been no violation of Article 3 of the Convention under this head.

#### **Article 4 of Protocol No. 4**

As the Court had previously observed, the fact that a number of aliens were subject to similar decisions did not in itself lead to the conclusion that there had been a collective expulsion if each person concerned had been given the opportunity to put arguments against his or her expulsion to the competent authorities on an individual basis.

The Court observed that the applicants had not disputed the fact that they had undergone identification on two occasions: by Italian civil servants and by the Tunisian Consul. As to the conditions of the first identification on their arrival at the CSPA, the Government argued that it had consisted of a genuine individual interview, carried out in the presence of an interpreter or cultural mediator, following which the authorities had filled out an "information sheet" containing personal data and any

circumstances specific to each migrant. The Government had provided a plausible explanation to justify their inability to produce the applicants' information sheets, namely the fact that those documents had been destroyed in the fire at the reception centre. The applicants did not dispute the Government's submission that 99 "social operators", three social workers, three psychologists, and eight interpreters and cultural mediators worked at the centre. The Court found it reasonable to assume that those persons had intervened to facilitate communication and mutual understanding between the migrants and the Italian authorities.

The Court was of the opinion that any time during their confinement in the CSPA and on board the ships, the applicants had had an opportunity to notify the authorities of reasons why they should remain in Italy or why they should not be returned. 72 migrants held in the CSPA at the time of the fire had expressed their wish to apply for asylum, thus halting their return and resulting in their transfer to other reception centres. There was no reason to assume that the Italian authorities would have remained unreceptive in response to the submission of other legitimate and legally arguable impediments to their removal.

The Court pointed out that Article 4 of Protocol No. 4 did not guarantee the right to an individual interview in all circumstances. The requirements of that provision were satisfied where each alien had the possibility of raising arguments against his or her expulsion and where those arguments had been examined by the authorities of the respondent State.

The applicants, who could reasonably have expected to be returned to Tunisia, had remained for between nine and 12 days in Italy and during that not insignificant period of time they had had the possibility of drawing the attention of the national authorities to any circumstance that might affect their status and entitle them to remain in Italy. In addition, the second identity check in the presence of the Italian Consul had enabled the migrants' nationality to be confirmed and had given them a last chance to raise objections to their expulsion.

As regards the relatively simple and standardised nature of the refusal-of-entry orders, the applicants did not have any valid travel documents and had not alleged either that they feared illtreatment in the event of their return or that there were any other legal impediments to their expulsion. Those orders had thus been justified merely by the applicants' nationality, by the observation that they had unlawfully crossed the Italian border, and by the absence of any of the situations provided for in the relevant Legislative Decree. It followed that the virtually simultaneous removal of the three applicants did not lead to the conclusion that their expulsion had been "collective" in nature.

Having undergone identification on two occasions and their nationality having been established, the applicants had been afforded a genuine and effective possibility of submitting arguments against their expulsion. There had therefore been no violation of Article 4 of Protocol No. 4.

### **Article 13 taken together with Article 3**

The Court observed that the Government had not indicated any remedies by which the applicants could have complained about the conditions in which they were held in the CSPA or on the ships. It followed that there had been a violation of Article 13 taken together with Article 3 of the Convention.

### **Article 13 taken together with Article 4 of Protocol No. 4**

The Court noted that the refusal-of-entry orders had indicated expressly that the individuals concerned could have appealed against them to the Agrigento Justice of the Peace. In that context the judge could examine any complaint about a failure to take account of the migrant's personal situation and thus about the "collective" nature of the expulsion. That kind of appeal would not, however, have suspended the enforcement of the refusal-of-entry orders.

The Court took the view that where an applicant did not allege that he or she faced violations of Articles 2 or 3 of the Convention in the destination country, removal from the territory of the respondent State would not expose him or her to harm of a potentially irreversible nature. There would be no risk of such harm, for example, where it was argued that the expulsion would breach the person's right to respect for his or her private and family life. Similar considerations applied where an applicant alleged that the expulsion procedure was "collective" in nature, but without claiming at the same time that it exposed him or her to a risk of irreversible harm in the form of a violation of Articles 2 or 3 of the Convention.

The Convention did not impose an absolute obligation on a State to guarantee an automatically suspensive remedy, but merely required that the person concerned should have an effective possibility of challenging the expulsion decision by having a sufficiently thorough examination of his or her complaints carried out by an independent and impartial domestic forum. The Court found that the Agrigento Justice of the Peace satisfied those requirements. The lack of suspensive effect of a remedy against a removal decision did not in itself constitute a violation of Article 13 where the applicants did not allege a real risk of a violation of the rights guaranteed by Articles 2 or 3 of the Convention in the destination country. There had not therefore been a violation of Article 13 taken together with Article 4 of Protocol No. 4.

#### **Just satisfaction (Article 41)**

The Court held, by fifteen votes to two, that Italy was to pay each applicant 2,500 euros (EUR) in respect of non-pecuniary damage and, unanimously, that it had to pay EUR 15,000 to the applicants jointly in respect of costs and expenses.

#### **Separate opinions**

Judge Raimondi expressed a concurring opinion and Judges Dedov and Serghides each expressed a partly dissenting opinion. These opinions are annexed to the judgment.

**156. ECHR, *Shioshvili and Others v. Russia*, no. 19356/07, Chamber judgment of 20 December 2016 (Article 3, Prohibition of torture and inhuman or degrading treatment – Violation; Article 13, Right to an effective remedy, taken in conjunction with Article 3 - Violation; Article 2 of Protocol No. 4, Freedom of movement – Violation; Article 4 of Protocol No. 4, Prohibition of collective expulsion - Violation).** The applicants, Georgian nationals settled in Russia, successfully complained that they had been collectively expelled from Russia, but then prevented from leaving the country for almost two weeks whilst being exposed to very poor conditions by the Russian authorities.

**ECHR 423 (2016)**

**20.12.2016**

**Press release issued by the Registrar of the Court**

In today's **Chamber** judgment in the case of ***Shioshvili and Others v. Russia*** (application no. 19356/07) the European Court of Human Rights held that there had been:

**violations of Article 3 (prohibition of inhuman and degrading treatment), Article 13 (right to an effective remedy) taken in conjunction with Article 3, Article 2 of Protocol No. 4 (freedom of movement) and Article 4 of Protocol No. 4 (prohibition of collective expulsion) to the European Convention on Human Rights.**

The case concerned the expulsion from Russian territory of a heavily pregnant Georgian woman, accompanied by her four young children, in the autumn of 2006. The applicants complained that they had been collectively expelled from Russia, but then prevented from leaving the country for almost two weeks whilst being exposed to very poor conditions by the Russian authorities. Though the family did eventually reach Georgia, after arriving the pregnant mother gave birth to a still-born baby.

The Court found in particular that the Russian authorities had subjected the mother to collective expulsion without properly assessing her case, before unlawfully preventing the family from leaving Russia, requiring them to stay with little money in an unfamiliar city in winter, and then failing to accommodate their needs arising from their very vulnerable situation. Furthermore, the applicants had had no access to a remedy in relation to these events.

The Court has also published judgments today in two other cases which involved the collective expulsion of Georgian nationals from Russia in the autumn of 2006. In *Berdzenishvili and Others v. Russia* (nos. 14594/07, 14597/07, 14976/07, 14978/07, 15221/07, 16369/07, and 16706/07), the Court upheld some of the complaints of 19 Georgian nationals, who had claimed that they had been unlawfully detained in degrading conditions before being expelled from Russia. In *Dzidzava v. Russia* (no. 16363/07), the Court found that the Russian authorities had held a Georgian man suffering from asthma in inhuman and degrading conditions, and could not properly explain why he had died whilst being deported from the country.

**Principal facts**

The applicants are Ms Lia Shioshvili (who was born in 1977 and lives in Gurjaani, Georgia), and her four children, born respectively in 1995, 1997, 2000, and 2004. They are all Georgian nationals.

Ms Shioshvili and her children settled in Russia in 2003. On 7 November 2006 the Ruzskiy District Court of the Moscow Region issued an expulsion decision against Ms Shioshvili. The applicants all left Moscow on 20 November 2006. Due to suspended transport links between Russia and Georgia,

they boarded a train headed to Baku (Azerbaijan). Ms Shioshvili was eight months pregnant at the time. The four other applicants were aged eleven, nine, six and two.

At 10.30pm on 22 November 2006, the train was on its way to the Russia/Azerbaijan border. According to the applicants, the following then took place. The train was stopped by Russian migration officers. They confiscated 400 US dollars from Ms Shioshvili (on the alleged grounds that they had not been declared), before informing all of the Georgian passengers that there were irregularities in their documents, and that they could not continue. The Georgians were then made to leave the train, and walk to a bus that would eventually take them to Derbent. The journey was particularly difficult for Ms Shioshvili. She had to travel whilst carrying a suitcase and her youngest child, outside in cold weather, whilst in a state of advanced pregnancy and worrying about the health of her children and unborn child. She made repeated oral complaints to the migration officers, but to no avail. Upon arrival in Derbent, the group was asked to visit the migration service office. The applicants waited for two hours outside, before the group was taken to Derbent train station at 3 a.m. to spend the night. No food or water was provided, and the Georgians had to pay 500 rubles to the police guards if they wished to use the toilet. The following morning they returned to the migration office, where they spent the whole day waiting outside in temperatures of 5°C.

By the evening of 23 November, Ms Shioshvili's health had deteriorated, her children were crying and coughing, and no food, water or shelter was offered by the authorities. The group of Georgians managed to rent an overcrowded flat in Derbent, where the applicants stayed whilst making repeated visits to the migration office. On 29 November, Ms Shioshvili and her three eldest children attempted to cross the border to Azerbaijan. However, they were turned back on the grounds that the decision ordering the expulsion had only concerned Ms Shioshvili, and not her children. Ms Shioshvili's health worsened, as she suffered from a cold, fever, depression and repeated asthma attacks.

Finally, by 4 December 2006, Ms Shioshvili was provided with all of the necessary documents for her and her children to leave Russia. After a further difficult journey through Azerbaijan, they arrived in Georgia the next day. However, Ms Shioshvili's health continued to weaken, as she suffered from severe cough and fever, an asthma attack and severe abdominal pain. On 15 December, she gave birth to a stillborn baby.

In July 2008, Ms Shioshvili lodged a complaint about the events with the General Prosecutor's office of the Russian Federation. She was notified that the complaint had been passed to the Prosecutor of Derbent, but received no further contact about her case. The Russian Government maintains that the border control services did not bring any Georgian nationals to the migration services on 22 or 23 November 2016.

### Complaints, procedure and composition of the Court

Relying on Article 2 of Protocol No. 4 (freedom of movement), the applicants complained that their freedom to leave Russia had been restricted without any justification. Relying on Article 4 of Protocol No. 4 (prohibition of collective expulsion of aliens), they further complained that they, as Georgian nationals, had been collectively expelled from Russia without an examination of their individual cases. Relying on Article 3 (prohibition of inhuman or degrading treatment), they complained that the conditions they had been exposed to after being prevented from crossing the border had led to physical suffering, feelings of humiliation and negative effects on their health. They also relied on Article 13 (right to an effective remedy) taken in conjunction with Article 3, to complain that they had had no access to an effective remedy to address the alleged violations of Article 3. Finally, the applicants relied on Article 14 (prohibition of discrimination) taken in conjunction with various articles, to complain that they had been subjected to discrimination on the ground of their ethnic origin. The application was lodged with the European Court of Human Rights on 4 May 2007.

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

Luis **López Guerra** (Spain), *President*,  
 Helena **Jäderblom** (Sweden),  
 Helen **Keller** (Switzerland),  
 Dmitry **Dedov** (Russia),  
 Branko **Lubarda** (Serbia),  
 Pere **Pastor Vilanova** (Andorra),  
 Georgios A. **Serghides** (Cyprus),

and also Fatoş **Aracı**, *Deputy Section Registrar*.

Decision of the Court

### **Establishment of Facts**

Though the Government denied that any Georgian nationals had been taken to the migration services in Derbent on 22 or 23 November 2016, it confirmed that Ms Shioshvili's youngest child had been taken off the train and registered by the Line Division of the Interior at Derbent station. Given that the child was only two years old at the time, the Court inferred from this that the other applicants had also been taken off the train, though they had not been registered. This was corroborated by television reports of the events concerned, and the detailed submissions of the applicants. The Court also held that the applicants had stayed in Derbent until they had all been given transit visas on 4 December 2006.

### **Article 2 of Protocol No. 4 (freedom of movement)**

The Court found a violation of the right to freedom of movement in relation to all of the applicants. This was because they had been prevented from leaving Russia between 22 November and 4 December 2006, and this measure had not been taken in accordance with the law. In particular, the Government had not explained what legal provision required the applicants to possess a transit visa in order to leave the country, exactly what documents the applicants had been missing, or what legal basis the Government had had for taking the applicants off the train.

### **Article 4 of Protocol No. 4 (prohibition of collective expulsion)**

The Court found a violation in the case of Ms Shioshvili, because she had been subjected to the administrative practice of expelling Georgian nationals, without a proper examination of their individual cases. The Court found no violations in regard to the other applicants, in particular because no expulsion order had been made against them.

### **Article 3 (prohibition of inhuman or degrading treatment)**

The applicants had been in a very vulnerable situation: Ms Shioshvili had been pregnant, the children had been very young, and they had had little money. The family's stay in Derbent arose due to the conduct of the Russian authorities, and the applicants could not have foreseen it. Furthermore, the contradictory conduct of expelling Ms Shioshvili, but then preventing the family from leaving Russia, would have created a feeling of extreme despair, anxiety and debasement. These circumstances were sufficient for there to be a positive obligation on the Government under Article 3. However, the authorities had showed indifference to the applicants' vulnerable situation, accommodating neither the needs of the heavily pregnant Ms Shioshvili nor the young children, whilst delaying their onward journey for almost two weeks. The Court therefore found a violation of Article 3 in relation to all of the applicants.

### **Article 13 (right to an effective remedy) taken in conjunction with Article 3**

The Court noted that it had previously identified<sup>4</sup> the serious difficulties that Georgian nationals had had in accessing domestic remedies against the arrest, detention and expulsion orders made at the relevant time. The Court found that these difficulties applied in the case of the applicants, and also that their oral and written complaints to the Russian authorities had never produced any results. Accordingly, the Court found a violation of Article 13 taken in conjunction with Article 3.

**Article 14 (prohibition of discrimination) taken in conjunction with various articles**

The Court found that there was no need to examine the applicants' complaints under Article 14 of the Convention taken in conjunction with Articles 2 and 4 of the Protocol No.4, as these were substantially identical to the complaints submitted under Articles 2 and 4 of the Protocol No.4 taken in isolation. The Court found no violation of Article 14 taken in conjunction with Article 3 and 13 of the Convention, because the applicants had failed to show that non-Georgian nationals had been treated differently in a comparable situation.

**Just satisfaction (Article 41)**

The Court held that Russia was to pay the applicants 30,000 euros (EUR) in respect of non-pecuniary damage.

**157. ECHR, *J. and Others v. Austria*, no. 58216/12, Chamber judgment of 17 January 2017 (Article 4, Prohibition of forced labour- No violation; Article 3, Prohibition of inhuman or degrading treatment-No violation).** The case concerned the Austrian authorities' investigation into an allegation of human trafficking as two Filipino nationals filed a criminal complaint against their employers in Austria concerning their treatment in the United Arab Emirates which they claimed had continued during a short stay in Vienna. The local authorities found that they did not have jurisdiction over the alleged offences committed abroad and decided to discontinue the investigation. The Court found that there had been no obligation under the European Convention for States to provide for universal jurisdiction over trafficking offences committed abroad.

**ECHR 019 (2017)  
17.01.2017**

**Press release issued by the Registrar**

In today's **Chamber** judgment in the case of **J. and others v. Austria** (application no. 58216/12) the European Court of Human Rights held, unanimously, that there had been:

**no violation of Article 4 (prohibition of forced labour)** of the European Convention on Human Rights; **and**

**no violation of Article 3 (prohibition of inhuman or degrading treatment)** of the European Convention.

The case concerned the Austrian authorities' investigation into an allegation of human trafficking. In particular, two Filipino nationals, who had gone to work as maids or au pairs in the United Arab Emirates, alleged that their employers had taken their passports away from them and exploited them. They claimed that this treatment had continued during a short stay in Vienna where their employers had taken them and where they had eventually managed to escape. Following a criminal complaint filed by the applicants against their employers in Austria, the authorities found that they did not have jurisdiction over the alleged offences committed abroad and decided to discontinue the investigation into the applicants' case concerning the events in Austria. In their complaint before the European Court, they argued in particular that what had happened to them in Austria could not be viewed in isolation, and that the Austrian authorities had a duty under international law to investigate also those events which had occurred abroad.

The Court notably found that there had been no obligation under the European Convention to investigate the applicants' recruitment in the Philippines or their alleged exploitation in the United Arab Emirates, as States are not required under Article 4 of the Convention to provide for universal jurisdiction over trafficking offences committed abroad.

Turning to the events in Austria, the Court concluded that the authorities had taken all steps which could have reasonably been expected in the situation. The applicants, supported by a government funded NGO, had been interviewed by specially trained police officers, had been granted residence and work permits in order to regularise their stay in Austria, and a personal data disclosure ban had been imposed for their protection. Moreover, the investigation into the applicants' allegations about their stay in Vienna had been sufficient and the authorities' resulting assessment, given the facts of the case and the evidence available, had been reasonable. Any further steps in the case – such as confronting the applicants' employers – would not have had any reasonable prospect of success, as no mutual legal assistance agreement existed between Austria and the United Arab Emirates, and as the

applicants had only turned to the police approximately one year after the events in question, when their employers had long left the country.

### Principal facts

The applicants, Ms J., Ms G., and Ms C., are three Filipino nationals who were born in 1984, 1982, and 1972 respectively and live in Vienna (Mrs J. and Mrs G.) and Switzerland (Mrs C.). Between 2006 and 2009 all three applicants went to work as maids or au pairs in Dubai (the United Arab Emirates) for the same family or relatives of the same family. They allege that their employers took away their passports, ill-treated and exploited them. Notably, they were forced to work extremely long hours without being paid their agreed wages, were physically and emotionally abused and threatened.

In July 2010 the applicants' employers took them on a short trip to Vienna. Like in Dubai, their passports remained with their employers and they had to work from the early hours of the morning to midnight or even later, taking care of all the employers' children and carrying out numerous domestic duties. A few days after their arrival, two of applicants were subjected to extreme verbal abuse when one of their employers' children went missing at the zoo. Deciding that the violence towards them was likely to escalate at any time and that they could not continue working in such conditions any longer, they escaped with the help of an employee at the hotel where they were staying who spoke Tagalog, the first applicant's mother tongue. The applicants subsequently found support within the local Filipino community in Vienna.

About nine months later, the applicants contacted LEFÖ, a local, government-financed NGO actively involved in supporting the victims of trafficking in human beings in Austria. Assisted by the NGO, in July 2011 they filed a criminal complaint against their employers. Accompanied by the NGO, they were interviewed by police officers specially trained in dealing with victims of human trafficking, and described in detail what had happened to them and how they had been treated by their employers. On the basis of the police report, the public prosecutor's office initiated an investigation under Article 104a of the Criminal Code which related to human trafficking. However, the investigation was discontinued in November 2011 as the prosecutor's office found that the Austrian authorities did not have jurisdiction over the alleged offences, which had been committed abroad by non-nationals. The prosecuting authorities later also specified that the applicants' complaints about their stay in Vienna – including having to look after children, wash laundry and cook food for no more than three days – did not in themselves amount to exploitation under Article 104a of the Criminal Code.

In March 2012 the decision to discontinue the investigation was confirmed by the Vienna Regional Criminal Court, which added that there was no reason to prosecute if a conviction was no more likely than an acquittal. In its view, there was also no obligation under international law to pursue an investigation concerning events allegedly committed abroad.

The applicants were subsequently granted a special residence and work permit for victims of human trafficking in Austria, and a personal data disclosure ban was imposed on the Central Register so that their whereabouts would not be traceable by the general public.

### Complaints, procedure and composition of the Court

Relying on Article 4 (prohibition of forced labour) and Article 3 (prohibition of inhuman or degrading treatment) of the European Convention on Human Rights, the applicants alleged that they had been subjected to forced labour and human trafficking, and that the Austrian authorities had failed to carry out an effective and exhaustive investigation into their allegations. They argued in particular that what had happened to them in Austria could not be viewed in isolation, but had to be seen in the context of ongoing ill-treatment; therefore the Austrian authorities had had a duty under international law to investigate also those events which had occurred abroad.

The application was lodged with the European Court of Human Rights on 4 September 2012.

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

András **Sajó** (Hungary), *President*,  
 Vincent A. **De Gaetano** (Malta),  
 Nona **Tsotsoria** (Georgia),  
 Paulo **Pinto de Albuquerque** (Portugal),  
 Krzysztof **Wojtyczek** (Poland),  
 Gabriele **Kucsko-Stadlmayer** (Austria),  
 Marko **Bošnjak** (Slovenia),

and also Marialena **Tsirli**, *Section Registrar*.

#### Decision of the Court

The Court decided to strike Ms C.'s application out of its list of cases because it considered that she had to have lost interest in pursuing her application as she had failed to inform her representative of her current whereabouts. Nor did it find any reason relating to respect for human rights, as defined in the Convention and its Protocols, which would require it to continue the examination of her application, the other two applicants having raised the same complaints which the Court has examined as below.

#### **Article 4 (prohibition of forced labour)**

First, the Court was satisfied that the Austrian authorities had complied with their duty to identify, protect and support the applicants as (potential) victims of human trafficking. The legal and administrative framework in place concerning the protection of (potential) victims of human trafficking in Austria had been sufficient, and the Austrian authorities had taken all steps which could have reasonably been expected in the situation. In particular, from the point when Ms J. and Ms G had contacted the police, they had been interviewed by specially trained police officers, were granted residence and work permits in order to regularise their stay in Austria, and a personal data disclosure ban had been imposed for their protection. Furthermore, during the domestic proceedings, the applicants had been supported by the NGO LEFÖ, which is funded by the Government. Furthermore, the applicants had been given legal representation, procedural guidance and assistance to facilitate their integration in Austria.

Secondly, as concerned the events abroad, the Court found that Austria had had no obligation under the European Convention to investigate the applicants' recruitment in the Philippines or their alleged exploitation in the United Arab Emirates. Under Article 4 of the Convention, States are not required to provide for universal jurisdiction over trafficking offences committed abroad.

Lastly, as concerned the events in Austria, the Court considered that the Austrian authorities' investigation in the applicants' case had been sufficient. The authorities' assessment of the case, namely that the applicants' complaints about their stay in Vienna did not in themselves amount to exploitation under Article 104a of the Criminal Code, was not unreasonable, given the facts of the case and the evidence available.

In relation to the applicants' argument that the events in the Philippines, the United Arab Emirates and Austria could not be viewed in isolation, the Court found that, even if they had been taken together, there was no indication that the Austrian authorities had failed to comply with their duty of investigation. The applicants had only turned to the police approximately one year after the events in question, when their employers had long left the country. Any further steps in the case – such as confronting the applicants' employers with the allegations made against them – would not have had any reasonable prospect of success, as no mutual legal assistance agreement existed between Austria and the United Arab Emirates. Indeed, the Government referred to past experiences when even simple requests for legal assistance had been refused without discernible reason. The Court further

emphasised that, under Austrian law, it was not possible to conduct criminal proceedings in the absence of the accused and, besides, the public prosecutor's office had room for manoeuvre when deciding which cases to pursue and which to discontinue.

In conclusion, the Austrian authorities had complied with their duty to protect the applicants as (potential) victims of human trafficking. There had therefore been no violation of Article 4 of the Convention.

### **Article 3 (prohibition of inhuman or degrading treatment)**

For essentially the same reasons, the Court concluded that there had been no violation of Article 3 either.

### **Separate opinion**

Judge Pinto de Albuquerque, joined by Judge Tsotsoria, expressed a concurring opinion. This opinion is annexed to the judgment.

- 158. ECHR, *Döner and Others v. Turkey*, no. 29994/02, Chamber judgment of 7 March 2017 (Article 5, Right to liberty- Violation; Article 10, Freedom of expression- Violation).** The applicants, 20 Turkish nationals, lived in Istanbul and their children attended different public elementary schools. After submitting petitions requesting that their children be taught in Kurdish, criminal proceedings were brought against them for aiding and abetting the PKK (Workers' Party of Kurdistan) by participating in its strategy of carrying out non-violent acts of civil disobedience, aimed at leaving the State in a difficult position in the international arena. They complained, among others, that they had been subjected to criminal proceedings for using their constitutional right to file a petition, despite the absence of any provisions in domestic law criminalizing such conduct.
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**ECHR 078 (2017)  
07.03.2017**

**Press release issued by the Registrar**

The applicants are 20 Turkish nationals born between 1953 and 1983. At the time of the events giving rise to the present application, the applicants lived in Istanbul and their children attended different public elementary schools. The case concerned the criminal proceedings brought against them for aiding and abetting the PKK (Workers' Party of Kurdistan), after the applicants had submitted petitions requesting that their children be taught in Kurdish.

In December 2001, all but one of the applicants submitted petitions to the Bağcılar, Esenler and Kadıköy Education Directorates with a request for their children to be provided with education in Kurdish. It appears that similar petitions were submitted by other parents of Kurdish origin at the time.

Early on the morning of 13 January 2002 police officers from the Anti-terrorism branch of the Istanbul Security Directorate carried out a simultaneous search of the properties of 40 people, including the applicants, on the grounds that the petitions they had submitted had been made on the instructions of the PKK. No illegal material was found in the applicants' homes, but they were all arrested and taken into police custody. When questioned, two of the applicants denied sending the petition. The remaining applicants admitted sending the petition but denied any affiliation with the PKK, stating that their motive had been the desire for their children to be taught in Kurdish.

On 17 January 2002 all the applicants were released, after a hearing before a judge at the Istanbul State Security Court. The public prosecutor filed an objection about the decision. On the following day the Istanbul State Security Court upheld the public prosecutor's objection in respect of seven of the applicants, and ordered their arrest. Three of the applicants were arrested on 19 January, and held in custody until a court ordered their release on 12 February 2002.

In the meantime, the public prosecutor issued an indictment against 38 suspects, including all but one of the applicants, accusing them of aiding and abetting an armed organisation. The accused were said to have assisted the PKK by participating in its strategy of carrying out non-violent acts of civil disobedience, aimed at leaving the State in a difficult position in the international arena.

In May 2003 the Istanbul Security Court acquitted all of the accused, because on the facts none of the elements of the crime had been present in their actions and there was no other evidence to support the allegations brought against them.

The applicants complained in particular under Article 5 §§ 3 and 4 (right to liberty) that they had not been brought promptly before a judge, and that there had not been any effective remedies to challenge the lawfulness of their arrest and detention. They also complained under Article 5 § 5 that they had had no right to compensation under domestic law in respect of those complaints. Lastly, relying in substance on Article 10 (freedom of expression), they maintained that they had been subjected to criminal proceedings for using their constitutional right to file a petition, despite the absence of any provisions in domestic law criminalising such conduct.

**Violation of Article 5 §§ 3, 4 and 5** – in respect of all the applicants

**Violation of Article 10** – in respect of all the applicants, except Yılmaz Yavuz

**Just satisfaction:** EUR 6,500 to Yılmaz Yavuz and EUR 10,000 to each of the 19 other applicants (nonpecuniary damage), and EUR 3,000 to the 20 applicants jointly (costs and expenses)

**159. ECHR, *K2 v. the United Kingdom*, no. 42387/13, Chamber decision of 9 March 2017 (Article 8, Right to private and family life- Inadmissible; Article 14 taken together with Article 8- Prohibition of discrimination- Inadmissible).** The applicant, who was suspected of taking part in terrorism-related activities in Somalia and for this reason he was deprived of his UK citizenship and barred from re-entering the country, claimed that these decisions had violated his right to respect for private and family life and had been discriminatory. The Court noted that the applicant would not be left stateless by the loss of UK citizenship (as he had Sudanese citizenship), and the interference to his private and family life caused by the deprivation of citizenship was limited.

**ECHR 084 (2017)  
09.03.2017**

**Press release issued by the Registrar**

In its **decision** in the case of **K2 v. the United Kingdom** (application no. 42387/13) the European Court of Human Rights has unanimously declared the application inadmissible. The decision is final.

K2 was suspected of taking part in terrorism-related activities in Somalia. In 2010, the Secretary of State for the Home Office deprived him of his UK citizenship and barred him from re-entering the country.

*K2 claimed that these decisions had violated his right to respect for private and family life under Article 8, and had been discriminatory.*

The Court ruled that the complaints were inadmissible, as they were clearly without merit. Although an arbitrary denial or revocation of citizenship might in some circumstances raise an issue under Article 8, because of its impact on the private life of an individual, the Court found that no such issue arose in the present case. The Home Secretary at the time had acted swiftly and diligently, and in accordance with the law. K2 had had a statutory right to appeal and access to judicial review but the UK courts had rejected his claims after giving them a comprehensive and thorough examination. Though some of the case against K2 had been kept secret for security reasons, his special advocate had had access to this information, and the nature of the case was broadly known to K2.

*K2 also argued that he could not properly make his case from abroad, because of fears that his communications could be intercepted by Sudanese counter-terrorism authorities that would then harm him.*

The Court held that Article 8 cannot be interpreted so as to impose an obligation on States to facilitate the return of every person deprived of citizenship in order for them to pursue an appeal against that decision. The UK court had rejected K2's claims about not being able to argue his case from abroad, and the Court did not consider itself in a position to call into question that finding. Furthermore, the UK court had adopted a cautious approach to the case given the absence of instructions from the applicant, but still found conclusive evidence that he had been engaged in terrorism-related activities. In any case, it was K2 who had originally chosen to leave the country. Finally, the Court noted that K2 would not be left stateless by the loss of UK citizenship (as he had Sudanese citizenship), and the interference to his private and family life caused by the deprivation of citizenship was limited. In these circumstances, the deprivation of citizenship had been lawful under Article 8.

## Principal facts

K2 was born in Sudan. He arrived in the UK as a child and became a naturalised UK citizen in 2000.

In 2009 K2 was arrested and charged with a public order offence, but, before he was required to surrender his bail, he left the UK.

There is a dispute whether from the UK he went directly to Sudan or whether he first travelled with two extremist associates to Somalia, where he engaged in terrorism-related activities linked to Al-Shabaab.

On 14 June 2010, the Secretary of State for the Home Office, having notified him of her intention to do so, made an order depriving him of his UK citizenship. On the same day, the Home Secretary notified K2 of her decision to exclude him from the UK, on account of his terrorism-related activities and his links to extremists. It is common ground that at this time he was in Sudan.

K2 brought two sets of proceedings to challenge these decisions: a judicial review of the decision to exclude him and an appeal against the decision to deprive him of citizenship.

In the judicial review proceedings, K2 primarily complained that his exclusion from the UK had undermined his ability to challenge the deprivation of his citizenship in court. However, the High Court dismissed the claim in July 2011. The Court of Appeal upheld the judgment on appeal, and the Supreme Court refused further permission to appeal in February 2013.

The citizenship issue came before the Special Immigration Appeals Commission (“SIAC”). Though some of the case against K2 had been kept secret for security reasons, his special advocate had had access to this information, and the nature of the case was broadly known to K2. K2 claimed that he could rebut the allegations of terrorism-related activities, but maintained that he was unable to do so whilst he remained in Sudan. He asserted that he feared that his communications were subject to surveillance by the Sudanese authorities and that communicating about his case would expose him to a risk of harm from them.

SIAC rejected this argument in December 2014. It held that there were at least three viable means of communication between K2, his lawyers, and SIAC (“discreet” communications with lawyers in Sudan; internet-based communications such as email or skype; and through visiting friends or relatives). There was therefore no good reason why K2 could not instruct his lawyers and engage with the case. One year later, SIAC gave judgment on the substantive part of the appeal. It found that there was “conclusive” evidence that K2 had established associations with known extremists and that he had travelled to Somalia in the company of extremists to engage in terrorism-related activities. Furthermore, the court found it highly probable that the terrorism-related activities were, at least in part, directly involved with Al-Shabaab. The court concluded that the Home Secretary had been fully justified in deciding to deprive K2 of his British citizenship and dismissed the appeal. The Court of Appeal refused K2’s application for permission to appeal the judgment in July 2016.

## Complaints, procedure and composition of the Court

The application was lodged with the European Court of Human Rights on 27 June 2013.

K2 complained that the decisions to deprive him of his British citizenship and exclude him from the UK had violated his rights under Article 8 (right to private and family life). He further complained under Article 14 (prohibition of discrimination) read together with Article 8 that he had been treated differently from British citizens considered a threat to national security who did not hold a second

nationality; and from non-national residents who enjoyed a suspensory appeal against the revocation of leave to remain in the United Kingdom.

The decision was given by a Chamber of seven, composed as follows:

Linos-Alexandre **Sicilianos** (Greece), *President*,  
 Kristina **Pardalos** (San Marino),  
 Ledi **Bianku** (Albania),  
 Aleš **Pejchal** (the Czech Republic),  
 Robert **Spano** (Iceland),  
 Armen **Harutyunyan** (Armenia),

Pauliine **Koskelo** (Finland), *Judges*,

and also Abel **Campos**, *Section Registrar*.

Decision of the Court

### **Article 8 (right to private and family life)**

#### **The deprivation of UK citizenship**

The Court noted that an arbitrary denial or revocation of citizenship might in some circumstances raise an issue under Article 8, because of its impact on the private life of an individual. Two issues fell to be considered: whether the revocation was arbitrary, and what the consequences were for the applicant.

The removal of K2's citizenship was not arbitrary. First, it was done "in accordance with the law", because section 40(2) of the British Nationality Act 1981 empowers the Home Secretary to make an order depriving a person of British citizenship; and the Crown enjoys a common law prerogative power to exclude a person from the UK. Second, the authorities had acted swiftly and diligently: evidence suggested that K2 had left the UK in October 2009 and engaged in terrorist-related activities in Somalia; and the Home Secretary had deprived him of his citizenship in June 2010. Third, the Court noted that K2 had enjoyed sufficient procedural safeguards in relation to the decision. He had had a statutory right of appeal to SIAC, before which he had been provided with a statement setting out clearly the details of the national security case against him. In relation to the closed material, the Court noted that K2 had been represented by counsel and Special Advocates who had been appointed in order to address this evidence. The Court noted that it has previously held that similar SIAC proceedings had contained sufficient guarantees as required by Article 8.

K2 had argued that he had been denied the opportunity to effectively participate in the proceedings due to his exclusion from the UK, claiming that communicating with his lawyers from Sudan would have put him at risk of harm from the Sudanese authorities. However, an out-of-country appeal does not necessarily make a decision to revoke citizenship "arbitrary", and Article 8 cannot be interpreted so as to impose a positive obligation on States to facilitate the return of every person deprived of citizenship in order to pursue an appeal against that decision. SIAC had found that K2's fears about his communications being intercepted were unfounded – and this conclusion was not inconsistent with the findings of the High Court and the Court of Appeal in the judicial review proceedings. Moreover, SIAC had taken an especially rigorous approach to the evidence, given the absence of instructions from K2, but had still found conclusive evidence of terrorism-related activities. Finally, the Court also noted the reason why K2 had had to make the appeal from outside the UK: his decision to flee the country before he was required to surrender his bail.

As for the consequences of the revocation of citizenship, the Court noted that K2 was not rendered stateless by the decision, as he was entitled to (and has since obtained) a Sudanese passport. Furthermore, the Court noted SIAC's findings, that K2 had left the UK prior to the decision to deport him; that his wife and child were no longer living in the UK and could freely go to Sudan; and that the applicant's own natal family could – and did – visit him reasonably often.

In view of these considerations, the Court held K2's claim that his deprivation of citizenship had violated Article 8 to be manifestly ill-founded.

### **Exclusion from the UK**

Though the Court noted that the decision to exclude K2 from the UK had interfered with his private and family life, it also noted the limited nature of the interference, and SIAC's clear findings concerning the extent of his terrorism-related activities. The decision to exclude him was therefore not disproportionate with the legitimate aim of protecting the public from the threat of terrorism. The Court therefore held that this part of K2's application was also manifestly ill-founded.

### **Article 14 (prohibition of discrimination) read together with Article 8**

In regard to K2's complaint that he had been treated differently from British citizens considered a threat to national security – on the grounds that he possessed a second nationality – the Court noted that this argument had not been raised in the domestic courts. K2 had therefore failed to exhaust the domestic remedies available to him.

K2 also complained that he had been treated differently from non-national residents, because they enjoy a suspensory appeal against a decision to revoke their leave to remain in the UK. The Court held that this argument was misplaced. K2 had been denied an in-country appeal not because he was a British citizen, but because he had already left the UK of his own volition when the impugned decisions were taken. A non-national resident who had his leave to remain cancelled while out of the country would also not be permitted to return for the purposes of an appeal. Accordingly, the Court held that this part of the complaint was manifestly ill-founded, and therefore inadmissible.

160. ECHR, *Ilias and Ahmed v. Hungary*, no. 47287/15, Chamber judgment of 14 March 2017 (Article 5-1, Right to liberty and security- Violation; Article 5-4, Right to judicial review of detention-Violation; Article 3, Prohibition of torture and inhuman or degrading treatment- Violation; Article 13, Right to an effective remedy-Violation taken together with Article 3, Prohibition of torture and inhuman or degrading treatment- No violation). The applicants, two Bangladeshi asylum-seekers, successfully claimed that their border-zone detention in Hungary had amounted to violation of their liberty and security, as they had effectively been detained without any formal, reasoned decision and without appropriate judicial review and that their removal from Hungary to Serbia, insofar as they had no effective guarantees to protect them from exposure to a real risk of being subjected to inhuman or degrading treatment in case of a chain- refoulement to Greece.

ECHR 090 (2017)

14.03.2017

#### Press release issued by the Registrar

The case of **Ilias and Ahmed v. Hungary** (application no. 47287/15) concerned the border-zone detention for 23 days of two Bangladeshi asylum-seekers as well as their removal from Hungary to Serbia. In today's **Chamber** judgment in the case the European Court of Human Rights held, unanimously, that there had been:

**a violation of Article 5 §§ 1 and 4 (right to liberty and security)** of the European Convention on Human Rights because the applicants' confinement in the Röszke border-zone had amounted to detention, meaning they had effectively been deprived of their liberty without any formal, reasoned decision and without appropriate judicial review;

**no violation of Article 3 (prohibition of inhuman or degrading treatment)** as concerned the conditions of their detention in the transit zone, but **a violation of Article 13 (right to an effective remedy)** as concerned the lack of an effective remedy with which they could have complained about their conditions of detention; and,

**a violation of Article 3** on account of the applicants' expulsion to Serbia insofar as they had not had the benefit of effective guarantees to protect them from exposure to a real risk of being subjected to inhuman or degrading treatment.

The Court found in particular that, in the applicants' asylum proceedings, the Hungarian authorities had: failed to carry out an individual assessment of each applicant's case; schematically referred to the Government's list of safe third countries; disregarded the country reports and other evidence submitted by the applicants; and imposed an unfair and excessive burden on them to prove that they were at real risk of a chain-*refoulement* situation, whereby they could eventually be driven to Greece to face inhuman and degrading reception conditions.

#### Principal facts

The applicants, Md Ilias Ilias and Ali Ahmed, are Bangladeshi nationals who were born in 1983 and 1980.

Having left Bangladesh, the applicants transited through Greece, "the former Yugoslav Republic of Macedonia" and Serbia, eventually arriving in Hungary on 15 September 2015. They immediately

applied for asylum. For the next 23 days they stayed inside the Röske transit zone situated on the border between Hungary and Serbia; they could not leave in the direction of Hungary as the zone was surrounded by a fence and guarded.

Following two sets of asylum proceedings, they were removed from Hungary essentially on the strength of a Government Decree, introduced in 2015, listing Serbia – the last country through which the applicants had transited – as a safe third country. The asylum authorities notably found that psychiatrist reports, following their visits with the applicants, had not shown that the applicants had special needs which could not be met in the transit zone. Nor had the applicants referred to any pressing individual circumstances to substantiate their assertion that Serbia was not a safe country for them. The domestic court upheld this decision which was served on the applicants on 8 October 2015. They were immediately escorted to the Serbian border, leaving the transit zone without physical coercion being applied.

### Complaints, procedure and composition of the Court

Relying on Article 5 § 1 (right to liberty and security) and Article 5 § 4 (right to have lawfulness of detention decided speedily by a court), the applicants alleged that the 23 days they had spent in the transit zone amounted to a deprivation of liberty which had no legal basis and which could not be remedied by appropriate judicial review.

Further relying on Article 3 (prohibition of inhuman or degrading treatment) and Article 13 (right to an effective remedy), they alleged that their protracted confinement in the transit zone in substandard conditions, especially given that they had been suffering from posttraumatic stress disorder, had been inhuman. Further relying on Article 3, they alleged that their expulsion to Serbia, without a thorough and individualised assessment of their cases, had exposed them to possible *chain-refoulement* – via Serbia and FYROM – to Greece, where they had been at risk of inhuman reception conditions. They further claimed that the inadequacy of the asylum proceedings had been aggravated by the fact that the only legal information the authorities had given the applicants, who were illiterate, had been written, and that one of them had been interviewed in a language he did not speak.

The application was lodged with the European Court of Human Rights on 25 September 2015.

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

Ganna **Yudkivska** (Ukraine), *President*,  
 Vincent A. **De Gaetano** (Malta),  
 András **Sajó** (Hungary),  
 Nona **Tsotsoria** (Georgia),  
 Krzysztof **Wojtyczek** (Poland),  
 Gabriele **Kucsko-Stadlmayer** (Austria),  
 Marko **Bošnjak** (Slovenia),

and also Marialena **Tsirli**, *Section Registrar*.

### Decision of the Court

#### **Article 5 §§ 1 and 4 (unlawfulness of applicants' detention in the transit zone, without judicial review)**

The Court found that the applicants' confinement for more than three weeks in the Röske transit zone, in a guarded compound which could not be accessed from the outside (even by their lawyer), had amounted to a *de facto* deprivation of their liberty. It doubted that the applicants would have

voluntarily left the transit zone in the direction of Serbia, as suggested by the Government, as they would have run the risk of forfeiting their asylum claim and *refoulement*.

Furthermore, the applicants' detention had been more of a practical arrangement than a formal decision of legal relevance, complete with reasoning. The applicants had thus been deprived of their liberty without any formal decision. The Government's submissions, according to which the applicants' stay at the transit zone had not amounted to detention but nevertheless had a compelling basis in national law, namely section 71/A (1) and (2) of the Asylum Act, only cast doubt on the clarity and foreseeability of the domestic provisions in question. Indeed, the Court found it difficult to identify in those provisions any reference to the possibility of detention at the transit zone. It followed that the applicants' detention could not be considered "lawful", in violation of Article 5 § 1.

Moreover, it was quite inconceivable how the applicants could have pursued any judicial review of their detention in the transit zone in such circumstances, their detention not having been ordered in any formal proceedings or taken any shape of a decision. The Court therefore concluded that the applicants had not had the possibility of bringing "proceedings by which the lawfulness of [their] detention [could have been] decided speedily by a court", in violation of Article 5 § 4.

### **Articles 3 and 13 (conditions of detention)**

The Court considered that the applicants' conditions of detention had been satisfactory. They had been the only occupants of a container measuring 13 square metres meant to sleep five; they had been provided with sanitary facilities in separate containers; they had been given three meals daily; and the health-care facilities, including their having had access to a psychiatrist, had generally been favourable. Indeed, in a report issued soon after the applicants had left the transit zone, the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment ("CPT") had described the conditions in the transit zone as acceptable.

Furthermore, although the Court took into account psychiatric reports which found that the applicants had been suffering from post-traumatic stress disorder, it considered that they had not been more vulnerable than any other adult asylum-seeker detained at the time.

In view of the above as well as the relatively short time involved, the Court concluded that the applicants' conditions of detention had not reached the minimum level of severity necessary to constitute inhuman treatment under Article 3. There had therefore been no violation of Article 3.

Nevertheless, it considered that the applicants' complaints concerning their conditions of detention had raised serious questions of fact and law requiring examination on the merits. Yet the Government had not indicated any remedies by which the applicants could have complained about the conditions in which they had been held in the transit zone. There had therefore been a violation of Article 13.

### **Article 3 (risk of inhuman and degrading treatment)**

First, the Court noted that the Government had not convincingly explained why there had been an abrupt legislative change in July 2015 in the Hungarian stance on Serbia from the perspective of asylum proceedings, Serbia not having been considered a safe country up until that point. This reversal of attitude was of particular concern, especially given the reservations expressed as late as December 2016 by the United Nations High Commissioner for Refugees and respected international human rights organisations about removal to Serbia.

As concerned the applicants' asylum proceedings, the Court found that the procedure applied by the Hungarian authorities had not provided the necessary protection against a real risk of inhuman and degrading treatment. Notably, having failed to carry out an individual assessment of each applicant's case, the authorities had: schematically referred to the Government's list of safe third countries;

disregarded the country reports and other evidence submitted by the applicants; and imposed an unfair and excessive burden on them to prove that they were at real risk of a chain-*refoulement* situation, whereby they could eventually be driven to Greece to face inhuman and degrading reception conditions.

Aside from those shortcomings, the Court further observed that, owing to a mistake, the first applicant had been interviewed and given an information leaflet on asylum proceedings in a language he did not understand. As a consequence, his chances of actively participating in the proceedings and explaining the details of his flight from his country of origin had been extremely limited. In addition, despite the applicants being illiterate, all the information they had received on the asylum proceedings had been contained in a leaflet. The authorities had thus failed to provide the applicants with sufficient information on the procedure. Moreover, a translation of the decision in their case had only been given to their lawyer at a time when they had already been outside Hungary for two months.

The Court therefore concluded that the applicants had not had the benefit of effective guarantees which would have protected them from exposure to a real risk of being subjected to inhuman or degrading treatment, in breach of Article 3 of the Convention.

#### **Article 41 (just satisfaction)**

The Court held that Hungary was to pay each applicant 10,000 euros (EUR) in respect of non-pecuniary damage and EUR 8,705 for costs and expenses.

**161. ECHR, *Mitrović v. Serbia*, no. 52142/12, Chamber judgment of 21 March 2017 (Article 5-1, Right to liberty and security- Violation).** The applicant, a Bosnia and Herzegovina national, was arrested and imprisoned for over two years by the Serbian authorities on the basis that he had been convicted of a crime in 1994 by the courts of the “Republic of Serbian Krajina” – an internationally unrecognised entity, composed of a territory that is now in the Republic of Croatia – and still had time left to serve in his sentence. He successfully claimed that he had been deprived of his liberty as his conviction had been issued by a court of an internationally unrecognised entity, and the judgment had never been formally recognized by the Serbian courts.

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**ECHR 098 (2017)**  
**21.03.2017**

#### **Press release issued by the Registrar**

In 2010 the applicant was arrested and imprisoned for over two years by the Serbian authorities. He was arrested on the basis that he had been convicted of a crime in 1994 by the courts of the “Republic of Serbian Krajina” – an internationally unrecognised entity, composed of a territory that is now in the Republic of Croatia – and still had time left to serve in his sentence. The applicant complained to the European Court of Human Rights that this conviction had been issued by a court of an internationally unrecognised entity, and that the judgment had never been formally recognized by the Serbian courts.

In today’s **Chamber** judgment in the case of **Mitrović v. Serbia** (application no. 52142/12) the European Court of Human Rights held, unanimously, that there had been **a violation of Article 5 § 1** (right to liberty and security) of the European Convention on Human Rights.

In particular, the Court held that any deprivation of a person’s liberty must be lawful, meaning that it must conform to the rules of national law. The applicant had been convicted by a “court” which had operated outside the Serbian judicial system. Under the rules of domestic law, the detention of a person is unlawful when it is on the basis of a decision of a foreign court which has not been recognised by the authorities in an appropriate procedure. However, in this case the Serbian authorities had conducted no proceedings for the recognition of a foreign decision and the applicant’s detention had therefore been unlawful.

#### **Principal facts**

The applicant, Miladin Mitrović, now deceased, was a Bosnia and Herzegovina national who was born in 1943 and lived in Sremska Mitrovica (Serbia).

Back in 1994, Mr Mitrović was sentenced to 8 years’ imprisonment for murder by the courts of the “Republic of Serbian Krajina”. This was an internationally unrecognised self-proclaimed entity established on the territory of the Republic of Croatia during the wars in the former Yugoslavia. Mr Mitrović was imprisoned within the territory during the conflict, after which he was transferred to a prison in Serbia. However, in 1999 he was released for 10 days’ annual leave, and failed to return to prison. Mr Mitrović was re-arrested in July 2010 when he attempted to enter Serbia from Croatia, and sent to a Serbian prison to serve the remainder of his sentence. He lodged an appeal to the Constitutional Court to challenge the lawfulness of his imprisonment, and also civil proceedings to claim compensation for unlawful imprisonment – both of which were dismissed. Mr Mitrović was released in November 2012 following a pardon from the President of the Republic of Serbia. He died in October 2014.

## Complaints, procedure and composition of the Court

Prior to his death, Mr Mitrović complained to the European Court of Human Rights that he had been imprisoned on the basis of a judgment of a court of an internationally unrecognised entity, and that this had violated Article 5 § 1 (a) (right to liberty and security).

The application was lodged with the European Court of Human Rights on 31 July 2012. Following the death of Mr Mitrović, the application was continued by his heirs: Ms Toma Mitrović, Mr Mladen Mitrović, Mr Milorad Mitrović and Ms Radmila Siroćuk.

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

Helena **Jäderblom** (Sweden), *President*,  
Branko **Lubarda** (Serbia),  
Luis **López Guerra** (Spain),  
Helen **Keller** (Switzerland),  
Dmitry **Dedov** (Russia),  
Alena **Poláčková** (Slovakia),  
Georgios A. **Serghides** (Cyprus),

and also Stephen **Phillips**, *Section Registrar*.

## Decision of the Court

### **Article 5 § 1 (right to liberty and security)**

The Court noted the fundamental importance of the guarantees contained in Article 5 for securing the right of individuals to be free from arbitrary detention. It also highlighted the repeated references in the Court's case law to the requirement that any deprivation of liberty must be lawful. In order to meet the requirement of lawfulness, a deprivation of liberty must conform to the substantive and procedural rules of national law.

Mr Mitrović was convicted for murder by a "court" which operated outside the Serbian judicial system. However, the Serbian authorities conducted no proceedings for the recognition of a foreign decision, as required by the relevant provisions of the Criminal Procedure Code then in force.

In the cases substantially similar to the present one, the Supreme Court of Cassation took the view that the omission of such procedure was unlawful. The reasoning of the Constitutional Court does not contradict this conclusion, as it also found that the relevant procedure was not followed in Mr Mitrović's case. The Constitutional Court, however, took the view that the Mr Mitrović's right to liberty was not violated because his detention was "proportionate" to the crime he had committed.

Even if proportionality was a factor which should be taken into consideration when assessing whether a deprivation of liberty satisfies the requirements of Article 5 § 1, it would be relevant only subject to the precondition that such deprivation of liberty was lawful. However, under the rules of domestic law, detention of a person is unlawful when it is on the basis of a decision of a foreign court which has not been recognised by the Serbian authorities in an appropriate procedure. Given that the applicant was detained on the basis of a non-domestic decision which had not been recognized domestically, and in the absence of any other basis in domestic law for the detention, the requirement of lawfulness contained in Article 5 § 1 was not met.

The Court therefore found that Mr Mitrović's detention between 7 July 2010 and 15 November 2012 had been unlawful. Accordingly, there had been a violation of Article 5 § 1 of the Convention.

**Just satisfaction (Article 41)**

The Court did not award Mr Mitrović any just satisfaction, as he had not submitted a claim for any.

- 162. ECHR, *Z.A. and Others v. Russia*, nos. 61411/15, 61420/15, 61427/15 and 3028/16, Chamber judgment of 21 March 2017 (Article 3, Prohibition of torture and inhuman or degrading treatment-Violation; Article 5-1, Right to liberty and security- Violation).** The applicants, four individuals from Iraq, the Palestinian\*\* territories, Somalia and Syria, successfully claimed that their confinement in the transit zone of Moscow's Sheremetyevo Airport, which had not been of their own choosing, had amounted to a deprivation of liberty as well as inhuman and degrading treatment, since there was no legal basis for it under domestic law and the conditions of detention were unacceptable.
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**ECHR 109 (2017)**  
**21.03.2017**

**Press release issued by the Registrar**

The case ***Z.A. and Others v. Russia*** (application nos. 61411/15, 61420/15, 61427/15, and 3028/16) concerned complaints brought by four individuals from Iraq, the Palestinian\*\* territories, Somalia and Syria who were travelling via Moscow's Sheremetyevo Airport and were denied entry into Russia. Three of the applicants ended up spending between five and eight months in the transit zone of the airport; one of the applicants, from Somalia, spent nearly two years in the zone.

In today's **Chamber** judgment in the case the European Court of Human Rights held, by six votes to one, that there had been a **violation of Article 3 (prohibition of inhuman or degrading treatment)** and a **violation of Article 5 § 1 (right to liberty and security)** of the European Convention on Human Rights.

The Court found in particular that the applicants' confinement in the transit zone, which had not been of their own choosing, had amounted to a deprivation of liberty and that there had been no legal basis for it under domestic law. Moreover, it found that the applicants had been detained for extended periods of time in unacceptable conditions, which had undermined the applicants' dignity, made them feel humiliated and debased, and therefore amounted to inhuman and degrading treatment.

**Principal facts**

The applicants in this case are four individuals holding identity documents from Iraq, the Palestinian\*\* territories, Somalia and Syria.

While travelling, independently from each other, via Moscow's Sheremetyevo Airport, the applicants were denied entry into Russia by the Russian border authority due to irregularities with their travel documents. As a result, three of the applicants ended up spending between five and eight months in 2015/2016 in the transit zone of the airport; one of the applicants, from Somalia, was in the zone for one year and eleven months between 9 April 2015 and 9 March 2017.

All four applicants applied for refugee status in Russia, without success. The Iraqi applicant and the Syrian applicant were eventually resettled by the office of the United Nations High Commissioner for Refugees (the "UNHCR"), in Denmark and Sweden respectively. The applicant from the Palestinian\*\* territories was able to leave the transit zone when the opportunity to take a flight to Egypt presented itself. The applicant from Somalia left for Mogadishu having lost hope of obtaining refugee status in Russia.

## Complaints, procedure and composition of the Court

Relying on Article 3 (prohibition of inhuman or degrading treatment), the applicants complained about the poor conditions of their detention in the transit zone where they had to sleep on a mattress in the constantly-lit and noisy boarding area of the airport, with no possibility to shower, and live on emergency rations provided by the UNHCR. They also alleged that their confinement to the transit zone had amounted to an unlawful deprivation of their liberty, in breach of Article 5 § 1 (right to liberty and security).

Applications nos. 61411/15, 61420/15 and 61427/15 were lodged with the European Court of Human Rights on 12 December 2015; application no. 3028/16 was lodged on 14 January 2016.

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

Helena **Jäderblom** (Sweden), *President*,  
 Branko **Lubarda** (Serbia),  
 Helen **Keller** (Switzerland),  
 Dmitry **Dedov** (Russia),  
 Pere **Pastor Vilanova** (Andorra),  
 Alena **Poláčková** (Slovakia),  
 Georgios A. **Serghides** (Cyprus),

and also Stephen **Phillips**, *Section Registrar*.

## Decision of the Court

### **Article 5 (right to liberty and security)**

First, considering that holding the applicants in the international zone of Sheremetyevo airport had made them subject to Russian law, the Court rejected the Government's argument that the applicants had not been on Russian territory. Furthermore, the applicants, who had been in the situation of asylum-seekers whose applications had not yet been considered, had not chosen to stay in the transit zone, as they could neither enter Russian territory nor any State other than the one which they had just left. They had thus not validly consented to being deprived of their liberty. The Court therefore concluded that their confinement in the transit zone had amounted to a *de facto* deprivation of liberty.

Moreover, the Government had not referred to any legal provision governing this deprivation of liberty, apart from an international treaty on civil aviation (namely, Chapter 5 of Annex 9 to the Convention on International Civil Aviation). However, no rules were set in that treaty regarding the detention of passengers with irregularities in their travel documents, meaning that the matter was left to Contracting States to regulate under domestic law. As the Government had not referred to any provision of Russian law capable of serving as grounds for justifying the applicants' deprivation of liberty, the Court considered that their lengthy confinement in the transit zone had not had any legal basis under domestic law, in violation of Article 5 § 1.

### **Article 3 (conditions of detention)**

The Court found it established that the applicants had not had access to such basic amenities as beds, showers or cooking facilities in the transit zone, the Government not having provided any evidence to the contrary. It considered it unacceptable that anyone could be detained in conditions in which there was a complete failure to take care of such essential needs. The conditions which the applicants had had to endure for extended periods of time had therefore to have caused them considerable mental suffering, undermined their dignity and made them feel humiliated and debased. The Court considered such treatment inhuman and degrading, in violation of Article 3.

**Article 41 (just satisfaction)**

The Court held that Russia was to pay, in respect of pecuniary damage, 15,000 euros (EUR) to the applicant from the Palestinian\*\* territories, EUR 20,000 each to the Iraqi and Syrian applicants and EUR 26,000 to the Somalian applicant. EUR 3,500 was awarded to each applicant for costs and expenses.

**Separate opinion**

Judge Dedov expressed a dissenting opinion.

163. **ECHR, *Škorjanec v. Croatia*, no. 25536/14, Chamber judgment of 28 March 2017 (Article 3, Prohibition of inhuman or degrading treatment in conjunction with Article 14, Prohibition of discrimination- Violation)**. The applicant, a Croatian national, complained to Court of a lack of an effective procedural response of the Croatian authorities in relation to a racially motivated act of violence against her. In June 2013, two men racially abused the applicant's partner on the basis of his Roma origin, before attacking both him and the applicant herself. She maintained that domestic law and practice was deficient, as it did not provide protection against discriminatory violence for individuals who were victims due to their association with another person.
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**ECHR 107 (2017)**  
**28.03.2017**

#### **Press release issued by the Registrar**

In June 2013, two men racially abused the applicant's partner on the basis of his Roma origin, before attacking both him and the applicant herself. The two assailants were prosecuted and convicted on charges that included a hate crime against the applicant's partner. However, the men were not charged for a racially motivated crime against the applicant herself. The authorities rejected her complaint of a hate crime, finding that there was no indication that the men had attacked her because of hatred towards Roma, as she is not of Roma origin. The applicant complained to the European Court of Human Rights of a lack of an effective procedural response of the Croatian authorities in relation to a racially motivated act of violence against her.

In today's **Chamber** judgment in the case of *Škorjanec v. Croatia* (application no. 25536/14) the Court held, unanimously, that there had been a **violation of Article 3 (prohibition of inhuman or degrading treatment) in conjunction with Article 14 (prohibition of discrimination)** of the European Convention on Human Rights.

Under Convention case law, a person may be a victim of a violent hate crime not only when they have been attacked because they themselves have a certain characteristic - but also when they are attacked because they have an actual or presumed association with another person, who has (or is perceived to have) that characteristic. States have an obligation to recognise both types as hate crimes, and investigate them accordingly. However, in this case the Croatian authorities repeatedly failed to take the necessary care in identifying the violence against the applicant as a suspected hate crime. By rejecting the applicant's criminal complaint, the authorities failed in their obligations under the Convention.

#### **Principal facts**

The applicant, Maja Škorjanec, is a Croatian national who was born in 1988 and lives in Zagreb. In June 2013, she was walking with her partner in a market in Zagreb. Two men started uttering various racial insults against Ms Škorjanec's partner, on the grounds of his Roma origin. He was then chased by the two men, who caught him and beat him. Ms Škorjanec maintained that, when she went to her partner's aid, she was pushed to the floor and kicked in the head.

The two assailants were prosecuted and convicted on charges of making serious threats against Ms Škorjanec's partner and inflicting bodily harm on him, associated with a hate crime element.

However, the men were not charged for committing a racially motivated crime against Ms Škorjanec. The couple lodged a criminal complaint, where Ms Škorjanec claimed that she had also been a victim of a hate crime. However, the Zagreb Municipal State Attorney's Office rejected it on the grounds that there was no indication that the men had attacked Ms Škorjanec because of hatred towards Roma, as she is not of Roma origin.

### Complaints, procedure and composition of the Court

Relying on Articles 3 (prohibition of inhuman or degrading treatment), 8 (right to private and family life) and 14 (prohibition of discrimination), Ms Škorjanec complained in particular of the failure to prosecute her attackers for a hate crime against her. She maintained that domestic law and practice was deficient, as it did not provide protection against discriminatory violence for individuals who were victims due to their association with another person.

The application was lodged with the European Court of Human Rights on 20 March 2014.

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

Işıl **Karakaş** (Turkey), *President*,  
 Julia **Laffranque** (Estonia),  
 Nebojša **Vučinić** (Montenegro),  
 Paul **Lemmens** (Belgium),  
 Ksenija **Turković** (Croatia),  
 Jon Fridrik **Kjølbro** (Denmark),  
 Stéphanie **Mourou-Vikström** (Monaco),

and also Stanley **Naismith**, *Section Registrar*.

### Decision of the Court

#### **Article 3 (prohibition of inhuman or degrading treatment) in conjunction with Article 14**

##### **(prohibition of discrimination)**

##### **Convention principles**

When investigating violent incidents triggered by suspected racist attitudes, State authorities are required to take all reasonable action to ascertain whether there were racist motives and whether feelings of hatred or prejudice based on ethnicity played a role. Treating racially motivated violence on an equal footing with cases lacking any racist overtones would be tantamount to turning a blind eye to the specific nature of acts which are particularly destructive of fundamental human rights, and may constitute unjustified treatment irreconcilable with Article 14. In this connection, not only acts based solely on a victim's characteristics can be classified as hate crimes. Article 14 also covers cases in which the adverse treatment of an individual relates to another person's status or protected characteristics. Under Article 3 taken in conjunction with Article 14, the obligation on the authorities to seek a possible link between racist attitudes and a given act of violence concerns not only acts of violence based on a victim's actual or perceived personal status or characteristics, but also acts of violence based on a victim's actual or presumed association or affiliation with another person who actually or presumably possesses a particular status or protected characteristic.

##### **Adequacy of domestic law**

The Croatian Criminal Code explicitly describes hate crime as an aggravating circumstance, both in relation to the particular offence of causing bodily injury, and for criminal acts in general.

Furthermore, it is sufficient under the Criminal Code for a hate crime to be committed on the grounds of or out of racial hatred, without requiring the victim to personally hold the protected characteristic or status. The Croatian legal system therefore provided the applicant with adequate legal mechanisms to afford an acceptable level of protection in the circumstances.

### **Adequacy of the authorities' actions in this case**

Whilst the appropriate legal provisions were in place for the recognition of the attack against Ms Škorjanec as a suspected hate crime, the way in which the criminal-law mechanisms were implemented in practice was defective to the point of constituting a violation of the Convention.

In the course of the initial investigation by police, Ms Škorjanec and her partner both gave statements suggesting that the former had fallen victim to a racially motivated attack due to the fact that she had been in the company of the latter. Nevertheless, the authorities failed to properly consider the possibility that Ms Škorjanec had been the victim of a hate crime. The authorities also refused to investigate whether a hate crime had been committed against her, after she had made specific allegations of racially motivated violence against her in her criminal complaint; and after further information came to light in the course of the criminal proceedings against the attackers, suggesting that she had been the victim of racially motivated violence.

The Court reiterated its subsidiary role to that of the national courts, and that it is mindful that it is prevented from substituting its own assessment of the facts for that of the national authorities. Nevertheless, the Court noted that the prosecuting authorities' insistence on the fact that Ms Škorjanec herself was not of Roma origin and their failure to identify whether she was perceived by the attackers as being of Roma origin herself, as well as their failure to take into account and establish the link between the racist motive for the attack and Ms Škorjanec's association with her partner, resulted in a deficient assessment of the circumstances of the case.

That impaired the adequacy of the domestic authorities' procedural response to Ms Škorjanec's allegations to an extent that is irreconcilable with the State's obligation of taking all reasonable steps to unmask the role of racist motives in the incident. The Court was forced to the conclusion that the domestic authorities failed in their obligations under the Convention when rejecting Ms Škorjanec's criminal complaint without conducting further investigation prior to their decision. There had therefore been a violation of Article 3 under its procedural aspect in conjunction with Article 14.

### **Just satisfaction (Article 41)**

The Court held that Croatia was to pay the applicant 12,500 euros (EUR) in respect of non-pecuniary damage and EUR 2,200 in respect of costs and expenses.

- 164. ECHR, *Chowdury and Others v. Greece*, no. 21884/15, Chamber judgment of 30 March 2017 (Article 4-2, Prohibition of forced labour-Violation).** The case concerned 42 Bangladeshi nationals who did not have work permits and were subjected to forced labour. The Court found, firstly, that the applicants' situation was one of human trafficking and forced labour, and specified that exploitation through labour was one aspect of trafficking in human beings and that the State had failed in its obligations to prevent this, to protect the victims, to conduct an effective investigation into the offences committed and to punish those responsible for the trafficking.
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**ECHR 112 (2017)**  
**30.03.2017**

**Press release issued by the Registrar**

In today's **Chamber** judgment in the case of **Chowdury and Others v. Greece** (application no. 21884/15) the European Court of Human Rights held, unanimously, that there had been:

**a violation of Article 4 § 2 (prohibition of forced labour)** of the European Convention on Human Rights.

The case concerned 42 Bangladeshi nationals who did not have work permits and were subjected to forced labour. Their employers had recruited them to pick strawberries on a farm in Manolada (Greece) but failed to pay the applicants' wages and obliged them to work in difficult physical conditions under the supervision of armed guards.

The Court found, firstly, that the applicants' situation was one of human trafficking and forced labour, and specified that exploitation through labour was one aspect of trafficking in human beings.

The Court then held that the State had failed in its obligations to prevent the situation of human trafficking, to protect the victims, to conduct an effective investigation into the offences committed and to punish those responsible for the trafficking.

**Principal facts**

The applicants are 42 Bangladeshi nationals who live in Greece. They did not have work permits when they were recruited between October 2012 and February 2013 to pick strawberries on a farm in Manolada. They had been promised a wage of 22 euros for seven hours' work and three euros for each hour of overtime. They worked every day from 7 a.m. to 7 p.m. under the supervision of armed guards. Their employers had warned them that they would only receive their wages if they continued to work. The applicants lived in makeshift shacks without toilets or running water.

In February 2013, March 2013 and April 2013 the workers went on strike demanding payment of their unpaid wages, but without success. On 17 April 2013 the employers recruited other Bangladeshi migrants. Fearing that they would not be paid, 100 to 150 workers from the 2012-2013 season started moving towards the two employers in order to demand their wages. One of the armed guards then opened fire, seriously injuring 30 workers, including 21 of the applicants. The wounded were taken to hospital and were subsequently questioned by police.

The two employers, together with the guard who had opened fire and an armed overseer, were arrested and tried for attempted murder – subsequently reclassified as grievous bodily harm – and also for trafficking in human beings. By a judgment of 30 July 2014, the assize court acquitted them of the charge of trafficking in human beings. It convicted the armed guard and one of the employers of grievous bodily harm and unlawful use of firearms; their prison sentences were commuted to a financial penalty. They were also ordered to pay 1,500 euros to the 35 workers who had been recognised as victims – that is, 43 euros to each of them. The two convicted men lodged an appeal against that decision. The appeal is currently pending and has a suspensive effect.

On 21 October 2014 the workers asked the public prosecutor at the Court of Cassation to appeal against the assize court judgment, arguing that the charge of human trafficking had not been examined properly. That request was dismissed and the part of the assize court judgment dealing with human trafficking became “irrevocable”.

### Complaints, procedure and composition of the Court

Relying on Article 4 § 2 (prohibition of forced labour), the applicants alleged that they had been subjected to forced or compulsory labour; they further submitted that the State was under an obligation to prevent their being subjected to human trafficking, to adopt preventive measures for that purpose and to punish the employers.

The application was lodged with the European Court of Human Rights on 27 April 2015.

The Law Faculty of Lund University (Sweden), the International Trade-Union Confederation, the organisation Anti-Slavery International, the AIRE Centre (Advice for Individual Rights in Europe) and the PICUM (Platform for International Cooperation on Undocumented Migrants) were given leave by the President to intervene as third parties in the written procedure (Article 36 § 2 of the Convention and Rule 44 § 3 (a) of the Rules of Court).

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

Kristina **Pardalos** (San Marino), *President*,  
 Linos-Alexandre **Sicilianos** (Greece),  
 Aleš **Pejchal** (the Czech Republic),  
 Robert **Spano** (Iceland),  
 Armen **Harutyunyan** (Armenia),  
 Tim **Eicke** (the United Kingdom),  
 Jovan **Ilievski** (the former Yugoslav Republic of Macedonia),

and also Abel **Campos**, *Section Registrar*.

### Decision of the Court

#### **Article 4 § 2 (prohibition of forced labour)**

##### ***1. Human trafficking and forced labour***

The Court reiterated that human trafficking fell within the scope of Article 4 of the Convention and that, according to Article 4 (a) of the Council of Europe Convention on Action against Trafficking in Human Beings, exploitation through labour was one aspect of human trafficking.

The Court noted that the domestic courts had interpreted and applied the concept of trafficking in human beings in a very restrictive manner, by more or less identifying it with servitude. However, the applicants' situation did not amount to servitude. The fundamental distinguishing feature between

servitude and forced or compulsory labour lay in the victims' feeling that their condition was permanent and that the situation was unlikely to change. In the present case, the applicants could not have experienced this feeling, in that they were all seasonal workers. The facts at issue, and particularly the applicants' working conditions, showed clearly that they amounted to human trafficking and forced labour, and corresponded to the definition of trafficking in human beings set out in Article 3a of the "Palermo Protocol" and Article 4 of the Council of Europe's Anti-Trafficking Convention. That being so, the Court concluded that the applicants' situation fell within the scope of Article 4 § 2 of the Convention in so far as it concerned human trafficking and forced labour.

## **2. The State's obligations under Article 4 § 2**

The States must put in place a legislative and administrative framework that prohibits and punishes forced or compulsory labour, servitude and slavery. Greece had largely complied with that obligation, in particular by ratifying the Palermo Protocol and the Council of Europe Convention on Action against Trafficking in Human Beings (see §§ 105 to 109 of the judgment for details).

The States were required to adopt a series of measures to prevent trafficking and protect the rights of victims. In the present case, the Court noted that well before the events of 17 April 2013, the authorities had been aware of the situation in the Manolada strawberry plantations, their attention having been drawn to it by reports and press articles. Debates had been held in Parliament and three ministers had ordered inspections and the drafting of legislative texts aimed at improving the migrants' situation. However, this mobilisation had not yielded any tangible results. In April 2008 the Ombudsman's Office had alerted several ministers and State bodies, as well as the public prosecutor's office, recommending that a series of measures be adopted. However, the authorities' reaction had been on an *ad hoc* basis, and they had not, at least until 2013, provided a general solution to the problems faced by the Manolada migrant workers. Furthermore, the Amaliada police station seemed to have been aware of the employers' refusal to pay the applicants' wages, as one of its police officers had given evidence to the assize court that workers from the farm had come to the police station to complain about this refusal. In consequence, the Court considered that the operational measures taken by the authorities had not been sufficient to prevent human trafficking and to protect the applicants from the treatment to which they were being subjected.

The States had to ensure that the investigation and judicial proceedings were effective. In cases involving exploitation, the authorities had to carry out an investigation capable of leading to the identification and punishment of those responsible. They had to act of their own motion once the matter had come to their attention.

**With regard to the applicants who did not take part in the procedure before the assize court:** they had filed a complaint on 8 May 2013, claiming that they had been employed on the farm belonging to T.A. and N.V. in conditions of human trafficking and forced labour, and alleging that they had been present at the scene of the incident on 17 April 2013 in order to demand their unpaid wages. Their complaint was dismissed, as the Amaliada prosecutor considered, among other points, that had they really been victims, they would have reported the matter to the police authorities on 17 April 2013 rather than waiting until 8 May 2013. The Court considered that by omitting to verify whether the allegations by this group of applicants were well-founded, the prosecutor had not complied with his obligation to carry out an investigation, and that in dismissing their request on the grounds that they had delayed in complaining to the police, the prosecutor had breached the regulatory framework governing trafficking in human beings. Indeed, Article 13 of the Council of Europe Convention on Action against Trafficking in Human Beings provided for a "recovery and reflection period" of at least 30 days, so that the person concerned could recover and escape the influence of traffickers and take an informed decision on cooperating with the competent authorities. The Court therefore concluded that there had been a violation of Article 4 § 2 of the Convention with regard to the procedural obligation to conduct an effective investigation.

**With regard to the applicants who took part in the proceedings before the assize court:** the Patras Assize Court acquitted the defendants of the charge of trafficking in human beings, finding, in particular, that it had not been absolutely impossible for the workers to protect themselves and that their freedom of movement had not been compromised in that they had been free to leave their jobs. The Court considered that a restriction on freedom of movement was not a condition *sine qua non* for classifying a situation as forced labour or even human trafficking. A trafficking situation could exist in spite of the victim's freedom of movement. Moreover, the Patras Assize Court had acquitted the defendants of the charge of human trafficking and had converted the prison sentence imposed on the two convicted individuals for serious bodily harm into a financial penalty of EUR 5 per day of imprisonment. The public prosecutor at the Court of Cassation had refused to appeal on points of law against the acquittal judgment. The assize court had ordered T.A. and one of the armed guards to pay a total amount of EUR 1,500, or EUR 43 per injured worker, for the prejudice sustained. Yet Article 15 of the Council of Europe Convention on Action against Trafficking in Human Beings required the Contracting States, including Greece, to provide for the right of victims to obtain compensation from the persons who committed the offence, and, among other measures, to create a compensation fund for victims. The Court accordingly held that there had been a violation of Article 4 § 2 of the Convention as regards the State's procedural obligation to carry out an effective investigation into the situation of human trafficking and forced labour complained of by the applicants and to provide effective judicial proceedings.

**In conclusion,** the Court held that there had been a violation of Article 4 § 2 of the Convention on account of the State's failure to fulfil its positive obligations under that provision, namely to prevent the human trafficking situation complained of, to protect the victims, to conduct an effective investigation into the offences and to punish those responsible for the trafficking.

#### **Article 41 (just satisfaction)**

The Court held that Greece was to pay each of the applicants who had participated in the proceedings before the assize court 16,000 euros (EUR), and each of the other applicants EUR 12,000 in respect of all the damage sustained, plus EUR 4,363.64 to the applicants jointly in respect of costs and expenses.

**165. ECHR, *Nagmetov v. Russia*, no. 35589/08, Grand Chamber judgment of 30 March 2017 (Article 2, Right to life-Violation).** The case concerned the issue of whether an award of just satisfaction could be made in the absence of a properly made “claim”. The Court found in particular that where a “claim” had not been properly made in compliance with its Rules of Court, it remained empowered to afford, in a reasonable and restrained manner, just satisfaction on account of non-pecuniary damage arising in the exceptional circumstances of a given case.

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**ECHR 110 (2017)**

**30.03.2017**

**Press release issued by the Registrar**

In today’s **Grand Chamber** judgment in the case of **Nagmetov v. Russia** (application no. 35589/08) 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 under its substantive and procedural limbs, and,
- by fourteen votes to three, that the **respondent State was to pay the applicant 50,000 euros** in respect of non-pecuniary damage.

The case concerned the issue of whether an award of just satisfaction could be made in the absence of a properly made “claim”.

The Court found in particular that where a “claim” had not been properly made in compliance with its Rules of Court, it remained empowered to afford, in a reasonable and restrained manner, just satisfaction on account of non-pecuniary damage arising in the exceptional circumstances of a given case.

The Court considered that the finding of a violation of the substantive and procedural limbs of Article 2 in this case would not constitute in itself sufficient just satisfaction. The gravity and impact of the violations in question and the overall context in which the breach occurred, in particular the lengthy and defective investigation of a death inflicted by an agent of the State, pleaded in favour of a just-satisfaction award.

The Court found no indication that the domestic law allowed adequate “reparation” to be sought and obtained within a reasonable time.

Thus, the Court concluded that the present case disclosed exceptional circumstances which called for a just-satisfaction award in respect of non-pecuniary damage, notwithstanding the absence of a properly made claim.

**Principal facts**

The applicant, Yarmet Uzerovich Nagmetov, is a Russian national who was born in 1949 and lives in Makhachkala (Republic of Dagestan, Russia).

On 25 April 2006 the applicant’s son, Murad Nagmetov, took part in a public gathering of several hundred people in Makhachkala alleging corruption by local public officials. The gathering was dispersed by the authorities with the use of firearms. Murad Nagmetov died of injuries sustained by a tear-gas grenade. On the same day a criminal investigation into murder and the illegal handling of

firearms was opened. In February 2007 the investigating authority suspended the investigation. In December 2009 the investigation was resumed and then suspended again on 16 January 2010. In February 2011 the acting prosecutor determined that the decision of 16 January 2010 was unlawful and ordered a resumption of the investigation. In particular, he noted that the investigation had not exhausted the measures aimed at establishing the circumstances of the crime, the collection of evidence or the identification of the rifle used to cause the victim's death. The prosecutor considered that it would not have been impossible to identify this rifle, as alleged in an expert report, had cartridges of the relevant type been provided. Most recently, in April 2011, the investigation was once again suspended.

### Complaints, procedure and composition of the Court

Relying on Article 2 (right to life), the applicant complained that his son Murad had died in circumstances disclosing an unlawful and excessive use of lethal force, and that no effective investigation had been carried out.

The application was lodged with the European Court of Human Rights on 11 July 2008. In its Chamber judgment, delivered on 5 November 2015, the Court held, unanimously, that there had been a violation of Article 2 of the Convention under both its substantive and its procedural limbs.

On 4 February 2016 the Government requested that the case be referred to the Grand Chamber under Article 43 (referral to the Grand Chamber) and on 14 March 2016 the panel of the Grand Chamber accepted that request.

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

Guido **Raimondi** (Italy), *President*,  
 Luis **López Guerra** (Spain),  
 Angelika **Nußberger** (Germany),  
 Ledi **Bianku** (Albania),  
 Helen **Keller** (Switzerland),  
 Paul **Lemmens** (Belgium),  
 Valeriu **Grițco** (the Republic of Moldova),  
 Faris **Vehabović** (Bosnia and Herzegovina),  
 Ksenija **Turković** (Croatia),  
 Dmitry **Dedov** (Russia),  
 Branko **Lubarda** (Serbia),  
 Yonko **Grozev** (Bulgaria),  
 Síofra **O'Leary** (Ireland),  
 Carlo **Ranzoni** (Liechtenstein),  
 Armen **Harutyunyan** (Armenia),  
 Stéphanie **Mourou-Vikström** (Monaco),  
 Pauline **Koskelo** (Finland),

and also Françoise **Elens-Passos**, *Deputy Registrar*.

### Decision of the Court

#### Article 2

In its judgment of 5 November 2015, the Court had noted that it was acknowledged by the Russian Government that Murad Nagmetov had been killed in violation of the requirements of Article 2 of the Convention. In particular, the Government had stated that it was against Russian law to fire tear-gas grenades directly at a person. The Court had found no reason to disagree with that analysis. In

addition, it had held that the authorities had not taken all the reasonable and practicable measures to identify the shooter and establish all the circumstances of the case.

The Grand Chamber endorsed the Chamber's findings and held that there had been a violation of Article 2 of the Convention under its substantive and procedural limbs.

### **Just satisfaction (Article 41)**

In its judgment of 5 November 2015, the Chamber had decided to award the applicant damages, although no "claim" for just satisfaction had been submitted in the appropriate manner. It had justified that decision by referring to the particular gravity of the violation of the Convention, the absence of any domestic compensation and the uncertain prospects of success in obtaining adequate compensation in a speedy manner after the Court's judgment. It had therefore considered it appropriate and necessary to award the applicant 50,000 euros in respect of non-pecuniary damage.

For its part, the Grand Chamber noted firstly that the applicant had stated in the application form that he wished to obtain monetary compensation in relation to the violations of the Convention, including Article 2. In the light of the general principles and its established practice, the Court considered that the indication of a wish for eventual monetary compensation as expressed at the initial stage of the procedure before the Court did not amount to a "claim" within the meaning of Rule 60 of the Rules of Court, read together with Rule 71 § 1 in the context of the present case.

The Court noted that it was not specified in Article 41 of the Convention that the existence of a claim was a prerequisite for the Court to exercise its discretion. It had been the Court's prevailing practice that it normally examined only the claims actually submitted to it, and would not of its own motion consider whether the applicant had sustained other damage. In a few rare cases, it had found it necessary to make a monetary award in respect of non-pecuniary damage, even where no such claim had been made or where the claim was belated. In other cases the Court had considered that a finding of a violation constituted sufficient just satisfaction and had accordingly dismissed the submitted claims.

Lastly, the Court emphasised that, in particular in respect of just satisfaction for non-pecuniary damage, its guiding principle was that of equity. This involved a certain flexibility and an objective consideration of what was just, fair and reasonable in all the circumstances of the case.

The Court reiterated that Article 41 conferred on it the competence to afford just satisfaction and allowed the Court discretion in deciding on this matter "if necessary". Under that discretion, it could decide to award or to refuse monetary compensation. An applicant and his or her representative had to observe the formal and substantive requirements contained in the Rules on the matter of just satisfaction, at a risk of incurring adverse consequences for the applicant. A representative acted on behalf of the applicant who had appointed him or her. The representative was deemed to be acting in the applicant's interest. This usually entailed that an applicant had to bear the adverse consequences that could arise from his or her representative's conduct of a case before the Court. It followed that a representative's failure to submit a claim for just satisfaction would, as a rule, entail that the Court would make no award.

The Court considered, however, that while it would normally not consider of its own motion the question of just satisfaction, neither the Convention nor the Protocols thereto precluded it from exercising its discretion under Article 41. The Court remained empowered to afford, in a reasonable and restrained manner, just satisfaction on account of non-pecuniary damage arising in the exceptional circumstances of a given case, where a claim had not been properly made in compliance with the Rules of Court. Where the Court might envisage a possibility of a just-satisfaction award in respect of non-pecuniary damage in the absence of a properly made claim, it had first to ascertain that a number of prerequisites had been met. The Court would therefore attach particular importance to

indications unequivocally showing that an applicant had expressed a wish to obtain monetary compensation in addition to the recognition of the violation of the Convention. It was further necessary to ascertain that there was a causal link between the violation and the nonmaterial harm arising from the violation of the Convention.

The Court would then examine whether there were compelling considerations in favour of making an award, despite the applicant's failure to comply with the requirements of Rule 60 of the Rules of Court. The Court would further ascertain whether there were reasonable prospects of obtaining adequate "reparation", in terms of Article 41 of the Convention, at the national level.

In the present case, the Court considered that Mr Nagmetov had sustained non-material harm arising from the violation of Article 2 of the Convention and that there was a causal link between the violation and the harm. The non-pecuniary damage existed on account of the moral suffering and distress sustained by him due to the unlawful and unjustified lethal use of firearms against his son and the incomplete investigation in this case.

Although Mr Nagmetov had unequivocally indicated that he wished and continued to wish to obtain monetary compensation in addition to the recognition of the violation of the Convention, the Court noted, that Mr Nagmetov's representative in the present case had submitted no claim for just satisfaction in the procedure before the Chamber. In the particular circumstances of the present case the Court was not inclined to conclude that Mr Nagmetov should bear the adverse consequences of such an omission by his representative.

Endorsing the Chamber's assessment, the Grand Chamber had concluded that the case disclosed particularly serious violations of the Convention. The Court considered that the finding of a violation of the substantive and procedural limbs of Article 2 in this case would not constitute in itself sufficient just satisfaction. The gravity and impact of the violations in question and the overall context in which the breach occurred, in particular the lengthy and defective investigation of a death inflicted by an agent of the State, pleaded in favour of a just-satisfaction award.

The Court noted that the applicant had not received any redress, such as a monetary compensation, in relation to the facts underlying the violations found. The Government had not suggested that Mr Nagmetov had available to him domestic remedies that offered reasonable prospects of reparation, in particular remedies that could be initiated after the Court's judgment finding a violation of the Convention, for claiming monetary compensation.

The documents in the case file showed that the criminal investigation had remained suspended since 2011, so that no definitive domestic decision had been taken as to the merits of Mr Nagmetov's criminal complaint. While it appeared that, following the Court's judgment, the application of the Code of Criminal Procedure could open a possibility of having the criminal investigation resumed, the Court noted that more than nine years had passed since the relevant events, which could compromise any eventual measure of "reparation". Against this background, the Court found no indication – and the Government had not argued otherwise – that the domestic law allowed adequate "reparation" to be sought and obtained within a reasonable time.

The Court held that the present case disclosed exceptional circumstances which called for a satisfaction award in respect of non-pecuniary damage, notwithstanding the absence of a properly made claim.

The Court held that Russia was to pay the applicant 50,000 euros (EUR) in respect of non-pecuniary damage.

### Separate opinion

Judges Nußberger and Lemmens expressed a joint concurring opinion. Judges Raimondi, O'Leary and Ranzoni expressed a joint dissenting opinion. These opinions are annexed to the judgment.

**166. ECHR, *Thimothawes v. Belgium*, no. 39061/11, Chamber judgment of 4 April 2017 (Article 5-1, Right to liberty and security-No violation).** The applicant, an Egyptian asylum-seeker, unsuccessfully claimed that his five-month detention at the Belgian border violated his right to liberty. The Court found in particular that where a legal provision depriving a person of his liberty originated in international law, only the domestic courts were empowered to interpret it, pursuant to the supranational provisions in question.

**ECHR 115 (2017)**

**04.04.2017**

**Press release issued by the Registrar**

In today's **Chamber** judgment in the case of **Thimothawes v. Belgium** (application no. 39061/11) the European Court of Human Rights held, by a majority, that there had been:

**no violation of Article 5 § 1 (right to liberty and security)** of the European Convention on Human Rights.

The case concerned the five-month detention of an Egyptian asylum-seeker at the Belgian border.

The Court found in particular that any measure depriving a person of his liberty had to be prescribed by law. Where the legal provision in question originated in international law, only the domestic courts, except in the case of an arbitrary or manifestly unreasonable interpretation, were empowered to interpret domestic law pursuant to the supranational provisions in question. The Court only scrutinised the conformity of the effects of that interpretation with the Convention.

In the present case, the scrutiny of lawfulness conducted by the domestic courts of the detention order had taken account of the case-law of the Court. Moreover, the issue of the applicant's mental health was not, on its own, sufficient for a finding that his detention had been arbitrary. Finally, the assessment of the facts of the case supported a finding that his period of detention had not been unreasonably long.

**Principal facts**

The applicant, Waleed Nasser Thimothawes, is an Egyptian national who was born in 1984 and lives in Bruges (Belgium).

On 1 February 2011 Mr Thimothawes arrived from Turkey at the Belgian border. He immediately lodged an asylum application, which was rejected on 17 February 2011 by the Commissioner General for Refugees and Stateless Persons.

Meanwhile Mr Thimothawes was served with a refusal-of-entry decision, accompanied by expulsion (*refoulement*) and detention in a designated place close to the border. On 1 March 2011 he lodged an application for release from detention, which was declared ill-founded by both the Brussels Regional Court and the Indictment Division of the Brussels Court of Appeal.

On 26 March 2011, after having refused to be repatriated to Turkey, a second decision was taken to detain him in a designated place. Mr Thimothawes reapplied for release, which application was once again dismissed by the Indictment Division of the Brussels Court of Appeal. On 5 May 2011, before he could even lodge an appeal with the Court of Cassation, the Aliens' Office issued a third refusal-of-entry decision, accompanied by expulsion and detention in a designated holding centre. One last application for release was dismissed at first and second instances.

Mr Thimothawes was released on 4 July 2011 on expiry of the maximum legal period of detention.

Concurrently, on 5 May 2011, Mr Thimothawes had lodged a second application for asylum based on new documents relating to his mental health, which had been rejected by decision of the Commissioner General for Refugees and Stateless Persons, that decision having been upheld by the Aliens' Litigation Council.

### Complaints, procedure and composition of the Court

The application was lodged with the European Court of Human Rights on 22 June 2011.

The applicant complained that his detention as an asylum-seeker had been contrary to Article 5 § 1 (f) of the Convention (right to liberty and security).

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

Işıl **Karakaş** (Turkey), *President*,  
Nebojša **Vučinić** (Montenegro),  
Paul **Lemmens** (Belgium),  
Valeriu **Griţco** (the Republic of Moldova),  
Ksenija **Turković** (Croatia),  
Stéphanie **Mourou-Vikström** (Monaco),  
Georges **Ravarani** (Luxembourg),

and also Hasan **Bakırcı**, *Deputy Section Registrar*.

### Decision of the Court

#### Article 5 § 1

The Court reiterated that pursuant to Article 5 of the Convention detention orders had to be prescribed by law, which refers to either a domestic provision or a legal standard laid down in international law.

The Court observed that the Aliens Act had been applied to Mr Thimothawes, which legislation he considered contrary to two European Union directives.

The Court reiterated that it was incumbent on the national authorities to interpret domestic law in conformity with European Union law. Save in the case of an arbitrary or manifestly unreasonable interpretation, the Court confined itself to assessing the compatibility of the effects of that interpretation with the Convention. The Court pointed out that general or automatic decisions to detain asylum-seekers without any individual appraisal of any special needs could raise an issue under Article 5 § 1. In the instant case, however, the Court held that the succinct, stereotypical wording of the detention orders with which Mr Thimothawes had been served had not prevented the Belgian courts from conducting scrutiny which, although confined to supervision of lawfulness, took account of the case-law of the Court.

Furthermore, the Court considered that the applicant's mental health was not a factor clearly conducive to the conclusion that his detention had not been justified. It observed that Mr Thimothawes had been given proper care in both the holding centres in which he had been detained and that the reports drawn up by the psychological services had not mentioned any obstacles to his detention. The Court concluded that the detention order had not been unsuited to his mental state and that the authorities had been under no obligation to seek less coercive measures.

Finally, as regards the allegation of an unreasonable length of detention, the Court held that in the circumstances the repatriation procedure to Turkey, the expulsion procedure to Egypt and the assessment of the various asylum applications demonstrated that the duration of detention, totalling five months, had not been excessive.

There had therefore been no violation of Article 5 § 1.

**167. ECHR, *Güzelyurtlu and Others v. Cyprus and Turkey*, no. 36925/07, Chamber judgment of 4 April 2017 (Article 2, Right to life- procedural obligation, investigation- Violation by Cyprus; Article 2, Right to life- procedural obligation, investigation- Violation by Turkey).** The applicants, relatives of three Cypriot nationals of Turkish Cypriot origin, complained that both the Cypriot and Turkish authorities (including those of the “Turkish Republic of Northern Cyprus”) failed to co-operate and conduct an effective investigation into the killing of their relatives, in violation of their right to life. The Court found that both Governments had not been prepared to make any compromise on their positions and find middle ground, despite various options put forward, including by the United Nations.

**ECHR 118 (2017)  
04.04.2017**

**Press release issued by the Registrar**

In today’s **Chamber** judgment in the case of **Guzelyurtlu and Others v. Cyprus and Turkey** (application no. 36925/07) the European Court of Human Rights held:

by five votes to two, that there had been a **violation of Article 2 (right to life/investigation)** of the European Convention on Human Rights by Cyprus and,

unanimously, that there had been a **violation of Article 2 (right to life/investigation)** of the European Convention by Turkey.

The case concerned the killing of Elmas, Zerrin and Eylül Güzelyurtlu, who were shot dead in the Cypriot-Government controlled area of Cyprus on 15 January 2005. The killers fled back to the “Turkish Republic of Northern Cyprus” (the “TRNC”). Parallel investigations into the murders were conducted by the authorities of the Cypriot Government and the Turkish Government, including those of the “TRNC”. The “TRNC” authorities insisted that the case file containing the evidence against the suspects be handed over so that they could conduct a prosecution. The Cypriot authorities refused. On the strength of the evidence gathered during their investigation, the Cypriot authorities sought the extradition of the suspects who were within Turkey’s jurisdiction (either in the “TRNC” or in mainland Turkey) with a view to their trial. The extradition requests were returned to the Cypriot authorities without reply. The investigations of both respondent States thus reached an impasse in 2008.

The applicants, relatives of the victims, complained that both the Cypriot and Turkish authorities (including those of the “TRNC”) have failed to co-operate and conduct an effective investigation into the killing of their relatives.

The Court found that, where – as in the applicants’ case – the investigation of unlawful killings unavoidably implicated more than one State, the States concerned were obliged to cooperate effectively and take all reasonable steps necessary to facilitate and realise an effective investigation into the case overall. However, it was clear from all the material before the Court, that both Governments had not been prepared to make any compromise on their positions and find middle ground, despite various options having been put forward, including by the United Nations. That position arose from political considerations which reflected the long-standing and intense political dispute between Cyprus and Turkey. A situation thus resulted in which the respondent Governments’ respective investigations – which the Court found adequate up until the impasse – remain open.

Nothing has therefore been done for more than eight years to bring to a close what is ultimately a straightforward case.

### Principal facts

The applicants are all relatives of Elmas, Zerrin, and Eylül Güzelyurtlu, who were shot dead on the Nicosia-Larnaca highway in the Cypriot-Government-controlled areas on 15 January 2005. Elmas was found dead in a ditch and his wife, Zerrin, and daughter, Eylül, in the back seat of their car parked on the hard shoulder. The three victims were all Cypriot nationals of Turkish Cypriot origin. The killers fled back to the “TRNC”.

Parallel investigations into the murders were conducted by the authorities of the Cypriot Government and the Turkish Government, including those of the “TRNC”.

The Cypriot authorities, among other things, collected and secured evidence at the scene of the crime and at the victims’ house, conducted post-mortem examinations, took statements from numerous witnesses (including the victims’ relatives), carried out a ballistic examination and DNA tests, searched the records of vehicles that had gone through the crossing points, and examined the security system of the victims’ house and computer hard discs. The investigative steps quickly led the authorities to conclude that the victims had been kidnapped and murdered in the early hours of 15 January 2005 and then to identify eight suspects. In the days after the shootings, domestic and European arrest warrants were thus issued and the Cypriot police submitted requests to Interpol to search for and arrest the suspects with a view to their extradition. Red notices were published by Interpol in respect of all suspects. The suspects were also all added to the Cypriot Government’s “stop list” (a register of individuals whose entry into and exit from Cyprus is monitored or banned). On 24 April 2008 the case file was classified as “otherwise disposed of” pending future developments.

The Turkish (including the “TRNC”) authorities equally took a number of investigative steps following the news of the murders, and by the end of January 2005 all of the suspects had been arrested. Statements were taken from the suspects – who denied any involvement in the crime – and persons who knew or were connected to them as well as from the applicants. Evidence was also collected. However, the suspects were released on or around 11 February 2005 due to lack of evidence connecting them to the murders. The file was classified as “non-resolved for the time being” in March 2007.

The “TRNC” authorities insisted that the case file containing the evidence against the suspects be handed over so that they could conduct a prosecution. The Cypriot authorities refused. On the strength of the evidence gathered during their investigation, the Cypriot authorities – in November 2008 – sought the extradition of the suspects who were within Turkey’s jurisdiction (either in the “TRNC” or in mainland Turkey) with a view to their trial. The extradition requests were returned to the Cypriot authorities without reply. The investigations of both respondent States thus reached an impasse and have remained open since then.

Following the murders the Cypriot Government, the “TRNC” and the applicants were in contact with the United Nations Peacekeeping Force in Cyprus (“UNFICYP”) about the case. A number of meetings were held and there was also an exchange of telephone calls and correspondence. However, UNFICYP’s efforts to assist the sides to bring the suspects to justice have proved unsuccessful.

The applicants are Mehmet Güzelyurtlu, Ayça Güzelyurtlu, Deniz Erdinç, Emine Akerson, Fezile Kirralar, Meryem Özfirat and Muzaffer Özfirat. They are Cypriot nationals of Turkish Cypriot origin who were born in 1978, 1976, 1980, 1962, 1956, 1933, and 1933 respectively. They live in the “Turkish Republic of Northern Cyprus” or in the United Kingdom.

## Complaints, procedure and composition of the Court

Relying on Article 2 (right to life), the applicants complained that both the Cypriot and Turkish authorities (including those of the “TRNC”) had failed to conduct an effective investigation into the killing of their relatives. They further alleged that as a result of the refusal of Turkey and Cyprus to co-operate the killers have not yet faced justice. Relying on Article 13 (right to an effective remedy) in conjunction with Article 2, they complained of a lack of an effective remedy in respect of their Article 2 complaint.

The application was lodged with the European Court of Human Rights on 16 August 2007.

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

Helena **Jäderblom** (Sweden), *President*,  
Branko **Lubarda** (Serbia),  
Işıl **Karakaş** (Turkey),  
Helen **Keller** (Switzerland),  
Pere **Pastor Vilanova** (Andorra),  
Alena **Poláčková** (Slovakia),  
Georgios A. **Serghides** (Cyprus),

and also Stephen **Phillips**, *Section Registrar*.

## Decision of the Court

The Court recalled that, generally, the procedural obligation under Article 2 to carry out an effective investigation fell on the State under whose jurisdiction the victim was at the time of death. Nonetheless, where there is a cross-border dimension to an incident of unlawful violence leading to loss of life, Article 2 requires that the authorities of the Contracting State to which the suspects have fled and in which evidence of the offence could be located, take it upon themselves to take effective measures in that regard. Otherwise, those involved in cross-border attacks would be able to operate with impunity and the authorities of the State where the unlawful attacks have taken place would be prevented from protecting the fundamental rights of their citizens and, indeed, of any individuals within their jurisdiction. In the present case, the suspects are or were within Turkey’s jurisdiction, either in the “TRNC” or in mainland Turkey. The Turkish (including the “TRNC”) authorities had been informed of the crime and Red Notices concerning the suspects had been published. A departure from the general approach was therefore justified and not only the Republic of Cyprus but also Turkey’s obligations under Article 2 were engaged. The Court further noted that the “TRNC” authorities had instituted their own criminal investigation and that their courts had jurisdiction.

First, it was clear that the authorities of the respondent States had taken a significant number of investigative steps promptly. A considerable amount of evidence had been collected and eight suspects had quickly been identified, traced and arrested. Prior to the impasse, the Court therefore found on the facts of the case that there had been no shortcomings in the respective investigations in themselves.

However, in assessing whether there had been a violation of Article 2, the Court also examined whether the authorities had done all that could be reasonably expected of them in the circumstances. Where – as in the applicants’ case – the investigation of the unlawful killing unavoidably implicated more than one State, the respondent States concerned were obliged to cooperate effectively and take all reasonable steps necessary to facilitate and realise an effective investigation into the case overall. Despite this, the authorities of the respondent States in the present case had failed to co-operate resulting in a situation in which their respective investigations remain open. Nothing has therefore been done for more than eight years to bring to a close what is ultimately a straightforward case.

Moreover, although the respondent States had had the opportunity to find a solution and come to an agreement under the brokerage of UNFICYP, they had not used that opportunity to the full. Any suggestions made in an effort to find a compromise solution or that the authorities concerned meet each other half way had been met with downright refusal on the part of those authorities. A number of options have been put forward, including: organising meetings on neutral territory between the Cypriot and “TRNC” police, UNFICYP and the Sovereign Base Areas police; questioning of the suspects through a video recording interview method at the Ledra Palace Hotel in the UN buffer zone; the possibility of an ad hoc arrangement or trial at a neutral venue; the exchange of evidence (under certain conditions); and dealing with the issue on a technical services level.

It was therefore clear from all the material before the Court, including the 2005 UN Secretary-General’s report on the UN operation in Cyprus, that both Governments had not been prepared to make any compromise on their positions and find middle ground. That position arose from political considerations which reflected the long-standing and intense political dispute between Cyprus and Turkey. On the Cypriot Government’s side it was evident that what had driven the unwillingness to cooperate was the refusal to lend (or the fear of lending) any legitimacy to the “TRNC” – an argument that this Court rejected. The Court ruled in this respect that it did not accept that steps taken to cooperate in order to further the investigation in this case would amount to recognition, implied or otherwise of the “TRNC”. Nor would it be tantamount to holding that Turkey wields internationally recognised sovereignty over northern Cyprus. On the other hand, the Court found it striking that the extradition requests made by the Cypriot Government, the sole legitimate government of Cyprus, had been completely ignored by the Turkish Government.

The failure to cooperate directly or through UNFICYP had resulted in the suspects’ release. If there had been cooperation, in line with the procedural obligation under Article 2, criminal proceedings might have ensued against one or more of the suspects or the investigation might have come to a proper conclusion. Therefore, the Court held that there had been a violation of Article 2 of the Convention under its procedural aspect on account of the failure of the two Governments to cooperate.

Given that conclusion, the Court was of the opinion that there was no need to examine separately the applicants’ complaint under Article 13 of the Convention taken in conjunction with Article 2.

#### **Just satisfaction (Article 41)**

The Court held, by five votes to two, that each respondent Government was to pay each applicant 8,500 euros (EUR) in respect of non-pecuniary damage.

#### **Separate opinions**

Judges Serghides and Pastor Vilanova each expressed a partly dissenting opinion. These opinions are annexed to the judgment.

168. ECHR, *Tagayeva and Others v. Russia*, nos. 26562/07, 14755/08, 49339/08, 49380/08, 51313/08, 21294/11 and 37096/11, Chamber judgment of 13 April 2017 (**Article 2, Right to life- Violation, violation of its procedural obligations and violation due to serious shortcomings in planning; Article 13, Right to an effective remedy- No violation; Article 46, Binding force and implementation of judgments**). The case was brought by 409 Russian nationals who had either been taken hostage and/or injured in the incident, or are family members of those taken hostage, killed or injured in the September 2004 terrorist attack on a school in Beslan, North Ossetia (Russia). All of the applicants maintained that the State had failed in its obligation to protect the victims from the known risk to life and that there had been no effective investigation into the events.
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**ECHR 127 (2017)**  
**13.04.2017**

**Press release issued by the Registrar**

The case concerned the September 2004 terrorist attack on a school in Beslan, North Ossetia (Russia). For over fifty hours heavily armed terrorists held captive over 1,000 people, the majority of them children. Following explosions, fire and an armed intervention, over 330 people lost their lives (including over 180 children) and over 750 people were injured. The case was brought by 409 Russian nationals who had either been taken hostage and/or injured in the incident, or are family members of those taken hostage, killed or injured. They made allegations of a range of failings by the Russian State in relation to the attack.

In today's **Chamber** judgment in the case of **Tagayeva and Others v. Russia** (application nos. 26562/07, 14755/08, 49339/08, 49380/08, 51313/08, 21294/11 and 37096/11), the European Court of Human Rights made the following findings.

Unanimously, the Court held that there had been a **violation of Article 2 (right to life)** of the European Convention on Human Rights, arising from a failure to take preventive measures. The authorities had been in possession of sufficiently specific information of a planned terrorist attack in the area, linked to an educational institution. Nevertheless, not enough had been done to disrupt the terrorists meeting and preparing; insufficient steps had been taken to prevent them travelling on the day of the attack; security at the school had not been increased; and neither the school nor the public had been warned of the threat.

Unanimously, the Court found that there had been a **violation of the procedural obligation under Article 2**, primarily because the investigation had not been capable of leading to a determination of whether the force used by the State agents had or had not been justified in the circumstances.

By five votes to two, the Court held that there had been a **further violation of Article 2**, due to serious shortcomings in the planning and control of the security operation. The command structure of the operation had suffered from a lack of formal leadership, resulting in serious flaws in decisionmaking and coordination with other relevant agencies.

By five votes to two, the Court also found that there had been a **violation of Article 2** arising from the use of lethal force by security forces. In the absence of proper legal rules, powerful weapons such as tank cannon, grenade launchers and flame-throwers had been used on the school. This had contributed

to the casualties among the hostages and had not been compatible with the requirement under Article 2 that lethal force be used “no more than [is] absolutely necessary.”

Taking into account the compensation already afforded to the victims in Russia and various domestic procedures that had been aimed at establishing the circumstances of the events, the Court held, by six votes to one, that there had been **no violation of Article 13 (right to an effective remedy)**.

Under **Article 46 (binding force and implementation of judgments)**, the Court indicated the need for a variety of measures aimed at drawing lessons from the past, raising awareness of applicable legal and operational standards, and deterring similar violations in the future. It also held that the future requirements of the pending investigation into the incident must be determined with regard to the Court’s conclusions about investigation’s failures to date.

### Principal facts

In the early hours of 1 September 2004 over thirty heavily armed terrorists crossed the administrative border between Ingushetia and North Ossetia. At 9 a.m. a ceremony to celebrate the start of the academic year began in a courtyard of school no.1 in Beslan. Minutes later, the terrorists surrounded the gathering and rounded up over 1,100 people into the school gymnasium (including around 800 children). The terrorists turned the school into an improvised stronghold and mined the gymnasium. They executed a number of hostages, refused to accept any offers aimed at alleviating the hostages’ situation and, starting from 2 September, denied even drinking water to their victims. The security forces surrounded the premises. An operative headquarters (OH) was set up to command the operation and attempted to negotiate with the terrorists, who made political demands.

At 1 p.m. on September 3, two powerful explosions occurred in the gymnasium. Some hostages tried to escape through the hole in the wall and the terrorists fired on them. This prompted an exchange of gunfire with the security forces, which were then ordered to storm the building.

Many terrorists had survived the initial explosions. They rounded up some surviving hostages in the gymnasium (about 300 people) and forced them to other parts of the school. The dead, injured and shell-shocked remained in the gymnasium. Flames spread around the room and at about 3.30 p.m. the roof collapsed.

Meanwhile, the security forces had continued to engage the terrorists. Amid heavy fighting, special forces secured the premises and rescued the surviving hostages. Over 330 people had been killed and hundreds more were wounded. 12 servicemen were among the dead and over 50 were injured. One suspected terrorist was captured and all the others were killed.

There were a number of domestic investigations into the incident. In the first criminal investigation, no. 20/849, the actions of the officials were found to have been lawful and reasonable in the circumstances, and no causal link was found between their decisions and any negative consequences. This investigation is still pending. Additional sets of criminal proceedings were brought against the only surviving hostage-taker, Mr Kulayev (who in 2006 was sentenced to life imprisonment); officials of the Beslan police station (who were given amnesty in relation to negligence-related charges); and officials of the police in Ingushetia (who were acquitted of negligence-related charges). Groups of victims made civil claims against the Russian and North Ossetian Ministries of Interior, but they were unsuccessful.

Reports into the incident were produced by special commissions of the North Ossetian Parliament and the Russian Federal Assembly. A member of the latter, Mr Yuriy Savelyev, also produced a separate report disagreeing with the conclusions of his commission.

Victims of the terrorist attack were awarded various sums in compensation, including funds collected through a humanitarian response. A range of community-oriented measures were implemented in Beslan by the Russian Government in 2004 – 2010.

### Complaints, procedure and composition of the Court

The applicants can be separated into two groups: “the first group of applicants”, who were represented by lawyers from the EHRAC/Memorial Human Rights Centre; and “the second group of applicants”, who were represented by lawyers practicing in Moscow.

Relying on Article 2 (right to life), all of the applicants maintained that the State had failed in its obligation to protect the victims from the known risk to life, and that there had been no effective investigation into the events. The first group of applicants also maintained that many aspects of the planning and control of the security operation had been deficient, and that the deaths had been the result of an indiscriminate and disproportionate use of force by the authorities. The first group also complained of violations of Article 13 (right to an effective remedy).

The seven applications were lodged with the European Court of Human Rights between June 2007 and May 2011. The case was communicated to the Russian Government for observations on 10 April 2012. A hearing on the admissibility and merits took place at the Court on 14 October 2014. A Chamber decision on admissibility was delivered on 2 July 2015.

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

Linos-Alexandre **Sicilianos** (Greece), *President*,  
Mirjana **Lazarova Trajkovska** (“the Former Yugoslav Republic of Macedonia”),  
Khanlar **Hajiyev** (Azerbaijan),  
Julia **Laffranque** (Estonia),  
Paulo **Pinto de Albuquerque** (Portugal),  
Erik **Møse** (Norway),  
Dmitry **Dedov** (Russia),

and also Abel **Campos**, *Section Registrar*.

### Decision of the Court

#### **Right to life - the obligation to protect life (Article 2)**

The Court found that, at least several days in advance, the authorities had had sufficiently specific information about a planned terrorist attack in the area, linked with the opening of the academic year in educational institutions, and likened to major attacks carried out in the past by Chechen separatists involving the taking of hostages in public locations and heavy casualties.

In the face of such a threat, it could be reasonably expected that some preventive and protective measures would cover all educational facilities in the area and include a range of other security steps. While certain security measures had been taken, in general the preventive measures in the present case could be characterised as inadequate. The security arrangement at the school had not been heightened; the local police had not taken sufficient measures to reduce the risks; no warning had been given to the school administration, or to the public attending the ceremony; and no single sufficiently high-level structure had been responsible for the handling of the situation. The authorities had therefore failed to take measures capable of preventing or minimising the known risk, in violation of Article 2.

**Right to life - the obligation to investigate (Article 2)**

The Court identified a number of serious shortcomings in the investigation into the attack. Firstly, there had been no proper examination of how the victims had died. The authorities had failed to conduct full forensic examinations of the majority of the victims (in order, for example, to identify and match external objects like bullets or shrapnel); and had failed to properly record the location of the vast majority of the hostages' bodies. For one third of the victims, the exact cause of death had not been established. Secondly, the investigation had failed to properly secure and record other evidence before the site was irreparably altered by large machinery and the lifting of the security cordon on the day after the end of the rescue operation. This had caused irreparable harm to the subsequent analysis of the event.

Thirdly, the investigation had failed to adequately examine the use of lethal force by the authorities, despite the existence of a credible body of evidence pointing at the security forces' use of weapons capable of causing indiscriminate harm to the people inside the building, such as grenade launchers, flame-throwers, and tank cannon. For example, it did not make a single inventory of the weapons and ammunition that had been used, establish who had used them, and the time and place that they had been deployed. The lack of objective information had constituted a major failure to clarify this key aspect of the events and to create a ground for drawing conclusions about individual and collective responsibility.

Lastly, the investigating authorities and supervising courts had repeatedly refused to give the applicants access to some key expert reports concerning the use of lethal force by the security forces, and the origins of the first explosions in the gymnasium. The victims' inability to acquaint themselves with these findings and challenge their results appeared unjustifiable.

The Court concluded that there had been a breach of Article 2, since the investigation had not been "effective", as it had not been capable of leading to a determination of whether the force used by the State had been justified in the circumstances. It also noted that the public scrutiny aspect of the investigation had been breached by the victims' restricted access to it.

**Right to life - planning and control of the operation (Article 2)**

The Court held that the Russian authorities had failed to plan and conduct the rescue operation so as to ensure that the risk to life was minimised, in breach of Article 2. This failure had originated in the functioning of the OH, the body responsible for the operation. There were delays in setting it up and inconsistencies in determining its leadership and composition, and the lack of any records highlights the appearance of a void of formal responsibility.

This absence of formal leadership resulted in serious flaws in the decision-making process and coordination with other agencies. Among other things, it affected the authorities' ability to coordinate the medical, rescue and fire-fighting response. The Court could not avoid the conclusion that this lack of responsibility and coordination had contributed, to some extent, to the tragic outcome of the events.

**Right to life - use of lethal force (Article 2)**

Firstly, the Court concluded that the use of lethal force by security forces had contributed, to some extent, to the casualties among the hostages. The applicants had relied on a number of witness statements to argue that indiscriminate force had been used by the servicemen upon the building when the terrorists and hostages had been intermingled, and the investigation had failed to fully assess these allegations. Furthermore, the reports of both the North Ossetian Parliament and Mr Savelyev had pointed at the same conclusion. The investigation had failed to establish the circumstances of the use of lethal force and to fully assess these allegations. Presumptions can be drawn from the co-existence of an un rebutted body of evidence pointing to the use of indiscriminate weapons whilst both terrorists

and hostages had been present, and the absence of proper fact finding into the causes of death and circumstances of the use of arms.

The Court held that Russia had failed to set up an effective legal framework of safeguards against arbitrariness and the use of force, since the applicable legislation had failed to set the most important principles and constraints of the use of force in lawful anti-terrorist operations. Coupled with wide-ranging immunity for any harm caused in the course of anti-terrorist operations, this situation resulted in a dangerous gap in regulating life-threatening situations and bore a direct relevance on the Court's finding under this heading.

Combined with the lack of responsibility and co-ordination in the OH, this led to a situation where the decisions about the use of force had been left to the commanders in charge of the storming. However, there is very little evidence about their explanation for the use of lethal force. In view of the available information about the use of indiscriminate weapons, this absence of an explanation led the Court to find that the Government had not provided a "satisfactory and convincing explanation" that the lethal force used had been no more than what had been absolutely necessary. Furthermore, the Court came to the conclusion that, though the decision to resort to the use of lethal force had been justified in the circumstances, such a massive use of explosive and indiscriminate weapons could not be regarded as absolutely necessary, and had violated Article 2.

### **Right to an effective remedy (Article 13)**

The applicants had complained under Article 13 on two principal grounds: that they had had no means of obtaining compensation from individuals who had allegedly perpetrated unlawful acts; and that they had been denied access to the relevant information retained by the authorities.

In regard to the compensation, the Court noted that the applicants had received compensation from the State as victims of the terrorist attack, that they had also received compensation from a humanitarian effort, and that they had been granted procedural status in the criminal trial of Mr Kulayev (where civil damages could have been sought). The Court was unable to conclude that the lack of progress on some important aspects of criminal investigation no. 20/849 had precluded the applicants from obtaining compensation.

In regard to the complaint concerning access to information, the Court observed that the victims had had access to evidence from the criminal investigation no. 20/849, the trial of Mr Kulayev, and the two sets of criminal proceedings against police officers. The Court further noted the extensive and detailed studies by the commissions of the North Ossetian Parliament and the Federal Assembly, including the separate report by Mr Savelyev. These reports had ensured access to knowledge about the aspects of the serious human rights violations that would have otherwise remained inaccessible.

On the basis of the above, and in so far as the issues complained of have not been covered by the findings under the procedural aspect of Article 2, the Court found no breach of Article 13.

### **Just satisfaction (Article 41)**

The Court held that Russia was to pay the applicants a total of 2,955,000 euros (EUR) in respect of non-pecuniary damage, and the applicants' representatives a total of EUR 88,000 in respect of costs. The individual awards to the applicants took account of the extent of their suffering and of the measures taken by Russia with the aim of compensating and rehabilitating the victims.

### **Binding force and execution of judgments (Article 46)**

The Court indicated the need for a variety of measures aimed at drawing lessons from the past, raising awareness of applicable legal and operational standards, and deterring similar violations in the future.

It also held that the future requirements of the pending investigation into the incident must be determined with regard to the Court's conclusions about investigation's failures to date.

#### Separate Opinions

There were two partly dissenting opinions: one by Judges Hajiyeu and Dedov and the other by Judge Pinto de Albuquerque. The opinions are annexed to the judgment.

- 169. ECHR, *Harkins v. the United Kingdom*, no. 71537/14, Grand Chamber decision of 10 July 2017 (Article 3, Prohibition of inhuman and degrading treatment-Inadmissible; Article 6, Right to a fair trial-Inadmissible).** The Grand Chamber upheld the Chamber judgment (case no.66). The applicant, a British national, unsuccessfully claimed that his extradition to the USA would violate his right to a fair trial and it would expose him to inhuman or degrading treatment, as, if convicted in Florida, he would face a mandatory sentence of life in prison without the possibility of parole.

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**ECHR 239 (2017)**  
**10.07.2017**

**Press release issued by the Registrar**

The case **Harkins v. the United Kingdom** (application no. 71537/14) concerned the extradition of a British national to the United States of America (USA) to face trial for first-degree murder. Mr Harkins, the applicant, complained that his extradition to the USA would violate Articles 3 (inhuman or degrading treatment) and 6 (right to a fair trial) of the European Convention of Human Rights, because if convicted in Florida he would face a mandatory sentence of life in prison without the possibility of parole. In its decision in the case today the European Court of Human Rights has declared both complaints inadmissible. The decision is final. The Court also decided that the interim measure (under Rule 39 of the Rules of Court) indicating to the UK Government that it should stay Mr Harkins' extradition is to be lifted.

This is the second time Mr Harkins has applied to the European Court with regard to his extradition. In 2012, in the judgment *Harkins and Edwards v. the United Kingdom*, the Court found that his extradition would not violate Article 3 of the European Convention. However, Mr Harkins was not extradited and following the subsequent ECtHR judgments in *Vinter and Others v. the UK* and *Trabelsi v. Belgium* he argued before the national courts that developments in the Court's Article 3 case-law on life sentences without the possibility of parole were such as to require the re-opening of the proceedings. The UK courts refused to re-open the proceedings and, in this second application to the Court, Mr Harkins, relying on the Court's recent case-law, once again complained that his extradition would breach his rights under Article 3 of the Convention.

The Court held that Mr Harkins' complaints under Article 3 should be declared **inadmissible** as they were "substantially the same" (within the meaning of Article 35 § 2 (b) of the Convention) as the Article 3 complaint considered by it in 2012. In reaching this conclusion, the Court rejected Mr Harkins' argument that the development of its case-law in the *Vinter* and *Trabelsi* cases could constitute "relevant new information" for the purposes of Article 35 § 2 (b). To find otherwise would undermine the principle of legal certainty and undermine the credibility and authority of the Court's judgments.

As concerned Mr Harkins' complaint under Article 6, the Court concluded that the facts of the case did not disclose any risk that Mr Harkins would suffer a flagrant denial of justice.

**Principal facts and complaints**

The applicant, Phillip Harkins, is a British national who was born in 1978.

In 2000 Mr Harkins was indicted in Florida for first degree murder and attempted robbery with a firearm. He was arrested in the UK in 2003 and the US authorities sought his extradition. In a

Diplomatic Note issued on 3 June 2005 the US Embassy assured the UK Government that the death penalty would not be sought. In June 2006 the British Secretary of State ordered Mr Harkins' extradition. Mr Harkins then complained unsuccessfully before the British courts that, if extradited, he risked the death penalty or a sentence of life imprisonment without the possibility of parole. In 2007 the High Court found that there would be no risk of the death penalty if Mr Harkins were to be extradited and, in 2011, it found that a life sentence without the possibility of parole would not violate Article 3 (prohibition of inhuman or degrading treatment) of the European Convention on Human Rights.

In the meantime, in 2007, Mr Harkins had applied to the European Court of Human Rights for the first time (*Harkins and Edwards v. the United Kingdom*, application no. 9146/07). In January 2012, a Chamber of the Court found that Mr Harkins' extradition would not violate Article 3 of the European Convention. It rejected as inadmissible the complaint concerning the alleged risk of the death penalty, considering that the diplomatic assurances, provided by the US to the UK Government, were clear and sufficient to remove any risk of Mr Harkins being sentenced to death if extradited. The Court also found that the imposition of a mandatory life sentence in the US would not violate Article 3. He had been over 18 at the time of his alleged crime, had not been diagnosed with a psychiatric disorder, and the killing had been part of an armed robbery attempt – an aggravating factor. Further, he had not yet been convicted, and – even if he were convicted and given a mandatory life sentence – keeping him in prison might continue to be justified throughout his life time. If that were not the case, the Governor of Florida and the Florida Board of Executive Clemency could, in principle, decide to reduce his sentence.

Mr Harkins was not extradited and following the ECtHR judgments in the cases of *Vinter and Others v. the United Kingdom* (nos. 66069/09, 130/10 and 3896/10, Grand Chamber) of July 2013 and *Trabelsi v. Belgium* (no. 140/10) of September 2014 he brought new proceedings before the domestic courts in which he argued that developments in the Court's Article 3 case-law on life sentences without the possibility of parole were such as to require the re-opening of the proceedings. However, in November 2014, the High Court refused to re-open the proceedings, finding that the ECtHR judgments in *Vinter and Others v. the United Kingdom* and *Trabelsi v. Belgium* had not recast Convention law to such an extent that his extradition would result in a violation of Article 3 of the Convention.

On 11 November 2014 Mr Harkins applied to the European Court a second time. Relying on Articles 3 (prohibition of inhuman or degrading treatment) and 6 (right to a fair trial) of the Convention, Mr Harkins complained about his extradition to the USA, arguing that if convicted in Florida he would face a mandatory sentence of life in prison without the possibility of parole.

### Procedure and composition of the Court

The application was lodged with the European Court of Human Rights on 11 November 2014.

On 14 November 2014 the European Court of Human Rights granted an interim measure under Rule 39 of its Rules of Court, which indicated to the UK Government that it should stay Mr Harkins' extradition.

The case was communicated to the UK Government, with questions from the Court, on 31 March 2015. At the same time, the Chamber decided to grant the case priority under Rule 41 of the Rules of the Court.

On 5 July 2016 the Chamber to which the case had been allocated relinquished jurisdiction in favour of the Grand Chamber. A Grand Chamber hearing was held in the case on 11 January 2017.

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

Guido **Raimondi** (Italy), *President*,  
 Angelika **Nußberger** (Germany),  
 Ganna **Yudkivska** (Ukraine),  
 Helena **Jäderblom** (Sweden),  
 Robert **Spano** (Iceland),  
 Mirjana **Lazarova Trajkovska** (“the Former Yugoslav Republic of Macedonia”),  
 Luis **López Guerra** (Spain),  
 Ledi **Bianku** (Albania),  
 Işıl **Karakaş** (Turkey),  
 Kristina **Pardalos** (San Marino),  
 Julia **Laffranque** (Estonia),  
 André **Potocki** (France),  
 Aleš **Pejchal** (the Czech Republic),  
 Carlo **Ranzoni** (Liechtenstein),  
 Pauline **Koskelo** (Finland),  
 Tim **Eicke** (the United Kingdom),  
 Lətif **Hüseynov** (Azerbaijan),

and also Lawrence **Early**, *Jurisconsult*.

Decision of the Court

### **Article 3 (prohibition of inhuman or degrading treatment)**

First, the Court recalled that Article 35 § 2 (b) of the Convention prevented it from considering an application which was substantially the same as a matter it had already decided. An application would generally fall foul of this admissibility criterion where an applicant had brought a previous application which related essentially to the same person, the same facts and raised the same complaints, unless he advanced new information not previously considered by the Court.

In the case at hand, the Court noted that Mr Harkins’ complaints under Article 3 were substantially the same as those raised in his previous application (*Harkins and Edwards v. the UK*) lodged in 2007. Furthermore, the facts upon which his original complaint had been based had not changed. He is facing the same charges in respect of the same criminal offences, and both the sentencing regime and clemency process in Florida are the same today as they were in 2012.

As to whether the development of the Court’s case-law following its judgment in Mr Harkins’ first application constituted “relevant new information” for the purposes of Article 35 § 2 (b), the Court declined to expand this notion beyond its ordinary meaning, i.e. new factual information (and not new legal argument). In this regard, the Court has adopted a rigorous approach in applying those admissibility criteria whose object and purpose, like that of the criterion in Article 35 § 2 (b), is to serve the interests of finality and legal certainty and to mark out the limits of its competence. The Court’s case-law is constantly evolving and, if jurisprudential developments were to permit unsuccessful applicants to reintroduce their complaints, final judgments would continually be called into question by the lodging of a fresh application, which would undermine the credibility and authority of those judgments. Moreover, the principle of legal certainty would not apply equally to both applicant and Government parties, as only an applicant, on the basis of subsequent jurisprudential developments, would effectively be permitted to “reopen” previously examined cases.

Accordingly, the Court rejected, by a majority, Mr Harkins’ complaints under Article 3 as inadmissible on the basis that they were “substantially the same” as the complaints already examined by the Court on 17 January 2012 in *Harkins and Edwards*, and its subsequent case-law did not constitute “relevant new information” for the purposes of Article 35 § 2 (b) of the Convention.

**Article 6 (right to a fair trial)**

The Court concluded that the facts of the case did not disclose any risk that Mr Harkins would suffer a flagrant denial of justice. Nor indeed had Mr Harkins himself suggested that the trial process in the USA would be unfair. The Court therefore declared, unanimously, Mr Harkins' complaint under Article 6 inadmissible as manifestly ill-founded.

**170. ECHR, *Belkacem v. Belgium*, no. 34367/14, Chamber decision of 20 July 2017 (Article 10, Freedom of expression- Incompatible as contrary to the spirit of the Convention).** The applicant, the leader and spokesperson of the organisation “Sharia4Belgium”, which was dissolved in 2012, unsuccessfully claimed that his right to freedom of expression had been violated. The Court observed that defending Sharia while calling for violence to establish it could be regarded as “hate speech”, and that each Contracting State was entitled to oppose political movements based on religious fundamentalism.

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**ECHR 253 (2017)  
20.07.2017**

**Press release issued by the Registrar**

In its **decision** in the case of **Belkacem v. Belgium** (application no. 34367/14) the European Court of Human Rights has unanimously declared the application inadmissible. The decision is final.

The case concerned the conviction of Mr Belkacem, the leader and spokesperson of the organisation “Sharia4Belgium”, which was dissolved in 2012, for incitement to discrimination, hatred and violence on account of remarks he made in YouTube videos concerning non-Muslim groups and Sharia.

The Court noted that in his remarks Mr Belkacem had called on viewers to overpower non-Muslims, teach them a lesson and fight them. The Court considered that the remarks in question had a markedly hateful content and that Mr Belkacem, through his recordings, had sought to stir up hatred, discrimination and violence towards all non-Muslims. In the Court’s view, such a general and vehement attack was incompatible with the values of tolerance, social peace and non-discrimination underlying the European Convention on Human Rights.

With reference to Mr Belkacem’s remarks concerning Sharia, the Court observed that it had previously ruled that defending Sharia while calling for violence to establish it could be regarded as “hate speech”, and that each Contracting State was entitled to oppose political movements based on religious fundamentalism.

The Court therefore rejected the application, finding that it was incompatible with the provisions of the Convention and that Mr Belkacem had attempted to deflect Article 10 of the Convention from its real purpose by using his right to freedom of expression for ends which were manifestly contrary to the spirit of the Convention.

**Principal facts**

The applicant, Fouad Belkacem, is a Belgian national who was born in 1982 and lives in Boom (Belgium). He was the leader and spokesperson of the organisation “Sharia4Belgium”, which was dissolved in 2012.

Mr Belkacem was prosecuted for various offences under the Law of 10 May 2007 on combating certain forms of discrimination, especially on account of remarks he had made and published on YouTube concerning the Belgian Defence Minister at the time and the deceased husband of a Belgian female politician. In the videos in question Mr Belkacem had called on viewers, among other things, to overpower non-Muslims, teach them a lesson and fight them. He also advocated jihad and Sharia. On 10 February 2012 the Antwerp Criminal Court sentenced Mr Belkacem to a two-year prison term and a fine of 550 euros (EUR). The applicant appealed. On 4 May 2012 the Antwerp Criminal Court confirmed the judgment but suspended enforcement of the custodial sentence for five years. Mr

Belkacem lodged an appeal. On 6 June 2013 the Antwerp Court of Appeal sentenced him to a suspended term of one year and six months' imprisonment and to a fine of EUR 550. The court specified that the offence of public incitement to discrimination, violence and hatred was clear simply from the description of the facts. Mr Belkacem lodged an appeal on points of law.

On 29 October 2013 the Court of Cassation dismissed the appeal. It found that Mr Belkacem had not simply expressed his views, but had unquestionably incited others to discrimination on the basis of faith and to discrimination, segregation, hatred or violence towards non-Muslims, and had done so knowingly and therefore intentionally.

### Complaints, procedure and composition of the Court

The application was lodged with the European Court of Human Rights on 29 April 2014.

Relying on Article 10 (freedom of expression) of the European Convention on Human Rights, Mr Belkacem argued that he had never intended to incite others to hatred, violence or discrimination but had simply sought to propagate his ideas and opinions. He maintained that his remarks had merely been a manifestation of his freedom of expression and religion and had not been apt to constitute a threat to public order.

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

Robert **Spano** (Iceland), *President*,  
 Julia **Laffranque** (Estonia),  
 Ledi **Bianku** (Albania),  
 Işıl **Karakaş** (Turkey),  
 Paul **Lemmens** (Belgium),  
 Jon Fridrik **Kjølbro** (Denmark),  
 Stéphanie **Mourou-Vikström** (Monaco), *Judges*,

and Stanley **Naismith**, *Section Registrar*.

### Decision of the Court

#### **Article 10 (freedom of expression)**

The Court noted at the outset that, while its case-law enshrined the overriding and essential nature of freedom of expression in a democratic society, it also laid down its limits by excluding certain statements from the protection of Article 10 of the Convention. In that connection the Court noted that Mr Belkacem had published a series of videos on the YouTube platform in which he called on viewers to overpower non-Muslims, teach them a lesson and fight them. The Court was in no doubt as to the markedly hateful nature of Mr Belkacem's views, and agreed with the domestic courts' finding that the applicant, through his recordings, had sought to stir up hatred, discrimination and violence towards all non-Muslims. In the Court's view, such a general and vehement attack was incompatible with the values of tolerance, social peace and non-discrimination underlying the Convention. With particular reference to Mr Belkacem's remarks concerning Sharia, the Court reiterated that it had ruled that the fact of defending Sharia while calling for violence to establish it could be regarded as "hate speech", and that each Contracting State was entitled to oppose political movements based on religious fundamentalism, for instance a movement that aimed to establish a political regime based on Sharia.

The Court went on to observe that the Belgian legislation as applied in the present case appeared to conform to the relevant provisions and recommendations of the Council of Europe and the European Union aimed at combating incitement to hatred, discrimination and violence.

Lastly, the Court considered that Mr Belkacem had attempted to deflect Article 10 of the Convention from its real purpose by using his right to freedom of expression for ends which were manifestly contrary to the spirit of the Convention. Accordingly, the Court held that, in accordance with Article 17 of the Convention, Mr Belkacem could not claim the protection of Article 10.

**The application was therefore incompatible *ratione materiae* with the provisions of the Convention (Article 35 §§ 3(a) and 4).**

**171. ECHR, *Khlebiak v. Ukraine*, no.2945/16, Chamber judgment of 25 July 2017 (Article 6-1, Right to a fair trial within a reasonable time- No violation, Article 5, Right to liberty and security- Inadmissible).** The applicant, a Ukrainian national who had been convicted of several offences by a court in the Luhansk Region in 2013, unsuccessfully claimed that his right to a fair trial had been violated, as the domestic courts were unable to examine his appeal against his conviction, because his case file was blocked in an area that was no longer under the Ukrainian Government's control.

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**ECHR 256 (2017)**  
**25.07.2017**

**Press release issued by the Registrar**

The case of **Khlebiak v. Ukraine** (application no. 2945/16) concerned the complaint by a man who had been convicted of several offences by a court in the Luhansk Region in 2013 that the domestic courts were unable to examine his appeal against his conviction, because his case file was blocked in an area that was no longer under the Ukrainian Government's control.

In today's **Chamber** judgment in the case, the European Court of Human Rights held, unanimously, that there had been:

**no violation of Article 6 § 1 (right to a fair trial within a reasonable time)** of the European Convention on Human Rights.

The Court came to the conclusion that the Ukrainian authorities had done all in their power, under the circumstances of the hostilities in Eastern Ukraine, to address Mr Khlebiak's situation. Notably, they had duly examined the possibility of restoring his case file.

**Principal facts**

The applicant, Oleksandr Khlebiak, is a Ukrainian national who was born in 1974 and lives in Nizhyn in the Chernihiv Region (Ukraine).

In April 2013 Mr Khlebiak was convicted by a court in the Luhansk Region of, among other things, banditry and armed robbery; he was sentenced to eight years and nine months' imprisonment. His appeal against this conviction was still pending when hostilities started in Eastern Ukraine in April 2014. He remained detained in Starobilsk remand prison, awaiting examination of his appeal, located in the part of the Luhansk Region controlled by the Ukrainian Government. However, his case file remained with the Court of Appeal, in Luhansk, which is not under Government control.

When the Court of Appeal was relocated to Sieverodonetsk, in the Government-controlled area, Mr Khlebiak complained about the delay in the examination of his appeal. He was told that the appeal court could not examine his case as his file was blocked in Luhansk. Mr Khlebiak asked the Parliamentary Commissioner or Human Rights for assistance, but was told that there was no possibility to obtain case files from the territory that was not controlled by the Government. His application to have the case file restored, lodged with a local court, was equally unsuccessful as the court concluded that no sufficient material concerning his case was available in the Government controlled territory. He also applied for release on several occasions between May 2015 and February 2016, without success. He was nevertheless released in March 2016 as he benefitted from a legislative reform which had in the meantime been adopted permitting release of individuals who have served at

least half of their sentence while in detention on remand. According to most recent information, Mr Khlebig's appeal against his conviction is currently still pending before the Court of Appeal.

### Complaints, procedure and composition of the Court

Relying on Article 5 §§ 1 and 5 (right to liberty and security/right to compensation), Mr Khlebig complained about his detention from April 2013 to March 2016. Further relying on Article 6 § 1 (right to a fair trial within a reasonable time) and Article 2 of Protocol No. 7 (right of appeal in criminal matters), he also complained about the Ukrainian authorities' failure to enact legislation allowing for his appeal to be effectively examined.

The application was lodged with the European Court of Human Rights on 18 December 2015.

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

Vincent A. **De Gaetano** (Malta), *President*,  
Ganna **Yudkivska** (Ukraine),  
Faris **Vehabović** (Bosnia and Herzegovina),  
Egidijus **Kūris** (Lithuania),  
Carlo **Ranzoni** (Liechtenstein),  
Marko **Bošnjak** (Slovenia),  
Péter **Paczolay** (Hungary),

and also Andrea **Tamietti**, *Deputy Section Registrar*.

### Decision of the Court

#### **Article 6 § 1 and Article 2 of Protocol No. 7**

The Court observed that Mr Khlebig, as was uncontested, had been able to lodge an appeal against his conviction, which had been accepted for examination on the merits. It was also uncontested that the essential reason why his case had so far not been examined by the appeal court was that his case file was no longer available as a result of the hostilities in the areas the Ukrainian Government did not control.

Regarding the question of whether the Ukrainian authorities had taken all the measures available to them in practice, under the circumstances, to render effective Mr Khlebig's rights guaranteed by Article 6, the Court addressed three main possible avenues which, according to Mr Khlebig, were open to the authorities to proceed with the examination of his appeal.

As to the possibility of requesting the assistance of the Parliamentary Commissioner for Human Rights in obtaining the case file, the Court noted in particular that Mr Khlebig had himself asked for such help, which the Commissioner had been unable to provide. Account was also to be taken of the fact that hostilities in the area had been continuing throughout the period at issue and no lasting ceasefire had so far been established.

As to the second suggestion, namely the possibility of conducting a new investigation and trial, the Court could see no reason to doubt the domestic court's conclusion, reached in the case file restoration proceedings, that no relevant material concerning the case was available to it, given that both the offence of which Mr Khlebig had been convicted and his trial had taken place in the areas of the Luhansk Region currently not under the Government's control. It had therefore not been shown that a new investigation and trial would be effective in practice.

As to the option of reviewing Mr Khlebig's conviction and sentence based on the available material, the Court noted that under the legislation in force the standard of review would entail an examination

of questions of both law and fact, thus requiring access to the evidence collected in the case file. Given that no such evidence was currently available to the authorities and that it could not be ruled out that they might come into possession of such evidence in the future, an examination of the entirety of the issues before the evidence was available might prejudice the possibility of a more informed review in the future.

Having regard to the fact that under its case-law the question of whether the applicant was in detention was a relevant factor in determining the reasonableness of the length of criminal cases, the Court attached importance to the fact that the Ukrainian courts had adopted the decision to release Mr Khlebig.

The Court concluded that the Ukrainian authorities had done all in their power under the circumstances to address Mr Khlebig's situation.

The Court also welcomed other initiatives the Ukrainian authorities had taken, in particular their requests for assistance of the International Committee of the Red Cross in facilitating the recovery of files located in the territory not under their control and a legislative proposal intended to facilitate examination of appeals in situations where part of a case file remained unavailable.

In the light of these considerations, the Court concluded that there had been no violation of Article 6.

The Court did not consider it necessary to examine separately Mr Khlebig's complaint under Article 2 of Protocol No. 7, finding that it concerned the same facts and raised the same issues as those examined under Article 6.

#### **Article 5**

The Court declared inadmissible for being manifestly ill-founded Mr Khlebig's complaints under Article 5. It noted in particular that he had been detained following conviction by a competent court and that he had not shown that as a result of the delay in the examination of his appeal he had spent more time in detention than he would have under normal circumstances.

**172. ECHR, *Bărbulescu v. Romania*, no. 61496/08, Grand chamber judgment of 5 September 2017 (Article 8, Right to respect for private and family life- Violation).**

The applicant, a Romanian national, claimed that his employer's decision to terminate his contract after monitoring his electronic communications and accessing their contents was based on a breach of his privacy and that domestic courts failed to protect his right to respect for his private life and correspondence. The Court in its judgment particularly referred to international and European standards of data protection, such as International Labour Office Code of Practice on the Protection of Workers' Personal Data and Recommendation CM/Rec (2015)5 of the Committee of Ministers of the Council of Europe.

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**ECHR 268 (2017)  
05.09.2017**

**Press release issued by the Registrar**

The case of **Bărbulescu v. Romania** (application no. 61496/08) concerned the decision of a private company to dismiss an employee after monitoring his electronic communications and accessing their contents, and the alleged failure of the domestic courts to protect his right to respect for his private life and correspondence.

In today's **Grand Chamber** judgment<sup>1</sup> in the case, the European Court of Human Rights held, by eleven votes to six, that there had been:

**a violation of Article 8 (right to respect for private and family life, the home and correspondence)** of the European Convention on Human Rights.

The Court concluded that the national authorities had not adequately protected Mr Bărbulescu's right to respect for his private life and correspondence. They had consequently failed to strike a fair balance between the interests at stake.

In particular, the national courts had failed to determine whether Mr Bărbulescu had received prior notice from his employer of the possibility that his communications might be monitored; nor had they had regard either to the fact that he had not been informed of the nature or the extent of the monitoring, or the degree of intrusion into his private life and correspondence. In addition, the national courts had failed to determine, firstly, the specific reasons justifying the introduction of the monitoring measures; secondly, whether the employer could have used measures entailing less intrusion into Mr Bărbulescu's private life and correspondence; and thirdly, whether the communications might have been accessed without his knowledge.

**Principal facts**

The applicant, Bogdan Mihai Bărbulescu, is a Romanian national who was born in 1979 and lives in Bucharest.

From 1 August 2004 until 6 August 2007 Mr Bărbulescu was employed by a private company as an engineer in charge of sales. At his employers' request, he created a Yahoo Messenger account for the purpose of responding to clients' enquiries.

On 3 July 2007 the company circulated an information notice among its employees which stated that one employee had been dismissed on disciplinary grounds after she had privately used the internet, the telephone and the photocopier.

On 13 July 2007 Mr Bărbulescu was summoned by his employer to give an explanation. He was informed that his Yahoo Messenger communications had been monitored and that there was evidence that he had used the internet for personal purposes.

Mr Bărbulescu replied in writing that he had only used the service for professional purposes. He was then presented with a transcript of 45 pages of his communications from 5 to 12 July 2007, consisting of messages he had exchanged with his brother and his fiancée relating to personal matters, some of the messages being of an intimate nature. On 1 August 2007 the employer terminated Mr Bărbulescu's employment contract for breach of the company's internal regulations that prohibited the use of company resources for personal purposes.

Mr Bărbulescu challenged his employer's decision before the courts, complaining that the decision to terminate his contract was null and void as his employer had violated his right to correspondence in accessing his communications in breach of the Constitution and Criminal Code. His complaint was rejected by the Bucharest County Court in December 2007, on the grounds, in particular, that the employer had complied with the dismissal proceedings provided for by the Labour Code; that employers were entitled to set rules for the use of the internet, which was a tool made available to employees for professional use; and that Mr Bărbulescu had been duly informed of the company's regulations. The County Court noted that shortly before Mr Bărbulescu's disciplinary sanction, another employee had been dismissed for using the internet, the telephone and the photocopier for personal purposes.

Mr Bărbulescu appealed, contending that the court had not struck a fair balance between the interests at stake. In a final decision on 17 June 2008 the Court of Appeal dismissed his appeal. It essentially confirmed the lower court's findings. Referring to European Union Directive 95/46/EC on data protection, it held that the employer's conduct, after having warned Mr Bărbulescu and his colleagues that company resources should not be used for personal purposes, had been reasonable and that the monitoring of Mr Bărbulescu's communications had been the only method of establishing whether there had been a disciplinary breach.

### Complaints, procedure and composition of the Court

Relying in particular on Article 8 (right to respect for private and family life, the home and correspondence) of the European Convention on Human Rights, Mr Bărbulescu complained that his employer's decision to terminate his contract after monitoring his electronic communications and accessing their contents was based on a breach of his privacy and that the domestic courts failed to protect his right to respect for his private life and correspondence.

The application was lodged with the European Court of Human Rights on 15 December 2008.

In its Chamber judgment of 12 January 2016, the European Court of Human Rights held, by six votes to one, that there had been no violation of Article 8 of the Convention, finding that the domestic courts had struck a fair balance between Mr Bărbulescu's right to respect for his private life and correspondence under Article 8 and the interests of his employer. The Court noted, in particular, that Mr Bărbulescu's private life and correspondence had been engaged. However, his employer's monitoring of his communications had been reasonable in the context of disciplinary proceedings.

On 6 June 2016 the case was referred to the Grand Chamber at Mr Bărbulescu's request.

The Government of France and the European Trade Union Confederation (ETUC) were granted leave to intervene in the written proceedings as third parties.

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

Guido **Raimondi** (Italy), *President*,  
 Angelika **Nußberger** (Germany),  
 Mirjana **Lazarova Trajkovska** (“The former Yugoslav Republic of Macedonia”),  
 Luis **López Guerra** (Spain), *ad hoc judge*  
 Ledi **Bianku** (Albania),  
 Işıl **Karakaş** (Turkey),  
 Nebojša **Vučinić** (Montenegro),  
 André **Potocki** (France),  
 Paul **Lemmens** (Belgium),  
 Dmitry **Dedov** (Russia),  
 Jon Fridrik **Kjølbro** (Denmark),  
 Mārtiņš **Mits** (Latvia),  
 Armen **Harutyunyan** (Armenia),  
 Stéphanie **Mourou-Vikström** (Monaco),  
 Georges **Ravarani** (Luxembourg),  
 Marko **Bošnjak** (Slovenia),  
 Tim **Eicke** (the United Kingdom),

and also Søren **Prebensen**, *Deputy Grand Chamber Registrar*.

Decision of the Court

### Article 8

The Court confirmed that Article 8 was applicable in Mr Bărbulescu’s case, concluding that his communications in the workplace had been covered by the concepts of “private life” and “correspondence”. It noted in particular that, although it was questionable whether Mr Bărbulescu could have had a reasonable expectation of privacy in view of his employer’s restrictive regulations on internet use, of which he had been informed, an employer’s instructions could not reduce private social life in the workplace to zero. The right to respect for private life and for the privacy of correspondence continued to exist, even if these might be restricted in so far as necessary.

While the measure complained of, namely the monitoring of Mr Bărbulescu’s communications which resulted in his dismissal, had been taken by a private company, it had been accepted by the national courts. The Court therefore considered that the complaint was to be examined from the standpoint of the State’s positive obligations. The national authorities had been required to carry out a balancing exercise between the competing interests at stake, namely Mr Bărbulescu’s right to respect for his private life, on the one hand, and his employer’s right to take measures in order to ensure the smooth running of the company, on the other.

As to the resulting question of whether the national authorities had struck a fair balance between those interests, the Court first observed that the national courts had expressly referred to Mr Bărbulescu’s right to respect for his private life and to the applicable legal principles. Notably the Court of Appeal had made reference to the relevant European Union Directive<sup>2</sup> and the principles set forth in it, namely necessity, purpose specification, transparency, legitimacy, proportionality and security. The national courts had also examined whether the disciplinary proceedings had been conducted in an adversarial manner and whether Mr Bărbulescu had been given the opportunity to put forward his arguments.

However, the national courts had omitted to determine whether Mr Bărbulescu had been notified in advance of the possibility that his employer might introduce monitoring measures, and of the nature of such measures. The County Court had simply observed that employees’ attention had been drawn to

the fact that, shortly before Mr Bărbulescu's disciplinary sanction, another employee had been dismissed for using the internet, the telephone and the photocopier for personal purposes. The Court of Appeal had found that he had been warned that he should not use company resources for personal purposes.

The Court considered, following international and European standards<sup>3</sup>, that to qualify as prior notice, the warning from an employer had to be given before the monitoring was initiated, especially where it entailed accessing the contents of employees' communications. The Court concluded, from the material in the case file, that Mr Bărbulescu had not been informed in advance of the extent and nature of his employer's monitoring, or the possibility that the employer might have access to the actual contents of his messages.

As to the scope of the monitoring and the degree of intrusion into Mr Bărbulescu's privacy, this question had not been examined by either of the national courts, even though the employer had recorded all communications of Mr Bărbulescu during the monitoring period in real time and had printed out their contents.

Nor had the national courts carried out a sufficient assessment of whether there had been legitimate reasons to justify monitoring Mr Bărbulescu's communications. The County Court had referred, in particular, to the need to avoid the company's IT systems being damaged or liability being incurred by the company in the event of illegal activities online. However, these examples could only be seen as theoretical, since there was no suggestion that Mr Bărbulescu had actually exposed the company to any of those risks.

Furthermore, neither of the national courts had sufficiently examined whether the aim pursued by the employer could have been achieved by less intrusive methods than accessing the contents of Mr Bărbulescu's communications. Moreover, neither court had considered the seriousness of the consequences of the monitoring and the subsequent disciplinary proceedings, namely the fact that – being dismissed – he had received the most severe disciplinary sanction. Finally, the courts had not established at what point during the disciplinary proceedings the employer had accessed the relevant content, in particular whether he had accessed the content at the time he summoned Mr Bărbulescu to give an explanation for his use of company resources.

Having regard to those considerations, the Court concluded that the national authorities had not adequately protected Mr Bărbulescu's right to respect for his private life and correspondence and that they had consequently failed to strike a fair balance between the interests at stake. There had therefore been a violation of Article 8.

#### **Just satisfaction (Article 41)**

The Court held that the finding of a violation constituted in itself sufficient just satisfaction for the non-pecuniary damage sustained by Mr Bărbulescu.

#### **Separate opinions**

Judge Karakaş expressed a partly dissenting opinion. Judges Raimondi, Dedov, Kjølbros, Mits, Mourou-Vikström and Eicke expressed a joint dissenting opinion. These opinions are annexed to the judgment.

- 173. ECHR, *Falkauskienė v. Lithuania*, no. 42307/09, Chamber decision of 21 September 2017 (Article 1 of Protocol No. 1, Protection of property- Inadmissible; Article 6-1, Right of access to court- Inadmissible).** The applicant, a Lithuanian national, complained that it was impossible for her to recover money that she had deposited with a bank operating in Lithuania in 1991, following the country's independence in 1990, violating thus her right to protection of property. Moreover, she claimed that her right of access to court was violated by the excessive court fees in the civil proceedings.
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**ECHR 286 (2017)**  
**21.09.2017**

**Press release issued by the Registrar**

The case **Falkauskienė v. Lithuania** (application no. 42307/09) concerned a dispute about a foreign currency deposit following Lithuania's independence in 1990. Ms Falkauskienė, the applicant, notably complained that it was impossible for her to recover an inheritance of 15,800 US dollars which she had deposited with a bank operating in Lithuania in 1991.

The dispute between Ms Falkauskienė and the Lithuanian State had principally turned on whether the deposit had been made with a Soviet or Lithuanian bank. Ms Falkauskienė considered that the new regulations adopted following Lithuania's independence to restructure banks clearly stated that Soviet banks operating in Lithuania would come under Lithuanian jurisdiction and that Lithuania had therefore assumed an obligation to guarantee deposits. However, the domestic courts – at three levels – had concluded that those regulations had not in fact been implemented and the bank where she had deposited her inheritance had not been restructured into an independent Lithuanian bank. In their view therefore the Lithuanian State had never assumed any obligation to return Ms Falkauskienė's deposit as it had not been transferred to a Lithuanian bank.

The Court found that there was no evidence to show that the domestic authorities' assessment, which was based on a thorough analysis of the documents available, had been arbitrary. Furthermore, the Lithuanian authorities had consistently stated that the return of deposits such as Ms Falkauskienė's was dependent on negotiations with Russia – which, to date, have not been successful. Ms Falkauskienė has in any case been partially compensated, in line with Lithuania's undertakings under domestic law with regard to lost deposits.

Therefore, in its decision in the case today the European Court of Human Rights has declared Ms Falkauskienė's complaint under Article 1 of Protocol No. 1 (protection of property) inadmissible. It also declared inadmissible Ms Falkauskienė's complaint under Article 6 § 1 (access to court) about excessive court fees in the civil proceedings concerning the recovery of her deposit because she had failed to exhaust domestic remedies.

The decision is final.

**Principal facts**

The applicant, Aldona Falkauskienė, is a Lithuanian national who was born in 1929 and lives in Girkalniai, Klaipėda Region (Lithuania).

Following Lithuania's independence in 1990, various regulations were adopted providing that Soviet banks operating in Lithuania were to be restructured and transferred to Lithuania's jurisdiction.

In May 1991 Ms Falkauskienė inherited 15,800 US dollars from the USA. In September 1991 she requested to open a bank account in US dollars at the Lithuanian Bank of Foreign Economic Affairs. This name was used to refer both to the Lithuanian branch of the Bank of Foreign Economic Affairs of the USSR and to an independent Lithuanian bank which was to be established following the restructuring under the new regulations. Following Ms Falkauskienė's request, an account was opened and a record made of her inheritance. However, when asking to withdraw the entire amount in 1992, she was informed that the bank did not have sufficient funds and was only given USD 2,000. She was subsequently provided with USD 1,400 compensation in line with Government regulations on lost deposits.

Ms Falkauskienė subsequently wrote to various State institutions and officials to try to recover the remainder of her deposit. She was told that the Lithuanian and Russian authorities had agreed on a procedure for returning foreign currency deposits but that negotiations were still pending.

In 2006 she also brought a civil claim against the Lithuanian State demanding the return of her deposit, plus interest. However, three instances of domestic courts concluded – ultimately at the level of the Supreme Court in April 2009 – that the Lithuanian branch of the Bank of Foreign Economic Affairs of the former USSR had not been restructured into an independent Lithuanian Bank of Foreign Economic Affairs. The courts established that the Lithuanian Bank of Foreign Economic Affairs had not been registered with the central bank, as required by domestic law, that the Soviet bank had not transferred any of its assets to the Lithuanian banks or authorities, that the Soviet bank had acknowledged its debt to individuals who had deposited their funds with its Lithuanian branch, and that the negotiations between the Lithuanian and Russian authorities concerning the return of all such deposits were still pending. Therefore, since the Lithuanian State had not taken over the applicant's deposit, it could not be obliged to return it to her. The courts also found that Lithuania had assumed an obligation only to provide partial compensation for lost deposits, and that it had fulfilled that obligation in as far as it concerned Ms Falkauskienė.

#### Complaints, procedure and composition of the Court

Relying on Article 1 of Protocol No. 1 (protection of property), Ms Falkauskienė complained that she had been unable to recover her foreign currency deposit, alleging in particular that the new regulations adopted to restructure banks clearly stated that Soviet banks operating in Lithuania would come under Lithuanian jurisdiction and that Lithuania had therefore assumed an obligation to guarantee deposits. She also complained under Article 6 § 1 (right of access to court) that in the civil proceedings concerning the recovery of her deposit she had been obliged to pay excessive court fees.

The application was lodged with the European Court of Human Rights on 14 July 2009.

The decision was given by a Chamber of seven, composed as follows:

Ganna **Yudkivska** (Ukraine), *President*,  
Paulo **Pinto de Albuquerque** (Portugal),  
Egidijus **Kūris** (Lithuania),  
Iulia **Motoc** (Romania),  
Carlo **Ranzoni** (Liechtenstein),  
Marko **Bošnjak** (Slovenia),  
Péter **Paczolay** (Hungary), *Judges*,

and also Marialena **Tsirli**, *Section Registrar*.

## Decision of the Court

### **Article 1 of Protocol No. 1 (protection of property)**

First, the Court found that the dispute between Ms Falkauskienė and the Lithuanian State had principally turned on whether the deposit had been made with a Soviet or Lithuanian bank.

The domestic courts – at three levels – had concluded that the bank where she had deposited her inheritance had not been restructured into an independent Lithuanian bank. Therefore, in their view, the Lithuanian State had never assumed any obligation to return Ms Falkauskienė's deposit as it had not been transferred to a Lithuanian bank.

The Court recalled that it could not question that assessment of Ms Falkauskienė's case unless there was clear evidence of arbitrariness. Although there had been some confusion as to which bank had actually been operating, there was no evidence to show that the domestic authorities' assessment had been arbitrary; it had been based on a thorough analysis of the documents available. Furthermore, the Lithuanian authorities had consistently stated that the return of deposits such as Ms Falkauskienė's was dependent on negotiations with Russia – which, to date, have not been successful. Moreover, Lithuania, which had been occupied and annexed by the Soviet Union, was not its successor and had not accepted any obligations as concerned currency funds deposited in Soviet banks. Lastly, Ms Falkauskienė has been partially compensated, in line with Lithuania's undertakings under domestic law with regard to lost deposits.

Therefore, the Court declared, by a majority, that Ms Falkauskienė's complaint under Article 1 of Protocol No. 1 was inadmissible.

### **Article 6 § 1**

The Court found that the only time that Ms Falkauskienė had submitted a properly reasoned request for exemption from court fees on the grounds of her financial situation had been at last instance, before the Supreme Court. Her request had been granted and she had been ordered to pay relatively small fee, approximately 29 Euros. Therefore a domestic remedy was available and effective. However, she had failed to use that remedy before the first and appellate instances. As a consequence, the Court declared, unanimously, her complaint under Article 6 § 1 inadmissible for failure to exhaust domestic remedies.

**174. ECHR, *N.D. and N.T. v. Spain*, nos. 8675/15 and 8697/15, Chamber judgment of 3 October 2017 (Article 4 of Protocol No. 4, Prohibition of collective expulsion of aliens- Violation; Article 13, Right to an effective remedy, taken together with Article 4 of Protocol No. 4- Violation).** The case concerned the immediate return to Morocco of two sub-Saharan migrants who had attempted to enter Spanish territory illegally at the Melilla enclave on the North-African coast without any previous administrative or judicial decision. The Court concluded that it amounted to collective expulsion with a clear link to the fact that they were prevented from having access to a remedy before the removal.

**ECHR 291 (2017)**

**03.10.2017**

**Press release issued by the Registrar**

In today's **Chamber** judgment in the case of **N.D. and N.T. v. Spain** (applications nos. 8675/15 and 8697/15) the European Court of Human Rights held, unanimously, that there had been:

**a violation of Article 4 of Protocol No. 4 (prohibition of collective expulsions of aliens)** to the European Convention on Human Rights, and

**a violation of Article 13 (right to an effective remedy) taken together with Article 4 of Protocol No. 4.**

The case concerned the immediate return to Morocco of sub-Saharan migrants who had attempted on 13 August 2014 to enter Spanish territory illegally by scaling the barriers which surround the Melilla enclave on the North-African coast.

The Court noted that N.D. and N.T. had been expelled and sent back to Morocco against their wishes and that the removal measures were taken in the absence of any prior administrative or judicial decision. At no point were N.D. and N.T. subjected to any identification procedure by the Spanish authorities. The Court concluded that, in those circumstances, the measures were indeed collective in nature.

The applicants' version of the attempt to scale the barriers towards Melilla was corroborated by numerous statements, gathered by various witnesses and journalists as well as by the UN High Commissioner for Refugees or by the Human Rights Commissioner. Lastly, the Court noted the existence of a clear link between the collective expulsion to which N.D. and N.T. were subjected at the Melilla border and the fact that they were effectively prevented from having access to a remedy that would have enabled them to submit their complaint to a competent authority and to obtain a thorough and rigorous assessment of their requests before their removal.

**Principal facts**

The applicants, N.D. and N.T., are, respectively, Malian and Ivorian nationals who were born in 1986 and 1985. N.D. arrived in Morocco in March 2013 and stayed for about nine months in the makeshift camp on Gurugu Mountain, near the border crossing into Melilla, a Spanish enclave situated on the North-African coast. N.T. arrived in Morocco at the end of 2012 and also stayed in this camp.

On 13 August 2014 N.D. and N.T. left the camp and attempted to enter Spain with a group of sub-Saharan migrants via the Melilla border crossing. This border crossing is made up of three enclosures, namely two six-metre-high external barriers and another three-metre-high internal barrier. N.D., N.T.

and other migrants scaled the first barrier. They claimed that the Moroccan authorities threw stones at them. N.D. succeeded in climbing to the top of the third barrier. N.T. said that he managed to cross the first two barriers. N.T. climbed down at about 2 p.m., assisted by the Spanish police, and N.D. at around 3 p.m.

They were immediately arrested by members of *Guardia Civil*, handcuffed and returned to Morocco. At no point were their identities checked. They did not have an opportunity to explain their personal circumstances or to receive assistance from lawyers, interpreters or medical personnel. They were subsequently transferred to the Nador police station, and then to Fez, more than 300 km from Melilla, in the company of 75 to 80 other migrants who had attempted to enter Melilla on the same date. Videos of the events of 13 August were made by witnesses and journalists, and those videos were submitted to the Court by the applicants. Non-governmental organisations subsequently lodged a complaint and called for the opening of an investigation.

Later, on 9 December 2014 and 23 October 2014 respectively, N.D. and N.T. succeeded in entering Spanish territory by the Melilla border crossing. Orders for deportation were issued against both of them. N.D. was returned to Mali on 31 March 2015. An order for N.T.'s deportation was issued on 7 November 2014 and his current situation is unknown.

#### Complaints, procedure and composition of the Court

Relying on Article 4 of Protocol No. 4 to the Convention (prohibition of collective expulsions of aliens), the applicants claimed that they had been subjected to a collective expulsion without an individual assessment of their situation, with no basis in law and without the provision of any legal advice.

Relying on Article 13 of the Convention (right to an effective remedy) taken together with Article 4 of Protocol No. 4, the applicants complained that it had been impossible to have their identity established, to put forward their individual situations, to challenge before the Spanish authorities their return to Morocco and to have the risk of ill-treatment that they ran in that State taken into consideration.

The application was lodged with the European Court of Human Rights on 12 February 2015. The Council of Europe Commissioner for Human Rights exercised his right to intervene in the proceedings and submitted written comments. Written observations were received from the Office of the United Nations High Commissioner for Refugees (UNHCR), the UN High Commissioner for Human Rights (UNOHCHR), the Spanish Commission for Assistance to Refugees (CEAR) and, acting collectively, from the Centre for Advice on Individual Rights in Europe (the AIRE Centre), Amnesty International (AI), the European Council on Refugees and Exiles (ECRE) and the International Commission of Jurists (ICJ), all of which had been given leave to intervene in the written proceedings by the President of the Chamber.

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

Branko **Lubarda** (Serbia), *President*,  
 Luis **López Guerra** (Spain),  
 Helen **Keller** (Switzerland),  
 Dmitry **Dedov** (Russia),  
 Pere **Pastor Vilanova** (Andorra),  
 Alena **Poláčková** (Slovakia),  
 Georgios A. **Serghides** (Cyprus),

and also Fatoş **Aracı**, *Deputy Section Registrar*.

## Decision of the Court

### **Article 1 – Territorial application**

The Government considered that the application was based on events which occurred outside the jurisdiction of Spain. The applicants had not succeeded in getting past the protective structures at the Melilla border crossing and had not therefore entered Spanish territory. The police had had no choice but to prevent them being able to enter Spanish territory.

The Court noted that, in the Government's view, the events had occurred outside the jurisdiction of Spain, in that the applicants had not succeeded in entering Spanish territory. The Court considered that it was unnecessary to establish whether or not the border crossing erected between Morocco and Spain was located in Spain. It reiterated that, where there was control over another, this was *de jure* control exercised by the State over the individuals concerned. In the Court's opinion, from the moment that the applicants climbed down from the barriers, they had been under the continuous and exclusive control of the Spanish authorities. For the Court, there could be no doubt that the facts of the present case fell within the jurisdiction of Spain, within the meaning of Article 1 of the Convention.

### **Objections raised by the Government**

The Government considered that the applicants could not claim to be "victims" of the events complained of by them. The applicants had claimed, without official identity documents in support of their statement, that they had participated in the assault on the Melilla border crossing at dawn on 13 August 2014 and that they recognised themselves on the video recordings submitted by them. The Government were of the opinion that, even supposing that the persons visible on the videos were the applicants, they had lost victim status in that they had succeeded in entering Spanish territory unlawfully and deportation orders had been issued against them. Furthermore, neither of the two applicants has submitted a request for international protection to the Spanish authorities before applying to the Court.

The Court confirmed that the applicants could claim to be victims. They had given a coherent account of the circumstances, their countries of origin and the difficulties that had led them to the makeshift camp on Mount Gurugu, and of their participation with other migrants in the attempt to scale the barriers surrounding the Melilla border crossing on 13 August 2014, with the aim of entering Spanish territory. In support of their statements, the applicants had submitted video stills that appeared credible. Furthermore, the Government did not deny the existence of summary expulsions, and shortly after the events in question had amended the Institutional Act on the rights and freedoms of foreign nationals.

Lastly, the Court dismissed the Government's objection of non-exhaustion of domestic remedies, to the effect that the applicants had not challenged the deportation orders against them before the administrative proceedings courts, and that only the second applicant had requested asylum. Concerning as it did deportation orders issued after the events complained of, this objection of non-exhaustion had to be rejected.

### **Article 4 of Protocol No. 4**

The Court observed that it was undisputed that N.D. and N.T., who were under the exclusive and continuous control of the Spanish authorities, had been expelled and sent back to Morocco against their wishes. This clearly amounted to "expulsion" for the purposes of Article 4 of Protocol No. 4.

The Court noted that the removal measures had been taken in the absence of any prior administrative or judicial decision. At no point were N.D. and N.T. subjected to any procedure. The issue of sufficient safeguards did not even arise in this case, as there had been no assessment of each individual situation. No identification procedure had been carried out by the Spanish authorities in respect of either applicant. The Court concluded that, in those circumstances, there was no doubt that these were indeed collective expulsions.

The Court concluded that the removal of N.D. and N.T. had been of a collective nature, in breach of Article 4 of Protocol No. 4 to the Convention and that, accordingly, there had been a violation of that provision.

#### **Article 13 taken together with Article 4 of Protocol No. 4**

The Court attached greater weight to the applicants' version, in that it was corroborated by a very large number of witness statements gathered by, among others, the UN High Commissioner for Refugees and the Human Rights Commissioner. The Court had already noted under Article 4 of Protocol No. 4 that the applicants were immediately expelled by the authorities, and that they had no access to interpreters or to legal assistance, for the purpose of informing them of the relevant provisions of asylum law or the procedures available to them to challenge their expulsion. The Court noted the existence of a clear link between the collective expulsion to which N.D. and N.T. were subjected at the Melilla border and the fact that they were effectively prevented from having access to any domestic remedy meeting the requirements of Article 13.

In the light of these circumstances and of the immediate nature of their expulsion, the Court considered that the applicants had been deprived of any remedy that would have enabled them to submit their complaint to a competent authority and to obtain a thorough and rigorous assessment of their requests prior to their expulsion.

For these reasons, the Court concluded that there had been a violation of Article 13 of the Convention taken together with Article 4 of Protocol No. 4 to the Convention.

#### **Just satisfaction (Article 41)**

The Court held that Spain was to pay each of the applicants 5,000 euros (EUR) in respect of non-pecuniary damage.

#### **Separate opinion**

Judge Dedov expressed a separate opinion, which is annexed to the judgment.

**175. ECHR, *Burmych and Others v. Ukraine*, nos. 46852/13 et al., Grand Chamber judgment of 12 October 2017 (Article 6-1, Right to a fair hearing within a reasonable time- Violation; Article 13, Right to an effective remedy- Violation; Article 1 of Protocol No. 1, Protection of property- Violation; Article 37-1, Striking out applications).** The Court found that the present cases were part and parcel of the execution procedure set out in the *Ivanov* pilot judgment and they should be transmitted to the Committee of Ministers in its capacity as the body responsible for ensuring that all persons affected by the systemic problem found in the pilot judgment obtain justice and compensation. The issue in this case was namely the non-enforcement or delayed enforcement of domestic court decisions, combined with the absence of effective domestic remedies in respect of such shortcomings.

**ECHR 307 (2017)  
12.10.2017**

**Press release issued by the Registrar**

These cases concerned the prolonged non-enforcement of final judicial decisions, and raised issues similar to those assessed in the *Ivanov* pilot judgment, which noted the existence of a structural problem which amounted to a breach of Article 6 § 1 (right to a fair hearing within a reasonable time) and Article 13 (right to an effective remedy) of the European Convention on Human Rights and Article 1 of Protocol No. 1 (protection of property) to the European Convention.

In today's **Grand Chamber** judgment in the case of **Burmych and Others v. Ukraine** (applications nos. 46852/13 et al.), the European Court of Human Rights:

declared, by majority, the **five applications admissible**;

decided, by ten votes to seven, **to join those five applications and 12,143 applications pending before the Court**, lists of which are appended to the judgment;

held, by thirteen votes to four, that the **five applications and the 12,143 applications joined should be dealt with in compliance with the obligation set out in the pilot judgment delivered on 15 October 2009 in the case of *Ivanov v. Ukraine***;

and decided, by ten votes to seven, to **strike those applications out of the list of cases pursuant to Article 37 § 1 (c) of the Convention and to transmit them to the Committee of Ministers of the Council of Europe in order to be dealt with in the framework of the general enforcement measures set out in the *Ivanov* pilot judgment.**

In accordance with the principle of subsidiarity, which underlay the whole Convention and not only the pilot judgment procedure, the matter treated by the *Ivanov* pilot judgment, including the provision of redress for victims of the systemic violation of the Convention found in *Ivanov*, was a question of execution under Article 46 of the Convention.

The present cases, and all 12,143 similar applications currently pending as well as all potential future similar applications were part and parcel of the execution procedure set out in the pilot judgment. The settlement of all those cases should necessarily be encompassed under the general execution measures to be implemented by the respondent State under the supervision of the Committee of Ministers.

All these cases should be considered in the framework of the execution procedure for the *Ivanov* judgment and be transmitted to the Committee of Ministers in its capacity as the body responsible for

ensuring that all persons affected by the systemic problem found in the pilot judgment obtain justice and compensation, including the applicants in the present cases.

Having regard to the fact that the interests of the actual and potential victims of the impugned systemic problem were more appropriately protected in the framework of the execution procedure, the Court held that the aims of the Convention were not best served if it continued to deal with *Ivanov*-type cases. It therefore concluded that there was no justification for continuing to examine the cases before it.

### Principal facts

The applicants, Ms Lidiya Burmych, Mr Grygoriy Yaremchuk, Mr Oleg Varava and Mr Yuriy Neborachko, are Ukrainian nationals. The applicant Izolyatsiya, PAT, is a private joint-stock company based in Donetsk, Ukraine.

The applicants had all obtained a final judgment in their favour, which remained unenforced.

### Complaints, procedure and composition of the Court

Relying on Articles 6 § 1 (right to a fair hearing within a reasonable time), 13 (right to an effective remedy) and Article 1 of Protocol No. 1 (protection of property), the applicants complained about the non-enforcement or delayed enforcement of the domestic judicial decisions delivered in their favour and of the lack of an effective domestic remedy for their complaints under the Convention.

The applications were lodged with the European Court of Human Rights respectively on 9 July 2013, 16 July 2013, 8 August 2013, 16 August 2013 and 11 December 2013.

On 8 December 2015 the Chamber relinquished jurisdiction in favour of the Grand Chamber.

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

Guido **Raimondi** (Italy), *President*,  
Angelika **Nußberger** (Germany),  
Ganna **Yudkivska** (Ukraine),  
Helena **Jäderblom** (Sweden),  
Luis **López Guerra** (Spain),  
András **Sajó** (Hungary),  
Ledi **Bianku** (Albania),  
Işıl **Karakaş** (Turkey),  
Vincent A. **De Gaetano** (Malta),  
Julia **Laffranque** (Estonia),  
André **Potocki** (France),  
Paul **Mahoney** (United Kingdom),  
Aleš **Pejchal** (the Czech Republic),  
Johannes **Silvis** (Netherlands),  
Valeriu **Griţco** (the Republic of Moldova),  
Iulia **Motoc** (Romania),  
Georges **Ravarani** (Luxembourg),

and also Roderick **Liddell**, *Registrar*.

## Decision of the Court

### *Joinder and admissibility of the applications*

The Court decided to join the applications pursuant to Rule 42 § 1 of the Rules of Court given the common origin of the present applications in the systemic violation of the Convention found in the *Ivanov* judgment.

### **Articles 6 and 13 and Article 1 of Protocol No. 1**

The Court considered that at the heart of the applications under review lay the division of competence between, on the one hand, the Court, whose function was to “ensure the observance of the engagements undertaken by the High Contracting Parties in the Convention and the Protocols thereto” (Article 19) and, on the other, the Committee of Ministers “which shall supervise [the] execution” of the final judgments of the Court (Article 46). The understanding of that division of responsibility had developed with regard to changing circumstances, and notably the proliferation of structural and systemic violations of the Convention. The introduction of the pilot-judgment procedure by the Court in order to deal with the phenomenon of repetitive cases<sup>2</sup> had added a new dimension to the Court’s and the Committee of Ministers’ respective roles under the Convention. It had become necessary to clarify where the responsibilities lay in addressing issues arising out of a failure to execute a pilot judgment.

### *Applications pending before the Court and the Ivanov judgment*

The present applications form part of a group of some 12,143 similar applications currently pending before the Court. They all originated in the same systemic problem identified in the *Ivanov* pilot judgment, namely the series of dysfunctions in the Ukrainian judicial system which hinder the enforcement of final judgments, thus entailing a systemic problem of non-enforcement or delayed enforcement of domestic court decisions, combined with the absence of effective domestic remedies in respect of such shortcomings.

The Court pointed to its findings in the *Ivanov* pilot judgment, where it had held that the structural problems with which it was dealing were large-scale and complex in nature and that they required the implementation of comprehensive and complex measures, possibly of a legislative and administrative character, involving various domestic authorities. It had also observed that the Committee of Ministers was better placed and equipped than the Court to monitor the measures to be adopted by Ukraine in that respect. The Court had acknowledged that it fell to the Committee of Ministers to determine what would be the most appropriate way to tackle the problems and indicate any general measures to be taken by the respondent State. It had also stressed that specific reforms in Ukraine’s legislation and administrative practice should be implemented without delay in order to bring them into line with the Court’s conclusions and to comply with the requirements of Article 46 of the Convention.

However, despite the significant lapse of time since the delivery of the *Ivanov* pilot judgment, the Ukrainian Government had so far failed to implement the requisite general measures capable of addressing the root causes of the systemic problem identified by the Court and to provide an effective remedy securing redress to all victims at national level. As acknowledged on many occasions by the authorities themselves and recognised by the Committee of Ministers in the 2008 Interim Resolution, adopted before the *Ivanov* judgment, the problem of non-enforcement or delayed enforcement of judicial decisions at that time had already existed in Ukraine for more than a decade. It remained unresolved, notwithstanding the additional guidance given to the respondent State by the Committee of Ministers over the years by means of its six subsequent interim resolutions.

Since the lodging of the first applications in 1999 the Court had received some 29,000 *Ivanov*-type applications, of which 14,430 had been examined by various judicial formations of the Court.

However, some 12,143 of those applications, the majority of which had been lodged between 2013 and 2017, were still awaiting judicial examination.

### ***The impact of the failure to implement the Ivanov pilot judgment***

The continuing failure by Ukraine to execute the *Ivanov* judgment had left unresolved the systemic problem of non-enforcement of domestic judicial decisions. The continued failure to take appropriate general measures had led the Court to adopt a practice of dealing with the *Ivanov* follow-up cases under an accelerated, simplified summary procedure for grouped judgments and strike-out decisions, essentially limited to a statement of a violation and award of just satisfaction. This had allowed the applicants to obtain swiftly a decision affording them financial redress.

However, that judicial policy had not had any meaningful impact on the overall systemic problem identified in *Ivanov*. Nor had it resulted in any apparent progress in the execution process. Every year growing numbers of applicants, instead of receiving appropriate redress at domestic level, had applied to the Court in order to obtain financial relief under Article 41 of the Convention. Some new applications concerned non-enforcement of domestic decisions which had already been the subject of the Court's judgments finding a violation of the Convention.

On adoption of the *Ivanov* judgment in September 2009 1,400 follow-up cases had been pending before the Court. At present, even though the Court had already dealt with 14,430 such cases, 12,143 were still pending. If the Court examined the present cases and all the other follow-up cases in the same or a similar manner, it would face the inevitable prospect that growing numbers of applicants in Ukraine would turn to it for redress in the future. The Court would still be at risk of receiving new applications as long as the root cause of the problem was not addressed.

The Court ran the risk of operating as part of the Ukrainian legal enforcement system and substituting itself for the Ukrainian authorities. That task was not compatible with the subsidiary role which the Court was supposed to play in relation to the High Contracting Parties under Articles 1 and 19 of the Convention, and ran directly counter to the logic of the pilot-judgment procedure developed by the Court.

The Court had therefore to consider how this situation could best be addressed in a way which respected the rationale of the pilot-judgment procedure as conceived in the *Broniowski* judgment, in accordance with the principle of subsidiarity underpinning that rationale. In particular, it had to examine whether it should act as a mechanism for awarding compensation in respect of the large numbers of repetitive applications which followed pilot or leading judgments whose execution was to be supervised by the Committee of Ministers.

According to the rationale of the pilot judgment, under the umbrella of the general measures required of the respondent State, all the other victims are absorbed into the process of execution.

Bearing in mind its efforts in examining *Ivanov*-type cases for over 16 years, the Court concluded that nothing was to be gained, nor would justice be best served, by the repetition of its findings in a lengthy series of comparable cases, which would place a significant burden on its own resources, with a consequent impact on its considerable caseload. It followed that the value for Convention purposes of the continued examination of *Ivanov*-type applications was clearly in issue. Accordingly the question arose as to whether it was justified to continue to examine the post-*Ivanov* applications, having regard to Articles 19 and 46 of the Convention and to the Court's power under Article 37 § 1 (c) to strike an application out of its list when no such justification exists.

### ***Articles 19 and 46 – question of the continuation of Ivanov-type cases***

The legal issues concerning prolonged non-enforcement of domestic decisions in Ukraine had already been resolved in the *Ivanov* pilot judgment. The Court had identified the systemic shortcoming, had

held there to be a violation of the Convention by reason of this shortcoming, and had given guidance as to the general measures to be taken for the satisfactory execution of the pilot judgment so as to ensure relief and redress for all victims, past, present and future, of the systemic violation found. The Court had thereby discharged its function under Article 19 of the Convention. In accordance with the principle of subsidiarity, which underlay the whole Convention and not only the pilot judgment procedure, the matter treated by the *Ivanov* pilot judgment, including the provision of redress for victims of the systemic violation of the Convention found in *Ivanov*, was a question of execution under Article 46 of the Convention.

The present case and all 12,143 similar cases pending before the Court, as well as any future similar cases to be submitted to it, were part and parcel of the process of execution of the pilot judgment. Their resolution must necessarily be encompassed by the general measures of execution to be put in place by the respondent State under the supervision of the Committee of Ministers.

Consequently, all such cases fell to be dealt with under the execution process and should be notified to the Committee of Ministers in its capacity as the body which, under the Convention system, had the responsibility to oversee redress and justice for all the victims affected by the systemic problem found in a pilot judgment, including the applicants in the present case.

Having regard to the respective competences of the Court and the Committee of Ministers under Articles 19 and 46 of the Convention, the Court concluded that no useful purpose was served in terms of the Convention's aims in its continuing to deal with these cases. It therefore had to consider whether in these circumstances it should exercise its power under Article 37 § 1 (c) to strike the applications out of its list.

#### **Article 37 § 1 (c)**

The Court reiterated that the pilot-judgment procedure was designed to assist the Contracting States in fulfilling their role in the Convention system by resolving such problems at national level, thereby securing to all actual and potential victims of the systemic problem the Convention rights and freedoms as required by the Convention, offering to them more rapid redress while, at the same time, easing the burden on the Court.

In view of the fact that the interests of the present and potential victims of the systemic problem in question were more appropriately protected in the framework of the execution process, the Court found that the Convention aims were not best served by continuing to deal with post-*Ivanov* cases. It therefore concluded that the continued examination of the cases was not justified. It remained to be determined whether "respect for human rights" required it nonetheless to continue that examination.

In all cases in which a systemic problem had been identified and on which a pilot judgment had been delivered, every applicant is a "victim" entitled to have the pilot judgment fully executed at domestic level and to obtain "adequate and sufficient redress". Such redress should include enforcement of domestic judgments in their favour. The Court reiterated that, as it has repeatedly held in numerous *Ivanov*-type cases, the Ukrainian State had an outstanding obligation to enforce domestic judgments which remained enforceable.

The grievances raised in these applications therefore had to be resolved in the context of the general measures required by the execution of the *Ivanov* pilot judgment, including the provision of appropriate and sufficient redress for the Convention violations found in that judgment. Those measures were subject to the supervision of the Committee of Ministers.

Consequently, respect for human rights within the meaning of Article 37 § 1 (c) did not require such continued examination of the applications in question from the point of view of individual redress. Nor did it find that the case raised important issues other than those already clarified under the pilot-judgment procedure as would require it to continue its examination of the cases. On the contrary, the

overall interest of the proper and effective functioning of the Convention system militated in favour of the approach adopted.

The Court therefore found no circumstances which required the continued examination of the present case and other *Ivanov*-type applications. That conclusion was without prejudice to its power to restore the present, or any other similar application, to the list of cases if the circumstances justified such a course.

The Court accordingly decided to strike out the applications in question under Article 37 § 1 (c) of the Convention.

***The issue of similar applications pending***

The Court considered that the similar applications pending should be joined (see Appendices I and II to the judgment) to the present applications, and found that the 7,641 communicated applications listed in Annex I and the 4,502 or so new applications listed in Annex II to the judgment should be struck out of its list of cases. As regards future similar applications, the Court stated that it was open to it to strike them out of the list of its cases and to transmit them directly to the Committee of Ministers, apart from those applications which were found to be inadmissible. Moreover, the Committee of Ministers and the respondent State would be provided with the Court's judgments and decisions listing such applications, which should then be dealt with in the framework of the general measures of execution of the pilot judgment at national level, in such a way as to ensure appropriate relief for all applicants in those cases.

The decision to strike *Ivanov* follow-up applications out of the Court's list of cases was without any prejudice to its power to restore to the list of cases, the applications listed in the annexes to the judgment, or any other similar future applications, if the circumstances justified such a course.

Separate opinions

Judges Yudkivska, Sajó, Bianku, Karakaş, De Gaetano, Laffranque and Motoc expressed a joint dissenting opinion. Judge Sajó expressed a dissenting opinion. These opinions are annexed to the judgment.

**176. ECHR, *Ilgar Mammadov v. Azerbaijan* (No. 2), no. 919/15, Chamber judgment of 16 November 2017 (Article 6-1, Right to a fair trial-Violation).** The case concerned the criminal proceedings brought against a prominent Azerbaijani opposition politician, Ilgar Mammadov. The Court found that there had been a violation of his right to a fair trial as the domestic courts had either not addressed or remained silent about a number of inconsistencies in the evidence used to convict the applicant. This is the second case he has brought before the Court; the first concerned his arrest and pre-trial detention following the same events (see case no 88).

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**ECHR 348 (2017)**  
**16.11.2017**

**Press release issued by the Registrar**

The case concerned the criminal proceedings brought against a prominent Azerbaijani opposition politician, Ilgar Eldar oglu Mammadov, following protests in the town of Ismayilli in 2013. Mr Mammadov was subsequently charged and convicted of mass disorder. This is the second case he has brought before the European Court of Human Rights; the first concerned his arrest and pre-trial detention following the same events.

In today's **Chamber** judgment in the case of ***Ilgar Mammadov v. Azerbaijan* (No. 2)** (application no. 919/15) the European Court of Human Rights held, unanimously, that there had been:

**a violation of Article 6 § 1 (right to a fair trial)** of the European Convention on Human Rights.

The Court found that the domestic courts had either not addressed or remained silent about a number of inconsistencies in the evidence used to convict Mr Mammadov, despite the defence's repeated objections about flawed or misrepresented evidence. In particular, as concerned the witness statements for the prosecution: some of the police officers who testified that Mr Mammadov had incited protestors to violence had only been questioned five months after the protests and one had retracted his pre-trial statement saying that he had signed it without even reading it. As concerned certain video recordings used to convict him: one had shown clashes between protestors whereas another had shown footage of calm streets with very few protestors. Furthermore, Mr Mammadov's blog posts and social media posts as well as a transcript of a radio interview, used to prove that he had planned the mass disorder, had dated either from when he had been in Ismayilli or after leaving it, and had contained no incitement to violence. Indeed, in the news coverage on the riots, which the courts found to be in support of the prosecution's case, there had been no express reporting of any actual outbreak of violence during the afternoon of 24 January 2013 when Mr Mammadov had been present in Ismayilli.

In conclusion, there had been serious shortcomings in the manner in which the evidence used to convict Mr Mammadov had been admitted, examined and/or assessed. Equally, the manner in which the courts had dealt with the defence's objections concerning that evidence had been inadequate. Indeed, any evidence favourable to him had been systematically dismissed in an inadequately reasoned or manifestly unreasonable manner.

**Principal facts**

Ilgar Eldar oglu Mammadov, an Azerbaijani national born in 1970, is currently serving a seven-year prison sentence following his conviction in 2014 of mass disorder.

Mr Mammadov has a history of criticising the Azerbaijani Government and had announced his intention to stand as candidate in the November 2013 presidential elections. However, he was unable to do so because he was arrested and placed in pre-trial detention following protests in the town of Ismayilli on 24 January 2013. He was in particular accused of organising public disorder (subsequently replaced with the charge of mass disorder) and violent resistance to the police, apparently for having told protestors to throw stones at the police.

In March 2014 Mr Mammadov was convicted as charged at first instance. After a series of appeals, his conviction and sentence were eventually upheld in November 2016 by the Supreme Court. In convicting him, the domestic courts essentially relied on statements by witnesses for the prosecution (mainly police officers testifying that they had seen Mr Mammadov organising and inciting the protestors to violence and that they had then themselves been attacked), letters written by the law-enforcement authorities (accusing Mr Mammadov of having incited the local Ismayilli residents against the State, government bodies and the police), video recordings and contemporaneous news coverage. In addition, the courts relied on Mr Mammadov's blog posts and social media posts as well as a transcript of an interview with Azadliq Radio, all allegedly showing that he had planned the mass disorder. The courts dismissed the statements of all the defence witnesses (most of them journalists) as untruthful, finding that they knew Mr Mammadov personally and therefore wanted to help him. Throughout the proceedings Mr Mammadov repeatedly complained about flawed or misrepresented evidence, which were all dismissed.

Mr Mammadov has lodged a previous application with the European Court of Human Rights to complain about his arrest and pre-trial detention following the Ismayilli riots. In 2014 the Court delivered a judgment, *Ilgar Mammadov v. Azerbaijan* (no. 15172/13), finding that Mr Mammadov had been arrested and detained without any evidence to reasonably suspect him of having committed a criminal offence and concluding that the actual purpose of his detention had been to silence or punish him for criticising the Government. The enforcement of this judgment, in particular with regard to Mr Mammadov's release, is still currently underway before the Committee of Ministers of the Council of Europe.

### Complaints, procedure and composition of the Court

In the present application, Mr Mammadov complained under Article 6 (right to a fair hearing within a reasonable time) and Article 13 (right to an effective remedy) about a number of defects in the criminal proceedings against him.

He alleged in particular: that the judgment against him had been ill-reasoned and that his conviction had been based on flawed and manifestly wrongly assessed evidence; that the domestic courts had not duly examined the defence's objections and requests concerning the admission of evidence and conduct of the proceedings; that the defence had not been given proper access to the transcripts of the trial hearings, either before or after the trial, and had not been allowed to use laptop and tablet computers during the trial hearings; that his lawyers had been harassed, one of them eventually even having been disbarred; and that the entire proceedings had lasted too long.

He also made a number of other complaints under Article 14 (prohibition on discrimination), Article 17 (prohibition of abuse of rights) and Article 18 (limitation on use of restrictions on rights) in conjunction with Article 6, alleging that the proceedings against him had been discriminatory because he is an opposition politician and had been used to remove him from the political stage.

The application was lodged with the European Court of Human Rights on 19 December 2014.

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

Angelika **Nußberger** (Germany), *President*,  
 Erik **Møse** (Norway),  
 Nona **Tsotsoria** (Georgia),  
 Yonko **Grozev** (Bulgaria),  
 Síofra **O’Leary** (Ireland),  
 Mārtiņš **Mits** (Latvia),  
 Lətif **Hüseynov** (Azerbaijan),

and also Milan **Blaško**, *Deputy Section Registrar*.

Decision of the Court

### **Article 6 (right to a fair hearing within a reasonable time)**

The criminal proceedings against Mr Mammadov had lasted slightly longer than three years and nine months at three levels of judicial instance; the higher two instances (the Court of Appeal and the Supreme Court) had examined the case two times each. Given the complexity of the case, the Court considered that the overall length of the proceedings had not been excessive and therefore declared that part of Mr Mammadov’s complaint inadmissible.

However, the Court found that there had been serious shortcomings in the domestic courts’ reasoning and in the manner in which the evidence used to convict Mr Mammadov had been admitted, examined and/or assessed. Equally, the manner in which the courts had dealt with the defence’s objections concerning that evidence had been inadequate.

The Court examined, in turn, the different categories of evidence, noting first of all that the domestic courts’ reliance on the prosecution witness statements to convict Mr Mammadov could only qualify as manifestly unreasonable or arbitrary.

In particular, the courts had never addressed in their judgments the defence’s strong and factually substantiated objections calling into question the credibility of **the police officers’ witness statements**. The defence had argued that some of the officers had been questioned for the first time as late as five months after the riots, that they had failed to report the events immediately after they had occurred and that there had been no medical evidence of their injuries. Nor did the courts address in an adequate manner the fact that one of the police officers had retracted his pre-trial statement because he had signed it without even reading it, and the implications that that could have had on the credibility of the other police officers’ statements. At no point did the courts inquire either whether the officers’ statements could have been obtained through undue pressure.

Documents submitted to the Court even suggested that two of the police officers, whose statements had been relied upon to convict Mr Mammadov, could not have actually seen him: one testified that he had been in his office during Mr Mammadov’s visit to Ismayilli; and another, injured by a stone, had been in hospital before Mr Mammadov had even arrived in the town.

Furthermore, the courts had accepted certain **witness statements made by civilians** as proof of the accusations against Mr Mammadov, despite the fact that the defence had produced documents showing that one of them had lied. Moreover, another civilian witness, according to the case file, had not mentioned Mr Mammadov at all in her testimony.

In contrast, the courts had refused to give any weight to the **defence witness statements** they had heard. It was not clear why and on what particular basis the domestic courts had found that most of the defence witnesses, who were journalists, had close relations with Mr Mammadov, or why such a finding would lead the courts to assume that they would lie in court and risk committing perjury. The Court therefore considered that the conclusion that all of the witnesses who had testified in Mr

Mammadov's favour had been untruthful and biased had been made without sufficient reasons and without due regard to the individual situation of each witness.

**The letters written by the law-enforcement authorities**, also used to convict Mr Mammadov, had given brief and vague factual statements, with no substantiating material (such as investigative documents, videos, reports of search operations). Despite Mr Mammadov's repeated objections to the use of those letters as evidence, he had never been given the opportunity to challenge the authors of those letters during the criminal proceedings.

The Court examined the full content of Mr Mammadov's **blog posts and social media posts** as well as a transcript of his **interview with Azadliq Radio** and, unlike the domestic courts, did not find that they proved that he had planned the mass disorder. On the contrary, the posts had been made and the interview given either in Ismayilli or after leaving it, and, although strongly critical of the authorities, had contained no intention to commit a criminal offence or incitement to violence. Using Mr Mammadov's public statements as evidence to convict him had therefore clearly been arbitrary.

Similarly the courts' assessment of the **news coverage on the riots**, finding that it had supported the prosecution's case, had been arbitrary. Although there had been reports of a general situation of tension, none of the media sources had expressly reported any actual outbreak of violence during the afternoon of 24 January 2013.

Finally, as concerned the **video recordings**, one had shown clashes between protestors and the police whereas another had shown footage of calm streets with very few protestors. The first instance court had relied on the footage showing clashes, but on appeal the court – apparently recognising that that footage had been of events in the morning and therefore before Mr Mammadov had arrived in town – had agreed to allow the footage taken during the afternoon by a camera installed on a building along the alleged route of the protestors. However, this recording showed that the situation had been calm. The appeal court held that this could have been because the protestors had been going along the street one-by-one or had arrived from other directions. The courts thus created a purely hypothetical version of events which had never even been argued by the prosecution and which had not been supported by any evidence.

Indeed, the higher instances had remained silent about the defence's allegations of the prosecution having tried to pass off one video recording showing clashes as having taken place in the afternoon (when Mammadov had been present), whereas the footage had actually been recorded in the morning. In support of their allegations, they had submitted the full version of the video as well as another video of a similar nature. The courts should have examined such strong evidence, and all the more so in a case where the main point of contention between the parties had been whether any mass disorder had actually taken place while Mr Mammadov had been in Ismayilli.

In conclusion, Mr Mammadov's conviction had been based on flawed or misrepresented evidence and his objections in this respect had been inadequately addressed. The evidence favourable to him had been systematically dismissed in an inadequately reasoned or manifestly unreasonable manner. Even though the case had been remitted once for a new examination by the Supreme Court and an attempt had been made to address some of the defence's requests and objections, none of the above shortcomings had ultimately been remedied. The criminal proceedings against Mr Mammadov, taken as a whole, had not therefore complied with the guarantees of a fair trial. There had accordingly been a violation of Article 6 § 1 of the Convention.

Given that conclusion, the Court considered that it was not necessary to further examine in detail Mr Mammadov's arguments concerning the allegedly inadequate facilities for the preparation of the defence. It was also unnecessary to examine the issue concerning the disbarment of one of his lawyers.

**Other articles**

The Court further held that it was not necessary to examine separately the complaints under Articles 13 and 14 or to examine the admissibility and merits of the complaint under Article 18 in conjunction with Article 6. Mr Mammadov's complaint under Article 17 was declared inadmissible.

**Article 41 (just satisfaction)**

The Court held that Azerbaijan was to pay Mr Mammadov 10,000 euros (EUR) in respect of nonpecuniary damage.

**Separate opinion**

Judges Nussberger, Tsotsoria, O'Leary and Mits expressed a joint concurring opinion which is annexed to the judgment.

177. ECHR, *Merabishvili v. Georgia*, no. 72508/13, Grand Chamber judgment of 28 November 2017 (Article 5-1, Right to liberty and security- No violation; Article 5-3, Entitlement of a detainee to trial within a reasonable time or to release pending trial- No violation with regard to his initial placement in pre-trial detention/ Violation at least from 25 September 2013 onwards, his pre-trial detention had ceased to be based on sufficient grounds; Article 18 taken in conjunction with Article 5, Limitation on use of restrictions on rights- Violation). The case concerned the arrest and pre-trial detention of a former Prime Minister of Georgia, Mr. Merabishvili, and his complaint that there had been ulterior purposes behind these measures. Namely, he alleged that the arrest and pre-trial detention had aimed to remove him from the political scene and that the Chief Public Prosecutor had attempted to use his detention as leverage to pressure him to provide information about the foreign bank accounts of the former President of Georgia, Mr. Saakashvili and about the death in 2005 of the former Prime Minister, Zurab Zhvania. The Court in its judgment referred to relevant European law provisions on the exploitation of power and to the case law of the Inter-American Court of Human Rights.

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ECHR 366 (2017)  
28.11.2017

**Press release issued by the Registrar**

The case of **Merabishvili v. Georgia** (application no. 72508/13) concerned the arrest and pre-trial detention of a former Prime Minister of Georgia, Ivane Merabishvili, and his complaint that there had been ulterior purposes behind these measures. Mr Merabishvili namely alleged that the arrest and the pre-trial detention had aimed to remove him from the political scene, and that the Chief Public Prosecutor – by having him covertly removed from his cell late at night several months after his arrest to question him – had attempted to use his detention as leverage to pressure him to provide information about the foreign bank accounts of the former President of Georgia Mikheil Saakashvili and about the death in 2005 of the former Prime Minister of Georgia Zurab Zhvania.

In today's **Grand Chamber** judgment in the case the European Court of Human Rights held:

*unanimously*, that there had been **no violation of Article 5 § 1 (right to liberty and security)** of the European Convention on Human Rights with regard to Mr Merabishvili's arrest or his pre-trial detention;

*unanimously*, that there had been **no violation of Article 5 § 3 (entitlement of a detainee to trial within a reasonable time or to release pending trial)** with regard to his initial placement in pre-trial detention;

*unanimously*, that there had been a **violation of Article 5 § 3** in that, at least from 25 September 2013 onwards, his pre-trial detention had ceased to be based on sufficient grounds; and *by nine votes to eight*, that there had been a **violation of Article 18 (limitation on use of restrictions on rights) taken in conjunction with Article 5 § 1**.

The Court came to the conclusion that it had not been established that Mr Merabishvili's pre-trial detention had principally been meant to remove him from Georgia's political scene. However, the

Court found his allegations concerning his covert removal from his prison cell and his late-night questioning during his pre-trial detention sufficiently convincing and therefore proven.

The Court considered that the restriction of Mr Merabishvili's right to liberty had amounted to a continuous situation. It came to the conclusion – bearing in mind all the circumstances – that the predominant purpose of that restriction had changed over time. While in the beginning that purpose had been the investigation of offences based on a reasonable suspicion, later on the predominant purpose became to obtain information about Mr Zhvania's death and Mr Saakashvili's bank accounts. It was thus chiefly meant for an ulterior purpose not prescribed by the Convention.

In its judgment, the Court took the occasion to clarify the principles to be applied in cases where an alleged breach of Article 18 of the Convention was at issue.

### Main facts

The applicant, Ivane Merabishvili, is a Georgian national born in 1968. He is currently serving a prison sentence in Tbilisi.

Before the parliamentary elections of October 2012, which resulted in a change of power, Mr Merabishvili, one of the leaders of the then ruling party, the United National Movement (UNM), was a member of the Georgian Government: from 2005 to 2012 he was Minister of Internal Affairs and then, from July to October 2012, Prime Minister. After the political coalition Georgian Dream had won the parliamentary election of October 2012 and formed a new Government, Mr Merabishvili was elected Secretary General of the UNM, which became the main opposition party in Georgia.

Mr Merabishvili was arrested on 21 May 2013 following the institution against him of two sets of criminal proceedings. The first charge against him was that between July and September 2012 he had devised a scheme creating fictitious public-sector jobs for over 20,000 people whereby they had unduly been paid the equivalent of more than two million euros for carrying out campaign work for UNM ahead of the October 2012 elections. According to the authorities, he had thus bought votes, misappropriated property and abused his power as a public official. The second charge was that he had systematically used a private house in a resort on Georgia's Black Sea coast, which belonged to a company under investigation by the Ministry of Internal Affairs, for holidays with his family, and that he had used public funds for renovation works on that house. According to the authorities, he had thus infringed the inviolability of property and had misappropriated property, both by using an official position.

On 22 May 2013 the Kutaisi City Court followed a request by the district prosecutor's office of Western Georgia to place Mr Merabishvili in pre-trial detention on the grounds that there was a risk that he would flee or obstruct the gathering of evidence. As to the risk of flight, the prosecutor had notably referred to the fact that Mr Merabishvili, having held public offices for several years, had many contacts abroad, that his wife had left Georgia right after he had been summoned for questioning, that a search of his flat had revealed large sums of cash and that it had been found that he had a fake passport. Mr Merabishvili's appeal against that decision was rejected on 25 May 2013.

During a pre-trial session on 25 September 2013, Mr Merabishvili requested to be released from pre-trial detention, noting in particular that before his arrest he had always duly appeared for questioning and that he had been abroad many times, having always returned as scheduled. He also offered to hand in his passport. He moreover pointed out that the investigation had already been concluded and all witness and other evidence had been secured, therefore there was no longer any risk of his influencing witnesses. The prosecution argued, among other things, that there was still a risk of his influencing witnesses, referring in particular to an incident in November 2012, when he had been stopped at Tbilisi airport attempting to cross the border with a fake passport and had subsequently threatened the head of the Border Police, trying to keep him from investigating the incident. The

prosecution also pointed to the fact that the witnesses were still due to testify at trial. The Kutaisi City Court examined Mr Merabishvili's request on the same day and rejected it without further explanation.

When his trial started, on 7 October 2013, Mr Merabishvili again requested to be released from pretrial detention. The trial court again dismissed the request, noting that he had failed to point to new circumstances calling for reconsideration. The fact that the trial had already started had no bearing on the justification for his detention.

In February 2014 Mr Merabishvili was convicted of the majority of the charges against him, including vote-buying, misappropriation of property and breach of the inviolability of another person's home. The charge of abuse of authority was dismissed as superfluous. He was sentenced to five years' imprisonment and banned from holding public office for one and a half years. The judgment was upheld on appeal.

Mr Merabishvili was subsequently convicted in three additional sets of criminal proceedings for offences involving abuse of official authority when he was Minister of the Interior.

According to Mr Merabishvili, while in pre-trial detention, in the early hours of 14 December 2013 he was covertly removed from his cell and taken by car, while having his head covered, for a meeting with the Chief Public Prosecutor, O.P., and the head of the Penitentiary Department, D.D. The two officials threatened him in order to obtain information about the bank accounts of the former President of Georgia Mikheil Saakashvili, who had left the country in October 2013, and about the death in 2005 of the former Prime Minister, Zurab Zhvania. The death of Mr Zhvania, who, according to the official version of the events, had died accidentally from carbon monoxide poisoning, was still a subject of heated debate, and the party Georgian Dream had made it one of their campaign promises to elucidate its circumstances.

Mr Merabishvili voiced his allegations about the incident at a hearing on his case on 17 December 2013, which was broadcast live on television. He called upon the authorities to verify his allegations by, in particular, examining video footage from the surveillance cameras of the prison where he was held.

On 20 December 2013 the Ministry of Prisons' General Inspectorate opened an internal inquiry into Mr Merabishvili's allegations. During the inquiry, the Penitentiary Department's deputy head informed the General Inspectorate's deputy head that his request for a copy of the footage from the surveillance cameras of the prison and the Penitentiary Department building for the relevant period could not be complied with, since that footage was kept only for 24 hours and was then deleted. Inspectors reviewed footage from surveillance cameras belonging to facilities such as petrol stations along the road supposedly taken by the car transporting Mr Merabishvili during the night in question; they noted that nothing of interest could be seen. The inquiry was terminated in January 2014 with a report concluding that Mr Merabishvili's allegations had not been confirmed.

After the European Court of Human Rights' Chamber judgment in the case had been delivered, the Chief Public Prosecutor's Office, on 21 June 2016, opened a criminal investigation in relation to Mr Merabishvili's allegations. Among other witnesses, both the then former Chief Public Prosecutor O.P. and the then former head of the Penitentiary Department D.D. were interviewed for the first time in September 2016. They both denied the allegations. In February 2017 a prosecutor from the Chief Public Prosecutor's Office closed the investigation, concluding that Mr Merabishvili's allegations had not been confirmed.

Complaints, procedure and composition of the Court

Relying on Article 5 §§ 1, 3 and 4 (right to liberty and security / entitlement to trial within a reasonable time or to release pending trial / right to have lawfulness of detention decided speedily by a court) of the European Convention on Human Rights, Mr Merabishvili complained: that his arrest and pre-trial detention had been unlawful and unjustified; that the domestic courts had not given a specific time limit for his detention; that the courts had not given relevant and sufficient reasons for his pre-trial detention; and that the court decision of 25 September 2013 rejecting his request for release had not contained any reasons.

Further relying on Article 18 (limitation on use of restrictions on rights) taken in conjunction with Article 5 § 1, Mr Merabishvili alleged that the purpose behind the criminal proceedings against him and his pre-trial detention had been to remove him from the political scene and to prevent him from standing in the 2013 presidential elections in Georgia. In his observations in reply to those of the Government he further alleged that on 14 December 2013 the Chief Public Prosecutor had attempted to use his detention as a leverage to pressure him to provide information about Mr Saakashvili's bank accounts and about Mr Zhvania's death.

The application was lodged with the European Court of Human Rights on 20 November 2013.

In its Chamber judgment of 14 June 2016, the Court concluded in particular that Mr Merabishvili's pre-trial detention had been lawful and based on reasonable grounds but had also been used as a means to exert pressure on him. In particular, it held, unanimously, that there had been: no violation of Article 5 §§ 1 and 3 (right to liberty and security / entitlement to trial within a reasonable time or to release pending trial) of the European Convention as concerned the lawfulness of and grounds for the court decisions of May 2013 ordering Mr Merabishvili's pre-trial detention; a violation of Article 5 § 3 as concerned the court decision of 25 September 2013 reviewing Mr Merabishvili's pre-trial detention; and, lastly, a violation of Article 18 (limitation on use of restrictions on rights) taken in conjunction with Article 5 § 1.

On 17 October 2016 the Grand Chamber Panel accepted the Georgian Government's request that the case be referred to the Grand Chamber. A Grand Chamber hearing was held on 8 March 2017.

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

Guido **Raimondi** (Italy), *President*,  
 Angelika **Nußberger** (Germany),  
 Linos-Alexandre **Sicilianos** (Greece),  
 Ganna **Yudkivska** (Ukraine),  
 Robert **Spano** (Iceland),  
 Nona **Tsotsoria** (Georgia),  
 Işıl **Karakaş** (Turkey),  
 Kristina **Pardalos** (San Marino),  
 Faris **Vehabović** (Bosnia and Herzegovina),  
 Ksenija **Turković** (Croatia),  
 Jon Fridrik **Kjølbro** (Denmark),  
 Yonko **Grozev** (Bulgaria),  
 Georges **Ravarani** (Luxembourg),  
 Pere **Pastor Vilanova** (Andorra),  
 Alena **Poláčková** (Slovakia),  
 Georgios A. **Serghides** (Cyprus),  
 Lətif **Hüseynov** (Azerbaijan),

and also Søren **Prebensen**, *Deputy Grand Chamber Registrar*.

## Decision of the Court

### **Article 5 § 1**

The Court found that there had been no violation of Article 5 § 1 either as regards Mr Merabishvili's arrest or his pre-trial detention in itself. It noted in particular that he had not claimed that his arrest and pre-trial detention had not been based on a reasonable suspicion of his having committed the offences in question.

Nothing in the material in the case file cast any doubt on the reasonableness of the suspicion against Mr Merabishvili. There was moreover nothing to suggest that at the time of his arrest there was no intention of bringing him before a court. Indeed, he had been brought before a court on the day following his arrest.

Noting that Mr Merabishvili took issue with the trial court's failure to fix the duration of his pre-trial detention, the Court considered that this omission did not raise an issue under the Convention. It observed in particular that under the Georgian Code of Criminal Procedure it was not possible to keep him in custody for more than nine months in connection with the charges against him. There had therefore not been any uncertainty about the rules governing his pre-trial detention or a risk that it would last indefinitely, and he had been convicted eight months and 27 days after being arrested.

### **Article 5 § 3**

The Court found that there had been no violation of Article 5 § 3 as regards Mr Merabishvili's initial placement in pre-trial detention in May 2013. It noted that the trial court had given relevant reasons to place him in pre-trial detention, namely the risk that he would flee and would influence witnesses. While that court had not strongly substantiated the risk of his influencing witnesses, the risk of flight had been established in more concrete terms.

The prosecution had notably referred to the fact that his wife had left Georgia right after he had been summoned for questioning, that a search of his flat had revealed large sums of cash and that he still had a fake passport. Those facts, amplified by the seriousness of the punishment he could expect if convicted, suggested that at that time, immediately after he had been charged, the risk of his fleeing abroad could be seen as sufficiently real and incapable of being averted by a less restrictive measure.

However, the Court found a violation of Article 5 § 3 as regards the continued justification of Mr Merabishvili's pre-trial detention.

When he had first challenged his detention in September 2013, four months after his arrest, the parties had essentially repeated their arguments about the risk of flight and the risk of influencing witnesses. Although by their nature those reasons which at first had justified his placement in pre-trial detention could change over time and thus required a fresh examination, the trial court had omitted to give any reasons for its decision to continue the measure. In its subsequent decision of October 2013 that court had briefly noted that Mr Merabishvili had not pointed to any new facts or evidence. It had thus entirely disregarded the passage of time and had made it clear that it was for Mr Merabishvili to show that his detention was no longer justified. However, under Article 5 § 3 it was the responsibility of the authorities, not of the detainee, to establish that reasons persisted to justify continued pre-trial detention. The reasons given by the trial court had therefore not been sufficient to justify its decision to continue the measure.

#### Article 5 § 4

Having regard to its findings under Article 5 § 3, the Court did not consider it necessary to examine the same issue under Article 5 § 4.

#### Article 18 in conjunction with Article 5 § 1

The Court first dismissed a preliminary objection by the Government to the effect that Mr Merabishvili had failed to raise his allegations about the meeting with the Chief Public Prosecutor within six months of that alleged meeting and had therefore failed to comply with the six-month time-limit under Article 35 § 1 of the Convention. The Court observed that those allegations had indeed been duly raised more than six months after the alleged meeting and after his lawyer had been informed that the inquiry into the matter had been completed. If those allegations were to be seen as a separate complaint they had been out of time. However, the Court found that they were simply a further aspect, or a further argument in support of, the complaint already set out in the application, namely that the restriction of Mr Merabishvili's right to liberty had been applied for a purpose not prescribed by the Convention. It followed that the Court was not precluded from dealing with those allegations.

#### Principles

In its judgment, the Court provided an overview of the existing case-law on Article 18, observing that the examination of Mr Merabishvili's case had brought to light the need to clarify that case-law.

The Court pointed out that Article 18 did not have an independent existence; it could only be applied in conjunction with an Article of the Convention or the Protocols thereto which set out or qualified the rights and freedoms guaranteed by it. Its wording complemented that of clauses, such as the second sentence of Article 5 § 1 and the second paragraphs of Articles 8 to 11 of the Convention (right to respect for private life; freedom of religion; freedom of expression; freedom of assembly and association), which permitted restrictions to those rights and freedoms.

However, Article 18 also expressly prohibited member States from restricting the rights and freedoms guaranteed by the Convention for purposes not prescribed by the Convention itself, and to that extent it was autonomous. Therefore, there could be a breach of Article 18 even if there was no breach of the Article in conjunction with which it applied.

Furthermore, the mere fact that a restriction of a Convention right did not meet all the requirements of the clause that permitted it did not necessarily raise an issue under Article 18. Separate examination of a complaint under Article 18 was only warranted if the claim that a restriction had been applied for a purpose not prescribed by the Convention was a fundamental aspect of the case.

As to situations where a right or freedom was restricted for a **plurality of purposes** – both for an ulterior purpose and a purpose prescribed by the Convention – the Court took the view that the mere presence of a purpose which did not fall within the restriction clause of the Article concerned could not of itself give rise to a breach of Article 18. Conversely, a finding that a restriction pursued a purpose prescribed by the Convention did not necessarily rule out a breach of Article 18.

Therefore a restriction could be compatible with the substantive Convention provision authorising it but still infringe Article 18 because it was chiefly meant for another purpose not prescribed by the Convention. What mattered was whether that other purpose was predominant. In continuing situations, it could not be excluded that the assessment of which purpose was predominant might vary over time.

As to the required **standard of proof**, the Court considered that there was no reason to restrict itself to direct proof in relation to complaints under Article 18, or to apply a special standard of proof. Instead, it was to adhere to its usual approach to proof. While it relied on the evidence submitted by the parties, it also routinely asked the parties of its own motion to provide material which could corroborate or refute the allegations made before it. If the respondent Government did not respond to such a request, the Court could draw inferences, especially in situations where the State alone had access to the relevant information. Furthermore, the standard of proof had to be beyond reasonable doubt. Such proof could follow from the coexistence of sufficiently strong, clear and concordant inferences. Information from reports by international observers, non-governmental organisations or the decisions of other national or international courts were often taken into account when making inferences about the events in question.

#### **Application to Mr Merabishvili's case**

As to the first aspect of Mr Merabishvili's complaint under Article 18, the Court came to the conclusion that it had not been established that his pre-trial detention had principally been meant to remove him from Georgia's political scene. Although his pre-trial detention had taken place against the background of bitter political antagonism between UNM and Georgian Dream, Mr Merabishvili's submissions were not sufficient to show that the predominant purpose of that detention had been to hinder his participation in Georgian politics.

Notably, while the fact that there had been criminal prosecutions against a number of other former high officials from UNM could suggest an intention to harm that party, it could equally reflect the aim to deal with alleged wrongdoings under a previous government whose members could not be held to account while in power. There was no evidence that the courts were not sufficiently independent from the executive authorities. Furthermore, the manner in which the criminal proceedings against Mr Merabishvili had been conducted did not reveal a predominantly political purpose behind his pre-trial detention either: The duration of the trial had not been unreasonably long, and the fact that it had taken place in Kutaisi rather than Tbilisi did not indicate forum shopping by the prosecuting authorities – as had been suggested by Mr Merabishvili – given that in separate criminal proceedings a court in Tbilisi had also ordered his pre-trial detention.

As to the second aspect of Mr Merabishvili's complaint under Article 18, the Court found his allegations concerning his covert removal from his prison cell on 14 December 2013 – which had been fully disputed by the Government – sufficiently convincing and therefore proven. Notably, his account of the way in which he had been taken out of prison and to the meeting with the Chief Prosecutor had been detailed and specific and had remained consistent throughout.

While there was no direct evidence of Mr Merabishvili's account, he had hardly been in a position to provide such evidence, being in the custody of the authorities. His assertions were, however, corroborated by several indirect elements. Notably, two witnesses interviewed during the investigation by the Chief Public Prosecutor's Office had stated that they had on several occasions heard the head of the special forces of the Ministry of Prisons at the relevant time say that he had been one of the persons who had transported Mr Merabishvili to the late-night meeting with the Chief Public Prosecutor. While that was hearsay evidence by two witnesses who had previously been subordinates to Mr Merabishvili, that factor was somewhat offset by the fact that one of the witnesses had previously been dismissed by Mr Merabishvili; he had therefore had no reason to bend the truth in Mr Merabishvili's favour. Furthermore, a senior official at the Penitentiary Department had twice stated in interviews given to the media that Mr Merabishvili had been taken to the meeting in question with the Chief Public Prosecutor, and that senior official had shortly after that been dismissed from her post.

Moreover, there were several elements calling the Government's assertions into question. Most importantly, they had claimed that the footage from the surveillance cameras in the prison and in the Penitentiary Department building – which could have conclusively proved or disproved Mr

Merabishvili's allegations – was automatically deleted after 24 hours. That claim was doubtful, having regard to the fact that two officials – the Minister of Prisons and the deputy head of the General Inspectorate of the Ministry of Prisons – appeared to have been unaware of that practice, as evidenced by the statement of the former in response to the allegations and the request of the latter, during the inquiry by the Ministry of Prisons' General Inspectorate, to obtain a copy of the footage. Moreover, the method used to examine footage from private surveillance and road traffic cameras – which had revealed nothing of interest, according to the Ministry's inspectors – remained unclear, and that footage had not been made available to Mr Merabishvili's lawyer. Finally, there was no significant value to witness statements during the inquiry by people as the prison governor, who were subordinates of the alleged perpetrators. The two alleged perpetrators themselves, the Chief Public Prosecutor and the head of the Penitentiary Department, had not been interviewed until September 2016 during the second investigation opened following the Chamber judgment in the case. The Court considered that it could draw inferences from the material and the authorities' conduct.

There was no evidence that until 14 December 2013, nearly seven months after Mr Merabishvili's arrest, the authorities had attempted to use his pre-trial detention as a means to pressure him into providing information about Mr Zhvania's death or Mr Saakashvili's bank accounts. However, the Court considered that the restriction of Mr Merabishvili's right to liberty had amounted to a continuous situation. It came to the conclusion – bearing in mind all the circumstances – that the predominant purpose of that restriction had changed. While in the beginning that purpose had been the investigation of offences based on a reasonable suspicion, it later on became to obtain information about Mr Zhvania's death and Mr Saakashvili's bank accounts, as shown by the incident of 14 December 2013.

The Court noted in particular that by that time, the reasons for keeping Mr Merabishvili in pre-trial detention had receded, which had led the Court to find a violation of Article 5 § 3. Moreover, both issues on which he was questioned were of considerable importance for the authorities at that time, when Mr Saakashvili – who had become the target of several criminal investigations – had just left the country following the end of his presidency, and the investigation into Mr Zhvania's death, which had been renewed in late 2012, had not made significant progress.

The Court concluded that there had been a violation of Article 18 in conjunction with Article 5 § 1.

#### **Just satisfaction (Article 41)**

The Court held, by nine votes to eight, that Georgia was to pay Mr Merabishvili 4,000 euros (EUR) in respect of non-pecuniary damage.

#### **Separate opinions**

Judges Yudkivska, Tsotsoria and Vehabović expressed a joint concurring opinion. Judge Serghides also expressed a concurring opinion. Judges Raimondi, Spano, Kjølbros, Grozev, Ravarani, Pastor-Vilanova, Poláčková and Hüseyinov expressed a joint partly dissenting opinion. These opinions are annexed to the judgment.

**178. ECHR, X v. Germany, no. 54646/17, Chamber decision of 30 November 2017 (Article 3, Prohibition of torture and of inhuman or degrading treatment- Inadmissible, Article 13, Right to an effective remedy- Inadmissible; Article 8, Right to respect for private and family life- Inadmissible).** The applicant, a Russian national living in Germany, unsuccessfully claimed that his deportation to Moscow exposed him to a real risk of being subjected to inhuman or degrading treatment

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**ECHR 370 (2017)  
30.11.2017**

### **Press release issued by the Registrar**

In its **decision** in the case of **X v. Germany** (application no. 54646/17) the European Court of Human Rights has unanimously declared the application inadmissible. The decision is final.

Like the domestic courts, the European Court concluded that there were no substantial grounds for believing that the applicant, if deported to Moscow, would be exposed to a real risk of being subjected to treatment contrary to Article 3 (prohibition of torture and of inhuman or degrading treatment) of the European Convention on Human Rights as he had no connection with the conflicts in the Northern Caucasus. In particular, the Court saw no reason to depart from the domestic courts' decisions, which had carefully weighed all the evidence and had made a comprehensive assessment of the applicant's case.

#### **Principal facts**

The applicant is a Russian national who was born in 1999 in Dagestan in the Northern Caucasus (Russia), and grew up in Germany.

In March 2017, the applicant's deportation to Russia was ordered by the German authorities, as he was suspected of being willing to participate in or carry out a terrorist attack in Germany and was therefore considered to constitute a threat to national security. He was placed in detention pending deportation.

In July 2017 the domestic courts rejected the applicant's requests to suspend his removal. In particular, in interim proceedings the Federal Administrative Court came to the conclusion that, even if there was a risk of torture and ill-treatment in the region of Dagestan, where the applicant was born, there was no such risk in other parts of Russia and he could therefore be deported there. It based this finding on information provided by a local Russian NGO, "Committee against Torture", according to which the applicant would probably be questioned and monitored by security agencies in Russia, but it was highly unlikely that he would be tortured. It found that other publicly available reports concerning those who were either directly connected to the conflicts in the Northern Caucasus or their relatives were not applicable to the applicant, who had left Dagestan when he was three years old. This assessment was confirmed soon after by the Federal Constitutional Court.

The main proceedings before the Federal Administrative Court are still pending.

Also in July 2017, the European Court of Human Rights applied an interim measure following a request by the applicant, indicating to the German Government that he should not be removed pending the receipt of further information. This interim measure was lifted in August 2017.

## Complaints, procedure and composition of the Court

The application was lodged with the European Court of Human Rights on 30 July 2017.

Relying on Article 3 (prohibition of torture and of inhuman or degrading treatment), the applicant complained, in particular, that his removal to Russia would expose him to the risk of being tortured, placed under surveillance, detained or subjected to a forced disappearance. Relying on Article 8 (right to respect for private and family life), he also complained that he would be torn from his family and the country in which he has lived for the past 15 years. Lastly, he alleged under Article 13 (right to an effective remedy) that the domestic courts had not sufficiently assessed the situation in which he would find himself if he were deported to Russia.

The decision was given by a Chamber of seven, composed as follows:

Erik **Møse** (Norway), *President*,  
 Angelika **Nußberger** (Germany),  
 Nona **Tsotsoria** (Georgia),  
 André **Potocki** (France),  
 Yonko **Grozev** (Bulgaria),  
 Síofra **O’Leary** (Ireland),  
 Mārtiņš **Mits** (Latvia), *Judges*,

and also Milan **Blaško**, *Deputy Section Registrar*.

## Decision of the Court

### **Article 3 (prohibition of torture and of inhuman or degrading treatment)**

Bearing in mind the careful weighing of evidence and comprehensive assessment by the domestic courts of the applicant’s case, the Court concluded that there were no substantial grounds for believing that the applicant, if deported to Moscow, would be exposed to a real risk of being subjected to torture and inhuman or degrading treatment.

Like the domestic courts, the Court observed that the available reports concerned either those directly connected to the conflicts in the Northern Caucasus or those who had relatives directly connected. However, the applicant had no connection with those conflicts as he had left Dagestan when he was three years old.

The Court also assessed new information from another NGO, Memorial, which was not available during the domestic proceedings. The new information contradicted the report by “Committee against Torture” relied on by the courts during the domestic proceedings: the report stated that there was a highly increased risk that the applicant would become a victim of prosecution and torture if deported. The Court considered that, although both NGOs were equally credible, neither of them had referred to previous similar deportations in order to substantiate their assumptions.

Therefore it saw no reason to depart from the decisions of the domestic courts as concerned the risk of ill-treatment, and found that that part of the applicant’s complaint had to be rejected as manifestly ill-founded.

### **Article 13 (right to an effective remedy)**

The Court had already considered the complaint that the domestic courts’ assessment had not been thorough enough under Article 3. That complaint was therefore also rejected as manifestly ill-founded.

**Article 8 (right to respect for private and family life)**

Given that the main proceedings raising issues under Article 8 are still pending before the Federal Administrative Court, the Court found that that complaint had to be rejected for non-exhaustion of domestic remedies.

**179. ECHR, *Ribač v. Slovenia*, no. 57101/10, Chamber judgment of 5 December 2017 (Article 14, Prohibition of discrimination, taken together with Article 1 of Protocol No. 1, Protection of property- Violation).** The applicant was a citizen of Serbia within the Socialist Federal Republic of Yugoslavia (SFRY) but has been residing in Slovenia since 1964 and served as an officer in the Yugoslav People's Army until 1991. He successfully claimed that the refusal of the Slovenian authorities to grant him an old-age pension between November 1998 and April 2003 on the grounds that he had not had Slovenian citizenship was discriminatory and violated his right to property.

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**ECHR 374 (2017)**  
**05.12.2017**

**Press release issued by the Registrar**

The applicant, Arandel Ribač, is a Slovenian national who was born in 1942 and lives in Maribor (Slovenia). The case concerned the authorities' refusal to grant him an old-age pension between November 1998 and April 2003.

Mr Ribač was a citizen of Serbia within the Socialist Federal Republic of Yugoslavia (the SFRY) but has been residing in Slovenia since 1964. He was an officer in active military service in the Yugoslav People's Army until September 1991, when he retired. In February 1992 he applied for an advance of his military pension under the relevant Ordinance enacted in 1992 by the Republic of Slovenia, which in June 1991 had become independent from the SFRY. By a decision of May 1993 the Slovenian pension authorities found that he had been entitled to such an advance, starting from November 1991.

In October 1998 the pension authorities issued a decision not to convert Mr Ribač's advance on his military pension into an old-age pension – under an Act on the Rights Stemming from the Pension and Disability Insurance of Former Military Personnel enacted in 1998 – on the grounds that he did not fulfil the statutory conditions. His advance was accordingly suspended. The authorities dismissed his appeal in September 2002, holding that he could not be a beneficiary as he did not have Slovenian citizenship and did not comply with the requirements applicable to foreign beneficiaries. He subsequently acquired Slovenian citizenship and was granted an old-age pension as from April 2003.

An application for judicial review of the 2002 decision which Mr Ribač had lodged in the meantime was dismissed by the labour and social court in January 2006. His appeals were dismissed and the Constitutional Court eventually decided, in March 2010, not to accept his constitutional complaint for consideration.

Mr Ribač complained that the refusal to grant him an old-age pension between November 1998 and April 2003 on the grounds that he had not had Slovenian citizenship had been in breach of Article 14 (prohibition of discrimination) taken in conjunction with Article 1 of Protocol No. 1 (protection of property).

**Violation of Article 14 taken in conjunction with Article 1 of Protocol No. 1**

**Just satisfaction:** EUR 37,000 (pecuniary damage), EUR 5,000 (non-pecuniary damage) and EUR 3,570 (costs and expenses)

- 180. ECHR, *S.F. and Others v. Bulgaria*, no. 8138/16, Chamber judgment of 7 December 2017 (Article 3, Prohibition of torture and inhuman or degrading treatment- Violation in respect of the three children).** The case concerned a complaint brought by an Iraqi family about the conditions in which they had been kept in immigration detention for a few days when trying to cross Bulgaria on their way to Western Europe in 2015, as they successfully claimed that it amounted to inhuman and degrading treatment.
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**ECHR 379 (2017)**  
**07.12.2017**

**Press release issued by the Registrar**

The case concerned a complaint brought by an Iraqi family about the conditions in which they had been kept in immigration detention for a few days when trying to cross Bulgaria on their way to Western Europe in 2015. They now live in Switzerland, where they were granted asylum in July 2017.

In August 2015 the applicants, an Iraqi couple and their three sons, who had fled Iraq, tried to pass covertly through Bulgaria in order to seek international protection in Western Europe. They were however intercepted near the Bulgarian-Serbian border on 17 August and arrested because they had not entered the country lawfully. They were then kept in immigration detention in a short-term holding facility in Vidin pending their transfer on 19 August to a bigger immigration detention facility in Sofia. On 31 August 2015 they settled in an open facility for asylum-seekers. Shortly afterwards, they left this facility and made their way to Switzerland.

Relying on Article 3 (prohibition of inhuman or degrading treatment) of the European Convention, the applicants complained in particular about the conditions in which the three minors – then aged 16, 11 and one and a half years – had been kept in the detention facility in Vidin. Submitting a video recording, the applicants alleged in particular that the cell in which they had been held had been extremely run-down, with dirty and worn out bunk beds, mattresses and bed linen as well as litter and damp cardboard on the floor; and that, as there had been no toilet in the cell, they had had to urinate on the floor. They also complained that the authorities had failed to provide them with food and drink for the first 24 hours of their custody and that the baby bottle and milk of the youngest child had been taken away upon their arrival at the facility and only given to the mother 19 hours later.

**Violation of Article 3** (inhuman and degrading treatment) – in respect of the three children (Y.F., S.F. and A.F.)

**Just satisfaction:** 600 euros (EUR) each to Y.F., S.F. and A.F. (non-pecuniary damage), and EUR 1,000 to the applicants jointly (costs and expenses)

**181. ECHR, *D.L. v. Austria*, no. 34999/16, Chamber judgment of 7 December 2017 (Article 2, Right to life- No violation; Article 3, Prohibition of torture and inhuman or degrading treatment- No violation).** The applicant, a Serbian national, unsuccessfully claimed that his extradition from Austria to Kosovo\* would put his life at great risk and expose him to inhuman or degrading treatment there since the Kosovo\* authorities were either unwilling or unable to protect him.

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**ECHR 379 (2017)**  
**07.12.2017**

**Press release issued by the Registrar**

The applicant, Mr D.L., is a Serbian national who was born in 1973, and has been living in Austria since 2001. He is currently in detention pending extradition at Vienna-Josefstadt Prison (Austria). The case concerned the proceedings for his extradition from Austria to Kosovo\*.

Suspected of aggravated murder, he was arrested and taken into detention pending extradition in Austria in January 2016 on the basis of an international arrest warrant issued by the Kosovo\* authorities. He had allegedly ordered the murder of his former brother-in-law, but one of the latter's cousins had been killed by mistake.

There ensued three rounds of proceedings concerning Mr D.L.'s extradition. In those proceedings he notably claimed that his life was in danger in Kosovo\* because of a blood feud with his brother-in-law's clan, which the Kosovo\* authorities were either not willing or able to protect him from. He also alleged that detention conditions in Kosovo\* were deplorable, and in particular that ill-treatment by the police and prison officers, inter-prisoner violence and corruption were rife.

After having examined Mr D.L.'s claims, the courts found that his extradition was permissible. They notably found that the brother-in-law's clan could not be that influential in Kosovo\*, as certain of its members were themselves imprisoned in Kosovo\*; indeed the brother-in-law had been convicted in Kosovo\* in 2008 for threatening Mr D.L. They also took into account a sworn statement by the accused hired murderer who alleged that he had been pressured by the police into blaming Mr D.L. for ordering the murder. However, they found that this statement did not dispel the suspicion against Mr D.L. on which the extradition order was based.

Mr D.L.'s extradition has in the meantime been 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 Austrian Government that he should not be extradited for the duration of the proceedings before it.

Relying on Article 2 (right to life) and Article 3 (prohibition of torture and of inhuman or degrading treatment) o risk if extradited to Kosovo\*. Relying on international reports in particular, he claimed that the Kosovo\* authorities would not protect him from his brother-in-law's clan or ill-treatment at Mitrovica prison where he alleged that he would most likely be held.

**No violation of Articles 2 and 3** – in the event of Mr D.L.'s extradition to Kosovo\*

**Interim measure** (Rule 39 of the Rules of Court) – not to extradite Mr D.L. – still in force until judgment becomes final or until further order.

- 182. ECHR, *López Elorza v. Spain*, no. 30614/15, Chamber judgment of 12 December 2017 (Article 3, Prohibition of torture and inhuman or degrading treatment- No violation).** The applicant, a Venezuelan and Colombian national, unsuccessfully complained that his extradition from Spain to the United States of America would expose him to treatment incompatible with the European Convention as it would put him at risk of being sentenced to life imprisonment without parole.

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**ECHR 382 (2017)  
12.12.2017**

**Press release issued by the Registrar**

The applicant, Andrés López Elorza, is a Venezuelan and Colombian national who was born in 1982 in Venezuela and is currently in detention in Valdemoro Prison (Spain) pending extradition to the United States of America, where he will be prosecuted for drug trafficking.

The case concerned a complaint that extradition would put him at risk of being sentenced to life imprisonment without parole, contrary to Article 3 of the Convention.

Mr López Elorza was arrested by the Spanish police in 2013 at the request of the United States, which had charged him in 2005 with two drugs offences, which each carried a possible sentence of life imprisonment. In March 2014 the Spanish Public Prosecutor's Office agreed to his extradition, which was approved by the domestic court in October on condition that the US authorities provided a guarantee that any life sentence would not be irreducible.

Mr López Elorza appealed unsuccessfully and in February 2015 the domestic court accepted guarantees provided by the US authorities that he would be able to seek a review of any life sentence as adequate and authorised his extradition. Mr López Elorza lodged several further appeals, which were all rejected. In June 2015 he appealed to the Constitutional Court, which, however, ruled that his case and an application for interim measures to stay the extradition proceedings were inadmissible.

In July 2015 Mr López Elorza made a request for interim measures to the Court, asking that it indicate to the Spanish Government that it should stay the extradition proceedings pending the outcome of his case before the Court. The request was granted until August the same year and the Court put questions to the Government about whether he risked a life sentence in the United States that precluded early release or release on parole and about the concrete mechanisms under US law to have any sentence reviewed.

The Government replied in July 2015, including a document prepared by the US Department of Justice. The document explained why the US authorities were seeking Mr López Elorza's extradition and laid out the sentencing procedures and possible penalties he might face. It concluded by saying that Mr López Elorza was unlikely to face the maximum sentence, however, if such a penalty was imposed there were a number of ways to have the sentence quashed, reduced or to obtain early release.

On 31 July 2015 the Court extended the interim measure and requested that the Spanish Government stay Mr López Elorza's extradition while it considered his case.

Relying on Article 3 (prohibition of inhuman or degrading treatment), Mr López Elorza complained that his extradition would expose him to treatment incompatible with the European Convention as it would put him at risk of being sentenced to life imprisonment without parole.

**No violation of Article 3** – in the event of Mr López Elorza’s extradition to the United States

**Interim measure** (Rule 39 of the Rules of Court) – not to extradite Mr López Elorza – still in force until the judgment becomes final or until further order.

**183. ECHR, *Joannou v. Turkey*, no. 53240/14, Chamber judgment of 12 December 2017 (Article 1 of Protocol No. 1, Protection of property- Violation).** The applicant, a British and Cypriot national, successfully claimed that the length of proceedings before the Immovable Property Commission, concerning compensation for her property, which is located in the “Turkish Republic of Northern Cyprus”, was excessive and thus in breach of her right to property.

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**ECHR 382 (2017)  
12.12.2017**

#### **Press release issued by the Registrar**

The case concerned a complaint about the excessive length of proceedings to obtain compensation for property located in northern Cyprus. The proceedings commenced in 2008 and are still pending.

The applicant, Adriani Joannou, is a British and Cypriot national who was born in 1953 and lives in Enfield (United Kingdom). In 1997 she received five plots of land in the village of Koma Tou Yialou, located in the “Turkish Republic of Northern Cyprus” (the “TRNC”), as a gift from her aunt who had owned it prior to the Turkish military intervention in 1974.

In May 2008 Ms Joannou, through her Turkish Cypriot lawyers, filed a claim with the Immovable Property Commission for compensation amounting to 1,800,000 British pounds (approximately 2,285,000 euros). The commission had been set up in 2005 following the introduction of new legislation (Law no. 67/2005) on the compensation, exchange or restitution of immovable property to which owners no longer had access in the “TRNC”.

Two years later, the “TRNC” authorities submitted an opinion to the commission on Ms Joannou’s claim, finding that she had failed to prove that she was the legal heir to the property and that her claim was excessive.

A number of preliminary hearings ensued before the commission over the next seven years, which have been repeatedly adjourned, essentially because the “TRNC” authorities made requests for Ms Joannou to provide additional documents concerning her property claim. These included requests: in June 2010, for a document showing that she used a Turkish Cypriot house in the South; in April 2013, for additional certificates proving her and her aunt’s identity; and, in October 2013, for clarification of the different spellings of the names of Ms Joannou’s mother and aunt, the marital status and succession of her aunt as well as the status of liabilities related to the property.

Further hearings were adjourned in 2016 after Ms Joannou’s lawyers withdrew from the case. Most recently that happened in March 2017 because the “TRNC” representatives argued that she could not be considered as a legal heir to the property as her aunt had given it to her while she was still alive.

Relying in particular on Article 1 of Protocol No. 1 (protection of property), Ms Joannou complained, inter alia, that the proceedings before the commission concerning compensation for her property had been protracted and ineffective.

#### **Violation of Article 1 of Protocol No. 1**

**Just satisfaction:** EUR 7,000 (non-pecuniary damage) and EUR 6,325 (costs and expenses)

**184. ECHR, *Chiragov and Others v. Armenia*, no. 13216/05, Grand Chamber judgment of 12 December 2017 (Article 41, Just Satisfaction- Awarded).** The Court unanimously held that the Armenian Government had to give just satisfaction in respect of pecuniary and non-pecuniary damage to each of the six applicants, Azerbaijani refugees, as 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 Nagorno-Karabakh conflict. The Court underlined the responsibility of the two States concerned to find a resolution to the Nagorno-Karabakh conflict on the political level.

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**ECHR 385 (2017)**  
**12.12.2017**

### **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 ruled on the question of just satisfaction. It held, unanimously, that the Armenian Government had to pay 5,000 euros in respect of pecuniary and non-pecuniary damage to each of the applicants and a total amount of 28,642.87 pounds sterling for costs and expenses.

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 Nagorno-Karabakh conflict.

The Court observed that the principle of subsidiarity underpinned the system of the European Convention on Human Rights. Thus, Armenia and Azerbaijan had given undertakings prior to their accession to the Council of Europe, committing themselves to the peaceful settlement of the Nagorno-Karabakh conflict. The Court could only underline that it was their responsibility to find a solution on a political level to the conflict. Without prejudice to any compensation to be awarded to the applicants as just satisfaction, the effective execution of the principal judgment called for the creation of general measures at national level.

The Court also noted that the damage did not lend itself to precise calculation. Certain difficulties in assessing the damage derived from the passage of time: the time element made the link between a breach of the Convention and the damage less certain.

In conclusion, the Court underlined the responsibility of the two States concerned to find a resolution to the Nagorno-Karabakh conflict. Pending a solution on the political level, the Court considered it appropriate to award the applicants aggregate sums for pecuniary and non-pecuniary damage.

### **Principal facts**

The applicants, Elkhon Chiragov, Adishirin Chiragov, Ramiz Gebrayilov, Akif Hasanof, Fekhreiddin Pashayev and Qaraca Gabrayilov are Azerbaijani nationals. The sixth applicant died in 2005; the application was pursued on his behalf by his son.

The applicants submitted that they were 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 conflict over Nagorno-Karabakh. Since then they had not been able to return to their homes and properties because of the Armenian occupation.

In a judgment of 16 June 2015 the Court held that there had been continuing violations of Article 8 (right to respect for home and private and family life) and Article 13 (right to an effective remedy) of the European Convention on Human Rights and of Article 1 of Protocol No. 1 (protection of property) to the Convention. With respect to Article 1 of Protocol No. 1, it concluded that, as from 26 April 2002 – the date on which Armenia had ratified the Convention – no aim had been indicated which could justify the denial of access of the applicants to their property and the lack of compensation for that interference. The Court found the Republic of Armenia responsible for the breaches of the applicants' rights.

As the question of just satisfaction was not ready for decision, the Court reserved it and invited the parties to submit their written observations on that issue and to notify the Court of any agreement they might reach.

### Complaints, procedure and composition of the Court

Relying on Article 41 (just satisfaction), the applicants sought just satisfaction amounting to several million euros in respect of damage sustained and of costs and expenses.

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 were given 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 complaints admissible. A second hearing was held on 22 January 2014. The Grand Chamber delivered its judgment on the merits on 16 June 2015.

Today's judgment on just satisfaction was given by the Grand Chamber of 17 judges, composed as follows:

Guido **Raimondi** (Italy), *President*,  
 Angelika **Nußberger** (Germany),  
 Linos-Alexandre **Sicilianos** (Greece),  
 Ganna **Yudkivska** (Ukraine),  
 Robert **Spano** (Iceland),  
 Luis **López Guerra** (Spain),  
 Nebojša **Vučinić** (Montenegro),  
 Paul **Lemmens** (Belgium),  
 Krzysztof **Wojtyczek** (Poland),  
 Ksenija **Turković** (Croatia),  
 Egidijus **Kūris** (Lithuania),  
 Iulia **Motoc** (Romania),  
 Branko **Lubarda** (Serbia),  
 Mārtiņš **Mīts** (Latvia),  
 Armen **Harutyunyan** (Armenia),  
 Lətif **Hüseynov** (Azerbaijan),  
 Jolien **Schukking** (the Netherlands),

and also Johan **Callewaert**, *Deputy Grand Chamber Registrar*.

### Decision of the Court

#### Article 41

In its principal judgment the Court referred to the exceptional nature of the case, owing to a number of features.

The case related to an ongoing conflict situation and the parties had still not reached a peace agreement. Despite a ceasefire agreement concluded 23 years ago, the ceasefire was still not observed. Whereas the events that had led the applicants to flee their property and homes had occurred in May 1992, the Republic of Armenia had not ratified the Convention until ten years later, on 26 April 2002. The Court concluded that from the date of entry into force of the Convention in respect of Armenia, the latter had been responsible for continuing violations of the applicants' rights under Article 1 of Protocol No. 1 and Articles 8 and 13 of the Convention.

The Court was thus dealing with a continuing situation which had its roots in the unresolved conflict over Nagorno-Karabakh and the surrounding territories and still affected a large number of individuals. More than 1,000 individual applications lodged by persons who had been displaced during the conflict were pending before the Court, slightly more than half of them being directed against Armenia and the remainder against Azerbaijan. The applicants in those cases represented just a small portion of the persons, estimated to exceed one million, who had had to flee during the conflict and had since been unable to return to their properties and homes or to receive any compensation.

The Court considered it appropriate to emphasise the principle of subsidiarity.

As to the political dimension, Armenia and Azerbaijan had committed themselves prior to their accession to the Council of Europe, to the peaceful settlement of the Nagorno-Karabakh conflict. By now, some 15 years had passed since the ratification of the Convention by the two States without a political solution of the conflict being in sight. The Court could only underline that it was their responsibility to find a solution to the conflict on a political level.

With regard to the legal dimension, the Court reiterated that the principle of subsidiarity underpinned the Convention system. By virtue of Article 1 of the Convention (obligation to respect human rights), the Contracting States had to secure the rights and freedoms guaranteed by the Convention to everyone within their jurisdiction, while, in accordance with Article 19 (establishment of the Court), it was for the Court to ensure the observance of the engagements undertaken by the States. It was precisely a failure on the part of the Government which obliged the Court to act as a court of first instance, establishing the relevant facts, evaluating evidence in respect of property claims and finally assessing monetary compensation.

Without prejudice to any compensation to be awarded as just satisfaction, the effective execution of the principal judgment called for the creation of general measures at national level. Guidance as to appropriate measures had been given in the principal judgment, where the Court had stated that pending a comprehensive peace agreement, it appeared particularly important "to establish a property claims mechanism, which should be easily accessible and provide procedures operating with flexible evidentiary standards, allowing the applicants and others in their situation to have their property rights restored and to obtain compensation for the loss of their enjoyment".

The Court concluded overall that the applicants were entitled to compensation for certain pecuniary losses and for non-pecuniary damage, the pecuniary and non-pecuniary damage being closely connected in the present case.

The Court noted, however, that the damage sustained did not lend itself to precise calculation. Certain difficulties in assessing the damage derived from the passage of time. The time element made the link between a breach of the Convention and the damage less certain. The period over which the Court had jurisdiction had started 15 years ago in April 2002, that is, ten years after the military attack and the

applicants' flight in May 1992. The Court considered that an award could still be made, notwithstanding the large number of imponderables involved.

Lastly, the Court reiterated that it was the responsibility of the two States concerned to find a resolution to the Nagorno-Karabakh conflict. Pending a solution on the political level, it considered it appropriate to award aggregate sums for pecuniary and non-pecuniary damage.

**Just satisfaction (Article 41)**

The Court held that Armenia was to pay each of the applicants 5,000 euros (EUR) covering all heads of damage, plus 28,642.87 pounds sterling to all the applicants in respect of costs and expenses.

**185. ECHR, *Sargsyan v. Azerbaijan*, no. 40167/06, Grand Chamber judgment of 12 December 2017 (Article 41, Just Satisfaction- Awarded).** The Court unanimously held that the Azerbaijani Government had to give just satisfaction in respect of pecuniary and non-pecuniary damage to the applicant, an Armenian refugee, after having been forced to flee from his home in the Shahumyan region of Azerbaijan in 1992 during the conflict over Nagorno-Karabakh and had since been denied the right to return to his village and to have access to and use his property there. The Court underlined the responsibility of the two States concerned to find a resolution to the Nagorno-Karabakh conflict on the political level.

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**ECHR 386 (2017)**

**12.12.2017**

#### **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 ruled on the question of just satisfaction. It held, unanimously, that the Azerbaijani Government had to pay the applicant 5,000 euros (EUR) in respect of pecuniary and non-pecuniary damage and EUR 30,000 in costs and expenses.

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 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.

The Court observed that the principle of subsidiarity underpinned the system of the European Convention on Human Rights. Thus, Armenia and Azerbaijan had given undertakings prior to their accession to the Council of Europe, committing themselves to the peaceful settlement of the Nagorno-Karabakh conflict. The Court could only underline that it was their responsibility to find a solution on a political level to the conflict. Without prejudice to any compensation to be awarded to the applicant as just satisfaction, the effective execution of the principal judgment called for the creation of general measures at national level.

The Court also noted that the damage did not lend itself to precise calculation. Certain difficulties in assessing the damage derived from the passage of time: the time element made the link between a breach of the Convention and the damage less certain.

In conclusion, the Court underlined the responsibility of the two States concerned to find a resolution to the Nagorno-Karabakh conflict. Pending a solution on the political level, the Court considered it appropriate to award the applicant an aggregate sum for pecuniary and non-pecuniary damage.

#### **Principal facts**

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. His widow, Lena Sargsyan, his son, Vladimir, and his daughters, Tsovinar and Nina Sargsyan pursued the application on his behalf. Lena Sargsyan died in 2014. Vladimir and Tsovinar Sargsyan pursued the proceedings on the applicant's 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 Soviet Socialist Republic, where they had a house and a plot of land. According to his submissions, his family had been forced to flee from their home in 1992 during the Nagorno-Karabakh conflict.

In a judgment delivered on 16 June 2015 the Grand Chamber dismissed the Government's preliminary objections and held that there had been continuing violations of Article 1 of Protocol No. 1 (protection of property), Article 8 (right to respect for home and private and family life) and Article 13 (right to an effective remedy) of the Convention. With respect to Article 1 of Protocol No. 1, it accepted that throughout the period within its jurisdiction, that is, from 15 April 2002 – the date on which Azerbaijan had ratified the Convention – refusing civilians, including the applicant, access to the village had been justified by safety considerations given that it was situated in an area of military activity. However, it considered that the fact that the respondent State had not taken any alternative measures to restore the applicant's property rights or to provide him with compensation for the loss of their enjoyment had placed an excessive burden on him.

As the question of just satisfaction was not ready for decision, the Court reserved it and invited the parties to submit their written observations on that issue and to notify the Court of any agreement they might reach.

### Complaints, procedure and composition of the Court

Relying on Article 41 (just satisfaction), the applicant sought just satisfaction in respect of pecuniary and non-pecuniary damage resulting from the violations found in the present case, as well as reimbursement of the costs and expenses incurred in the proceedings before the Court.

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 were granted leave to intervene as a third party. A first hearing was held on 15 September 2010.

In a decision of 14 December 2011, the Court declared the application partly admissible.

A second Grand Chamber hearing on the merits of the case was held on 5 February 2014.

The Grand Chamber delivered its judgment on the merits on 16 June 2015.

Today's judgment on just satisfaction was given by the Grand Chamber of 17 judges, composed as follows:

Guido **Raimondi** (Italy), *President*,  
 Angelika **Nußberger** (Germany),  
 Linos-Alexandre **Sicilianos** (Greece),  
 Ganna **Yudkivska** (Ukraine),  
 Robert **Spano** (Iceland),  
 Luis **López Guerra** (Spain),  
 Nebojša **Vučinić** (Montenegro),  
 Paul **Lemmens** (Belgium),  
 Krzysztof **Wojtyczek** (Poland),  
 Ksenija **Turković** (Croatia),  
 Egidijus **Kūris** (Lithuania),  
 Iulia **Motoc** (Romania),  
 Branko **Lubarda** (Serbia),  
 Mārtiņš **Mits** (Latvia),  
 Armen **Harutyunyan** (Armenia),  
 Lətif **Hüseynov** (Azerbaijan),  
 Jolien **Schukking** (the Netherlands),

and also Johan **Callewaert**, *Deputy Grand Chamber Registrar*.

## Decision of the Court

### Article 41

In its principal judgment the Court referred to the exceptional nature of the case, owing to a number of features.

The case related to an ongoing conflict situation and the parties had still not reached a peace agreement. Despite a ceasefire agreement concluded 23 years ago, the ceasefire was still not observed. Whereas the events that had led the applicant to flee his property and home had occurred in June 1992, the Republic of Azerbaijan had not ratified the Convention until ten years later, on 15 April 2002. The Court concluded that from the date of entry into force of the Convention in respect of Azerbaijan, the latter had been responsible for continuing violations of the applicant's rights under Article 1 of Protocol No. 1 and Articles 8 and 13 of the Convention.

The Court was thus dealing with a continuing situation which had its roots in the unresolved conflict over Nagorno-Karabakh and the surrounding territories and still affected a large number of individuals. More than 1,000 individual applications lodged by persons who had been displaced during the conflict were pending before the Court, slightly more than half of them being directed against Armenia and the remainder against Azerbaijan. The applicants in those cases represented just a small portion of the persons, estimated to exceed one million, who had had to flee during the conflict and had since been unable to return to their properties and homes or to receive any compensation.

The Court reiterated the importance of the principle of subsidiarity.

As to the political dimension, Armenia and Azerbaijan had committed themselves prior to their accession to the Council of Europe, to the peaceful settlement of the Nagorno-Karabakh conflict. By now, some 15 years had passed since the ratification of the Convention by the two States without a political solution of the conflict being in sight. The Court could only underline that it was their responsibility to find a solution to the conflict on a political level.

With regard to the legal dimension, the Court reiterated that the principle of subsidiarity underpinned the Convention system. By virtue of Article 1 (obligation to respect human rights), the Contracting States had to secure the rights and freedoms guaranteed by the Convention to everyone within their jurisdiction, while, in accordance with Article 19 (establishment of the Court), it was for the Court to ensure the observance of the engagements undertaken by the States. It was precisely a failure on the part of the Government which obliged the Court to act as a court of first instance, establishing the relevant facts, evaluating evidence in respect of property claims and finally assessing monetary compensation.

Without prejudice to any compensation to be awarded as just satisfaction, the effective execution of the principal judgment called for the creation of general measures at national level. Guidance as to appropriate measures had been given in the principal judgment, where the Court had stated that pending a comprehensive peace agreement, it appeared particularly important "to establish a property claims mechanism, which should be easily accessible and provide procedures operating with flexible evidentiary standards, allowing the applicants and others in their situation to have their property rights restored and to obtain compensation for the loss of their enjoyment".

The Court concluded overall that the applicant was entitled to compensation for certain pecuniary losses and for non-pecuniary damage, the pecuniary and non-pecuniary damage being closely connected in the present case.

The Court noted, however, that the damage sustained did not lend itself to precise calculation. Certain difficulties in assessing the damage derived from the passage of time: the time element made the link

between a breach of the Convention and the damage less certain. The violation of the right to respect for possessions was a continuing one and almost ten years had elapsed between the applicant's displacement from Gulistan and the entry into force of the Convention in respect of Azerbaijan, and some 15 years had elapsed thereafter. The Court considered that an award could still be made, notwithstanding the large number of imponderables involved.

Lastly, the Court reiterated that it was the responsibility of the two States concerned to find a resolution to the Nagorno-Karabakh conflict. Pending a solution on the political level, it considered it appropriate to award an aggregate sum for pecuniary and non-pecuniary damage.

#### **Just satisfaction (Article 41)**

The Court held that Azerbaijan was to pay Vladimir Sargsyan and Tsovinar Sargsyan EUR 5,000 jointly in respect of pecuniary and non-pecuniary damage, and EUR 30,000 in respect of costs and expenses.

#### **Separate opinion**

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

**186. ECHR, A. v. Switzerland, no. 60342/16, Chamber judgment of 19 December 2017 (Article 2, Right to life- No violation; Article 3, Prohibition of torture and inhuman or degrading treatment- No violation).** The applicant, an Iranian asylum-seeker, alleged that his conversion to Christianity put him at a real risk of being killed or ill-treated if he were to be deported to Iran.

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**ECHR 392 (2017)**  
**19.12.2017**

**Press release issued by the Registrar**

The case concerned the deportation of an Iranian asylum-seeker.

The applicant, Mr A., was born in 1982 and grew up in Iran. He entered Switzerland in 2009 and immediately claimed asylum.

He brought three sets of asylum proceedings, all without success. He was questioned in person in the first two sets of proceedings, with the help of an interpreter. Initially he stated that he had been arrested and imprisoned in Iran for demonstrating against the presidential elections, but managed to escape and flee the country with the help of a smuggler. In the meantime an Iranian court had sentenced him in his absence to 36 months' imprisonment. The asylum authorities found that this account was not credible or sufficiently substantiated. His first application was thus rejected and he was ordered to leave Switzerland in 2013.

In his second application he submitted at a hearing that he would be at risk if returned to Iran because he had meanwhile converted from Islam to Christianity. The asylum authorities doubted, however, that his conversion was genuine and lasting and again rejected his application.

In 2014 the Federal administrative Court dismissed an appeal by Mr A. against that decision. It considered that Christian converts would only face a risk of ill-treatment upon return to Iran if they were particularly exposed in the public arena on account of their Christian faith and could therefore be perceived as a threat by the Iranian authorities. This was not the case for Mr A., who was an ordinary member of a Christian circle and the Iranian authorities had most likely not even become aware of his conversion.

In 2016, in a third round of proceedings, his application was again rejected, essentially on the same grounds.

The State Secretariat for Migration thus set a deadline for Mr A.'s voluntary departure in October of the same year. However, his deportation had in the meantime been 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 Swiss Government that he should not be deported to Iran for the duration of the proceedings before it.

Relying on Article 2 (right to life) and Article 3 (prohibition of torture and of inhuman or degrading treatment), Mr A. alleged that his conversion to Christianity put him at a real risk of being killed or ill-treated if he were to be deported to Iran.

**No violation of Article 2 or 3** – in the event of Mr A.'s deportation to Iran

**Interim measure** (Rule 39 of the Rules of Court) – not to expel Mr A.– still in force until judgment becomes final or until further order.