

EFFECTIVE REMEDIES FOR LENGTH OF PROCEEDINGS



SUPPORTING EFFECTIVE DOMESTIC REMEDIES AND FACILITATING THE EXECUTION OF ECTHR JUDGMENTS

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EFFECTIVE REMEDIES FOR LENGTH OF PROCEEDINGS

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SECTION I - Implementation of the European Convention of Human Rights (ECHR) at national level

a) Overall Objective:

Overall objective of this session is to ensure learners improve their knowledge and comprehension on a range of issues related to the implementation of ECHR at domestic level. Additionally, it will enable learners to analyse and evaluate the obligation of High Contracting Parties under the Convention and make the differentiation with the member states' obligation for the execution of the European Court of Human Rights (ECtHR) judgements. The targeted learners for this session need to have a general knowledge of European Convention of Human Rights and the case law of ECtHR on Albania. More concretely, it is preferred that the participants should have the professional background of lawyers, judges, prosecutors, state agents that deal with the execution of ECtHR (state advocacy office, codification department in the Ministry of Justice, Ministry of Finance, Prime Minister Office etc). This training session may serve very well to all the law enforcement officers that deal in their daily work with public state activities.

b) Learning Objective:

By the end of this introductory session learners will be able to:

- Recall the rank of the ECHR in the hierarchy of national laws
- Restate the nature of obligation to directly apply the ECHR at the domestic level
- Distinguish the nature of obligation to execute the ECtHR judgements
- Identify the main actors that play a role in the execution process of ECtHR judgements
- Explain the shared responsibility for the implementation of the ECHR
- Appraise the effects of the Convention at domestic level in Albania

c) Length: 3 hours, 2 weeks

d) Final Assessment: case study, portfolio, debate paper

1. European Convention of Human Rights entrance into force in Albania

ECHR is the first convention adopted by Council of Europe that entered into force in 1953. This international instrument was signed by Albanian state on 13 July 1995 and ratified on 02 October 1996.³ Albania adhered to all the Protocols of the ECHR (1-16)² apart from the Protocol 9, 10³ and 14 bis.⁴ Article 117.3 of the Constitution of Albania provides that international agreements ratified by law are promulgated and published according to the procedures that are provided for laws. According to provision 1 of this Article, laws acquire juridical force only after they are published in the Official Journal. Therefore the same procedure is applicable for the promulgation of international agreements such as ECHR which was ratified by law no 8137, date 3.07.1996, as amended. However, its *de facto* publication was made only in 2008 (12 years after its ratification) in the Official Journal No. 28/ 2008 for the unpublished acts of year 1996.

2. The Constitution of Albania and the rank of ECHR in the hierarchy of laws

At the time when the ECHR was ratified on 02 October 1996, Albania did not yet have its Constitution but instead was governed by the Law No. 7491/1991 "On fundamental Constitutional dispositions", which repealed the 1976 Constitution. The fundamental constitutional dispositions served as a basis for the transformation of the Albanian state after 1991 from a monist authoritarian state into a parliamentary democracy that respects the freedoms and rights of citizens. Only 2 years after the ratification of ECHR, Albanian Parliament approved on 21 October 1998 the first democratic Albanian Constitution.⁵

Albanian legal system follows the national constitutional option of monist system by recognizing to the ECHR in the hierarchy of national laws the second place after the Albanian Constitution and its supremacy in relation to the domestic laws. Article 116 of the Constitution provides the order of normative acts that are effective in the entire territory of the Republic of Albania which are: a) the Constitution; b) ratified international agreements; c) the laws; ç) normative acts of the Council of Ministers.

³ Law no 8137, date 3.07.1996, as amended by Law no 8431, date 13.07.2000, law no 9264, date 29.07.2004, Law no 9453, date 25.12.2005

² Protocol of the Convention (signed 2 Octob. 1996, ratified the same day); Prot II (signed on 13 July 1995 ratified on 2 Oct 1996); Prot III (signed on 13 July 1995 ratified on 2 Oct 1996); Prot IV (signed 2 Oct 1996, ratified the same day); Prot V (signed on 13 July 1995, ratified on 2 Nov 1996); Prot VI (signed on 4 April 2000, ratified on 1 Oct 2000); Prot VII (signed on 2 Oct 1996, ratified on 1 Jan 1997); Prot VIII (signed on 13 July 1995, ratified on 2 Oct 1996); Prot XI (signed on 13 July 1995, ratified on 1 Nov 1998) Prot XII (signed on 26 May 2003, ratified on 1 May 2005); Prot XIII (signed on 26 May 2003, ratified on 1 June 2007); Prot XIV (signed on 10 Nov 2004, ratified on 3 Feb 2006); Prot XV (signed on 11 Feb 2014, ratified on 12 Nov 2015); Prot XVI (signed on 24 Nov 2014, ratified on 7 May 2015)

³ These 2 Protocols has been repealed as from the date of entry into force of Protocol No. 11 (ETS No. 155) on 1 November 1998 thus lost their purpose

⁴ This Protocol ceased to be in force or applied on a provisional basis as from 1 June 2010, date of entry into force of Protocol No. 14 to the Convention (CETS No. 194)

⁵ Which was voted and approved in the popular referendum on 22 November 1998 and came into force on 28 November 1998.

Following this approach, an international treaty, becomes part of domestic law immediately it has been signed and ratified, and as soon as it is published, without any legislative transposition being necessary. In this connection, Article 5 of the Constitution of Albania provides that the Republic of Albania applies international law that is binding upon it. Also, Article 122 of the Constitution provides that the international agreements ratified by law which contain self-executing norms are implemented directly (Art.122/1). They enjoy priority over the laws of the country that are incompatible with it (Art. 122/2). Additionally, the norms issued by an international organization which expressly provide for their direct applicability shall have superiority, in case of conflict, on the laws of the country (Art.122/3). In this respect, the ECHR enjoys a direct effect at domestic legal system.

Example: Constitutional Court of Albania in its Decision No.6/2006 for the first time affirmed the rank and direct effect of the Convention at domestic level, dealing with (1) the place of the Convention in the domestic legal system; (2) the interpretation of the Convention and the ECtHR' case law; (3) the legal effects of the ECtHR' judgments.

Example: Earlier, the Constitutional Court by Decision No.65/1999⁶ interpreted the Article 17 of the Constitution that refers explicitly to the standards of the ECHR when limitations of individual rights and freedoms have to be imposed by the state authorities, stating that "...*These limitations may not infringe the essence of the rights and freedoms and in no case may exceed the limitations provided for in the ECHR.*"

Example: Constitutional Court in Decision No.29/2005 argued that the minimum standard for the protection of the ECHR rights and freedoms is obligatory for the state authorities. Nonetheless, that does not impinge the national law to impose a higher standard for the protection of individual rights. More concretely it maintained that: "*the right of access to a court is a component of the individual rights but this right is not absolute. It may be subject to legal restrictions. Notwithstanding as such, the Albanian Constitution has superseded the safeguards granted by ECHR by associating the dismissal measures toward a judge with the right of complaint before the Supreme Court. Expanding this concept to the other disciplinary measures goes against the Constitution. Therefore Article 147, point 6 of the Constitution being conceived as a disposition of exceptional nature, may not be interpreted in an exhaustive manner.*"

The recognition of Convention at domestic level in other countries takes different forms. In some countries⁷ the Convention is considered as part of their domestic legislation. In some others⁸ the Constitution recognizes the international agreements only limited to the general principles of international law. In the latter case, the Convention and the ECtHR's case law is recognized as *lex specialis* by a special act, by rulings of the Constitutional Court⁹ or by a Supreme Court decision.¹⁰

⁶This decision deals with the compatibility of the death penalty with the Constitution standards, making the first case when Article 17/2 was ever applied in domestic legal system.

⁷Armenia, Azerbaijan, Romania, Slovakia, Spain, Sweden, Macedonia, Ukraine.

⁸Italy, Netherlands, United Kingdom, Norway, Russia, Slovenia, Latvia, Denmark.

⁹Germany recognized the effect of the Convention on behalf of the principle of openness to the principles of international law only after the German Federal Court came out with its decision *Görgülü* of 14 October 2004.

Example: the Supreme Court of the United Kingdom' decision *Horncastle* (2009)²¹, can be viewed as a direct response to the European Court of Human Rights ruling in *Al-Khawaja v United Kingdom* (2009)²² in which the facts were legally very similar. In this case the ECtHR ruled against the state and found that while it was justifiable to allow hearsay evidence in some circumstances, it was likely never permissible for a conviction to be based solely or decisively on such evidence. The Lords in *Horncastle* do not look favourably upon the decision of the Grand Chamber stating "that although the domestic court was required to take account of the jurisprudence of the European Court of Human Rights in applying principles which were clearly established, where, on rare occasions, the domestic court was concerned that the European court's decision insufficiently appreciated or accommodated particular aspects of the domestic process, it might decline to follow the decision. Later on, in another decision *Ullah*,²³ the Supreme Court adjusted its position expressing that the "duty of national courts is to keep pace with the Strasbourg jurisprudence as it evolves over time: no more, but certainly no less".

➤ Case study "Qufaj v. Albania"(the first judgment for Albania)²⁴

The Court communicated the application for this case to Albanian Government in 2003. The applicant, an Albanian company, Qufaj Co. Sh.p.k.²⁵ claimed before ECtHR that the failure of the Albanian authorities to comply with a final decision had infringed Article 6 § 1 of the Convention.

Facts: The Municipality of Tirana, after having granted to the applicant company a "**planning permission**" to build five hundred flats over 15,788 square meters of land in a residential area in Tirana, then refused to grant the applicant "**the building permit**",²⁶ since it failed to respect the criteria based on the new provisions of the law. The applicant sought compensation for its loss, in the Tirana District Court. On appeal, the Tirana Court of Appeal quashed the first-instance judgment and ordered the Municipality to pay the applicant an amount as compensation for the damage (decision no. 1197 of 23 February 1996). This decision became final for enforcement. Even though the Enforcement Office notified the Municipality that it should execute the Court of Appeal decision, it repeatedly refused to comply, arguing that it had no budget for the execution of judicial decisions. Having the case submitted before the Constitutional Court, the latter rejected the applicant company's complaint, stating that the "complaint [could] not be taken into consideration because the enforcement of court decisions is outside the jurisdiction of the Constitutional Court". The ECtHR

In Italy, the Constitutional Court ruling in case Candela Soriano landmarked a turning point for the recognition of the supremacy of the provisions of Convention to domestic laws.

²⁰ In Estonia, the Court's case law began to be considered as binding and enforceable only after the Supreme Court came out with its Decree dated 30 December 2008.

²¹ [2010] 2 AC 373, [2010] 2 WLR 47, [2010] 2 All ER 359

²² Application no. 26766/05 & 22228/06, Judgment (Merits and Just Satisfaction), Grand Chamber, date on 15 December 2011, <http://hudoc.echr.coe.int/eng?i=001-108072>

²³ Regina v. Special Adjudicator (Do v. Secretary of State for the Home Department), [2004] UKHL 26 on appeal from [2002] EWCA Civ 1856

²⁴ Application no. 54268/00, Judgment (Merits and Just Satisfaction), date 18 November 2004, <http://hudoc.echr.coe.int/eng?i=001-67514>

²⁵ Established by decision no. 5883 of the Tirana District Court on 20 July 1992, with the object of investing in the construction business

²⁶ A building permit was also required before the project could start, but the Municipality failed to decide the matter for a considerable length of time, thus preventing the building works from getting under way

delivered the judgment for this case on 18 November 2004 declaring that there was a violation for the non-execution of a final judicial decision by the Municipality.¹⁷The execution of the judgment was monitored under enhanced supervision procedures by the Committee of Ministers, having qualified the judgment as a leading case. Later on, the Committee of Ministers adopted a resolution for the closure of examination for this case considering that all the measures for the execution were exhausted.

List of questions:

- Discuss the possible effects this judgment has had in the domestic legal system for the prevention of similar violations
- What decision would you make as a judge in case a request for non-enforcement of a final court decision is assigned for examination?
- What is expected when judges encounter a conflict of norms between the national law and the Convention during the examination of a case?
- What is expected when lawyers encounter the conflict of norms between the national law and the Convention during their legal practice?
- What is expected when the national law lacks a provision that is deemed as necessary for the implementation of an individual right enshrined by the ECHR? Is the Convention directly applied in such a case?
- What is the approach to be followed by a lawyer, a judge, a prosecutor, a law enforcement officer in similar cases?
- In particular, should the judge engage in an inventive method of interpretation by granting the direct effect to the Convention, rather than stick with the mechanical interpretation of the domestic law?
- What is the approach to be followed by a judge in case he encounters a violation of a human right standard during the examination of a case which has not been claimed by the defendant, the plaintiff or an interested party as may be the case?

Recommended reading:

- Judgement on case of Qufaj Co. Sh.P.K. V. Albania no.54268/00, Judgment (Merits and Just Satisfaction)18/11/2004, final on 30/03/ 2005, <http://hudoc.echr.coe.int/eng#%7B%22fulltext%22:%5B%22qufaj%22%2C%22documentcollectionid%22:%5B%22GRANDCHAMBER%22%2C%22CHAMBER%22%2C%22temid%22:%5B%22001-67514%22%5D%7D>
- Resolution CM/ResDH(2011)86[1]Execution of the judgment of the European Court of Human RightsQufaj Co. Sh.P.K against Albania<http://hudoc.exec.coe.int/eng#%7B%22EXECIdentifier%22:%5B%22001-106810%22%5D%7D>
- Constitutional Court of Albania in its Decision No.6/2006
- Constitutional Court by Decision No.65/1999
- Constitutional Court in Decision No.29/2005
- Poitrimol v. France judgement
- Supreme Court in United Kingdom asserted in its decisionHorncastle (2009)

¹⁷Case of Qufaj Co. Sh.P.K. Against Albania [Cm/Resdh(2011)86]

Part B. Obligation to execute Judgements of the ECtHR

Respect for the ECHR, including the compulsory jurisdiction of the ECtHR and its binding judgments, is the main pillar of European public order. Article 1 of the Convention entails the High Contracting Parties with the obligation to secure to everyone within their jurisdiction the rights and freedoms enshrined in the Convention. The legal effects of this obligation have a general character of *erga omnes* effect, what implies that all High Contracting parties are invited to provide for a collective implementation of the rights enshrined in the Convention. Whereas, the nature and limits of member state' obligation under Article 1 of Convention, are largely dictated by the states jurisdiction' boundaries. In line with this, the Albanian Constitution provides in Article 15: "*The Albanian state has the obligation to respect fundamental human rights and freedoms by considering them indivisible, inalienable, and inviolable and which stand at the basis of the entire juridical order.*"

Example: in "*Mamatkulov v. Turkey*,"¹⁸ the Court held that "Indications of interim measures given by the Court, as in the present case, permit 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 is effective; such indications also subsequently allow the Committee of Ministers to supervise execution of the final judgment. Such measures thus enable the State concerned to discharge its obligation to comply with the final judgment of the Court, which is 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 instance the respondent State – must be examined in the light of the obligations which are imposed on the Contracting States by Articles 1, 34 and 46 of the Convention"

Note Interim Measures: *By virtue of Rule 39 of the Rules of Court, the Court may issue interim measures which are binding on the State concerned. Interim measures are only applied in exceptional cases. The Court will only issue an interim measure against a Member State where, having reviewed all the relevant information, it considers that the applicant faces a real risk of serious, irreversible harm if the measure is not applied. Applicants or their legal representatives who make a request for an interim measure pursuant to Rule 39 of the Rules of Court should comply with the requirements.*

Example: in "*Rrapo v. Albania*,"¹⁹ the Court considered that the failure of Albanian authorities to execute an ECtHR' interim measure caused the violation of Article 34 and subsequently had inflicted the violation of obligation under Article 1 of the Convention, stating: "...a failure by a respondent State to comply with interim measures will 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 set forth in the Convention."

1. Determination of the obligation for the execution of judgments of the ECtHR

Whenever, the High Contracting Parties fail to fulfil their primary obligation under Article 1 of the Convention, there is a potential for violation of Convention. Anytime the ECtHR finds a violation of human rights enshrined in the Convention, the

¹⁸ Application no. 6827/99 46951/99, Judgment (Merits and Just Satisfaction), Grand Chamber, date 04 February 2005, <http://hudoc.echr.coe.int/eng?i=001-68183>

¹⁹ Application no. 5855/10, Judgment (Merits and Just Satisfaction), date on 25 September 2012, <http://hudoc.echr.coe.int/eng?i=001-113328>

respondent state party bears the responsibility under Article 1 and Article 46 of the Convention to offer proper redress. In this context, Article 46 of the European Convention²⁰ provides the obligation of state parties to abide to a final ECtHR judgment. This obligation is three fold: first, the obligation to put an end to the violation; second the obligation to make reparation of the violation (to eliminate the past consequences of the act contravening international law) and, finally, the obligation to avoid similar violations (the obligation not to repeat the violation). These three obligations are equally apparent from the resolutions of the Committee of Ministers adopted with regard to Article 46§2 under Rule 6(2).²¹ In addition, Article 46²² of the ECHR provides that it is the Committee of Ministers which supervises the execution of judgments. This process involves all the High Contracting Parties in the Convention, which have to cooperate via their public institutions, including their parliaments.

Example: in the "Scozzari and Giunta v. Italy" case,²³ the Court reiterated that "a judgment finding a breach "imposes on the respondent state a legal obligation not just to pay those concerned the sum awarded by way of just satisfaction, but also to choose, subject to supervision by the Committee of Ministers, the general and/or, if appropriate, individual measures to be adopted in their domestic legal order to put an end to the violation found by the Court and to redress so far as possible the effects."

In case, the Committee of Ministers considers that the supervision of the execution of a final judgment is hindered by a problem of interpretation of the judgment, it may refer the matter to the Court for a ruling on the question of interpretation. Also, when a High Contracting Party refuses to abide by a final judgment in a case to which it is a party, the Committee of Ministers may refer to the Court the question whether that Party has failed to fulfil its obligation under paragraph 1. In addition, when a High Contracting Party fails its obligation under Article 46 §1 as combined with Article 1 of Convention, the Court shall refer the case to the Committee of Ministers for consideration of the measures to be taken in the future. In this connection, it is worth highlighting that the obligation on Article 1 and Article 46 of the Convention can be restricted only based on *ratione temporis*²⁴ criteria, applicable to set the boundaries for Convention' jurisdiction over states.

²⁰Article 46 of European Convention: "Binding force and execution of judgments 1. The High Contracting Parties under-take to abide by the final judgment of the Court in any case to which they are parties. 2. The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution."

²¹Rules adopted by the Committee of Ministers for the application of Article 46, paragraph 2, of the European Convention on Human Rights (Adopted by the Committee of Ministers on 10 May 2006 at the 964th meeting of the Ministers' Deputies).

²²A referral decision shall require a majority vote of two thirds of the representatives entitled to sit on the Committee

²³Application *Scozzari and Giunta v. Italy*, no. 39221/98 41963/98, Judgment (Merits and Just Satisfaction), date on 13 July 2000

²⁴Jurisdiction *Ratione Temporis* or temporal jurisdiction refers to the jurisdiction of a court of law over a proposed action in relation to the passage of time.

Example: in "Loizidou v. Turkey"²⁵ judgment ECtHR sets out the nature of limitations over the obligation under Article 1 and Article 46 of the Convention:

"The Court recalls that, although Article 1 sets limits on the breach of the Convention, the concept of "jurisdiction" under this provision is not restricted to the national territory of the High Contracting Parties. According to its established case-law, for example, the Court has held that the extradition or expulsion of a person by a Contracting State may give rise to an issue under Article 3, and hence engage the responsibility of that State under the Convention... Bearing in mind the object and purpose of the Convention, the responsibility of a Contracting Party may also arise when as a consequence of military action - whether lawful or unlawful - it exercises effective control of an area outside its national territory. The obligation to secure, in such an area, the rights and freedoms set out in the Convention derives from the fact of such control whether it be exercised directly, through its armed forces, or through a subordinate local administration

For the applicant and the Government of Cyprus, when States make declarations under Articles 25 and 46 (art. 25, art. 46) recognizing the competence of the Commission and Court, the only conditions permitted are those *ratione temporis*.

As was observed in the Court's Ireland v. the United Kingdom judgment of 18 January 1978 (Series A no. 25, p. 90, para. 239), "Unlike international treaties of the classic kind, the Convention comprises more than mere reciprocal engagements between Contracting States. It creates, over and above a network of mutual, bilateral undertakings, objective obligations which, in the words of the Preamble benefit from a 'collective enforcement'."

That the Convention is a living instrument which must be interpreted in the light of present-day conditions is firmly rooted in the Court's case-law (see, inter alia, the Tyrer v. the United Kingdom judgment of 25 April 1978, Series A no. 26, pp. 15-16, para. 31). Such an approach, in the Court's view, is not confined to the substantive provisions of the Convention, but also applies to those provisions, such as Articles 25 and 46 (art. 25, art. 46), which govern the operation of the Convention's enforcement machinery. It follows that these provisions cannot be interpreted solely in accordance with the intentions of their authors as expressed more than forty years ago.

Taking into consideration the character of the Convention, the ordinary meaning of Articles 25 and 46 (art. 25, art. 46) in their context and in the light of their object and purpose and the practice of Contracting Parties, the Court concludes that the restrictions *ratione loci* attached to Turkey's Article 25 and Article 46 (art. 25, art. 46) declarations are invalid."

List of questions:

- Define the obligation of High Contracting Parties under Article 1 of the ECHR
- Define the obligation of member states under Article 46 of the Convention
- Identify and discuss the obligation of respondent state raised under Article 1 and Article 46 of the Convention in the examples brought above

²⁵Application no. 15318/89, Judgment (Preliminary Objection), date on 23/03/1995, <http://hudoc.echr.coe.int/eng?i=001-57920>

Recommended readings:

- Resolutions
- Case Of Loizidou Against Turkey [Dh(2003)174 (Interim Resolution)]
- Case Of Loizidou Against Turkey [Dh(2003)191]
- Case Of Loizidou Against Turkey [Dh(2003)190]
- Case Of Loizidou Against Turkey [Dh (2001) 80 (Interim Resolution)]
- Case Of Loizidou Against Turkey [Dh (2000) 105]

1.1. Just satisfaction

The obligations arising out of the Court's judgments fall into three broad categories: just satisfaction, individual measures and general measures. Just satisfaction is ruled based on Article 41 of the Convention which provides as follows: "If the Court finds that there has been a violation of the Convention or the protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party." The criteria for the determination of amount of just satisfaction much depend on the nature of the case.²⁶

Following the entry into force of Protocol 14, on 1st June 2010,²⁷ the Committee of Ministers supervises also the execution of the terms of friendly settlements endorsed by the Court (Article 39 of Convention), including any sum that the State has agreed to pay the applicant under the terms of such a settlement.

Nonetheless, the Court will only award just satisfaction as it is considered to be "just" in the circumstances considering the particular features of the case. Hence, the award of just satisfaction is not an automatic consequence of a finding by the ECtHR that there has been a violation of a right guaranteed by the ECHR or its Protocols. In respect of the principle of subsidiarity the Court has as a primary scope the imposition of obligations that arise under Article 46 of the Convention. While the Courts' first intention is that Article 41 provisions should be implemented by making use the available domestic means. The Court decides to employ its own methods for the determination of the pecuniary and non pecuniary compensation only when the domestic legislation does not offer the legal means to require for the reparation of the violation. Therefore, the calculation of just satisfaction differs from case to case, depending to the relevant circumstances.

Example: in "Bajrami v. Albania,"²⁸ the Court does not discern any causal link between the violation found and the pecuniary damage alleged; it therefore dismisses this claim. As to non-pecuniary damage, the Court sees no reason to doubt that the applicant suffered some distress as a result of the non-enforcement of the final judgment at issue and that solely by the finding of a violation is not sufficient for granting just satisfaction.

Example: in "Tomasic v. Croatia,"²⁹ the Court reiterated as to the non-pecuniary damage sought, that where an applicant had resorted to an available domestic remedy and thereby obtained a finding of a violation and was awarded compensation, but can nevertheless still claim to be a "victim", the amount to be awarded under Article 41 may be less than the amounts the Court was awarding in similar cases. In that case an

²⁶ Round-table on Recommendation (2008)2 of the Committee of Ministers to Member States on efficient domestic capacity for rapid execution of judgments of the European Court of Human Rights, Strasbourg, 15 November 2011, Tirana Albania

²⁷ <http://www.coe.int/en/web/conventions/search-on-treaties/-/conventions/treaty/194>

²⁸ Application no. 35853/04, Judgment (Merits and Just Satisfaction), date on 12 December 2006, <http://hudoc.echr.coe.int/eng/?i=001-78425>

²⁹ Application no. 21753/02, Judgment (Merits and Just Satisfaction), date on 19 October 2006, <http://hudoc.echr.coe.int/eng/?i=001-77565>

applicant must be awarded the difference between the amount obtained from the Constitutional Court and an amount that would not have been regarded as manifestly unreasonable compared with the amounts awarded by the Court. The Court considered that, in the absence of domestic remedies, it would have awarded the sum of EUR 4,000. Whereas the amount that the applicant had received from the Constitutional Court was EUR 600, which is approximately 15 % of what the Court would have awarded him.

Example: in "Paudicio v. Italy,"³⁰the Court noted that the criminal courts had definitively determined that the applicant had suffered pecuniary damage as a result of the illegal construction carried out by his neighbors. However, in view of the fact that, in accordance with the decision of those courts, the applicant may bring an action before the civil courts in order to obtain compensation, the Court considers that it is not appropriate to award an amount of pecuniary damage.

Example: in "Cochiarella v. Italy,"³¹the Court indicates that "the amount it will award in respect of non-pecuniary damage may be less than that indicated in its case-law where the applicant has already obtained a finding of a violation at domestic level and compensation by using a domestic remedy. Apart from the fact that the existence of a domestic remedy is fully in keeping with the subsidiarity principle embodied in the Convention, such a remedy is closer and more accessible than an application to the Court, is faster and is processed in the applicant's own language; it thus offers advantages that need to be taken into consideration.

The Court considers, however, that where an applicant can still claim to be a "victim" after making use of that domestic remedy he or she must be awarded the difference between the amount obtained from the court of appeal and an amount that would not have been regarded as manifestly unreasonable compared with the amount awarded by the Court if it had been awarded by the court of appeal and paid speedily.

Applicants should also be awarded an amount in respect of stages of the proceedings that may not have been taken into account by the domestic courts in the reference period where they can no longer take the case back before the court of appeal seeking application of the change of position adopted by the Court of Cassation on 26 January 2004 or the remaining length was not in itself sufficiently long to be regarded as amounting to a second violation in respect of the same proceedings.

Lastly, the fact that an applicant who had endeavored to use the new domestic remedy by applying to the court of appeal after lodging an application with the Commission, has then had to endure a further delay while waiting for payment of a sum due from the State will lead the Court to order the Government to pay the applicant a further sum in respect of those months of frustration."

³⁰ Application no. 77606/01, Judgment (Merits and Just Satisfaction), date on 24/05/2007, <http://hudoc.echr.coe.int/eng?i=001-80618>

³¹ Application no. 64886/01, Judgment (Merits and Just Satisfaction), date on 29/03/2006, <http://hudoc.echr.coe.int/eng?i=001-72929>

List of questions:

- Identify the types of obligation of respondent party under Article 46.2 of the Convention for the execution of judgments brought as example
- Define the obligation of the High Contracting Party to the Convention based on Article 41 of the Convention
- Discuss the criteria for the determination of award of just satisfaction in the examples brought above

Recommended reading:

- Judgement "Bajrami v. Albania"
- Judgement "Tomasic v. Croatia"
- Judgement Paudicio v. Italy
- Judgement "Cochiarella v. Italy"
- Resolutions DH(1992)26, (1995)82 and (1994)26; Interim Resolutions ResDH(2000)135, ResDH(2005)114 ResDH(2007)2 and CM/ResDH(2009)42
- Interim Resolution CM/ResDH(2010)83 on the execution of the judgments of the European Court of Human Rights, Ben Khemais v. Italy
- Resolution 1226 (2000) on the execution of judgments of the European Court of Human Rights, adopted by the Assembly on 28 September 2000
- High Level Conference on the Future of the European Court of Human Rights, Interlaken Declaration, 19 February 2010. www.eda.admin.ch/etc/medialib/downloads/edazen/topics/europa/eur.oc.Par.0133.File.tmp/final_en.pdf Doc. 12455 20 December 2010
- Implementation of judgments of the European Court of Human Rights Report 1 Committee on Legal Affairs and Human Rights Rapporteur: Mr Christos POURGOURIDES, Cyprus, Group of the European People's Party

1.2. Individual Non-Pecuniary measures

If an ECtHR' judgment imposes on the respondent state a legal obligation under Article 46 of the Convention, to put an end to the violation it intends to offer reparation for the applicant in such a way as to restore the situation before the breach as far as possible. In this connection Article 41 of the Convention covers only the award of just satisfaction, when the national law allows partial or no reparation for the violation found. It follows, *inter alia*, that a judgment in which the Court finds a violation of the Convention or its Protocols imposes on the respondent State a legal obligation not just to pay those concerned the sums awarded by way of just satisfaction, but also to choose, subject to supervision by the Committee of Ministers, the general and/or, if appropriate, individual measures to be adopted in its domestic legal order. These measures shall aim to put an end to the violation found by the Court and make all feasible reparation for its consequences in such a way as to restore as far as possible the situation existing before the breach.³²

Depending on the circumstances of the case, the High Contracting Parties may be required to adopt individual non-pecuniary measures to repair the situation of violation such as the reopening of domestic judicial proceedings. If proceedings are not reopened, re-examination may prove sufficient. The choice between re-examination depends on the domestic systems. In criminal law a range of individual measures may be adopted by the respondent state to offer redress. These may include an agreement not to enforce the domestic measure at issue, including a judgment, the rectification of criminal records, suspending enforcement of a sentence, clemency and reduction of the sentence, pardon and the unconditional release of the convicted person.

Example: (Article 41 of Convention) "Gjonboçari v. Albania" case,³³ concerns the structural problem of failure to enforce final domestic court and administrative decisions relating to the right of the applicants to restitution or compensation (whether pecuniary or in kind) for property nationalized under the communist regime (violations of Article 6§1 and Article 1 of Protocol No. 1). Lack of an effective remedy was found in this respect (violation of Article 13 in conjunction with Article 6§1). The Court notes that the State's outstanding obligation to enforce the judgment of 6 March 2003 is not in dispute. Accordingly, the applicants are still entitled to have their property rights over the relevant plot of land determined. The Court recalls that the most appropriate form of redress in respect of a violation of Article 6 is to ensure that the applicant as far as possible is put in the position he would have been had the requirements of Article 6 not been disregarded. The same applies in the present case, especially in view of the violations found and the Court's findings in previous judgments concerning Albania. It therefore considers that the Government must secure, by appropriate means and speedily, the enforcement of the domestic court's final judgment. In this respect, as part of individual non-pecuniary measures, information was required regarding the performance of the procedures for the execution of the Supreme Court's decision.³⁴

³²See *Ilașcu and Others v. Moldova and Russia* [GC], no. 48787/99, § 487, ECHR 2004-VII; *Assanidze v. Georgia*

³³*Application no. 10508/02, ECtHR Judgment (Merits and Just Satisfaction), date 23 October 2007, <http://hudoc.echr.coe.int/eng?i=001-82863>*

³⁴[http://hudoc.exec.coe.int/ENG#%22EXECIdentifier%22:%5B%22DH-DD\(2012\)1031E%22%5D](http://hudoc.exec.coe.int/ENG#%22EXECIdentifier%22:%5B%22DH-DD(2012)1031E%22%5D)

Example:(Article 41 of Convention) "Çaush Driza v. Albania" case,³⁵ concerns the failure of the domestic authorities to enforce a final national decision that entitled the applicant with the right to get awarded with in kind compensation. This was found in violation of Article 6§1 and Article 1 of Protocol No. 1, as well violation of Article 13 in conjunction with Article 6§1 of the Convention, due to lack of an effective remedy in this respect. Under Article 41 the European Court ordered no pecuniary or non-pecuniary award due to the fact that the applicant failed to comply with the time limits set out in Article 60/2 of the Rules of Court. However, the Court ordered based on Article 41 that the applicant remains entitled to the award of in-kind compensation pursuant to the Court of Appeal's decision in his favour, and that the authorities are required to take the necessary steps to secure the enforcement of that decision. In this case, as part of individual non-pecuniary measure, information was expected from the authorities to specify the date when the applicant received full ownership of 1650 m2.³⁶

In the criminal cases Xheraj, Caka, Berhani, Cani, Shkalla, Kaçiu & Kotorri, Haxhia against Albania³⁷ the Court called for individual non-pecuniary measures for reopening of proceedings. In these cases the Court revealed a range of procedural irregularities that could render the proceedings unfair. Following the Xheraj case, in February and March 2012, the Supreme Court decided to reopen the proceedings in all the other cited cases based on the findings of ECtHR' judgements, where decisions taken in the domestic judicial proceedings had been found in breach of the Convention.³⁸

Example:(Article 41 of Convention) "Xheraj v. Albania" case,³⁹ concerns a violation of the applicant's right to a fair trial and infringement of the principle of legal certainty due to the quashing of a final judgment acquitting the applicant of murder (violation of Article 6§1). Under Article 41, the Court "does not discern any causal link between the violation found and the pecuniary damage alleged. What concerns the claims for non-pecuniary damages, the Court recalled that the breach of the Convention was caused by the quashing of the applicant's acquittal. Notwithstanding the final nature of the judgment acquitting him, he was convicted in breach of the principle of legal certainty. The Court considers that the applicant must have been caused a certain amount of stress and frustration as a result of the quashing of the District Court's decision of 14 December 1998. However, the Court also notes that the applicant continues to be subject to the consequences of the quashing of the decision of 14 December 1998. It considers that the most appropriate form of redress for this continuing situation would be for the applicant's final acquittal of 14 December 1998 to be confirmed by the authorities and his conviction in breach of the Convention to be erased with effect from

³⁵ Application no.0810/05, Judgment (Merits and Just Satisfaction), date on 15 March 2011,

<http://hudoc.echr.coe.int/eng?i=001-103927>

³⁶ <http://hudoc.exec.coe.int/ENG#{%22EXECDocumentTypeCollection%22:%22CEC%22,%22EXECIdentifie r%22:%22004-1%22}}>

³⁷ Application no.34783/06, ECtHR judgement 5.11.2013, final on 5.02.2014

³⁸ "1265 meeting (20-22 September 2016) (DH) - Updated action plan (06/07/2016) - Communication from Albania in the Caka group of cases against Albania (Application No. 44023/02) [Anglais uniquement]"

³⁹ Application no.37959/02, Judgment (Merits and Just Satisfaction), date on 29/07/2008,

<http://hudoc.echr.coe.int/eng?i=001-87964>

that date.” This was the first case where the Court imposed the reopening of proceedings in a criminal case for Albania. As part of non-pecuniary individual measures the applicant’s conviction was suspended and, following a change of case-law by the Constitutional Court, the criminal proceedings were reopened. In the due course the Supreme Court on 07 March 2012 acquitted the applicant of any charges and his criminal record was erased. As part of individual non-pecuniary measures, the Albanian authorities also withdrew the request for his extradition to Italy.

List of questions:

- Define the obligation of member states to undertake individual non-pecuniary measures based on Article 41 of the Convention
- Distinguish the individual non-pecuniary measures recommended by the Court in the examples brought above

Recommended readings:

- ECtHR’ judgement “Gjonboçari v. Albania”
- ECtHR’ judgement “Çaush Driza v. Albania”
- ECtHR’ judgement “Xheraj v. Albania”
- 1265 meeting (20-22 September 2016) (DH) - Updated action plan (06/07/2016) - Communication from Albania in the Caka group of cases against Albania (Application No. 44023/02) [Anglais uniquement]
- 1128 (DH) meeting/réunion, 29 November-2 December / 29 novembre/2 décembre 2011 - Decision cases No. 2 / Décision affaires n° 2 - Xheraj against Albania / Xheraj contre Albanie 37959/02

1.3. General Measures

The obligation to prevent repetition of a violation is fundamental to the European system and entails the requirement that general measures be adopted. General measures may imply a modification of the domestic legislation or a change in the domestic case-law. This will be the case where the Court has expressly or impliedly called a general legislative provision into question, or when violations of a similar kind cannot be avoided in the future without such legislative amendment. In addition, there are situations in which general legislation by its very existence violates the rights of the individual applicant. The obligation in question has immediate consequences on the day on which the judgment is delivered, and it has direct effect on the courts imposing the adoption of transitional measures in order to avoid new findings of violations pending definitive legislative reform. It should also be noted that the question of general measures is often raised *ex officio* by the Committee of Ministers, independently of the terms of the judgment. Each member state is invited to give information as to its practice and its evolution, notably by informing the General Secretariat of the Council of Europe. The latter will, in turn, periodically inform all member states of existing good practice. Often, the translation and dissemination of the Court judgement may be a sufficient measure for the execution of the judgement.

Examples of good practice for the execution of general measures:

a. Publication, translation and dissemination of, and training in, the human rights protection system through electronic means and in the language(s) of the country concerned, and the development of university education and professional training programmes in human rights.

b. Verification of draft laws carried out both at the executive and at the parliamentary level. It may also involve independent bodies for consultation (the ministry which initiated the draft law, the Chancellery, the Ministry of Justice and/or the Ministry of Foreign Affairs). In some member states, when a draft text is forwarded to parliament, it should be accompanied by an extensive explanatory memorandum, associated by a formal statement of compatibility with the Convention. In addition to verification by the executive, examination is also undertaken by the legal services of the parliament and/or its different parliamentary committees. These consultations can be envisaged at various stages of the legislative process. Optional or compulsory consultation of non-judicial bodies competent in the field of human rights is also often foreseen (ombudspersons, or local or international non-governmental organisations, institutes or centres for human rights, or the Bar, etc). Sometimes, "the Venice Commission" may be asked to give an opinion on the compatibility with the Convention of draft laws relating to human rights, which however does not replace an internal examination of compatibility with the Convention.

c. Verification of existing laws and administrative practice as a result of national experience in applying a law or regulation or following a new judgment by the Court⁴⁰(usually carried by the ministry that initiates legislation, governmental agencies, training institutions, competent organs of the state etc, within the framework of the parliamentary debates, ombudspersons). Verification may also take place within the framework of court proceedings brought by individuals with legal standing to act or even by state organs, persons or bodies not directly affected (for example before the Constitutional Court).

⁴⁰In the case of a judgment that concerns it directly, by virtue of Article 46, the state is under obligation to take the measures necessary to abide by it.

Having regard of the supervision status on the execution of ECtHR judgments in European countries, generally speaking the main problems continue to be excessive length of judicial proceedings, chronic non-enforcement of domestic judicial decisions (widespread, in particular, in Russia and Ukraine), deaths and ill-treatment by law enforcement officials and lack of effective investigations into them (particularly apparent in Russia and Moldova) and unlawful or over-long detention on remand (a problem notably in Moldova, Poland, Russia and Ukraine. In a number of other states, *inter alia*, Albania, Armenia, Azerbaijan, Bosnia and Herzegovina, Georgia and Serbia, there are issues of non-compliance with Convention' standards yet to be resolved.

Example: in "Luli & others v. Albania,"⁴² the Court criticised, in particular, the failure of the judicial system to manage properly a multiplication of proceedings before various courts on the same issue and repeated referrals of a case to a lower level of jurisdiction (violations of Article 6 § 1). In this case, the Court noted that this kind of violation was becoming a serious deficiency in domestic legal system in Albania requiring the introduction of new effective remedies.⁴² In response, the Albanian authorities undertook the justice reform (a committee of senior experts was in charge, as monitored by the parliamentary commission for the justice reform), which among others consisted on the amendment⁴³ of the Civil and Criminal Codes of Procedure and the organic law of Constitutional Court.⁴⁴ As result the amendment of these laws fixed: (1) the legal deadlines and the effective remedies to claim for excessive length of judicial proceedings including the right to "inquire damages" in case of an infringement, and (2) punishing measures for those officials/judges who directly or indirectly infringe this principle.

List of questions:

- Identify the general measures that Albanian state had to undertake for the prevention of the violation found in judgment "*Luli & others v. Albania*"
- Indicate the type of individual measures required for this case
- Discuss the possible effects this judgment has had in the domestic legal system for the prevention of similar violations

Recommended reading:

- ECtHR' judgement "*Luli & others v. Albania*"
- (CM/Rec(2004)5 Recommendation of the Committee of Ministers to member States on the **verification of the compatibility** of draft laws, existing laws and administrative practice with standards laid down in the European Convention on Human Rights (adopted by the Committee of Ministers on 12 May 2004 at its 114th Session)

⁴² Application no. 64480/09 64482/09 12874/10, ECtHR Judgment (Merits and Just Satisfaction) date 01 April 2014, <http://hudoc.echr.coe.int/eng/?i=001-142305>

⁴³ 1273 meeting (December 2016) (DH) - H46-1 Luli and others v. Albania (Application No. 64480/09) / 1273e réunion (décembre 2016) - Luli et autres c. Albanie (Requête n° 64480/09) / "1273 meeting (6-8 December 2016) (DH) - Updated action plan (20/10/2016) - Communication from Albania concerning the Luli and others group of cases against Albania (Application No. 64480/09) [Anglais uniquement]"

⁴³ Law no. 10052, date 29.12.2008

⁴⁴ Amendment of the organic law of the Constitutional Court in its Article 74 with the aim of making more flexible procedures for reaching the requested majority of a 9-member panel for taking the decision in defense of the right for access to court under Article 6 of the Convention.

1.4. The supervision procedure and relevant statistics

The Committee of Ministers (CM) applies either enhanced or standard monitoring procedure for the execution of a Court' judgement, depending on the circumstances of the case. Enhanced supervision procedure is applied in certain types of cases where there is need to take urgent individual measures, or deemed to concern important structural or complex problems, whether the problem has been identified by the Court or the CM itself. Pilot judgments are automatically under enhanced supervision, so are also inter-state cases. All other cases follow a standard supervision procedure. When enhanced supervision is no longer deemed necessary, cases will be transferred to standard supervision. Conversely, cases under standard supervision may be transferred to enhanced supervision if deemed appropriate in the light of developments.⁴⁵

According to the statistics,⁴⁶it shows that Albania as High Contracting Party is under supervision procedure for the execution of 52 judgements, whereas 28⁴⁷ of them are being monitored under the enhanced procedure and 22 under the standard procedure. Additionally there are 2 newly cases which will undergo the monitoring procedure. The total number of judgments on Albania including those closed and those under pending supervision procedures are 65. From these, 11 judgements are leading cases and 38 judgements are repetitive cases. Also, there have been 9 cases which were closed by means of friendly settlement negotiation. Additionally, there have been adopted 13 Resolutions from the Committee of Ministers for the closure of supervision' judgements for Albania.

Mainly, judgments under supervision for Albania are divided in 5 categories: (1) the Caka group deals with the unfairness of judicial proceedings (2) the Driza group and Manushaqe Puto pilot judgment deal with the non enforcement of final decisions recognizing the restitution of properties to the former owners, which were confiscated during the communist regime (3) the Dybeku and Grori group deal with the poor and unlawful detention (4) Luli & others group deal with the excessive length of proceedings and lack of effective remedies (5) Puto group deals with the non enforcement of judicial decisions in general.⁴⁸

⁴⁵*The first case which reveals a new structural problem, whether important or not, is called "leading case." The following cases concerning the same problem are called "repetitive cases."*

⁴⁶*10th annual report of the committee of ministers supervision of the execution of judgments and decisions of the European court of human rights, 2016.*

⁴⁷*Gjonbocari And Others V. Albania; Driza V. Albania; Caka V. Albania; Beshiri And Others V. Albania; Topallaj V. Albania; Bushati And Others V. Albania; Nuri V. Albania; Hamzaraj V. Albania (No. 1); Caush Driza V. Albania; Siliqi And Others V. Albania; Cani V. Albania; Eltari V. Albania; Karagjozi And Others V. Albania; Izet Haxhia V. Albania; Delvina V. Albania; Manushaqe Puto V. Albania; Bici V. Albania; Sharra V. Albania; Luli V. Albania; Metalla V. Albania; Luli And Others V. Albania; Rista V. Albania; Qerimi V. Albania; Karagjozi And Others V. Albania; Alicka And Vasha V. Albania; Halimi And Others V. Albania; Ramadhi And Others V. Albania; Vrioni V. Albania*

⁴⁸*Cases invoke Article 6(49), Article 6/1(43), Article 13 (27), P1/1 (22)*

The applicant in this case, a Polish national, alleged, in particular, that his detention had been unreasonably lengthy, that his right to a "hearing within a reasonable time" had not been respected and that he had had no effective domestic remedy whereby to complain about the excessive length of the criminal proceedings against him.

Facts: The applicant was detained on remand in August 1991. After numerous requests for release had been refused, the detention order was finally quashed in June 1992, on the basis of a psychiatric report which stated that the applicant showed persistent suicidal tendencies. The applicant subsequently failed to attend a hearing in his case in February 1993 and, as he did not submit the medical certificate requested by the court within the specified time limit, an arrest warrant was issued. The applicant was arrested in connection with a traffic offence in October 1993 and placed in detention on remand. However, an application for release was refused by the Regional Court on the basis of a report by prison officers. Several further requests were rejected before the applicant was convicted in June 1995. The conviction was quashed in February 1996 and a retrial ordered. In May 1996 the detention order was quashed, subject to payment of bail of 10,000 zlotys. The applicant's appeals against the amount, in which he invoked the risk of suicide, were unsuccessful. He was finally released in October 1996 after bail had been lodged. He was again convicted in December 1998, the sentence imposed was reduced on appeal in October 1999 and a cassation appeal is pending before the Supreme Court.

Article 6 § 1 – The length of appeal or cassation proceedings should be taken into account in assessing the overall reasonableness, and in the absence of any evidence that the Supreme Court has given judgment, the proceedings have lasted over 9 years, including 7 years and 5 months from the date of Poland's recognition of the right of petition. This period cannot be regarded as reasonable.

Article 13 – The Court for the first time has considered that it was necessary to examine a complaint under Article 13 when a violation of Article 6 had been found. The subsidiary character of the Convention machinery is articulated in Article 13 and Article 35 § 1 and the former gives direct expression to the States' obligation to protect human rights primarily within their own legal systems. While there is no prevailing pattern within Contracting States of remedies for excessive length of proceedings, there are examples which demonstrate that such remedies can be created and operate effectively. The correct interpretation of Article 13 is that it guarantees an effective remedy for an alleged breach of the right to have a court case determined within a reasonable time. In this particular case, the Government submitted that the aggregate of several remedies satisfied the requirements of Article 13 but did not indicate whether and how the applicant could obtain relief by having recourse to those measures. It was not suggested that they could have expedited the determination of the charges against him or provided him with adequate redress for the existing delays. Consequently, the measures referred to do not meet the standard of "effectiveness".

ECtHR Judgment: the Court noted that there was no specific legal avenue whereby the applicant could complain of the length of the proceedings. Some aggregate of several remedies were submitted however, it was not indicated how the applicant could obtain relief – either preventive or compensatory – by having recourse to those remedies. It was not suggested that any of the single remedies referred to, or a combination of them, could have expedited the determination of the charges against the applicant or provided him with adequate redress for delays that had already occurred. No example from domestic practice was provided to show that, by using the means in question, it was possible for the applicant to obtain such a relief.

⁴⁹Ibid.

List of questions:

- Discuss the nature of recommendations made by the Court in *Kudla v. Poland judgement*, what is the obligation for the Polish government based on article 46 of the Convention?
- What decision would you make as a judge in similar legal grounds?
- Identify the criteria applied by the court for determination of amount of just satisfaction (pecuniary and non pecuniary) in judgements *Bajrami v. Albania*, *Tomasic v. Croatia*, *Paudicio v. Italy*
- Discuss the differences in the applied criteria for each case
- How do you read the statistics produced for Albania during 2001-2017?
- What does the number of Committee of Ministers' Resolution for closure of supervision in 13 cases demonstrate in terms of Convention implementation by Albania? (does it indicate a good level of implementation of ECHR at domestic level?)

Recommended reading:

- Judgment on case of *Qufaj Co. Sh.P.K. V. Albania* no.54268/00, Judgment (Merits and Just Satisfaction) 18/11/2004, final on 30/03/ 2005, <http://hudoc.echr.coe.int/eng#%7B%22fulltext%22:%5B%22qufaj%22%22%22documentcollectionid%22:%5B%22GRANDCHAMBER%22%22%22CHAMBER%22%22%22itemid%22:%5B%22001-67514%22%22%5D%7D>
- Resolution CM/ResDH(2011)86[1] Execution of the judgment of the European Court of Human Rights *Qufaj Co. Sh.P.K against Albania* <http://hudoc.exec.coe.int/eng#%7B%22EXECIdentifier%22:%5B%22001-106810%22%22%7D>
- [CM/Rec\(2008\)2](#), Recommendation of the Committee of Ministers to member states on **efficient domestic capacity for rapid execution of judgments** of the European Court of Human Rights (adopted by the Committee of Ministers on 6 February 2008 at 1017th Session)
- [CM/Rec\(2004\)6](#) Recommendation of the Committee of Ministers to member States on the **improvement of domestic remedies** (adopted by the Committee of Ministers on 12 May 2004 at its 114th Session)
- [GT-Ref.ECHR\(2013\)2_rev2](#), Measures to improve the execution of the judgments and decisions of the Court, under discussion within the Ad hoc Working Party on Reform of the Human Rights Convention system, of 2 May 2013
- [CM/Res\(2002\)59](#), Resolution of the Committee of Ministers concerning the practice in respect of friendly settlements (Adopted by the Committee of Ministers on 18 December 2002 at the 822nd meeting of the Ministers' Deputies)
- [CM/Res\(2002\)58](#), Resolution of the Committee of Ministers on the publication and dissemination of the case-law of the European Court of Human Rights (Adopted by the Committee of Ministers on 18 December 2002 at the 822nd meeting of the Ministers' Deputies)
- [CM/Rec\(2010\)12](#), Recommendation of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities (adopted by the Committee of Ministers on 17 November 2010 at the 1098th meeting of the Ministers' Deputies)
- [CM/Rec\(2003\)16](#), Recommendation of the Committee of Ministers to member states on the execution of administrative and judicial decisions in the field of administrative law (adopted by the Committee of Ministers on 9 September 2003 at the 851st meeting of the Ministers' Deputies)

- CM/Rec(2003)17, Recommendation of the Committee of Ministers to member states on enforcement (adopted by the Committee of Ministers on 9 September 2003 at the 851st meeting of the Ministers' Deputies)
European Commission for the Efficiency of Justice ([website](#)), A good practice guide on Structural measures to improve the functioning of civil and administrative justice

Part C. Other actors involved in the implementation of the Convention

The execution of ECtHR' judgements is a complicated process that involves apart from the Committee of Ministers other actors that play a significant role such as: the European Court of Human Rights, the national authorities, the national courts, not excluding also the mutual impact with other European courts, such as the European Court of Justice (ECJ) in Luxembourg. However, the basic role for the supervision of execution process for the ECtHR judgments is assigned to the Committee of Ministers.

Example:in "Von Hannover v. Germany"(2),⁵⁰ the Court observes at the outset that it is not its task in the present case to examine whether Germany has satisfied its obligations under Article 46 of the Convention regarding execution of the VonHannover judgment (1), it delivered in 2004, as that task is the responsibility of the Committee of Ministers.

1. The role of the ECtHR in the execution of its judgements

Committee of Ministers on the other side has endorsed the role of the ECtHR on the execution process by considering the Court's case-law as a guiding tool for the states. More concretely, Committee of Ministers in its Resolution Res (2004)3,⁵¹ invited the ECtHR "to identify, in its judgments finding a violation of the Convention, what it consider[ed] to be an underlying systemic problem and the source of this problem, in particular when it [was] likely to give rise to numerous applications, so as to assist states in finding the appropriate solution and the Committee of Ministers in supervising the execution of judgments". Additionally, later the Committee of Ministers ascertained that "the case law of the European Court of Human Rights ..., notably its pilot judgments, provide[d] important guidance and instruction to member states in this respect".⁵² For many more, Article 46, as amended by Protocol No.14,⁵³ expressly recognises the fact that the Court has a certain role in the execution process.

As to cite Antônio Augusto Cançado Trindade:⁵⁴

"... Jurisdiction includes the authority to administer justice; it is not restricted to stating the law, but also encompasses monitoring compliance with what has been decided. ... Monitoring compliance with judgments is one of the elements that comprises jurisdiction. ... Compliance with the reparations ordered by the Court in its decisions is the materialization of justice for the specific case and, ultimately, of jurisdiction.

The Court itself has affirmed its jurisdiction to draw recommendations for the respondent states in its own judgement relying to the Article 46 and Article 32 of the

⁵⁰ Application no. 40660/08 60641/08, Judgment (Merits and Just Satisfaction), date on 07 February 02/2012, <http://hudoc.echr.coe.int/eng/?i=001-109029>,

⁵¹ Resolution Res(2004)3 of the Committee of Ministers on judgments revealing an underlying systemic problem (adopted by the Committee of Ministers on 12 May 2004, at its 114th Session)

⁵² Recommendation Rec(2010)3 on "effective remedies for excessive length of proceedings"

⁵³ http://www.echr.coe.int/Documents/Library_Collection_P14_ET5194E_ENG.pdf

⁵⁴ "Dialogue between judges, European Court of Human Rights, Council of Europe, 2014"

Convention.⁵⁵ Thus, there is a sound legal basis, (*a Convention basis and a customary basis*), for the Court's jurisdiction to indicate to respondent States the measures to be taken to ensure the execution of its judgments.

Example: in the "Manushaqe Puto v. Albania",⁵⁶ the ECtHR had the occasion to point out that, "Under Article 19⁵⁷ of the Convention, it had jurisdiction to "ensure" the observance of the engagements undertaken by States in the Convention. In accordance with the "implied powers" doctrine, this means that the Court has the power to indicate individual or general measures to discharge this task if it finds it necessary."

However, depending on the judgement the Court engages in different ways with the identification of individual or general measures necessary for the execution.

- Firstly, in some judgements the court confines itself to identifying the type of measure required for the appropriate execution of its judgments, which are usually general measures, of a legislative, administrative or other nature.
- Secondly, in some judgements the Court leaves several options to the respondent State, while providing it with comparative law material to guide its choice.
- Thirdly, in other judgments, the Court goes in discussion and analysis of domestic policy, detention conditions, etc.
- Fourthly, in some judgements the Court may call for individual measures.
- Lastly, in other cases, the Court requires both individual and general measures.

Example: in Caka group of cases,⁵⁸ against Albania, adoption of an individual measure for the reopening of criminal proceedings at domestic level acquired first the adoption of a legislative measure in order to provide the legal bases on the domestic law for such an action. In this respect, the Court made "soft" recommendations which leave considerable latitude to the respondent State for choosing the content of the measures to be taken. In such cases states enjoy a wide margin of appreciation as to the practical solution. Here subsidiarity comes into play in two respects. On the one hand, subsidiarity discourages the Court from indicating to the national courts a way out of this quandary. Conversely, subsidiarity requires the Court to analyze and understand how the human rights violations arise before the domestic legal framework.

⁵⁵Article 32—"Jurisdiction of the Court 1. The jurisdiction of the Court shall extend to all matters concerning the interpretation and application of the Convention and the Protocols thereto which are referred to it as provided in Articles 33, 34, 46 and 47.2. In the event of dispute as to whether the Court has jurisdiction, the Court shall decide.

⁵⁶Application no.604/07 34770/09 43628/07, Judgment (Merits and Just Satisfaction), date on 31/07/2012, <http://hudoc.echr.coe.int/eng?i=001-112529>

⁵⁷Article 19—"to ensure the observance of the engagements undertaken by the High Contracting Parties in the Convention and the Protocols thereto, there shall be set up a European Court of Human Rights, hereinafter referred to as "the Court". It shall function on a permanent basis."

⁵⁸ Application no.44023/02, Judgment (Merits and Just Satisfaction), date on 08 December 2009, <http://hudoc.echr.coe.int/eng?i=001-96033>

Example: the pilot judgment in "Manushaqe Putov.Albania",⁵⁹would be the case to explain the compelling nature of the ECtHR's recommendations which are "targeted" to concrete measures and are relatively precise. In this case, the Court indicated the general and/or individual measures to be taken by the Albanian authorities, which appear in the operative part as particularly mandatory.⁶⁰On such occasion, the respondent Albanian authorities had little or no freedom of choice to practical solutions.

However, the Court needs to be aware of the predicaments of domestic courts under national law in order to attain a consistency in its judgments for the interpretation of the Convention. The Court's sole duty is to interpret and apply the Convention, being competent to issue recommendations under Article 46, but not instructions as such. On the other side, it is in the interest of the national courts themselves that the ECtHR makes recommendations in its judgments and extend, rather than reduce, this practice.

Having regard of the Court case-law, it results that over 150 of its judgments refer to Article 46 of the Convention and concern the execution process. Twenty-three of these judgments are the so-called "pilot" or "semi-pilot" judgments, concerning structural problems. There are also dozens of "ordinary" judgments indicating execution measures which are based expressly on Article 46 of the Convention, which reveal the existence of problems that it is not merely structural but also systematic.

List of questions:

- Discuss the Court jurisdiction in making recommendations for the respondent state in its judgements on how to repair the violation
- Distinguish the 4 forms of approach undertaken by the ECtHR in drawing its recommendations in the judgements, use as an example the Court judgement in Caka v. Albania and Manushaqe Puto v. Albania.

Recommended reading:

- Resolution *Res(2004)3* of the Committee of Ministers on judgments revealing an underlying systemic problem (*adopted by the Committee of Ministers on 12 May 2004, at its 114th Session*)
- CM/Rec(2010)3, Recommendation of the Committee of Ministers to member states on effective remedies for excessive length of proceedings (adopted by the Committee of Ministers on 24 February 2010 at its 107th Session)
- Dialogue between judges, European Court of Human Rights, Council of Europe, 2014"
- Manushaqe Puto pilot judgement of European Court of Human Rights

⁵⁹See footnote 63

⁶⁰See footnote 63

2. The role of national authorities in the execution of judgements

In the execution of Court' judgment, Governments play a *primary* role. It is the Governments who report back to the Committee of Ministers of the Council of Europe on the measures which have been undertaken. Implementing the Court's important rulings will always involve multiple considerations, including the existing constitutional doctrine and precedent, the substantive case-law and the relationships with executives, legislators, and other judges. It may also occur that individuals, lawyers, and groups may invoke the Convention before national judges as part of a strategy to change national law and policy.

Parliamentary Assembly' Resolution 1787 (2011) on the Implementation of judgments of the European Court of Human Rights strongly urges national parliaments to introduce specific mechanisms and procedures for effective parliamentary oversight of the implementation of the Court's judgments.

Committee of Ministers' Recommendation CM/Rec(2008)2 on efficient domestic capacity for rapid execution of judgments of the European Court of Human Rights, invites member states to ensure that a decision-making body at the highest political level takes full responsibility for the co-ordination of all aspects of the domestic implementation process. This recommendation was addressed to state authorities in general also to chairpersons of national parliamentary delegations, together, if need be, with the relevant ministers of states in solving substantial problems highlighted.

Example: in Albania the execution process of ECtHR judgements has involved among others the Parliament of Republic of Albania,⁶¹the Prosecution Office, Ombudsman and other executive bodies that play a role for the implementation of Convention at national level.

List of questions:

- Discuss on how government and state authorities can involve for the execution of ECtHR judgements
- What is the best mechanism that could be put in place to provide rapid enforcement of Court'judgements

Recommended reading:

- Parliamentary Assembly/Resolution 1787 (2011) on the Implementation of judgments of the European Court of Human Rights
- Recommendation CM/Rec(2008)2 on efficient domestic capacity for rapid execution of judgments of the European Court of Human Rights

⁶¹See 82

⁶¹ Referring to judgement of ECtHR on application "Mullai v Albania", CC by decision no. 29, datë 12.06.2006 ruled on the clarification of procedures on adoption and annulment of construction permits according to the urban planning of territory. The Parliament has passed a new law which entered into force dated 30.09.2011 for the amendment of the law no.10119, dated 23.04.2009 "On planning of territory", as amended, which has abrogated entirely the law no. 8405 "On urban planning" aiming at modification of the procedures for the approval of construction permits etc

3. Role of national courts and judges in applying the ECtHR at national level

Based on the international law the recognition of ECtHR's jurisdiction implies the spontaneous execution, in *good faith*, of its judgments. It is for this reason that Article 41 and 46.1 intended to hold control on those situations where a state is unable to give effect to a judgment for practical reasons or reasons dictated by its domestic law. The primary responsibility for the enforcement of the Convention and ECtHR's judgments lie with the Governments where the national courts contribute only *indirectly*. In this respect the role of national courts is indispensable provided that: (a) individuals can plead at domestic courts against any act of public authority (b) judges are under a duty to identify parliamentary laws that conflict with rights, and to interpret them in light of the Convention, in order to avoid conflicts whenever possible (c) judges are expected to refuse to enforce laws found to be incompatible with the ECHR. Consequently, national courts are responsible to respond to demands for effective protection of human rights and avoid penalization of the High Contracting Party.

Example: Albanian Constitutional Court (CC) and the Supreme Court played a role for the direct implementation of Convention and the case law of the Court. CC based on the Court's findings in *Qufaj v. Albania* modified its practice when dealing with claims of non-execution of final judicial decisions. In *Qufaj's* case,⁶² the Court found that: "...The Constitutional Court rejected the applicant company's complaint, stating that the "complaint [could] not be taken into consideration because the enforcement of court decisions is outside the jurisdiction of the Constitutional Court". The Court notes that the Albanian legal system affords a remedy - in the form of an application complaining of a breach of the right to a fair trial - which was available to the applicant company in theory. The Court holds that the fair trial rules in Albania should have been interpreted in a way that guaranteed an effective remedy for an alleged breach of the requirement under Article 6§1 of the Convention. In the Court's opinion, therefore, the Constitutional Court was competent to deal with the applicant company's complaint relating to non-compliance with a final decision as part of its jurisdiction to secure the right to a fair trial."

After this judgment, the CC followed a new approach in dealing with claims of this nature in the case "*Memishaj v. the Municipality of Tirana*", where it maintained that: "the state organs are obliged to enforce court decisions, which are binding not only on the parties, but also on their heirs, on the persons who remove the rights of the parties, on the court that issued the decision and on all other courts and institutions."

The principles of trust and mutual recognition are cornerstones of the construction of a European legal area. Obligations imposed to a high contracting party according to Article 46 of the Convention give rise apart from the duty to undertake individual measures with *inter-partes* effect, also to undertake general measures which have *erga omnes* effect. In this respect, judgments contain general principles which apply *in concreto* to all parties and States are demanded to assume a proactive approach and adapt their legislation and practice in compliance with them. By consequence, although the judgements of the ECtHR are not *strictu sensu* applicable *erga omnes*, States cannot ignore principles set out in the ECtHR's case law e.g. Albanian domestic

⁶² See footnote 53

courts should abide not only to ECtHR'judgements concerning Albania, but also to the ECtHR'judgements concerning other member states.

CM/Rec(2002)13 Recommendation of the Committee of Ministers invites member states for the publication and dissemination of the case-law of the European Court of Human Rights aiming at ensuring that judgments and decisions which constitute relevant case-law developments, or which require special implementation measures on their part as respondent states, are rapidly and widely published, through state or private initiatives, in their entirety or at least in the form of substantial summaries or excerpts (together with appropriate references to the original texts) in the language(s) of the country, in particular in official gazettes, information bulletins from competent ministries, law journals and other media generally used by the legal community, including, where appropriate, the Internet sites.

The Interlaken Conference' Declaration expressly invited States to "tak[e] into account the Court's developing case-law, also with a view to considering the conclusions to be drawn from a judgment finding a violation of the Convention by another State, where the same problem of principle exists within their own legal system".⁶³

It is therefore essential for the states to increase exchanges between legal professionals from different networks, based on the need for mutual recognition of effects of their domestic court' decisions given at national level. National judiciaries are welcomed, in their role to (a) ensure that national law and case-law conforms to Convention as applicable in the relevant states;(b) reduce, different applications of Convention in the member state' systems bound by it; (c) assure, that national law and case-law, respects the case-law of the ECtHR (d) take duly into account recommendations of the Council of Europe.⁶⁴

Examples of Albanian domestic court' decisions making reference to ECtHR' case-law in other member states:

(a) Constitutional Court

Decision No. 38/2010 (equality of arms in criminal proceedings)

Decision No. 16/2006 (violation of equality of arms in trial related to the review of the recourse in the presence of the prosecutor only)

Decision No. 30/2010 (the right to be heard by the court related to the trial in absentia of the defendant)

Decision No.11/2009 (right to be tried by a court established by law related to the lack of jurisdiction of the court of serious crimes)

Decision No1/2017 (review of property act)

Decision 43/2011 (review of property act)

Decision No.33/2005 (reasoning of judgments related to the grounds for the judgment)

(b) Supreme Court: Decision No.4, date 6.12.2013

(d) Mirdite District Court: Decision No.17, date 23.01.2007 (referred in *the Ceka v. Albania* judgement)

⁶³See, principle of subsidiarity – Interlaken Follow-up – Note by the Jurisconsult, p. 8 : http://www.echr.coe.int/Documents/2010_Interlaken_Follow-up_ENG.pdf

⁶⁴Opinion no 9 (2006) of the Consultative Council of European Judges (CCJE) for the attention of the Committee of Ministers of the Council of Europe on the role of national judges in ensuring an effective application of international and European law

As could be concluded, the enforcement of the ECHR and the Court' case law at domestic level suggests that domestic courts are expected to take a proactive approach. This approach implies an assessment of the need to refer to other countries' case-law based on: (a) interpretation value *res interpretata*, (b) similarity of a problem, (c) finality and level of authority of a judgment (chamber judgments, sections of the court, Grand Chamber), (d) prevention of similar violations (e) general obligation to comply with Convention (as interpreted by the ECtHR' case-law).

Example: Supreme Court' Decision No.21/2013⁶⁵ of the Russian Federation, reminds to all Russian courts of their obligation to follow the ECtHR' case-law including those against other States parties to the Convention, which thus enshrines the principle of the *erga omnes* value of the Court' case-law. In its paragraph 25, the decision provides that: *"In order to read the texts of the judgments in the Russian language delivered by the European Court both in respect of the Russian Federation and other states which are parties to the Convention, the courts are recommended to use, among other sources, the Reference information system Mezhdunarodnoye Pravo (International Law) developed by the Supreme Court of the Russian Federation and installed in the departmental profile of the State automated system Pravosudiye (Justice) as well as HUDOC database of the European Court: <http://hudoc.echr.coe.int/sites/eng/>."*

List of questions:

- What is expected by the national courts for the execution of Court'judgements?
- How do they play a role for the implementation of ECHR?
- What approach should a judge undertake toward a Court judgement in a case for Albania?
- What approach should a judge undertake with regard to Court judgements for other countries?
- How would you decide for the examination of a case if you see that you find the answer in a Court'judgement against another state?
- Discuss the approach of Constitutional Court toward the case-law of ECtHR against other states.

Recommended Readings:

- Judgement "Qufaj v. Albania"
- Judgement "Marini v. Albania"
- Judgement "Xheraj v. Albania"
- CC decision no.6/2006 on "Memishaj v. Municipality"
- CC decision 12/2012 on Koliqi case
- CC decision no.20/2011
- Supreme Court Decision no.21/2013⁶⁶ of the Russian Federation
- The Interlaken Conference' declaration
- CM/Rec(2002)13 Recommendation of the Committee of Ministers to member states on the **publication and dissemination** in the member states of the text of the European Convention on Human Rights and the case-law of the European Court of Human Rights (adopted by the Committee of Ministers on 18 December 2002 at its 822nd Session)

⁶⁵It is the non-judicial decision delivered on 27 June 2013 by the plenary bench

⁶⁶It is the non-judicial decision delivered on 27 June 2013 by the plenary bench

4. Role of prosecutor Office

The Office of the Public Prosecutor plays a central and vital role in ensuring security and liberty throughout Council of Europe Member States.⁶⁷ This was also reiterated by the National systems vary in many ways, however, including the location and relationship of the office with respect to other branches of government, its responsibilities and powers within the criminal justice system (including the gate-keeping function, encompassing a filtering component, i.e. determining which cases go forward into the justice system to be prosecuted at public expense), and its role as regards the courts and other spheres of public administration. Prosecutors play a pivotal role in asserting and vindicating human rights, both of suspects, accused persons and victims.

Recommendation (2000)19 spells out the duties incumbent on Prosecutors in the discharge of their duties: "Prosecutors should carry out their functions fairly, impartially and objectively; respect and seek to protect human rights, as laid down in the ECHR; seek to ensure that the criminal justice system operates as expeditiously as possible. They have a duty to ensure equality before the law, and make themselves aware of all relevant circumstances including those affecting the suspect, irrespective of whether they are to the latter's advantage or disadvantage. Evidence against suspects should not be presented if Prosecutors know or believe on reasonable grounds that it was obtained through recourse to methods which are contrary to the law. In cases of any doubt, public prosecutors should ask the court to rule on the admissibility of such evidence. "

In relation to criminal proceedings, Prosecutors have a responsibility that every criminal process, including the procedural aspects, must be of an adversarial nature and ensure equality of arms between the prosecution and the defence. This is a fundamental aspect of the right to a fair trial. Moreover, Article 6(1) ECHR requires that the prosecution authorities disclose, during the trial phase, to the defence all relevant evidence in their possession, for or against the accused person.

The *right to a fair trial* includes the principle of equality of arms and also presumes the principle of adversarial procedure. It includes the right to full disclosure, in a timely manner, of all relevant material in the prosecutor's possession. This presumes the availability of all elements of proof and an obligation by the prosecutor or other investigative authority to look for evidence of both guilt and innocence.

Prosecutors, regardless of their role in the investigations, should ensure that their actions are in accordance with the law and in particular, respect the following principles:

⁶⁷The issue was the object of Recommendation (2000)19 on the role of prosecution in the criminal justice system available at <https://rm.coe.int/16804be55a> and of Opinion No.12 (2009) of the Consultative Council of European Judges (Ccje) and Opinion No.4 (2009) of the Consultative Council Of European Prosecutors (Ccpe) available at <https://wcd.coe.int/ViewDoc.jsp?p=&id=1542177&Site=COE&direct=true> and Opinion No.10 (2015) of the Consultative Council of European Prosecutors to the Committee of Ministers of the Council of Europe on the role of prosecutors in criminal investigations available at XXX

- equality before the law;
- impartiality and independence of prosecutors;
- the right of access to a lawyer;
- the right of the defence to full disclosure of all relevant material;
- the presumption of innocence;
- equality of arms;
- the independence of courts;
- the right of an accused to a fair trial;

Respect for *the presumption of innocence* is binding not only for the courts but also for all other state bodies. Prosecutors and investigation bodies should refrain from any statement or attitude that would contribute to violating this principle.

The *principle of equality of arms* requires, as a part of fair criminal procedure, that the person who is the subject of an investigation should be able to present his/her case before a court without being placed at a substantial disadvantage vis-à-vis the opposing party. A fair balance should therefore be maintained between the parties allowing them to discuss any element of the investigation.

Respect for the *adversarial principle* in criminal matters requires distinguishing between the investigation phase and the phase of trial. Concerning the first phase of investigation, the adversarial principle is not absolute. Rather, it is an anticipation of it: it consists of a search for evidence to establish whether there are sufficient grounds to proceed with an indictment and, during this phase, the procedure can be confidential⁷.

The obligation to seek out and preserve evidence of guilt or innocence should be interpreted realistically on the facts of each case and the relevance of the evidence should be evaluated. Evidence relevant to guilt or innocence should, so far as necessary and practicable, be kept, in conformity with national law, at least until the conclusion of the procedure. The fact that evidence is not to be used by the prosecution does not justify its destruction or unavailability or the destruction of notes or records about it. Where the evidence gives rise to a reasonable possibility of rebutting the prosecution case, it should be retained.

Where the prosecutor is aware of material relevant to the issue of innocence of an accused and/or which might materially assist the defence, the prosecutor should disclose that material. If the prosecutor refuses or is not able to do this, this may result in an acquittal or discontinuation of the prosecution.

Example: in "*Laska & Lika v. Albania*",⁶⁸ the Court observes that "the applicants were found guilty essentially on the strength of eyewitnesses' submissions obtained during the identification parade. It notes that the eyewitnesses' evidence resulting from the identification was the key evidence supporting the prosecution's case against the applicants.

⁶⁸ Application no. 12315/04 17605/04 , Judgment (Merits and Just Satisfaction), 20/04/2010, <http://hudoc.echr.coe.int/eng/?i=001-98349>

In the first place, the applicants and B. L were required to stand in the line-up wearing white and blue balaclavas, similar in color to those worn by the authors of the crime. The other two persons in the line-up wore black balaclavas, in stark contrast to the white and blue balaclavas worn by the applicants and B.L who were accused of committing the offence. The change of position of the persons in the line-up did not result in any different outcome for the applicants, as they were consistently required to wear the same color (white and blue) balaclavas. The Court finds that the identification parade was tantamount to an open invitation to witnesses to point the finger of guilt at both applicants and B.L. as the perpetrators of the crime. Moreover, the identification parade was held in the absence of the applicants' lawyers. It does not transpire from the case file that the applicants waived of their own free will, either expressly or tacitly, the entitlement to legal assistance at the time of the identification parade. The Court notes in this connection that even though the District Court accepted that there had been irregularities at the investigation stage, in convicting the applicants it relied on the positive identification of the applicants made by eyewitnesses at the identification parade. However, neither the assistance provided subsequently by a lawyer nor the adversarial nature of ensuing proceedings could cure the defects which had occurred during the criminal investigation."

5. Role of training institutions

Guaranteeing the long-term effectiveness of the Convention system is a priority and the need for a better implementation of the Convention at national level is vital. Thus, it appears necessary that all member states ensure that adequate education on the Convention is provided, in particular concerning legal and law enforcement professions.

Recommendation Rec(2004)4,⁶⁹ on ECHR in university education and professional training calls to member states "to ascertain that adequate professional training concerning the Convention and the case-law of the Court exist at national level, in particular (1) as a component of the preparation programs of national or local examinations for access to the various legal professions (2) the initial and continuous training provided to judges, prosecutors and lawyers (3) to personnel in other sectors responsible for law enforcement (4) and/or to personnel dealing with persons deprived of their liberty (for example, members of the police and the security forces, the personnel of penitentiary institutions and that of hospitals..."

Specific training on the Convention and its standards could entail the organization of workshops as part of the professional training for judges. More concretely, judges training intends incorporation of Convention standards and the Court's case-law in the reasoning of their judgments. CCJE⁷⁰ recommends that states have to enable the access of judges to relevant information, foreign language courses and translation facilities, especially:

⁶⁹ https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=0900016805dd13a

⁷⁰ *Opinion no 9 (2006) of the Consultative Council of European Judges (CCJE) for the attention of the Committee of Ministers of the Council of Europe on the role of national judges in ensuring an effective application of international and European law*

- Prior knowledge of international and European law and case-law⁷¹
- Appropriate knowledge of international and European law⁷²
- Play a relevant role in the initial and in-service training of judges⁷³
- Information on international and European law, including the decisions of the international and European Courts should be made available⁷⁴
- Judges gain full proficiency in foreign languages⁷⁵

Example: in Albania the School of Magistrates is the institution that operates for initial and continuous training of judges for both, recruitment and performance' evaluation purposes. The training program for the period 2012-2015 provided a broad coverage of the problems that were revealed in the ECtHR' judgments. Following up with the execution of ECtHR' judgements on Caka group of cases, Grori, Dybeku and Rrapo cases the School of Magistrates has included in the curricula for the initial and the continuing training some specific topics on issues concerning the ECtHR hitherto judgments related to the implementation of Article 6 of ECHR. Additionally, it has organized several seminars, round tables for identification of main key issues that need to be considered by judges or prosecutors during their activities e.g among the topics included in the program was the presence of defendant before the trial.

Specific training on the Convention and its standards is needed for lawyers. Adequate knowledge of the Convention by lawyers has impact on the prevention of applications that manifestly do not meet the admissibility requirements. Workshops could be organised on the rules of procedure of the Court and the practice of litigation, as well as the execution of judgments. In certain countries a journal on the case-law of the Court could be published regularly for judges and lawyers.

Example: in Albania the Law No.9015/2012 provides the rules on the initial and continuous training of lawyers. The National School of Advocates (NCA) is the body offering the training (Article 25§1, point 4). The general council of NCA adopts the founding status of the school and the rules for the training as proposed by the school. The law provides for the obligation for initial training of assistant lawyers and continuous training for the lawyers (Article 16/1) that consists on the legal, theoretical and practical matters(3) in case of refusal to follow the training it may serve as legal causes to remove the licence of profession of lawyer(4) the condition to have completed the program in the national school of advocates as criteria to get the licence for the profession of lawyer. During 2014-2015 the school covered only the initial training in 6 local chambers (Vlorë, Durrës, Fier, Korçë, Shkodër and Tiranë). The continuous training for this period has been covered by a pilot project of NCA in cooperation with JUST-USAID. After this pilot project the continuous training has to be covered by the school of advocates based on the action plan for the program of obligatory continuous training (2013-2016).

⁷¹Should be ensured by the inclusion of these topics in the curricula of the law faculties

⁷²should be one of the conditions that appointees to judicial posts should meet, before they take up their duties

⁷³Judicial training in this area would benefit from international cooperation between national judicial training institutions

⁷⁴with the co-operation of court documentation services, libraries and judicial assistants, the judge should be guaranteed an access to information suitably indexed and annotated; the information provided should be comprehensive and available promptly

⁷⁵additionally, courts should have translation and interpretation services of quality available apart from the ordinary cost of the functioning of courts

In addition, specific training on the Convention and its standards is needed for legal professionals dealing with law enforcement and detention, such as security forces, police officers and prison staff but also immigration services, hospitals, etc. Continuous training on the Convention standards is particularly important given the evolving nature of the interpretation and application of these standards in the Court's case-law.

Example: in Albania, the execution of "*Dybeku v. Albania*"⁷⁶ required the professional training of medical staff in penitentiary hospitals with a view to improve the treatment of prisoners suffering from mental disorders.

Example: in Armenia, trainings are held for relevant law enforcement agencies and officials in the judicial system on how to fulfill the requirements under the Convention after every delivery of a judgment in respect of Armenia by the Court.

Example: in Belgium, the Federal Police holds a specific training called "Maîtrise de la violence" (Control of violence), aiming to deter the use of violence or coercion in the profession.

Example: in Finland, the training material for the police includes Recommendation Rec(2001)10 of the Committee of Ministers on the European Code of Police Ethics.

List of questions:

- Discuss on the professional training needed for judges with specific focus on issues identified in Court judgements for Albania
- Discuss on the professional training needed for lawyers, prosecutors and other law enforcement officers with specific focus on issues identified in Court judgements for Albania (reference be made to ECtHR' judgements "Laska Lika v. Albania", "Grori v. Albania", "Cani v. Albania")

Recommended readings:

- ECtHR judgement "*Dybeku v. Albania*"
- ECtHR judgement "*Laska Lika v. Albania*"
- ECtHR judgement "*Grori v. Albania*"
- ECtHR judgement "*Cani v. Albania*"
- Opinion no 9 (2006) of the Consultative Council of European Judges (CCJE) for the attention of the Committee of Ministers of the Council of Europe on the role of national judges in ensuring an effective application of international and European law
- CM/Rec(2004)5, Recommendation of the Committee of Ministers to member States on the verification of the compatibility of draft laws, existing laws and administrative practice with standards laid down in the European Convention on Human Rights (adopted by the Committee of Ministers on 12 May 2004 at its 114th Session)
- CM/Rec(2004)4, Recommendation of the Committee of Ministers to member States on the European Convention on Human Rights concerning university education and professional training (adopted by the Committee of Ministers on 12 May 2004 at its 114th Session)

⁷⁶Application no. 41153/06, Judgment (*Merits and Just Satisfaction*), date on 18 December 2007, <http://hudoc.echr.coe.int/eng?i=001-84028>

Part D. Effect of the Convention on the domestic legal system

The first and most basic point is that “the Convention is no longer mainly a species of international law: it is “*national law*” that is directly enforceable by national judges.”⁷⁷ Today, every Contracting Party has domesticated the Convention in their domestic legal system. With incorporation, the Convention becomes binding on every state official who exercises public authority, as a matter of domestic law. One of the reasons that there are different standards of Convention’ implementation in member states is attributable to the fact that countries have approached different roots for incorporation of Convention in their domestic legal system.

Example: in “Von Hannover v. Germany”⁽²⁾,⁷⁸ a second application before the Court from the same applicant in *Von Hannover v. Germany* (1),⁷⁹ the Court observed that: “*In accordance with their case-law, the national courts carefully balanced the right of the publishing companies to freedom of expression against the right of the applicants to respect for their private life. In doing so, they attached fundamental importance to the question whether the photos, considered in the light of the accompanying Articles, had contributed to a debate of general interest. They also examined the circumstances in which the photos had been taken. The Court also observes that the national courts explicitly took account of the Court’s relevant case-law. Whilst the Federal Court of Justice had changed its approach following the VonHannover judgment, the Federal Constitutional Court, for its part, had not only confirmed that approach, but also undertaken a detailed analysis of the Court’s case-law in response to the applicants’ complaints that the Federal Court of Justice had disregarded the Convention and the Court’s case-law.*”

Example: following the “Doronin v. Ukraine”⁸⁰ in Ukraine 192 group of cases represent violations of Article 5 of the Convention for unlawful and lengthy detention on remand arising from: detention without judicial decision to that effect and/or the retro-active application of decisions on detention; failure to give reasons and set time limits for detention; the failure to consider alternative preventative measures to detention on remand; and the lack of judicial review of the lawfulness of detention. Measures have been taken to amend the existing Code of Criminal Procedure, in particular to ensure that the time taken for the detainee to familiarize him or herself with the case-file is taken into account when calculating the detention period.

Example: following “Dauti v. Albania,”⁸¹ in Albania the Medical Examination Appeals Commission on Capacity for Work (K.M.C.A.P. Epror - an appeal’ administrative body)⁸² was made compatible with the standards of an effective remedy based on Article 13 of European Convention through the necessary amendments in the legislation; following

⁷⁷ See footnote 82

⁷⁸ See footnote 57

⁷⁹ See footnote 87

⁸⁰ Report¹ Committee on Legal Affairs and Human Rights Rapporteur: Mr Christos POURGOURIDES, Cyprus, Group of the European People’s Party

⁸¹ Application no. 19206/05, ECtHR judgement 3 February 2009, final on 3 May 2009, <http://hudoc.echr.coe.int/eng/?i=001-91103>

⁸² The amendment of the Law No. 7703, Date 11.05.1993 “On social security”, by Law no/2013 which aimed at the modification of recruitment procedures and the adjudication methods of KMCAp members.

"Marini v. Albania" the legal reforms have adjusted the constitutional complaint to an effective remedy in compliance with Article 13 of the Convention;⁸³ following **"Luli & others v. Albania"**⁸⁴ the Code of Civil Procedures has been amended by Law no.38/2017 (art. 399/6) with the view to create remedies for the parties in the civil, administrative and criminal proceedings for claims of damage' compensation due to the excessive lengths of judicial proceeding and to create remedies for the non-execution of court' decisions.

1. Concept of shared responsibility for the enforcement of the Convention

Protocol No.11⁸⁵ of the Convention and the domestication of the Convention at national level, as combined gave birth to a new legal system. This system is based on the collective protection of human rights from all the member states, where the European Court holds the status of "the first among equals." The system works based on the principle of shared responsibility among the member states and the principle of opened dialogue among domestic courts with the ECtHR. This dual dimension makes the system pluralistic.

Protocol No.15⁸⁶ of the Convention even though not in force yet,⁸⁷ emphasized the importance of the principle of subsidiarity that rests on the roots of the relationship between the Court and national states. This principle imposes on States and on their courts the necessary obligations at the same time a broad discretion as regards the execution of the Court's judgments.

As to illustrate, there might be cases when ECtHR has to weight two substantive rights that are in tension with each other, by applying higher standards of protection for one right, as compared to the other. In such cases, even though the national courts have followed different approaches from the one maintained by the ECtHR, it is important that each of the courts have resolved these hard cases in *good faith*. It is for these situations that the ECtHR and the domestic courts should continue to engage in regular dialogue with each other in order to understand their respective positions, difficulties and sensitivities as regards the interpretation and application of the Convention and the implementation of the Court's judgments in the national legal orders. Following up with the Brighton' Declaration⁸⁸ the Protocol No.16 of the Convention has been adopted (not yet entered into force).⁸⁹ This Protocol aims at enhancing the tools of dialogue and interaction between the Court and national authorities, such as the extension of the Court' competencies to give advisory opinions based on the requests of domestic highest courts.

⁸³ *Amendment of Constitution of Albania (2016) and the enactment of the new law no.99/2016 "On the organisation and functioning of the Constitutional Court provide that the CC' decisions shall be legally binding and the CC shall invest itself for the adjudication of claims for a fair trial on both the procedural and substantive grounds*

⁸⁴ *The amendment of the Civil Procedural Code by law 34/2017,*⁸⁴ in Article 399

⁸⁵ <https://rm.coe.int/168007cda9>

⁸⁶ http://www.echr.coe.int/Documents/Protocol_15_ENG.pdf

⁸⁷ <http://www.coe.int/en/web/conventions/full-list>

⁸⁸ *For the facilitation of this dialogue there were organised several high-level conferences which took place respectively in Interlaken (February 2010), Izmir (April 2011) Brighton (April 2012), and Brussel (2014).*

⁸⁹ <http://www.coe.int/en/web/conventions/full-list>

Article 1 of Protocol 16 of the Convention provides: "highest courts and tribunals of a High Contracting Party, as specified in accordance with Article 10, may request the Court to give advisory opinions on questions of principle relating to the interpretation or application of the rights and freedoms defined in the Convention or the protocols thereto. The requesting court or tribunal may seek an advisory opinion only in the context of a case pending before it. The requesting court or tribunal shall give reasons for its request and shall provide the relevant legal and factual background of the pending case."

Briefly said, the Protocol No.16 will enable national highest courts to refer requests to the Court for advisory opinions on questions of principle concerning the interpretation or application of the rights and freedoms defined by the Convention. Such requests will be made in the context of cases that are pending before the domestic court. Court's advisory opinion will provide reasoning and will not be binding. If national courts criticize the Court's approach, it can respond by modifying or re-establishing its case-law. Conversely, if national courts are in doubt about the conformity with the Convention of a certain line of case-law, they can ask the Court to deny or confirm their reading of the Convention.

The benefit of the improved dialogue between the ECtHR and national courts is considered twofold: If national courts were to consistently implement the Convention, the backlog created before the Strasbourg Court would be considerably reduced. At the same time the risk of penalization of member states before the ECtHR would dramatically lessen. In addition, the Court would find a way to respond to national criticism and would have the chance to communicate to the national courts a list of general criteria that could be applied for an evolutive and autonomous interpretation. Simultaneously, the national courts empowered to make use of judicial dialogue, may create a counter balance against the power of the Court to interpret the Convention in an autonomous and evolutive fashion.

➤ **Case Study "Von Hannover v. Germany"(1)⁹⁰**

"Von Hannover v. Germany" judgement, concerns the different position maintained by the Constitutional Court of Germany based on the national law as compared to the ruling of the ECtHR on the case,

The applicant, the eldest daughter of Prince Rainier III of Monaco (Princess Caroline of Monaco), lodged an application with ECtHR alleging violation of the right for respect of private life and family (Article 8 of the Convention). More concretely, she claimed that domestic courts did not rule for the protection of her right to prevent the publication of photos about her private life in the tabloid press.

German' Constitutional Court (in a landmark judgment of 15 December 1999), maintained that it agrees with the criterion of the *community interest* applied by the lower courts, emphasizing the importance of the freedom of press. The free formation of opinions requires the press to have, within legal limits, sufficient margin of manoeuvre to decide, what the public interest demands, and what amounts to a matter of public interest. Also the concept of a 'figure of contemporary society "*par excellence*" designates people whose image is deemed by the public to be worthy of

⁹⁰ Application no. 59320/00, Judgment (Merits), date on 24 June 2004, <http://hudoc.echr.coe.int/eng?i=001-61853>

respect out of consideration for the public's interest. Moreover, Constitutional Court maintained also that the criteria from the theory prospect are irreproachable with the constitutional law, to determine the concept of 'legitimate interest' upholding the position that:

"Having regard to the function attributed to that privacy under constitutional law and to the fact that it is usually impossible to determine from a photo whether the person has been photographed secretly or caught unawares, the existence of unlawful interference with that privacy cannot in any case be made out merely because the photo was taken in those conditions."

The Federal Constitutional Court (in a decision of 13 April 2000) following the remittal of the case to the Federal Court of Justice in a second set of proceeding, held that the ordinary courts had properly determined the concept of private life, reiterating that it extends to aspects relating to personal identity, such as a person's name.

The ECtHR' judgement on Von Hannover v Germany (1) final on 2004, examining this application, makes an assessment of the protection that should be afforded for both: (1) the right of individual for private life (Article 8) (2) the freedom of press (Article 10). It emphasized the fair balance that has to be struck between the competing interests of the individual and of the community as a whole, where in both contexts the State enjoys a certain margin of appreciation. Within the scope of Article 8 these obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves. Where, in relation to the scope of Article 10 of the right to expression of press, it emphasized the duty of the press to not overstep certain bounds in respect of the reputation and rights of others. Its duty is only to impart, information and ideas on all matters of public interest. Thus, the Court argued that merely classifying the applicant as a figure of contemporary society "*par excellence*" does not suffice to justify such an intrusion into her private life.⁹¹ Furthermore, the Court considers that the public does not have a legitimate interest in knowing where the applicant is and how she behaves generally in her private life. Thus it found there has been a violation of Article 8 of the Convention.

List of questions:

- What rights are at stake in "**Von Hannover v. Germany**"?
- What was the position of Constitutional Court in its judgement in 1999 and the position of Federal Constitutional Court 2000?
- What interpretation followed the ECtHR in respect to Article 10 and Article 8?
- If you as a judge are to solve a case in similar legal grounds (concerning interpretation of Article 10 vs. Article 8 of the Convention), what decision would you make?

⁹¹It suggested in this view that the state authorities had to distinction drawn between figures of contemporary society "*par excellence*" and "*relatively*" public figures has to be clear and obvious so that, the individual has precise indications as to the behaviour he or she should adopt. Above all, they need to know exactly when and where they are in a protected sphere or, on the contrary, in a sphere in which they must expect interference from others, especially the tabloid press.

Hypothetical situation: Presuming a situation where the domestic courts are put in the position to decide on a case where the facts and the law applicable display a conflict between two fundamental rights equally important in terms of the Convention and Constitution of Albania. E.g the complaint of an individual that alleges violation of the right to a healthy environment within the right for family and private life (art.8 of the Convention) which is jeopardized by the pollution of air and rivers and water supplies by factories which on the other side implicates the right to property of the owner (art.1 Protocol₁ of the Convention). What approach would you follow as judges to determine the case with regard to the protection of both rights at conflict with each other?

Recommended reading:

- ECtHR' judgement "Von Hannover v. Germany"(1)
- Protocol no 11 of the ECHR
- Protocol no.15 of the ECtHR
- Protocol no.16 of the ECtHR
- Interlaken Conference Declaration
- Brighton conference Declaration
- Brussel conference Declaration
- ECtHR judgement "Von Hannover v. Germany"
- ECtHR judgement "Doronin v. Ukraine"
- ECtHR judgement "Dauti v. Albania"
- ECtHR judgement "Gjonbocari v. Albania"
- ECtHR judgement "Luli & others v. Albania"
- Report¹ Committee on Legal Affairs and Human Rights Rapporteur: Mr Christos POURGOURIDES, Cyprus, Group of the European People's Party

SECTION II - INTRODUCTION TO ARTICLE 6(1) - RIGHT TO A FAIR TRIAL

a) Overall Objective:

Overall objective of this session is to ensure learners improve their knowledge and comprehension on a range of issues related to methods of interpretation applied by the ECtHR for the examination of claims related to the right to a fair trial according to Article 6.1 of the Convention. More concretely, this session will enable learners to analyse and evaluate the application of general principles, referring to the relevant case-law and making use of different tests of hypothetical situations. The targeted learners for this session need to have a general knowledge of European Convention of Human Rights and the case law of ECtHR. The professional and organisational background acquired corresponds to the profession of judges, lawyers, and prosecutors.

b) Learning Objectives:

By the end of this introductory session learners will be able to:

- Comprehend the interpretation methods applied by the ECtHR in examination of the right to a fair trial according to Article 6.1 of the Convention
- Define the principles for the interpretation of Article 6.1 of the Convention
- Apply the general principles referring to the case-law of ECtHR
- Analyses of ECtHR' case-law related to the principle of effective protection
- Distinguish the 3 sub principles that are applicable to the effective protection standard and discuss the relevant case-law
- Analyses of the ECtHR case-law related to the principle of dynamic interpretation
- Analyses of the ECtHR case-law related to the principle of fair balance
- Distinguish the sub-principles that are applicable to the fair balance and discuss the relevant case-law
- Test their knowledge for the application of the three principles

c) Length: 3 hours, 2 weeks

d) Final Assessment: case study, portfolio, debate paper

I. Introduction of interpretation methods applied by the ECtHR

1.1. Teleological method of interpretation

The interpretive method developed by the Strasbourg Court encapsulates both a textual and teleological approach. The teleological approach will be elaborated by focusing on three fundamental interpretive principles developed by the Court. These are the principles of effective protection, dynamic interpretation, and fair balance. The preamble's focus on the overarching object and purpose of the ECHR is in general of greater importance than various specific intentions voiced in the *Travaux Préparatoires*. The first principle implies that a provision of the ECHR must be interpreted so that the rights enumerated become practical and effective, that is, we have a principle of effective protection. The second principle is that a provision of the ECHR must be interpreted in a dynamic and evolutive way in light of present-day conditions, that is, we have a principle of dynamic interpretation. The third principle is that a provision of the ECHR must be interpreted in light of the need to strike a 'fair balance' between, on the one hand, the individual right at issue and, on the other hand, other ECHR rights and legitimate public interests, that is, we have a principle of fair balance. This latter principle connects with the principle of subsidiarity.⁹²

A. Principle of effective protection

The object and purpose of ECHR is intended to protect rights that are not illusory or hypothetical. The ECHR's preamble refers this statement in its scope: "universal and effective recognition" of human rights, and emphasizes the importance of "maintenance and further realization of human rights". The principle of effective protection implies that all the rights enshrined to the Convention should be interpreted so that its purpose and moral values which underpin it are effectively protected and promoted. This protection includes also the rights which are implied and not stipulated in the Convention e.g the right to a 'fair hearing' before an 'independent and impartial tribunal' implies a right to access to court in the first place. In more concrete terms, the principle of effective protection is understood having regarded three aspects:

⁹²The preamble's focus on the overarching 'object and purpose' of the ECHR is in general of greater importance than various specific intentions voiced in the *Travaux Préparatoires*.

- The first principle is that a provision of the ECHR must be interpreted so that the rights enumerated become practical and effective, that is, we have a principle of effective protection.
- The second principle is that a provision of the ECHR must be interpreted in a dynamic and evolutive way in light of present-day conditions, that is, we have a principle of dynamic interpretation
- The third principle is that a provision of the ECHR must be interpreted in light of the need to strike a 'fair balance' between, on the one hand, the individual right at issue and, on the other hand, other ECHR rights and legitimate public interests, that is, we have a principle of fair balance. This latter principle connects with the principle of subsidiarity

- "Autonomous Interpretation" (implies that the norm must be conceptualized so that it can function as a minimum procedural standard for both typically adversarial and typically inquisitorial procedural systems)
- "Positive Obligations" (the contracting states are in reality required to devote substantial resources to the purpose of establishing and running a civil court system)
- Right to "Review" (the respondent state's acts and omissions that implicate the Convention' rights, should be reviewed to a certain intensity, and not simply defer to the assessments of the national authorities in this regard)

1. Autonomous meaning of Article 6(1) concepts (1st sub-principle of effective protection)

Article 6§1 of the European Convention on Human Rights (Convention):

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

1.1. The notion of autonomous concepts

Principle: the standard of the fair hearing set out in Article 6§1 is related to the determination of civil rights and obligations or of any criminal charge against an individual that has arguable claims that there exists a dispute. Having in mind that the member states have different systems for determination of civil and criminal cases, ECHR sets out the minimal procedural standards that need to be respected by all member states for (1) determination of civil rights (b) determination of criminal charges.

Example:in "König v. Germany,"⁹³ a case involving proceedings to withdraw the authorisation for a doctor to practice on grounds of alleged misconduct, where the plenary Court held "both the Commission and the Government agree that the concept of "civil rights and obligations" cannot be interpreted solely by reference to the domestic law of the respondent State...Hence, it considers that the same principle of autonomy applies to the concept in question; any other solution might lead to results incompatible with the object and purpose of the Convention...'(§88). However, national legislation plays a subsidiary role in the determination of the concepts in Article 6. Whilst the Court thus concludes that the concept of "civil rights and obligations" is autonomous, it nevertheless does not consider that, in this context, the legislation of the State concerned is without importance(§89)."

⁹³ Application No. 6232/73, Judgment of 28 June 1978, <http://hudoc.echr.coe.int/eng?i=001-57512>

1.2. Examples of autonomous concepts contained in Article 6§1 in the determination of civil rights and obligations

Example: in *Ringeisen v. Austria*,⁹⁴ the European Court held that "all proceedings the result of which is decisive for private rights and obligations" (§94) constitute the determination of civil rights and obligations. In the same case, the Court held: 'The character of the legislation which governs how the matter is to be determined (civil, commercial, administrative law, etc.) and that of the authority which is invested with jurisdiction in the matter (ordinary court, administrative body, etc.) are therefore of little consequence."

In deciding if there has been a determination of a person's civil rights and obligations, the plenary Chamber has held that 'only the character of the right at issue is relevant (*König v Germany*, §90). The Grand Chamber has also held that there is a requirement for a dispute in order for Article 6§1 to apply: 'The Court reiterates that for Article 6§1, in its "civil" limb, to be applicable there must be a dispute (contestation) over a "right" that can be said, at least on arguable grounds, to be recognised under domestic law. The dispute must be genuine and serious. It may relate not only to the actual existence of a right but also to its scope and the manner of its exercise. Moreover, the outcome of the proceedings must be directly decisive for the civil right in question. In addition, it must be shown that the dispute related to 'civil rights and obligations' or in other words that the 'result of the proceedings' was 'decisive' for such a right. Article 6§1 only applies to disputes over civil rights and obligations which can be said, "at least on arguable grounds, to be recognised under domestic law; it does not itself guarantee any particular content for (civil) 'rights and obligations' in the substantive law of the Contracting States".

Example: in *Vilho Eskelinen and others v. Finland*,⁹⁵ where the Grand Chamber redefined the previous functional criteria developed in *Pellegrin v France* [GC]⁹⁶ and held that a State may only exclude the application of Article 6 to public servants if two conditions are satisfied: Firstly, the State in its national law must have expressly excluded access to a court for the post or category of staff in question; and secondly, the exclusion must be justified on objective grounds in the State's interest' (§62). In *Ferrazzini v. Italy*⁹⁷, the Grand Chamber confirmed tax obligations fall outside the scope of civil rights and obligations (§29). In *Micallef v Malta*⁹⁸ the Grand Chamber revised its prior case-law and held that interim measures issued by civil courts may determine civil rights and obligations due to delays in the full hearing of a case.

Example: in *Dauti v. Albania*,⁹⁹ the Court found the applicability of Article 6§1 of the Convention in the instant case maintaining that "it has not been argued, nor is there anything to suggest, that this case relating to the applicant's claim for disability benefits did not concern a dispute (contestation) over a "right" which could be said, on arguable grounds, to be recognised under domestic law. In particular, it cannot be said that the applicant's claim was frivolous or vexatious or otherwise lacking in

⁹⁴ Application no 2614/65, Judgment of 16 July 1971, <http://hudoc.echr.coe.int/eng?i=001-57565>

⁹⁵ Application no. 63235/00, Judgment of 19 April 2007, <http://hudoc.echr.coe.int/eng?i=001-80249>

⁹⁶ Application no. 28544/95, Judgment of 8 December 1999, <http://hudoc.echr.coe.int/eng?i=001-58402>

⁹⁷ Application no. 44759/98, Judgment of 12 July 2001, <http://hudoc.echr.coe.int/eng?i=001-59589>

⁹⁸ Application no. 17056/06, Judgment of 15 October 2009, <http://hudoc.echr.coe.int/eng?i=001-95031>

⁹⁹ See footnote 93

foundation. Nor is it disputed, and the Court is satisfied, that the right in question was "civil" in character in the autonomous sense of Article 6§1 of the Convention. The Court reiterates that it has previously determined that welfare benefits and rights to social insurance are "civil rights" within the meaning of Article 6§1 of the Convention, which applies to proceedings in relation thereto. The present case concerned the applicant's right to welfare benefits, namely a disability allowance arising in connection with his incapacity for work."

1.3. *Examples of autonomous concepts contained in Article 6§1 in the determination of any criminal charge against him*

The European Court has consistently emphasised the autonomous construction of the notion of a 'charge' for the purposes of Article 6§1 (*Neumeister v Austria*, §18¹⁰⁰). In the construction of the word 'criminal', the European Court has held that a State is free to designate as a criminal offence an act or omission not constituting the normal exercise of one of the rights that is protected by the Convention. However, the plenary Court has ruled that, in the converse situation, it retains jurisdiction to adjudicate on the classification by the State of an act or omission as disciplinary rather than criminal (*Engel v The Netherlands*, §81¹⁰²).

Example: in "*Engel v. the Netherlands*",¹⁰² the plenary Court developed three criteria to determine if proceedings fall within scope of category of 'criminal' charge:

- The domestic classification of the offences;
- The nature of the charge; and
- The nature and severity of the penalty.

Example: in "*Ezeh and Connors v. UK*",¹⁰³ the Grand Chamber had to determine if the award of additional days custody to prisoners for breaches of prison discipline amounted to the determination of 'criminal proceedings' under the *Engel* criteria. It held "in addition, it is the Court's established jurisprudence that the second and third criteria laid down in *Engel* are alternative and not necessarily cumulative: for Article 6 to be held applicable, it suffices that the offence in question is by its nature to be regarded as "criminal" from the point of view of the Convention, or that the offence made the person liable to a sanction which, by its nature and degree of severity, belongs in general to the "criminal" sphere This does not exclude that a cumulative approach may be adopted where separate analysis of each criterion does not make it possible to reach a clear conclusion as to the existence of a criminal charge ... (§86)."

Example: in "*Mulosmani v. Albania*",¹⁰⁴ the Court argued that "Charge", for the purposes of Article 6, may be defined as "the official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence", a definition that also corresponds to the test whether "the situation of the [suspect] has been substantially affected."

¹⁰⁰ Application no. 1936/63, Judgment of 27 June 1968, <http://hudoc.echr.coe.int/eng?i=001-57543>

¹⁰¹ Application no. 5370/72, Judgment of 8 June 1976, <http://hudoc.echr.coe.int/eng?i=001-57479>

¹⁰² *Ibid.*

¹⁰³ Applications no. 39665/98 and 40086/98, Judgment of 9 October 2003,

<http://hudoc.echr.coe.int/eng?i=001-61333>

¹⁰⁴ Application no. 29864/03, Judgment date 08 October 2013, <http://hudoc.echr.coe.int/eng?i=001-126793>

List of questions:

- Explain the concept of autonomous meaning?
- Discuss the notion of autonomous meaning in the determination of civil rights.
- Discuss the notion of autonomous meaning in the determination of criminal rights.

Recommended hearing:

- ECtHR' judgement "König v. Germany"
- ECtHR' judgement "Ringeisen v. Austria"
- ECtHR' judgement "Vilho Eskelinen and others v. Finland"
- ECtHR' judgement "Dauti v. Albania"
- ECtHR' judgement "Engel v. the Netherlands"
- ECtHR' judgement "Ezeh and Connors v. UK"
- ECtHR' judgement "Mulosmani v. Albania"

2. Positive obligations (2nd sub-principle of effective protection)

2.1. The concept of positive obligations

In certain situations, a State is obliged to take positive steps to vindicate Convention rights and ensure they are effectively enjoyed by those in their jurisdiction. The European Court has relied on Article 1 of the Convention, which requires a state to 'secure to everyone within their jurisdiction the rights and freedoms defined in Section 1 of this Convention', as the jurisprudential basis for imposing a number of implied positive obligations on the States party to the Convention.¹⁰⁵In the view of the ECtHR' case-law, the prime characteristic of positive obligations is that they in practice require national authorities to take the necessary measures to safeguard a right or, more specifically, to adopt reasonable and suitable measures to protect the rights of the individual.¹⁰⁶

2.2. Positive and negative obligations

Positive obligations are to be distinguished from negative obligations.¹⁰⁷A negative obligation requires a State to refrain from any action which would amount to an unjustified interference with rights protected under the Convention. For many Convention rights, this negative obligation is absolute as, for example, the prohibition of torture under Article 3 of the Convention. Other rights are qualified, whose interference is permitted so long as certain conditions are met as for example in the case of freedom of expression under Article 10 and privacy and family rights under Article 8 of the Convention. It is not always simple to draw a distinction between positive and negative obligations.

Example:in "Keegan v. Ireland",¹⁰⁸ the European Court stated "the essential object of Article 8 is to protect the individual against arbitrary action by the public authorities. There may in addition be positive obligations inherent in an effective "respect" for family life. However, the boundaries between the State's positive and negative obligations under this provision do not lend themselves to precise definition. The applicable principles are, nonetheless, similar. In both contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole; and in both contexts the State enjoys a certain margin of appreciation."

¹⁰⁵A. Mowbray, *Cases, Materials and Commentary on the European Convention on Human Rights*, 3rd edn., (OUP, 2012) p.82.

¹⁰⁶Steven Greer, *The Margin of Appreciation: Interpretation and Discretion under The European Convention on Human Rights*, *Human Rights Handbooks No. 7*, Council of Europe (2000), p.7.
[http://www.echr.coe.int/LibraryDocs/DG2/HRFILES/DG2-EN-HRFILES-17\(2000\).pdf](http://www.echr.coe.int/LibraryDocs/DG2/HRFILES/DG2-EN-HRFILES-17(2000).pdf)

¹⁰⁷See for a detailed discussion of the difference between positive and negative obligations, Laurens Lavrysen, *Human Rights in the Positive State* (Intersentia:2016)
<http://intersentia.com/en/human-rights-in-a-positive-state.html>

¹⁰⁸Application No.16969/90, Judgment of 26 May 1994,<http://hudoc.echr.coe.int/eng?i=001-57881>

2.3. Types of positive obligations

The nature and extent of the positive obligations vary amongst the different Articles of the Convention. The Court has found that such obligations may arise under:

Article 2 (see *McCann and Others v. the United Kingdom*)

Article 3 (see *Assenov and Others v. Bulgaria*)

Article 8 (see *Gaskin v. the United Kingdom*)

Article 11 (see *Plattform "Ärzte für das Leben" v. Austria*)

Regard must be had to the fair balance that has to be struck between the general interest of the community and the interests of the individual. The scope of the obligation will vary, having regard to the diversity of situations in Contracting States, the difficulties involved in policing modern societies and the choices which must be made in terms of priorities and resources. The obligation must not be interpreted in such a way as to impose an impossible or disproportionate burden on the authorities.

Example:in "Marckx v. Belgium",¹⁰⁹the plenary Court held that Article 8 imposes positive obligation on State to provide domestic laws which would allow an unmarried mother and her child to lead a normal family life and allow the child to be integrated in the family from the moment of birth.

Example:in "X and Y v. The Netherlands",¹¹⁰the Court held that the Article 8 imposed a positive obligation on a State to make provision for punishment through appropriate criminal law provisions for wrongdoing which violates the essential aspects of a person's integrity.

Example:in "Airey v. Ireland",¹¹¹the applicant challenged the lack of availability of legal aid for judicial separation proceedings. The ECtHR found a violation of Article 6§1 maintaining that "To hold that so far-reaching an obligation exists would, the Court agrees, sit ill with the fact that the Convention contains no provision on legal aid for those disputes, Article 6 para. 3 (c) (art. 6-3-c) dealing only with criminal proceedings. However, despite the absence of a similar clause for civil litigation, Article 6 para. 1 (art. 6-1) may sometimes compel the State to provide for the assistance of a lawyer when such assistance proves indispensable for an effective access to court either because legal representation is rendered compulsory, as is done by the domestic law of certain Contracting States for various types of litigation, or by reason of the complexity of the procedure or of the case."

Example: in "Bushati v. Albania",¹¹²the Court reiterates that "execution of a final judgment given by any court must be regarded as an integral part of the "trial" for the purposes of Article 6 of the Convention (see *Hornsby v. Greece*). The State has a positive obligation to organise a system for enforcement of judgments that is effective

¹⁰⁹Application no. 6833/74, Judgment of 13 June 1979, <http://hudoc.echr.coe.int/eng?i=001-57534>

¹¹⁰Application no. 8978/80, Judgment of 26 March 1985, <http://hudoc.echr.coe.int/eng?i=001-57603>

¹¹¹Application no. 6289/73, Judgment of 9 October 1979, <http://hudoc.echr.coe.int/eng?i=001-57420>

¹¹²Application no. 6397/04, Judgment date 14 February 2012, <http://hudoc.echr.coe.int/eng?i=001-96025>

both in law and in practice and ensures their enforcement without any undue delays (see *Ruianu v. Romania*). When the authorities are obliged to act in order to enforce a judgment and they fail to do so, their inactivity can engage the State's responsibility on the ground of Article 6§1 of the Convention."

Example: in "*Bajrami v. Albania*,"¹¹³the Court reiterates that "the essential object of Article 8 is to protect the individual against arbitrary action by public authorities. There are in addition positive obligations inherent in effective "respect" for family life. In both contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole; and in both contexts the State enjoys a certain margin of appreciation (see *Keegan v. Ireland*). In relation to the State's obligation to take positive measures, the Court has repeatedly held that Article 8 includes a parent's right to the taking of measures with a view to his being reunited with his child and an obligation on the national authorities to facilitate such reunion."

2.4. Positive obligations in respect of procedural safeguards

Introduction: the European Court has held that a State may have a positive procedural obligation to provide effective protection of a Convention right. Whereas, earlier case-law distinguished procedural from substantive positive obligations, 'more recent case-law reflects a new tendency whereby the Court appears systematically to base the positive obligations which it lays down, whether substantive or procedural, on a combination of the standard-setting provisions of the European [Convention] text and Article 1 of that text'¹¹⁴.

Example: in "*Bijelić v. Montenegro and Serbia*,"¹¹⁵the Court found that by virtue of Article 1 of the Convention, each Contracting Party "shall secure to everyone within [its] jurisdiction the rights and freedoms defined in [the] Convention". The discharge of this general duty may entail positive obligations inherent in ensuring the effective exercise of the rights guaranteed by the Convention. In the context of Article 1 of Protocol No. 1, those positive obligations may require the State to take the measures necessary to protect the right of property ... particularly where there is a direct link between the measures which an applicant may legitimately expect the authorities to undertake and the effective enjoyment of his or her possessions ... It is thus the State's responsibility to make use of all available legal means at its disposal in order to enforce a final court decision, notwithstanding the fact that it has been issued against a private party, as well as to make sure that all relevant domestic procedures are duly complied with ... (§81-83)."

¹¹³ See footnote 32

¹¹⁴ Steven Greer, *The Margin of Appreciation: Interpretation and Discretion under The European Convention on Human Rights*, Human Rights Handbooks No. 7, Council of Europe (2000), pp8-9. [http://www.echr.coe.int/LibraryDocs/DG2/HRFILES/DG2-EN-HRFILES-17\(2000\).pdf](http://www.echr.coe.int/LibraryDocs/DG2/HRFILES/DG2-EN-HRFILES-17(2000).pdf)

¹¹⁵ Application No. 11890/05, Judgment of 28 April 2009, <http://hudoc.echr.coe.int/eng/?i=001-92484>

List of questions:

- Explain the notion of positive and negative obligation
- What rights provided in the Convention invoke the positive obligation of high Contracting parties?
- What scope should follow the positive obligations and what criteria should be had in mind when identifying as such?
- What is the positive procedural obligation?

Recommended reading:

- ECtHR judgement in "Keegan v. Ireland"
- ECtHR judgement "Marckx v. Belgium"
- ECtHR judgement "X and Y v. the Netherlands"
- ECtHR judgement "Airey v. Ireland"
- ECtHR judgement "Bushati v. Albania"
- ECtHR judgement "Bajrami v. Albania"
- ECtHR judgement "Bijelić v. Montenegro and Serbia"
- ECtHR judgement "McCann and Others v. the United Kingdom"
- ECtHR judgement "Assenov and Others v. Bulgaria"
- ECtHR judgement "Gaskin v. the United Kingdom"
- ECtHR judgement "Plattform "Ärzte für das Leben" v. Austria"

3. Subsidiarity and the fourth instance doctrine (3rd sub-principle of effective protection)

Principle of subsidiarity: according to the principle of subsidiarity, the protection of the rights and freedoms guaranteed by the Convention is subsidiary to the primary responsibility of the national authorities to protect those rights and freedoms. The European Court of Human Rights is intended to be subsidiary to the national systems safeguarding human rights and it is appropriate that the national courts should initially have the opportunity to determine questions of the compatibility of domestic law with the Convention and that, if an application is nonetheless subsequently brought to Strasbourg, the European Court should have the benefit of the views of the national courts, as being in direct and continuous contact with the forces of their countries.

Example: in "Burden v. United Kingdom",¹¹⁶ the European Court has based the principle of subsidiarity on Article 13 (right to an effective remedy) and Article 35 of the Convention (admissibility criteria) which provides that the European Court may only deal with the matter after all domestic remedies have been exhausted.¹¹⁷

Example: in "Bajrami v. Albania",¹¹⁸ the Court notes that "the purpose of Article 35 is to afford the Contracting States the possibility of preventing or putting in place the alleged violation against them before these claims were presented to it.¹¹⁹ As a result, the appeal to be submitted to the Court must first be submitted to the relevant national courts, at least in substance, in accordance with the formal requirements of the domestic law and within the time limits laid down by law. However, the only internal means that need to be evacuated are those that relate to the alleged violations and are at the same time possible and sufficient. The existence of such internal tools should be quite secure, not only in theory, but also in practice, and if they are not, they do not provide the necessary access and efficiency. In this context, it is up to the relevant State to prove the fulfilment of these various conditions."

Example: in "Gori v. Albania",¹²⁰ the Court reiterates that "the rule of exhaustion of domestic remedies obliges those seeking to raise their case against a State in an international judicial or arbitral body to use the means provided for by the national legal system first. The rule is based on the assumption that there are effective remedies available in respect of an alleged domestic infringement, irrespective of whether the provisions of the Convention are or are not incorporated in domestic law. In this way, this is an important aspect of the principle that the protection machinery envisaged in the Convention is complementary to national systems that preserve human rights. At the same time, it is the obligation of the government to provide an effective remedy available in theory and practice for the Court at the material time, a vehicle that was indisputable, capable of addressing the applicant's allegations and providing reasonable opportunities."

¹¹⁶ Application No. 13378/05, Judgment of 29 April 2008, <http://hudoc.echr.coe.int/eng?i=001-86146>

¹¹⁷ See Nicholas Bamforth, *Articles 13 and 35 Convention rights in national law (2016) European Human Rights Law Review*, No. 5, 501-507.

¹¹⁸ See footnote 32

¹¹⁹ Such as *Hentrich v. France*, Decision of 22 September 1994, Series A No 296-A, pp. 18, § 33, and *Remli v. France*, Judgment of 23 April 1996, Reports of Judgments and Decisions 1996-II, p. 33).

¹²⁰ Application no. 25336/04, Judgment date 07 July 2009, <http://hudoc.echr.coe.int/eng?i=001-93410>

3.1. Fourth instance principle.

In accordance with the principle of subsidiarity, the ECtHR has held that Article 6§1 of the Convention does not permit the Court to act as a fourth instance of appeal. It is admittedly not the Court's task to substitute its own assessment of the facts and the evidence for that of the domestic courts and, as a general rule, it is for these courts to assess the evidence before them. The Court's task is to ascertain whether the proceedings considered as a whole, including the way in which the evidence was taken, were fair (*Bernard v. France*, §37).¹²¹

Example: in "Balliu v. Albania",¹²² where the Court reiterates that "the admissibility of evidence is primarily governed by the rules of domestic law and that, as a rule, it is for the national courts to assess the evidence before them. The task of the Convention institutions is to ascertain whether the proceedings in their entirety, including the way in which evidence was taken, were fair. As a rule, these rights require that the defendant should be given an adequate and proper opportunity to challenge and question a witness against him either when he was making his statements or at a later stage of the proceedings."

I. Case-law' examples related to the doctrine of fourth instance.

The following sections provide case-law examples of the application of the fourth instance doctrine to three situations where claims of violation of Article 6(1) of the Convention have been adjudicated by the European Court: (i) *Inconsistent national judgments and principle of legal certainty*; (ii) *Errors of fact or law*; and (iii) *Lack of reasoning or legal basis*.

a. *Inconsistent national judgments and principle of legal certainty*

Example: in "Tomić and others v. Montenegro",¹²³ the Court reiterates that it is not its role to question the interpretation of the domestic law by the national courts. Similarly, it is not in principle its function to compare different decisions of national courts, even if given in apparently similar proceedings; it must respect the independence of those courts ... It has also been considered that certain divergences in interpretation could be accepted as an inherent trait of any judicial system which, like the Montenegrin one, is based on a network of trial and appeal courts with authority over a certain territory ... However, profound and long-standing differences in the practice of the highest domestic court may in itself be contrary to the principle of legal certainty, a principle which is implied in the Convention and which constitutes one of the basic elements of the rule of law ... The criteria in assessing whether conflicting decisions of domestic supreme courts are in breach of the fair trial requirement enshrined in Article 6 / 1 of the Convention consist in establishing whether "profound and long-standing differences" exist in the case-law of a supreme court, whether the domestic law provides for machinery for overcoming these inconsistencies, whether that machinery

¹²¹ Application No.22885/93, Judgment of 23 April 1998, <http://hudoc.echr.coe.int/eng?i=001-58161>

¹²² Application no.74727/01, Judgment date 16 June 2005, <http://hudoc.echr.coe.int/eng?i=001-69401>

¹²³ Applications no.18650/09, 18676/09, 18679/09, 38855/09, 38859/09, 38883/09, 39589/09, 39592/09, 65365/09 and 7316/10, Judgment of 22 October 2012, <http://hudoc.echr.coe.int/eng?i=001-110384>

has been applied and, if appropriate, to what effect ... Lastly, it has been accepted that giving two disputes different treatment cannot be considered to give rise to conflicting case-law when this is justified by a difference in the factual situations at issue ...”

Example: in “*Stanković and Trajković v. Serbia*,”¹²⁴the Court maintained that “the principle of legal certainty guarantees, *inter alia*, certain stability in legal situations and contributes to public confidence in the courts. The persistence of conflicting court decisions, on the other hand, can create a state of legal uncertainty likely to reduce public confidence in the judicial system, whereas such confidence is clearly one of the essential components of a State based on the rule of ... (vi) However, the requirements of legal certainty and the protection of the legitimate confidence of the public do not confer an acquired right to consistency since failure to maintain a dynamic and evolutive approach would risk hindering reform or improvement.”

b. Errors of fact or law

Example: in “*Tomić and others v. Montenegro*,”¹²⁵the Court reiterates that, “in accordance with Article 19 of the Convention, its duty is to ensure the observance of the engagements undertaken by the Contracting Parties to the Convention. In particular, it is not its function to deal with errors of fact or law allegedly committed by a national court unless and in so far as they may have infringed rights and freedoms protected by the Convention.”

c. Lack of reasoning or legal basis

Example: in “*Barać and others v. Montenegro*,”¹²⁶the Court held that “no fair trial could be considered to have been held where the reason given in the relevant domestic decision was not envisaged by the domestic legislation and, therefore, was not a legally valid one ... where the competent domestic body refused to enrol the applicant on the list of “pupil advocates”, relying on a ground which was not provided in the relevant legislation at all ...Turning to the present case, the Court observes that the final decision rendered by the Supreme Court against the applicants relied solely on an Act which had previously been declared unconstitutional and a relevant decision to that effect had been already published in the Official Gazette. Thus, the Labour Amendments Act 2004 had ceased to be in force and, as such, was not applicable in the applicants’ case, as provided by Article 69§1 of the Constitution in force at the time (see paragraph 13 above). Therefore, the only legal basis for the Supreme Court’s decision was not valid at the relevant time. It is irrelevant in this connection whether the impugned piece of legislation was declared unconstitutional for formal or substantial reasons (see paragraphs 15 and 31 above)”.

Example: in “*Milojević and others v. Serbia*,”¹²⁷the Court reiterates that “according to its established case-law, reflecting a principle linked to the proper administration of justice, judgments of courts and tribunals should adequately state the reasons on

¹²⁴ Applications No. 37194/08 and 37260/08, Judgment of 22 December 2015, <http://hudoc.echr.coe.int/eng?i=001-159376>

¹²⁵ See footnote 128

¹²⁶ Application No. 47974/06, Judgment of 13 December 2011, <http://hudoc.echr.coe.int/eng?i=001-107943>

¹²⁷ Applications No. 43519/07, 43524/07 and 45247/07, Judgment of 12 January 2016, <http://hudoc.echr.coe.int/eng?i=001-159880>

which they are based. The extent to which this duty to give reasons applies may vary according to the nature of the decision and must be determined in the light of the circumstances of the case ... Although Article 6/1 obliges courts to give reasons for their decisions, it cannot be understood as requiring a detailed answer to every argument of the parties involved ... When applying legal rules lacking in precision, however, the domestic courts must show particular diligence in giving sufficient reasons as to why such a rule was applied in a particular manner, given the circumstances of each specific case. Merely citing the language of the imprecise provision cannot be regarded as sufficient reasoning."

➤ **Case study "Mullai v. Albania"¹²⁸**

The applicant in this case "Tekno-project sh.pk", claims that state authorities have delayed without reason, for almost 9 years, the implementation of the Decision No. 766, dated 22.12.1998, of the Council of Territorial Adjustment of the Municipality of Tirana, in violation of their right to a fair trial (Article 6.1 of the Convention) and their right to property (Article 1 of Protocol 1 to the Convention). More concretely he complained of

- (1) Violation of the principle of legal certainty guaranteed by Article 6.1 of the Convention regarding the District Court's decision of 14 December 2005,
- (2) Non-execution of Decision No. 66, dated 22.12.1998, on the approval of the construction license, during the period when the works were suspended by the act of the Tirana Construction Police Directorate (TCPD).
- (3) Violation of the right for the peaceful enjoyment of property within the meaning of Article 1 Protocol 1 concerning the suspension of works

Facts: the Albanian authorities have recognized Mullai's owners of their property right over the land 1,515 m2 respectively by the decisions No. 1039 dated 30.12.1994 and Decision No. 100, dated 8.8.2002, of the Property Restitution and Compensation Commission. Also, the Municipality of Tirana, approved the construction site for the two objects (16 floors), in their favour by decision No. 670 dated 23.10.1998 of the CRT. Subsequently, it was the choice of Mullai' owners to enter into a contractual relationship with the company "Tekno-Projekt", for the completion of construction of the building. By Decision No. 766, dated 22.12.1998, the CRT approved the construction permit in favour of the company "Tekno Project". Initially, the implementation of the abovementioned decision on the construction permit was suspended by the Directorate of Construction Police, pursuant to an order of the Prefect of Tirana (and subsequently the Minister of Public affairs), with the reasoning that the building permit was null and void, since it was issued in violation of Law No. 8405, dated 17.09.1998 "On Urban Planning". The suspension order also stipulated that the legality of the construction permit should be assessed by the CRT. The suspension of construction works was filed by the "Tekno-Project" at Tirana District Court. At the end of this judicial process, the courts considered the suspension legitimate, until the CRT was finally pronounced on this matter. On 19 March 2001, the Swiss Embassy, as an interested party, being the building under construction in the western part of its headquarters, filed a lawsuit against Tirana District Court and Tirana "Tekno-Project", with object to declare the construction permit null and void. Three ongoing judicial processes have been developed, that lasted overall 9 years.

¹²⁸ Application no. 9074/07, Judgment (Merits), date on 23 March 2010, <http://hudoc.echr.coe.int/eng?i=001-97882>

ECtHR' judgement in *Mullai v. Albania*: the Court found that the Supreme Court's reasoning in the decision of 29 March 2001 is unfair since it states that the Prefect's decision of 12 January 2000 was *ultra vires* due to the non-exhaustion of local administrative remedies regarding the validity of the permit of the construction of the building. In the same decision, the Supreme Court has challenged this conclusion by declaring the construction permit valid. The European Court has ruled that such oppositions within the same decision are incompatible with the judicial function and the role that the Supreme Court should have in resolving conflicts and avoiding divergences being uniform in its decision. The Supreme Court's decision has become a source of legal insecurity, affecting the public confidence of individuals in the justice system and in the rule of law. As a result, judicial proceedings have significantly influenced the overall climate of legal insecurity. The way in which domestic authorities have proceeded violated the right of the applicants to deal with their claim clearly, coherently and with the due sustainability. It further observed that the domestic proceedings, particularly the manner in which the litigation was conducted, breached the principle of legal certainty under Article 6§1 of the Convention on account of the Supreme Court's inconsistent interpretation. Therefore, the Court considered that extending of the building permit's validity by two years and having the construction work resumed would be the most appropriate form of redress for the applicants.¹²⁹ Therefore, the parties were invited to negotiate and reach an agreement for the determination of the amount of compensation for the applicant' company as well as for the applicant Mullai' family.¹³⁰

List of questions:

- Discuss the case "*Mullai v. Albania*" and the principles applied by the court for the determination of the case.
- Explain what is the principle of subsidiarity?
- Explain the principle of the fourth instance doctrine.
- What is the underlying principle applied by the court to approach the determination of cases that concern to (1) the inconsistent national judgments and principle of legal certainty (2) errors of fact and law (3) lack of reasoning or legal bases?

Recommended reading:

- ECtHR' judgement "*Burden v. United Kingdom*"
- ECtHR' judgement "*Bajrami v. Albania*"
- ECtHR' judgement "*Groni v. Albania*"
- ECtHR' judgement "*Balliu v. Albania*"
- ECtHR' judgement "*Tomić and others v. Montenegro*"
- ECtHR' judgement "*Stanković and Trajković v. Serbia*"
- ECtHR' judgement "*Tomić and others v. Montenegro*"
- ECtHR' judgement "*Barać and others v. Montenegro*"
- ECtHR' judgement "*Milojević and others v. Serbia*"

¹²⁹ 1250 meeting (8-10 March 2016) (DH) - Action report (25/09/2015) - Communication from Albania concerning the case of Mullai and others against Albania (Application No. 9074/07) [Anglais uniquement]

¹³⁰ As the former owner of the 3-storey villa, object of appeal

B. Principle of dynamic interpretation

The general rights enshrined in the ECHR are regarded as standards which might evolve along with relevant societal developments, so that the level of protection of each individual right at any given time reflects present-day conditions in the various contracting states. ECHR's object and purpose and its preamble highlights the intention of contributing to a further realization of human rights' and facilitating a 'common understanding' of these rights. This approach aims at the creation of a region-wide European consensus as regards the implications of a right enumerated in the ECHR in respect of a specific rights-related question. In this connection the Court has required the commitment of contracting parties to not take on other international obligations which are in conflict with the ECHR. Also, based on the principle of general openness, the Court occasionally has taken account of other international tribunals' case-law, decisions of national courts interpreting national bills of rights or norms and standards set forth by other Council of Europe bodies.

Principle: The ECHR is a law-making treaty, which means that it is also necessary to seek the interpretation that is most appropriate in order to realise the aim and achieve its object and would restrict to the greatest possible degree the obligations undertaken by the Parties (*Wemhoff v Germany*).¹³¹ This teleological approach had led the European Court to interpret the Convention as a 'living instrument' which must evolve over time to reflect changing social attitudes in the Member States. In this respect the European Court is guided in its interpretation of the Convention by the Vienna Convention on the Law of Treaties (Article 31¹³² and 32).¹³³

Example: in "*Goodwin v. United Kingdom*,"¹³⁴ the Grand Chamber explained its teleological approach in the context of a case involving the legal status of transsexuals in order to justify its departure from its previous case-law. However, since the Convention is first and foremost a system for the protection of human rights, the Court must have regard to the changing conditions within the respondent State and within Contracting States generally and respond, for example, to any evolving convergence as to the standards to be achieved .. It is of crucial importance that the Convention is interpreted and applied in a manner which renders its rights practical and effective, not

¹³¹ Application no. 2122/64, Judgment of 27 June 1968, <http://hudoc.echr.coe.int/eng?i=001-57595>

¹³² VCLT Article 31, which sets out the general principles for the interpretation of a treaty, in its relevant parts reads:

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes

- ¹³³ Article 32 of the VCLT furthermore provides as follows:

- Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of Article 31, or to determine the meaning when the interpretation according to Article 31:
- (a) leaves the meaning ambiguous or obscure, or
- (b) leads to a result which is manifestly absurd or unreasonable

¹³⁴ Application No. 28957/95, Judgment of 11 July 2002, <http://hudoc.echr.coe.int/eng?i=001-57974>

theoretical and illusory. A failure by the Court to maintain a dynamic and evolutive approach would indeed risk rendering it a bar to reform or improvement.

Example: in "*Radunović and others v. Montenegro*,"³³⁵ the Court held "Moreover, the Convention has to be interpreted in the light of the rules set out in the Vienna Convention of 23 May 1969 on the Law of Treaties, Article 31§3 (c) of which indicates that account is to be taken of "any relevant rules of international law applicable in the relations between the parties". The Convention, including Article 6, cannot be interpreted in a vacuum. The Court must therefore be mindful of the Convention's special character as a human rights treaty, and it must also take the relevant rules of international law into account, including those relating to the grant of State immunity."

1. Article 6§1 and the teleological approach

As a result of the teleological approach, the European Court in its interpretation of Article 6§1 has developed a number of implied rights, including: a) the right of access to a court, b) the right to implementation of judgments and c) the right to finality of court decisions.

1. a. Right of access to a court

The European Court has implied a right of access to a court under Article 6(1) on the basis such a right is essential to secure protection of the procedural rights guaranteed under Article 6(1) of the Convention. The European Court has consistently held that the right of access to a court must be effective.

Example: in "*Golder v. United Kingdom*,"³³⁶ which deals with a prisoner seeking to contact a lawyer with a view to instituting civil libel proceedings against a prison officer claimed he had been denied access to a court. The Plenary court held "It would be inconceivable, in the opinion of the Court, that Article 6 para. 1 (art. 6-1) should describe in detail the procedural guarantees afforded to parties in a pending lawsuit and should not first protect that which alone makes it in fact possible to benefit from such guarantees, that is, access to a court. The fair, public and expeditious characteristics of judicial proceedings are of no value at all if there are no judicial proceedings."

Example: in "*Lawyer Partners A.S. v. Slovakia*,"³³⁷ the Court reiterates that "the Convention is intended to guarantee rights that are not theoretical or illusory, but practical and effective. This is particularly relevant with regard to Article 6§1 of the Convention, in view of the prominent place held in a democratic society by the right to a fair trial. It must also be borne in mind that hindrance can contravene the Convention just like a legal impediment (see *Andrejeva v. Latvia* [GC], no. [55707/00](#), / 98, ECHR 2009, with further references§51)."

³³⁵ Applications No. 45197/13, 53000/13 and 73404/13, Judgment of 25 January 2017, <http://hudoc.echr.coe.int/eng?i=001-167803>

³³⁶ Application No. 4451/70, Judgment of 21 February 1975, <http://hudoc.echr.coe.int/eng?i=001-57496>

³³⁷ Applications No. 54252/07, 3274/08, 3377/08, 3505/08, 3526/08, 3741/08, 3786/08, 3807/08, 3824/08, 15055/08, 29548/08, 29551/08, 29552/08, 29555/08 and 29557/08), Judgment of 6 November 2009, <http://hudoc.echr.coe.int/eng?i=001-92959>

Example: in "Marini v. Albania,"⁴³⁸ the Court found that "the inability of the Constitutional Court to come up with a reasoned decision only because the procedures provided for in Article 74 of the Law on the Organization of the MCRs required the absolute majority of a 9-member panel to allow the applicant to remain in an undetermined situation for a long time, leading to a violation of the essence of his right to access to the court under Article 6 of the Convention. The approach made by the Albanian legal system to regulating the CC procedures varies considerably from the regulation made to these procedures, the systems of other member states. In this respect, it is necessary to modify the Albanian legal system, with the aim of providing alternative procedures for achieving the absolute majority in any case."

Example: in "Dauti v. Albania,"⁴³⁹ the Court found "The European Court in its decision found that the Appeals Commission for medical examinations related to the capacity of work ability did not constitute an independent and unbiased body of assessment, consequently its decisions could not be entitled Executive, and as such they should be subject to judicial jurisdiction in respect of their right to complain. The refusal of the domestic courts to review the applicant's claim against a decision of this Commission has violated his right of access to the court."

Example: in "Shkalla v. Albania,"⁴⁴⁰ the Court notes that "the applicant's proceedings and conviction were conducted *in absentia*. It results from the information in the case file that the applicant took cognizance of his conviction *in absentia* only on 14 June 2003, on which date he surrendered to the authorities. The Court therefore considers that the starting date for the running of the statutory time-limit for the applicant to lodge a constitutional appeal should have been, at the latest, 14 June 2005. The Court considers that the impugned decision amounted to an unjustified denial of the applicant's right of access to the Constitutional Court."

1. b. Right to implementation of judgments

The European Court has held that the right to a court would be 'illusory' if it did not also include a right to effective enforcement of the final binding order of the court. The right to implementation of judgments is thus an integral part of right to a trial under Article 6(1) of the Convention.

Example: in "Vukelić v. Montenegro,"⁴⁴¹ the Court recalls that "Article 6§1 of the Convention, *inter alia*, protects the implementation of final, binding judicial decisions, which, in States that accept the rule of law, cannot remain inoperative to the detriment of one party. Accordingly, the execution of a judicial decision cannot be prevented, invalidated or unduly delayed (see, among other authorities, *Hornsby v. Greece*, 19 March 1997§40, Reports of Judgments and Decisions 1997-II). The State has an obligation to organize a system of enforcement of judgments that is effective both in law and in practice ... Further, the Court notes that, irrespective of whether enforcement is to be carried out against a private or State actor, it is up to the State to take all necessary steps, within its competence, to execute a final court judgment and,

⁴³⁸ Application No. 3738/02, ECtHR Judgment (*Merits and Just Satisfaction* 18 December 2007, <http://hudoc.echr.coe.int/eng/?i=001-84061>)

⁴³⁹ See footnote 93

⁴⁴⁰ Application no. 26866/05, Judgment date 10 May 2011, <http://hudoc.echr.coe.int/eng/?i=001-104710>

⁴⁴¹ Application no. 58258/09, Judgment of 4 June 2013, <http://hudoc.echr.coe.int/eng/?i=001-120064>

in so doing, to ensure the effective participation of its entire apparatus, failing which it will fall short of the requirements contained in Article 6§1 ... However, a failure to enforce a judgment because of the debtor's indigence cannot be held against the State unless and to the extent that it is imputable to the domestic authorities, for example, to their errors or delay in proceeding with the enforcement ... Lastly, the Court reiterates that enforcement proceedings by their very nature need to be dealt with expeditiously."

Example: in "Qufaj v. Albania,"¹⁴²the Court argued "State authorities cannot be justified by the lack of funds for not complying with a financial obligation arising from a court decision. Undoubtedly in special circumstances, the delay in executing a decision can be justified. However, this delay cannot be to the extent that it affects the essence of the right protected under Article 6§1 of the Convention. The right to a due legal process remains illusory and loses its purpose if the domestic legal system allows local authorities to refuse, neglect or delay the execution of a final court decision to the detriment of one party."

Example: in "Zyfli v. Albania,"¹⁴³the Court has reiterated that "the exhaustion rule of domestic remedies referred to in Article 35§1 of the Convention obliges the applicant to use remedies that are normally available and sufficient in the domestic legal system. The existence of remedies should be guaranteed both in theory and in practice. The right to compensation, within the meaning of paragraph 5, arises if the domestic authorities or courts infringe at least one of the preceding paragraphs of Article 5 of the Convention."

1. c. Right to finality of court decisions

Example: in "Brumărescu v. Romania,"¹⁴⁴the Court maintained that "The right to a fair hearing before a tribunal as guaranteed by Article 6 / 1 of the Convention must be interpreted in the light of the Preamble to the Convention, which declares, among other things, the rule of law to be part of the common heritage of the Contracting States. One of the fundamental aspects of the rule of law is the principle of legal certainty, which requires, inter alia, that where the courts have finally determined an issue, their ruling should not be called into question."

Example: in "Driza v. Albania,"¹⁴⁵the Court found "the Supreme Court dropped the case two times by, after 2 years and 7 months, of a final decision in favor of the applicant, once by the decision given in parallel proceedings and the next time by recourse in the interest of the law, which has led to the violation of legal certainty under Article 6§1 of the Convention. In the light of Article 6 of the Convention, guaranteeing the principle of legal certainty implying respect for the principle of *res judicata* requires that the lower court decisions on a particular case should not be questioned subsequently by the courts of higher jurisdictions. Higher courts have the right only to correct mistakes or inaccuracies of the lower courts' final decisions, but never retry the case on the merits."

¹⁴² See footnote 53

¹⁴³ Application no. 12310/04, Decision date 27 September 2005, <http://hudoc.echr.coe.int/eng?i=001-70629>

¹⁴⁴ Application no. 28342/95, Judgment of 28 October 1999, <http://hudoc.echr.coe.int/eng?i=001-58337>

¹⁴⁵ Application no. 33771/02, ECtHR Judgment (Merits and Just Satisfaction), date 13 November 2007, <http://hudoc.echr.coe.int/eng?i=001-83245>

Example: in "*Vrioni and others v. Albania*",¹⁴⁶ the Court found "Legal security presupposes respect for the principle of *res judicata*, that is, the principle of the offense. This principle insists that no party has the right to request a review of a binding final decision only to obtain a re-trial hearing and a retrial of the case. The powers to review the higher courts should be exercised to correct judicial errors and failures in rendering justice, but not to conduct a new trial of the case."

➤ **Case study "Handyside v. United Kingdom"**¹⁴⁷

Object: The application was lodged by Handyside in 1972, who complained violations of Conventions, the right to freedom of expression, in conjunction with the property right referring to Articles 10, 17, and P1-1.

Facts: Richard Handyside, proprietor of "Stage 1" publishers, purchased British rights of "the little red schoolbook" written by Søren Hansen and Jesper Jensen and published, as of 1976, in several countries, with content which was considered as not reasonable and necessary.¹⁴⁸ Handyside sent out several hundred review copies of the book, together with a press release, to a selection of publications from national and local newspapers to educational and medical journals. He also placed advertisements for the book. The book became subject of extensive press comment, both favourable and not. On 31 March 1971, 1,069 copies of the book were provisionally seized together with leaflets, posters, showcards, and correspondence relating to its publication and sale. On 1 April 1971, 139 more copies were seized. About 18,800 copies of a total print of 20,000 copies were missed and subsequently sold. On 8 April, a Magistrates' Court issued two summonses against Handyside for having in his possession obscene books for publication for gain. Handyside ceased distribution of the book and advised bookshops accordingly but, by that time, some 17,000 copies were already in circulation. On 1 July 1971, Handyside was found guilty of both offences and fined £25 on each summons and ordered to pay £110 costs. His appeal was rejected.

ECtHR judgement: the Commission held that the interference in Handyside's freedom of expression was both prescribed by law, having a legitimate aim and necessary in a democratic society, thus there was no violation of Article 10 ECHR. It had also held unanimously that Handyside's property rights (Article 1 of Protocol No. 1) were not violated.

The Commission's report and the subsequent hearings before the Court in June 1976 brought to light clear-cut differences of opinion on how to determine whether the actual "restrictions" and "penalties" complained of by the applicant were "necessary in a democratic society", "for the protection of morals". According to the Government and the majority of the Commission, the Court has only to ensure that the English courts acted reasonably, in good faith and within the limits of the margin of appreciation left to the Contracting States by Article 10 para. 2.

The Court points out that the machinery of protection established by the Convention is subsidiary to the national systems safeguarding human rights. The Convention leaves to each Contracting State, in the first place, the task of securing the rights and liberties it enshrines. The institutions created by it make their own contribution to this task but they

¹⁴⁶ Application no. 2141/03, Judgment date 24 March 2009, <http://hudoc.echr.coe.int/eng?i=001-102131>

¹⁴⁷ Application no. 5493/72, Judgement 07 December 1976, <http://hudoc.echr.coe.int/eng?i=001-57499>

¹⁴⁸ in Denmark, Belgium, Finland, France, West Germany, Greece, Iceland, Italy, the Netherlands, Norway, Sweden, and Switzerland as well as several non-European countries

become involved only through contentious proceedings and once all domestic remedies have been exhausted (Article 26) (art. 26).

These observations apply, notably, to Article 10 para. 2. In particular, it is not possible to find in the domestic law of the various Contracting States a uniform European conception of morals. The view taken by their respective laws of the requirements of morals varies from time to time and from place to place, especially in our era which is characterised by a rapid and far-reaching evolution of opinions on the subject. By reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements as well as on the "necessity" of a "restriction" or "penalty" intended to meet them.¹⁴⁹ Nevertheless, it is for the national authorities to make the initial assessment of the reality of the pressing social need implied by the notion of "necessity" in this context.

Consequently, Article 10 para. 2 leaves to the Contracting States a margin of appreciation. This margin is given both to the domestic legislator and to the bodies, judicial amongst others that are called upon to interpret and apply the laws in force.

List of questions:

- Discuss the principle of dynamic interpretation in the judgement *Handyside v. UK*, and the criteria applicable for its justification.
- Discuss how does the notion of the "necessity" of a "restriction" or "penalty" implies "the initial assessment of the reality of the pressing social need" in the case study
- Discuss the principle of implied rights and its application in relation to the (1) right of access to the courts (2) the right to implementation of judgements (3) right to finality of court decisions

Recommended hearing:

- ECtHR judgement "*Goodwin v. United Kingdom*"
- ECtHR judgement "*Radunović and others v. Montenegro*"
- ECtHR judgement "*Golder v. United Kingdom*"
- ECtHR judgement "*Marini v. Albania*"
- ECtHR judgement "*Dauti v. Albania*"
- ECtHR judgement "*Shkalla v. Albania*"
- ECtHR judgement "*Vukelić v. Montenegro*"
- ECtHR judgement "*Qufaj v. Albania*"
- ECtHR judgement "*Zyfilli v. Albania*"
- ECtHR judgement "*Brumărescu v. Romania*"
- ECtHR judgement "*Driza v. Albania*"
- ECtHR judgement "*Vrioni and others v. Albania*"

¹⁴⁹The Court notes at this juncture that, whilst the adjective "necessary", within the meaning of Article 10 para. 2 (art. 10-2), is not synonymous with "indispensable" (cf., in Articles 2 para. 2 (art. 2-2) and 6 para. 1 (art. 6-1), the words "absolutely necessary" and "strictly necessary" and, in Article 15 para. 1 (art. 15-1), the phrase "to the extent strictly required by the exigencies of the situation"), neither has it the flexibility of such expressions as "admissible", "ordinary" (cf. Article 4 para. 3) (art. 4-3), "useful" (cf. the French text of the first paragraph of Article 1 of Protocol No. 1) (P1-1), "reasonable" (cf. Articles 5 para. 3 and 6 para. 1) (art. 5-3, art. 6-1) or "desirable".

C. Principle of fair balance

The Convention aims for a fair balance between the demands of the general interest of the community as a whole and the requirements of the protection of the individual's fundamental rights. This principle covers three aspects:

- **The Substantive Aspect:** the rights enshrined in the ECHR are understood broadly, thus they often may come into tension with each other, necessitating that a 'balance' of some sort is struck between them. This implies that in some situations, the protection of the rights of one person will entail an interference with the rights of another person or many of the rights enshrined in the ECHR can come into tension with legitimate public interests. In such cases limitation of rights may be justifiable in the domestic legal system for the promotion of important public interests, such as national security, prevention of crime, the economic well-being of the nation, and so on. For example, ECHR provides legitimate restriction of some of the rights in Articles 8(2), 9(2), 10(2) and 11(2).
- **The institutional aspect:** the Convention' right must be interpreted and applied in a way which does not obliterate the prerogative of the "democratically accountable" state bodies of the High Contracting States to take important decisions on behalf of their respective communities.¹⁵⁰ According to this principle the contracting states enjoy a certain 'margin of appreciation', when it takes legislative, administrative, or judicial action in the area of a Convention rights.
- **The procedural aspect:** an interference with an ECHR right, through any general act by a contracting state' public body, must be carried out in accordance with the principle of the Rule of Law. This tenet gives rise to a requirement of legality as well as a requirement of procedural fairness referring in particular to the decision-making procedure which needs to guarantee adequate safeguards against arbitrariness.

1. Substantive Aspect (1st sub principle of fair balance)

1.a. Restrictions on right to a court - the essence test

Principle. The general principle applied for the limitation of Convention rights is that when interfering with a right in some way, the contracting state must pursue a legitimate aim, and the measure must be proportional to the aim pursued. ECtHR has consistently held that any restrictions on the right of access to a court under Article 6§1 of the Convention must not be such "as to impair the very essence of the right." However, the European Court has emphasised that the right of access is not absolute. The Court considers, accepting the views of the Commission and the alternative submission of the Government, that the right of access to the courts is not absolute. As this is a right which the Convention sets forth (see Articles 13, 14, 17 and 25) (art. 13, art. 14, art. 17, art. 25) without, in the narrower sense of the term, defining,

¹⁵⁰It is part of the 'object and purpose' of the ECHR, as defined in the preamble, to promote democratic ideals

there is room, apart from the bounds delimiting the very content of any right, for limitations permitted by implication(*Golder v. United Kingdom*,§38).¹⁵¹

Example: in "Marini v. Albania,"¹⁵²the Court found"...furthermore, the "right to a court" is not absolute. It is subject to limitations permitted by implication, in particular where the conditions of admissibility of an appeal are concerned, since by its very nature it calls for regulation by the State, which enjoys a certain margin of appreciation in this regard (see, *Ashingdane v. the United Kingdom*). However, these limitations must not restrict or reduce a person's access in such a way or to such an extent that the very essence of the right is impaired; lastly, such limitations will not be compatible with Article 6.1 if they do not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved (see *Levages Prestations Services v. France*)"

1. b. Categories of restrictions:

The European Court has reviewed a number of categories of national restrictions on the right of access to a court to determine if they deprive an applicant of the 'essence' of the right of access: including (a) limitation periods; (b) immunity claims; and (c) procedural restrictions.

Limitation periods as restriction

The European Court has recognised that limitation periods are a common feature of national legal systems and fulfil important and legitimate objectives namely 'to ensure legal certainty and finality, protect potential defendants from stale claims which might be difficult to counter and prevent the injustice which might arise if courts were required to decide upon events which took place in the distant past on the basis of evidence which might have become unreliable and incomplete because of the passage of time.'¹⁵³

However, while the European Court has accepted that a State retains a margin of appreciation in the determination of limitation periods, the final decision as to the observance of the Convention's requirements rests with the Court.

Example: in "Stubbings v. United Kingdom,"¹⁵⁴the Court found that "It must be satisfied that the limitations applied do not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired. Furthermore, a limitation will not be compatible with Article 6 para.1 (art. 6-1) if it does not pursue a legitimate aim and if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved."

¹⁵¹ See footnote 138

¹⁵² Application no. 3738/02, ECtHR Judgment (Merits and Just Satisfaction 18 December 2007, <http://hudoc.echr.coe.int/eng?i=001-84061>

¹⁵³ Application no. 22083/93; 22095/93, Judgment of 22 October 1996.

¹⁵⁴ Application no.2083/93 22095/93, Judgment (Merits), date on 22 October 1996, <http://hudoc.echr.coe.int/eng?i=001-58079>

Immunity claims as restrictions

Claims to immunity from jurisdiction arise both in the international and national context. In the national context, the European Court has exercised its supervisory jurisdiction to determine if the immunity amounts to a disproportionate restriction of the right of access to a court.

Example: *in "Osman v. United Kingdom,"*³⁵⁵ the Grand Chamber reviewed the national court's decision to dismiss an action for negligence against police on public policy grounds and it would observe that the application of the rule in this manner without further enquiry into the existence of competing public-interest considerations only serves to confer a blanket immunity on the police for their acts and omissions during the investigation and suppression of crime and amounts to an unjustifiable restriction on an applicant's right to have a determination on the merits of his or her claim against the police in deserving cases.

In the international context, the European Court has reviewed the claims to diplomatic immunity in the context both of international law and the requirements of the right of access to a court.

Example: *in "Radunović and others v. Montenegro"*³⁵⁶ the state immunity was pleaded in unfair dismissal proceedings brought by employees of the US embassy in Montenegro: 'In view of the above, the Court considers that by rejecting the applicants' claim for compensation relying on State immunity without giving relevant and sufficient reasons, and notwithstanding the applicable provisions of international law, as well as sections 28 of the Civil Procedure Act and sections 47 and 55 of Resolution of Conflict of Laws and Regulations of other States Act, the Montenegrin courts failed to preserve a reasonable relationship of proportionality. They thus impaired the very essence of the applicants' right of access to a court.

Example: *in "Vrioni v. Albania & Italy"*³⁵⁷ the Court noted that "applicants complained of a denial of access to a court on account of their inability to take proceedings against a diplomatic mission, namely the Embassy of the Republic of Italy in Albania. Article 6 § 1 of the Convention secures to everyone the right to have any claim relating to his civil rights and obligations brought before a court. The right of access to a court is not, however, absolute, but may be subject to limitations; these are permitted by implication since the right of access by its very nature calls for regulation by the State. The Court reiterates that generally recognized rules of international law on State immunity cannot be regarded as imposing a disproportionate restriction on the right of access to a court as embodied in Article 6 §1 of the Convention. As the right of access to a court is an inherent part of the fair-trial guarantee in that Article, so some restrictions on access must likewise be regarded as inherent, an example being those limitations generally accepted by the community of nations as part of the doctrine of State immunity. There is nothing in the present case to warrant departing from those

³⁵⁵ Application no. 23452/94, Judgment of 28 October

³⁵⁶ Applications no. 45197/13, 53000/13 and 73404/13, Judgment of 25 October 2016, <http://hudoc.echr.coe.int/eng?i=001-167803>

³⁵⁷ Application no. 35720/04 42832/06, Judgment date 29 September 2009, <http://hudoc.echr.coe.int/eng?i=001-94452>

conclusions. In these circumstances, the facts complained of do not disclose an unjustified restriction on the applicants' right of access to a court."

Example: in "Treska v. Albania & Italy,"¹⁵⁸ the Court considers that "the grant of sovereign immunity to a State in civil proceedings pursues the legitimate aim of complying with international law to promote comity and good relations between States through the respect of another State's sovereignty... It recalls that the Convention has to be interpreted in the light of the rules set out in the Vienna Convention of 23 May 1969 on the Law of Treaties, and that Article 31 § 3 (c) of that Convention indicates that account is to be taken of "any relevant rules of international law applicable in the relations between the parties"...The Convention should so far as possible be interpreted in harmony with other rules of international law of which it forms part, including those relating to the grant of State immunity...In this connection, the Court has held that measures taken by a High Contracting Party which reflect recognized rules of international law on State immunity cannot generally be regarded as imposing a disproportionate restriction on the right of access to a court as embodied in Article 6§1. It has also taken the view that, just as the right of access to a court is an inherent part of the fair-trial guarantee in that Article, so some restrictions on access must likewise be regarded as inherent, an example being those limitations generally accepted by the community of nations as part of the doctrine of State immunity."

List of questions:

- What is the principle of fair balance and its 3 sub-principles
- Discuss the 1st sub-principal the substantial aspect related to the restrictions to the right to a court and its categories (the limitation periods and the immunity)

Recommended hearing:

- ECtHR judgement "Marini v. Albania"
- ECtHR judgement "Stubbings v. United Kingdom"
- ECtHR judgement "Osman v. UK"
- ECtHR judgement "Radunović and others v. Montenegro"
- ECtHR judgement "Vrioni v. Albania & Italy"
- ECtHR judgement "Treska v. Albania & Italy"

¹⁵⁸ Application no.26937/04, Decision date 29 June 2006, <http://hudoc.echr.coe.int/eng/?i=001-76581>

2. Margin of appreciation doctrine in the context of Article 6(1) (2nd sub-principle of fair balance)

Principle: the margin of appreciation doctrine was developed by the European Court originally in the context of limitations on rights but the Court has since extended the doctrine to all the substantive Articles of the Convention. The doctrine reflects the subsidiary nature of the protection afforded under the Convention to the national mechanisms for the protection of human rights (the doctrine of subsidiarity). The margin of appreciation and subsidiarity doctrines were explicitly endorsed in the 2012 Brighton Declaration on the Future of the European Court of Human Rights.¹⁵⁹ Protocol No.15 of the Convention (not yet in force) adds a new preamble to the Convention making specific reference to the margin of appreciation enjoyed by the Member States 'subject to the supervisory jurisdiction' of the European Court.¹⁶⁰

According to this principle, the rights of the ECHR must not be interpreted and applied in a way which obliterates the prerogative of the democratically accountable political organs of the contracting states to take important decisions on behalf of their respective communities. It is part of the 'object and purpose' of the ECHR, as defined in the preamble, to promote democratic ideals. It implies the principle that the contracting states enjoy a certain 'margin of appreciation' also affirms that the contracting states' enjoyment of such a 'margin' is 'subject to the supervisory jurisdiction' of the Court. The state is allowed a certain measure of discretion, subject to European supervision, when it takes legislative, administrative, or judicial action in the area of a Convention right, which leads to the substantive concept and the structural concept of "margin of appreciation". The substantive concept relates directly to the question of whether a particular interference with a basic human right was justified. The structural concept 'imposes limits on the powers of judicial review by virtue of the fact that the ECHR is an international convention. The Principle of Subsidiarity means that there is a relationship between the Courts understanding of its own subsidiary role and the Court's so-called fourth instance doctrine.

Example: in *Handyside v. United Kingdom*,¹⁶¹ the plenary Court stated "This margin [of appreciation] is given both to the domestic legislator ("prescribed by law") and to the bodies, judicial amongst others, that are called upon to interpret and apply the laws in force (§4.8). In *Handyside* the plenary Court approved the restriction on free speech under Article 10§2 of the Convention based on the margin of appreciation doctrine. The amount of deference accorded to the State depends on the subject matter of the case (*Rasmussen v. Denmark*,¹⁶² *Sunday Times v. United Kingdom (No.1)*).¹⁶³

2.1. Application of the margin of appreciation doctrine to Article 6(1)

The autonomous interpretation by the European Court of key Article 6§1 concepts substantially limits the margin of appreciation for states under Article 6§1. However, the ECtHR recognizes that the positive obligation on a State to provide an effective

¹⁵⁹ http://www.echr.coe.int/Documents/2012_Brighton_FinalDeclaration_ENG.pdf

¹⁶⁰ http://www.echr.coe.int/Documents/Protocol_15_ENG.pdf

¹⁶¹ Application no. 5493/72, Judgment of 7 December 1976, <http://hudoc.echr.coe.int/eng?i=001-57499>

¹⁶² Application No. 8777/79, Judgment of 28 November 1984, <http://hudoc.echr.coe.int/eng?i=001-72015>

¹⁶³ Application No. 6538/74, Judgment of 26 April 1979, <http://hudoc.echr.coe.int/eng?i=001-57584>

right of access to the courts calls for regulations by the state which may vary according to national priorities and resources. In this context, the states enjoy a margin of appreciation as limitations of the right of access are permitted by implication and in accordance with the very essence requirement. The Grand Chamber has held that the right to access to courts "may be subject to legitimate restrictions such as statutory limitations period, security for costs orders, regulations concerning minors and persons of unsound mind(*Z and others v. The United Kingdom*)."¹⁶⁴

In this connection, the European Court has stated that "the contracting States have a greater latitude when dealing with civil cases concerning civil rights and obligations than they have when dealing with criminal cases" (*Dombo Beheer B.V v. The Netherlands*).¹⁶⁵ That is due to the fact that the second and third paragraphs of Article 6§1 of the Convention contain detailed provisions for criminal cases which have no equivalent with civil cases.

With regard to the evidence in civil cases, the Court has consistently held that it is within the margin of appreciation for the State and national courts to determine rules of evidence provided that the rules do not violate the procedural guarantees under Article 6 of the Convention.

Example: in "*Van Mechelen and Others v. the Netherlands*,"¹⁶⁶ the Court reiterates that the admissibility of evidence is primarily a matter for regulation by national law and as a general rule it is for the national courts to assess the evidence before them. The Court's task under the Convention is not to give a ruling as to whether statements of witnesses were properly admitted as evidence, but rather to ascertain whether the proceedings as a whole, including the way in which evidence was taken, were fair(§50).

Example: in "*Radunović v. Montenegro*,"¹⁶⁷ the Court maintained that "However, the right of access to a court secured by Article 6 / 1 is not absolute, but may be subject to limitations; these are permitted by implication since the right of access by its very nature calls for regulation by the State. In this respect, the Contracting States enjoy a certain margin of appreciation, although the final decision as to the observance of the Convention's requirements rests with the Court. It must be satisfied that the limitations applied do not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired. Furthermore, a limitation will not be compatible with Article 6 / 1 if it does not pursue a legitimate aim and if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved(§62).

Example: in "*Garžičić v. Montenegro*,"¹⁶⁸ the Court held "the right to a court, however, is not absolute; it is subject to limitations permitted by implication, in particular where the "conditions of admissibility of an appeal are concerned" since by its very nature it calls for regulation by a State, which enjoys a certain margin of appreciation in this

¹⁶⁴ Application no. 29392/95, Judgment of 10 May 2001, <http://hudoc.echr.coe.int/eng?i=001-59455>

¹⁶⁵ Application no. 14448/88, Judgment of 27 October 1993, <http://hudoc.echr.coe.int/eng?i=001-57850>

¹⁶⁶ Application no. 21363/93 21364/93 21427/93, Judgment (Merits), date on 23 April 1997, <http://hudoc.echr.coe.int/eng?i=001-58030>

¹⁶⁷ Applications nos. 45197/13, 53000/13 and 73404/13, Judgment of 25 October 2016, <http://hudoc.echr.coe.int/eng?i=001-167803>

¹⁶⁸ Application no. 17931/07, Judgment of 21 September 2010, <http://hudoc.echr.coe.int/eng?i=001-100500>

regard. Nonetheless, these limitations must not restrict or reduce the individual's access in such a way or to such an extent as to impair the very essence of the right. Moreover, they will only be compatible with Article 6§1 if they are in accordance with the relevant domestic legislation, pursue a legitimate aim and there is a reasonable relationship of proportionality between the means employed and the aim pursued..."

Example: in "Rramadhi v. Albania,"¹⁶⁹the Court reiterates that States have a wide margin of appreciation to determine what is in the public interest, especially where compensation for nationalisation or expropriation is concerned, as the national legislature has a wide discretion in implementing social and economic policies. However, that margin of appreciation is not unlimited and its exercise is subject to review by the Convention institutions (see *Lithgow and Others v. the United Kingdom*, judgment)."

Example: in "Beshiri v. Albania,"¹⁷⁰the Court held that "Article 1 of Protocol No.1 cannot be interpreted as imposing any general obligation on the Contracting States to return property which was transferred to them before they ratified the Convention. Nor does Article 1 of Protocol No. 1 impose any restrictions on the Contracting States' freedom to determine the scope of property restitution and to choose the conditions under which they agree to restore property rights of former owners (see *Jantner v. Slovakia*). In particular, the Contracting States enjoy a wide margin of appreciation with regard to the exclusion of certain categories of former owners from such entitlement. Where categories of owners are excluded in this way, their claims for restitution cannot provide the basis for a "legitimate expectation" attracting the protection of Article 1 of Protocol No.1. On the other hand, once a Contracting State, having ratified the Convention including Protocol No.1, enacts legislation providing for the full or partial restoration of property confiscated under a previous regime, such legislation may be regarded as generating a new property right protected by Article 1 of Protocol No. 1 for persons satisfying the requirements for entitlement. The same may apply in respect of arrangements for restitution or compensation established under pre-ratification legislation if such legislation remained in force after the Contracting State's ratification of Protocol No.1 (see *Broniowski v. Poland*)."

Example: in "Bajrami v. Albania"¹⁷¹the Court reiterates that the essential object of Article 8 is to protect the individual against arbitrary action by public authorities. There are in addition positive obligations inherent in effective "respect" for family life. In both contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole; and in both contexts the State enjoys a certain margin of appreciation."

Example: in "Maria Athanasius case cited in Manushaqe Puto v. Albania,"¹⁷²the Court argued that: "Furthermore, any interference with the enjoyment of a right or freedom recognized by the Convention must pursue a legitimate aim. By the same token, in cases involving a positive duty, there must be a legitimate justification for the State's inaction. The principle of a "fair balance" inherent in Article 1 of Protocol No. 1 itself

¹⁶⁹ *Application no.38222/02, ECtHR Judgment (Merits and Just Satisfaction), date 13 November 2007, <http://hudoc.echr.coe.int/eng?i=001-83249>*

¹⁷⁰ *Application no.7352/03, Judgment date 22 August 2006*

¹⁷¹ See footnote 32

¹⁷² See footnote 63

presupposes the existence of a general interest of the community. Because of their direct knowledge of their society and its needs, the national authorities are in principle better placed than the international judge to appreciate what is “in the public interest”. Under the system of protection established by the Convention, it is thus for the national authorities to make the initial assessment as to the existence of a problem of public concern warranting measures to be applied in the sphere of the exercise of the right of property, including deprivation and restitution of property. Here, as in other fields to which the safeguards of the Convention extend, the national authorities accordingly enjoy a certain margin of appreciation. Furthermore, the notion of “public interest” is necessarily extensive. In particular, the decision to enact laws expropriating property or affording publicly funded compensation for expropriated property will commonly involve consideration of political, economic and social issues. Finding it natural that the margin of appreciation available to the legislature in implementing social and economic policies should be a wide one, the Court has declared that it will respect the legislature’s judgment as to what is “in the public interest” unless that judgment is manifestly without reasonable foundation (...).”

List of questions:

- Discuss the “margin of appreciation” doctrine
- How was applied the margin of appreciation doctrine in different cases?

Recommended hearing:

- ECtHR’ judgement in “Handyside v. United Kingdom”
- ECtHR’ judgement in “Van Mechelen and Others v. the Netherlands”
- ECtHR’ judgement in “Radunović v. Montenegro”
- ECtHR’ judgement in “Garzičić v. Montenegro”
- ECtHR’ judgement in “Rramadhi v. Albania”
- ECtHR’ judgement in “Beshiri v. Albania”
- ECtHR’ judgement in “Bajrami v. Albania”
- ECtHR’ judgement in “Manushaqe Puto v. Albania”

3. Procedural restrictions (3rd sub-principle of fair balance)

3.1. *The right to appeal*

Example: in "*Garzičić v. Montenegro*",¹⁷³ the European Court, in the context of the national regulation of rights of appeal, set out clearly the criteria it will apply in adjudicating on the compatibility of procedural restrictions with the right of access to a court guaranteed under Article 6§1: "Article 6 of the Convention does not compel the Contracting States to set up courts of appeal or of cassation. Where such courts do exist, the guarantees of Article 6 must be complied with, for instance in that it guarantees to litigants an effective right of access to the courts for the determination of their "civil rights and obligations." The "right to a court", however, is not absolute; it is subject to limitations permitted by implication, in particular where the "conditions of admissibility of an appeal are concerned" since by its very nature it calls for regulation by a State, which enjoys a certain margin of appreciation in this regard ... Nonetheless, these limitations must not restrict or reduce the individual's access in such a way or to such an extent as to impair the very essence of the right. Moreover, they will only be compatible with Article 6§1 if they are in accordance with the relevant domestic legislation, pursue a legitimate aim and there is a reasonable relationship of proportionality between the means employed and the aim pursued.

3.2. *Equality of arms*

Principle. The principle of equality of arms requires that each party is provided with an equal opportunity to prepare and present their case in court. The principle forms part of the general obligation on a State under Article 6 to ensure a person has a fair trial. The principle overlaps with other of the obligations of fairness such as the right to adversarial proceedings which guarantees a party the right to access and comment on relevant evidence and material. There must be sufficient procedural safeguards appropriate to the nature of the case and corresponding to what is at stake between the parties.¹⁷⁴ The principle applies not only to the rules of court procedure but also to institutional arrangements, such as the role of the advocate general and the public prosecutor. The principle of equality of arms applies both to criminal and civil proceedings. In examining if the principle has been respected the European Court will examine the fairness of the proceedings as a whole.

Example: in "*Dombo Beheer BV v. Netherlands*",¹⁷⁵ the Court held that "The requirements inherent in the concept of "fair hearing" are not necessarily the same in cases concerning the determination of civil rights and obligations as they are in cases concerning the determination of a criminal charge. This is borne out by the absence of detailed provisions such as paragraphs 2 and 3 of Article 6 (art. 6-2, art. 6-3) applying to cases of the former category. Thus, although these provisions have a certain relevance outside the strict confines of criminal law ... the Contracting States have greater latitude when dealing with civil cases concerning civil rights and obligations than they have when dealing with criminal cases. Nevertheless, certain principles concerning the

¹⁷³ Application no. 17931/07, Judgment of 21 September 2010, <http://hudoc.echr.coe.int/eng?i=001-100500>

¹⁷⁴ Article 6: Self-learning course, Human Rights Education for Legal Professionals, Council of Europe (2014).

¹⁷⁵ Application no. 14448/88, Judgment of 27 October 1993, <http://hudoc.echr.coe.int/eng?i=001-57850>

notion of a "fair hearing" in cases concerning civil rights and obligations emerge from the Court's case-law. Most significantly for the present case, it is clear that the requirement of "equality of arms", in the sense of a "fair balance" between the parties, applies in principle to such cases as well as to the criminal cases."

Example: in "Perić v. Croatia,"¹⁷⁶ the Court maintained that "Nevertheless, certain principles concerning the notion of a fair hearing in cases concerning civil rights and obligations emerge from the Court's case-law. Most significantly for the present case, it is clear that the requirement of equality of arms, in the sense of a fair balance between the parties, applies in principle to such cases as well as to criminal cases ... In that connection the Court considers that as regards litigation involving opposing private interests, equality of arms implies that each party must be afforded a reasonable opportunity to present his case - including his evidence - under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent. It is left to the national authorities to ensure in each individual case that the requirements of a fair hearing are met."

Example: in "V v. UK"(Grand Chamber),¹⁷⁷ the Court recalls that Article 6§1 guarantees certain rights in respect of the "determination of ... any criminal charge ...". In criminal matters, it is clear that Article 6§1 covers the whole of the proceedings in issue, including appeal proceedings and the determination of sentence.

Example: in "Caka v. Albania," the Court argued that "the evidence must normally be produced at a public hearing, in the presence of the accused, with a view to adversarial argument. There are exceptions to this principle, but they must not infringe the rights of the defence. As a general rule, paragraphs 1 and 3(d) of Article 6 require that the defendant be given an adequate and proper opportunity to challenge and question a witness against him, either when he makes his statements or at a later stage of the proceedings. It is normally for the national courts to decide whether it is necessary or advisable to hear a particular witness. Article 6§3(d) does not require the attendance and examination of every witness on the accused's behalf: its essential aim, as indicated by the words "under the same conditions", is a full "equality of arms" in the matter. Under certain circumstances it may be necessary for the courts to have recourse to statements made during the criminal investigation stage. If the accused had sufficient and adequate opportunity to challenge such statements, at the time they were taken or at a later stage of the proceedings, their use does not run counter to the guarantees of Article 6§1 and 3 (d). The rights of the defence are restricted to an extent that is incompatible with the requirements of Article 6 if the conviction is based solely, or in a decisive manner, on the depositions of a witness whom the accused has had no opportunity to examine or to have examined either during the investigation or at trial."¹⁷⁸

¹⁷⁶ Application no. 34499/06, Judgment of 27 June 2008, <http://hudoc.echr.coe.int/eng?i=001-85583>

¹⁷⁷ Application no. 24888/94, Judgment of 16 December 1999.

¹⁷⁸ Application no. 44023/02, Judgment date 08 December 2009

The applicant complained before the European Court of Human Rights that there had been a breach of Article 6 § 1 of the Convention in conjunction with Article 6 § 3 (c), in that he was denied the right to defend himself at a public hearing before the Court of Appeal and the Supreme Court.

1st instance proceedings: following a number of remittals of the case against the applicant and two other co-defendants, on 4 March 2004 Berat District Court ("the District Court") convicted the applicant of several criminal charges committed in collusion with the co-defendants.¹⁸⁰ The District Court sentenced the applicant to a cumulative sentence of life imprisonment. During the District Court proceedings the applicant was mainly represented by court-appointed lawyers. In the final stage of those proceedings, the applicant appointed counsel of his own choosing on the strength of a power of attorney signed on 18 February 2004.

Appeal proceedings: On 12 March 2004 the applicant lodged an appeal with the Vloera Court of Appeal ("the Court of Appeal"). Although he admitted having committed the criminal offences, he challenged the penalty imposed. He argued that the trial court had failed to take account of some mitigating factors in his favor such as the remorse he had shown after committing the crime and his surrender to the authorities, his family's difficult financial situation and the fact that he had a minor child, the lack of any previous criminal records and his low educational level. During 4 May 2004 until 18 June 2004, the court postponed the hearings several times in order to ensure the applicant attendance.¹⁸¹ The applicant was not present at the hearings, but his lawyer did attend. In the end, the Court of Appeal decided to proceed with the hearing in the applicant's absence as he was represented by his lawyer, sentencing the applicant to a cumulative term of twenty-five years' imprisonment, reduced by one-third as a result of the use of the summary procedure.

Supreme Court proceedings: the prosecutor lodged an appeal with the Supreme Court on the grounds of an erroneous application of the criminal law. He stated, *inter alia*, that the penalty imposed by the Court of Appeal, which had not ordered life imprisonment for the applicant for being the perpetrator of a crime that had resulted in the death of a person, did not correspond to the serious danger to society posed by the applicant and the serious criminal consequences of that offence. On 15 June 2005 the

¹⁷⁹ Application no.11006/06, Judgment date 06 March 2012, <http://hudoc.echr.coe.int/eng?i=001-109359>

¹⁸⁰ The District Court found that the applicant had acted in aggravating circumstances in that he had been the perpetrator of one of the criminal offences, which had led to the death of a person, whereas the co-defendants had assisted in the commission of that offence. As regards the other criminal offences, the District Court found each co-defendant guilty as charged.

¹⁸¹ On 4 May 2004 a hearing took place which was adjourned to 26 May 2004 in order to summon the applicant to appear before the court. On the same date, a letter was sent by the Court of Appeal to the Police Commissariat and the local prison authorities, requesting them to escort the applicant to the hearing scheduled for 26 May 2004. The applicant did not attend the hearing on 26 May 2004. The court ordered an adjournment until 4 June 2004. The applicant's representative was present at the hearing. On 27 May 2004 the Court of Appeal sent a letter to the Ministry of Justice, the Directorate General of Prisons and the local prison authorities requesting that the applicant be escorted to the hearing on 4 June 2004 as he had expressed the wish to attend. The applicant did not appear at the hearing of 4 June 2004. The court ordered an adjournment until 18 June 2004. On 7 June 2004 the Court of Appeal sent a letter to the Ministry of Justice, the Directorate General of Prisons and the local prison authorities requesting that the applicant be escorted to the hearing on 18 June 2004 as he had expressed the wish to be present at the hearing.

applicant's brother appointed A.K to represent the applicant before the Supreme Court. At the hearing of 15 June 2005 before the Supreme Court, the applicant was represented by A.K, who requested the court to dismiss the prosecutor's appeal. On 15 June 2005 the Supreme Court quashed the Court of Appeal judgment and upheld the District Court judgment. The Supreme Court draws this conclusion because the reduction of the sentence by the Court of Appeal on the ground that the accused assisted justice by showing remorse for the offences he had committed and by requesting the use of the summary procedure, is not founded in law.

Constitutional Court proceedings: The applicant lodged a constitutional complaint with the Constitutional Court, alleging violations of his right to attend the hearings of the Court of Appeal and of the Supreme Court. On 10 February 2006 the Constitutional Court declared the complaint inadmissible, finding that the grounds of appeal fell outside its jurisdiction.

ECtHR' judgment for "Cani v. Albania," the Court reiterates that "the personal appearance of the defendant does not assume the same crucial significance for an appeal hearing as it does for the trial hearing. The manner of application of Article 6 to proceedings before courts of appeal does, however, depend on the special features of the proceedings involved; account must be taken of the entirety of the proceedings in the domestic legal order and of the role of the appellate court therein. Leave-to-appeal proceedings and proceedings involving only questions of law, as opposed to questions of fact, may comply with the requirements of Article 6 even though the appellant has not been given the opportunity to be heard in person by the appeal or cassation court, provided that there has been a public hearing at first instance. However, in the present case the underlying reason is that the courts concerned do not have the task of establishing the facts of the case, but only of interpreting the legal rules involved. Indeed, even where an appeal court has full jurisdiction to review the case on questions both of fact and of law, Article 6 does not always require a right to a public hearing and *a fortiori* a right to be present in person."

List of questions:

- Discuss the procedural restrictions in the right to defend oneself to a public hearing in the context of "Cani v. Albania" case. What approach should ECtHR follow for the determination of this case?
- Discuss how was applied the procedural restriction principle in relation to the right to appeal and the right to equality of arms

Recommended hearing:

- ECtHR' judgement "Garzičić v. Montenegro"
- ECtHR' judgement "Cani v. Albania"
- ECtHR' judgement "Dombo Beheer BV v. Netherlands"
- ECtHR' judgement "Perić v. Croatia"
- ECtHR' judgement "V v. UK"
- ECtHR' judgement "Mulosmani v. Albania"
- ECtHR' judgement "Caka v. Albania"

SECTION III Right to a trial within a Reasonable Time and related remedies

a) Overall Objective

Overall objective of this section is to ensure learners will get necessary elements to understand the scope of the right to a fair trial within a reasonable time in civil and criminal procedures. Learners will be able to individuate the period to be taken into consideration in order to evaluate the reasonableness of the length of procedures. Learner will get acquainted with the criteria used by the European Court of Human rights to evaluate compliance with article 6 of the Convention. Learners will also be able to individuate available remedies at national and international remedies which could ensure redress in case of violation of the right to a trial within a reasonable time. Learners will also have an overview of practices in some European Countries.

This section is designed for legal professionals who in their daily work could take into consideration principles and criteria held in the case law of the European Court of Human Rights and actively contributed to the implementation of the European Convention of Human rights at national level..

b) Learning objectives

By the end of this section learners will be able to:

- ✓ understand the scope of the right to a trial within a reasonable time
- ✓ understand what elements shall be taken into account in order to individuate the period to be considered for the evaluation of the length of proceedings
- ✓ understand the criteria used by the Court for evaluating the length of proceedings
- ✓ understand the importance to implement final domestic decisions
- ✓ refer to the relevant case law in their everyday work, as a legal professional in the EU

To achieve this goal, you learner will have the opportunity:

- ✓ to learn about case law of the ECtHR
- ✓ to carry out exercises to identify situations of potential violations of the rights to trial within a reasonable time

The course is also designed:

- ✓ to strengthen learners individual role professional acting in the legal field, namely in the area of criminal or civil procedures.

a) **Length:** 3 hours, 2 weeks

b) **Final Assessment:** case study, portfolio, debate paper

I. Length of Proceedings

Article 6 § 1 of the Convention provides that: "[...] everyone is entitled to a[...] hearing within a reasonable time by [a] tribunal [...]"

Article 6 requires judicial proceedings to be expeditious. The right to proceedings within a reasonable time as guaranteed by ECHR law is not a general right applicable to all trials or to everybody involved in judicial proceedings. As worded in the Convention, the right to a hearing within a reasonable time may be invoked in relation only to a tribunal responsible for determining – in the words of Article 6 – “civil rights and obligations” or “any criminal charge”. However, dynamic interpretation by the European Court seems to be gradually changing the position regarding these two concepts. Today in practice – although the European Court has refrained from describing the situation in these terms – Article 6 can clearly apply to any judicial proceedings, apart from certain spheres ruled out by judicial doctrine as being impossible to assimilate to civil or criminal cases.

The reasonable duration of proceedings is determined by the Court in the light of the circumstances of the case. When determining whether the duration of proceedings has been reasonable, the Court has regard to factors such as:

- (i) the complexity of the case;
- (ii) the complainant’s conduct;
- (iii) the conduct of the relevant authorities;
- (iv) what is at stake for the complainant

The criteria will be hereafter analysed as concerns the Criminal Limb (A) and the Civil Limb (B).

A. Criminal limb

1. Scope of the right to a hearing within a reasonable time in proceeding with ‘criminal charges’

The right to proceedings within a reasonable time as guaranteed by ECHR law is not a general right applicable to all trials or to everybody involved in judicial proceedings. Discussing the scope of the right to a hearing within a reasonable time, amounts to the discussion on the scope of Article 6 of the Convention as such.

As worded in the Convention, the right to a hearing within a reasonable time may be invoked in relation only to a tribunal responsible for determining –in the words of Article 6 – “civil rights and obligations” or “any criminal charge”.

The concept of “criminal” cases is an autonomous notion which has been broadly developed in the case law of the Court. Its meaning does not rely on definitions given in the domestic law of member states.¹⁸² The European Court has extended the criminal sphere to encompass administrative penalties, including disciplinary and tax

¹⁸² For the autonomous notion please refer to the specific paragraph in section II.

penalties.¹⁸³ Thus, disputes arising out of administrative penalties have been held to come within the criminal sphere if such penalties are imposed for non-compliance with trade rules.¹⁸⁴ Most of the penalties imposed by the “independent administrative authorities” also fall within the scope of Article 6 of the Convention.¹⁸⁵

Example. In the case **Grande Stevens and others v. Italy**¹⁸⁶ the applicants are two companies and their chairman, Mr Gabetti, together with Mr Marrone, the authorised representative of one of the companies, and Mr Grande Stevens, a lawyer who had advised them. They consulted the National Companies and Stock Exchange Commission (hereafter, Consob) about a possible financial operation. In response to a question from Consob, they issued a press release indicating that no initiative had been taken or examined concerning the expiry of a particular financial agreement, although negotiations with an English bank were in fact at an advanced stage. Consob’s Markets and Economic Opinions Division accused the applicants of breaching Article 187 ter § 1 of Legislative Decree no. 58 of 24 February 1998, penalising the dissemination of information, news or false or misleading rumours capable of providing false or misleading information concerning financial instruments. On appeal, the applicants were ordered to pay fines ranging from EUR 500,000 to EUR 3,000,000, and Mr Gabetti, Mr Grande Stevens and Mr Marrone were banned from administering, managing or supervising listed companies for several months. As concerns the applicability of article 6 de Court concluded as follows.

’94. The Court reiterates its established case-law that, in determining the existence of a “criminal charge”, it is necessary to have regard to three factors: the legal classification of the measure in question in national law, the very nature of the measure, and the nature and degree of severity of the “penalty” (see Engel and Others v. the Netherlands, 8 June 1976, § 82, Series A no. 22). Furthermore, these criteria are alternative and not cumulative ones: for Article 6 to apply in respect of the words “criminal charge”, it suffices that the offence in question should by its nature be “criminal” from the point of view of the Convention, or should have made the person concerned liable to a sanction which, by virtue of its nature and degree of severity, belongs in general to the “criminal” sphere. This, however, does not exclude a cumulative approach where separate analysis of each criterion does not make it possible to reach a clear conclusion as to the existence of a “criminal charge” (see Jussila v. Finland [GC], no. 73053/01, §§ 30 and 31, ECHR 2006-XIII, and Zaicevs v. Latvia, no. 65022/01, § 31, ECHR 2007-IX (extracts)).

95. In the present case, the Court first observes that the market manipulations with which the applicants were accused did not constitute a criminal offence in Italian law. Such conduct was in effect punished by a penalty which was classified as “administrative” by Article 187 ter § 1 of Legislative Decree no. 58 of 1998 (see paragraph 20 above). However, this was not decisive for the purposes of the applicability of Article 6 of the Convention in its criminal head, as the indications furnished by the domestic law have only a relative value (see Öztürk v. Germany, 21 February 1984, § 52, Series A no. 73, and Menarini

¹⁸³For example, *Bendenoun v. France*, 24 Feb. 1994.

¹⁸⁴*Garyfallou AEBE v. Greece*, 24 Sept. 1997

¹⁸⁵Admissibility decision, *Jean-Louis Didier v. France*, 27 Aug. 2002

¹⁸⁶Applications 18640/10 18647/10 18663/10, Judgment (Merits and Just Satisfaction), 04/03/2014

Diagnostics S.r.l., cited above, § 39).

96. As to the nature of the offence, it appears that the provisions which the applicants were accused of breaching were intended to guarantee the integrity of the financial markets and to maintain public confidence in the security of transactions. The Court reiterates that the CONSOB, an independent administrative body, has the task of protecting investors and ensuring the effectiveness, transparency and development of the stock markets (see paragraph 9 above). These are general interests of society, usually protected by criminal law (see, *mutatis mutandis*, *Menarini Diagnostics S.r.l., cited above, § 40*; see also *Société Stenuit v. France*, report of the European Commission of Human Rights, 30 May 1991, § 62, Series A no. 232-A). In addition, the Court considers that the fines imposed were essentially intended to punish, in order to prevent repeat offending. They had therefore been based on rules whose purpose was both deterrent, namely to dissuade the applicants from resuming the activity in question, and punitive, since they punished unlawful conduct (see, *mutatis mutandis*, *Jussila, cited above, § 38*). Thus, they were not solely intended, as the Government claimed (see paragraph 91 above), to repair damage of a financial nature. In this respect, it should be noted that the penalties were imposed by the CONSOB on the basis of the gravity of the impugned conduct, and not of the harm caused to investors.

97. As to the nature and severity of the penalty which was "likely to be imposed" on the applicants (see *Ezeh and Connors v. the United Kingdom [GC], nos. 39665/98 and 40086/98, § 120, ECHR 2003-X*), the Court, like the Government (see paragraph 90 above), notes that the fines in question could not be replaced by a custodial sentence in the event of non-payment (see, *a contrario*, *Anghel v. Romania, no. 28183/03, § 52, 4 October 2007*). However, the fine which the CONSOB was entitled to impose could go up to EUR 5,000,000 (see paragraph 20 above), and this ordinary maximum amount could, in certain circumstances, be tripled or fixed at ten times the proceeds or profit obtained through the unlawful conduct (see paragraph 53 above). Imposition of the above-mentioned pecuniary administrative sanctions entails the temporary loss of their honour for the representatives of the companies involved, and, if the latter are listed on the stock exchange, their representatives are temporarily forbidden from administering, managing or supervising listed companies for periods ranging from two months to three years. The CONSOB may also prohibit listed companies, management companies and auditing companies from engaging the services of the offender, for a maximum period of three years, and request professional associations to suspend, on a temporary basis, the individual's right to carry out his or her professional activity (see paragraph 54 above). Lastly, the imposition of financial administrative sanctions entails confiscation of the proceeds or profits of the unlawful conduct and of the assets which made it possible (see paragraph 56 above).

98. It is true that in the present case the maximum penalties were not imposed, the Turin Court of Appeal having reduced some of the fines imposed by the CONSOB (see paragraph 30 above), and no confiscations having been ordered. However, the criminal connotation of proceedings depends on the degree of severity of the penalty to which the person concerned is *a priori* liable (see *Engel and Others, cited above, § 82*), and not the severity of the penalty ultimately imposed (see *Dubus S.A., cited above, § 37*). Furthermore, in the present case the applicants had ultimately received fines ranging from EUR 500,000 to 3,000,000, and Mr Gabetti, Mr Grande Stevens and Mr Marrone had been prohibited from

administering, managing or supervising listed companies for periods ranging from two to four months (see paragraphs 25-26 and 30-31 above). This last penalty was such as to compromise the integrity of the persons concerned (see, *mutatis mutandis*, *Dubus S.A.*, *loc. ult. cit.*), and, given their amount, the fines were of undeniable severity and had significant financial implications for the applicants.

99. In the light of the above, and taking account of the severity of the fines imposed and of those to which the applicants were liable, the Court considers that the penalties in question, though their severity, were criminal in nature (see, *mutatis mutandis*, *Öztürk*, cited above, § 54, and, *a contrario*, *Inocêncio v. Portugal* (dec.), no. [43862/98](#), ECHR 2001-I).

100. Moreover, the Court also reiterates that, with regard to certain French administrative authorities which have jurisdiction in economic and financial law and enjoy sentencing powers, it has held that the criminal limb of Article 6 applied, in particular, with regard to the Disciplinary Offences (Budget and Finance) Court (*Guisset v. France*, no. [33933/96](#), § 59, ECHR 2000-IX), the Financial Markets Board (*Didier v. France* (dec.), no. [58188/00](#), 27 August 2002), the Competition Commission (*Lilly France S.A. v. France* (dec.), no. [53892/00](#), 3 December 2002), the sanctions committee of the financial market supervisory authorities (*Messier v. France* (dec.), no. [25041/07](#), 19 May 2009), and the Banking Commission (*Dubus S.A.*, cited above, § 38). The same finding was made in respect of the Italian regulatory authority responsible for competition and the market (the AGCM – *Autorità Garante della Concorrenza e del Mercato*; see *Menarini Diagnostics S.r.l.*, cited above, § 44).

101. After noting and giving due weight to the various aspects of the case, the Court considers that the fines imposed on the applicants were criminal in nature, with the result that Article 6 § 1 is applicable in this case under its criminal head (see, *mutatis mutandis*, *Menarini Diagnostics S.r.l.*, *loc. ult. cit.*).

Tax penalties may bring tax law within the scope of Article 6 because of their size, for example, some tax fines are essentially deterrent and punitive in purpose.¹⁸⁷ Article 6 also applies to disciplinary regulations, both in the army and in prison. One can conclude that proceedings which do not fall within the ambit of Article 6 under its criminal head are very rare.

2. Determining the length of proceedings

In criminal matters, the aim of Article 6 § 1, by which everyone has the right to a hearing within a reasonable time, is to ensure that accused persons do not have to lie under a charge for too long and that the charge is determined¹⁸⁸. For example, in the case *Kart v. Turkey* [GC]¹⁸⁹ the Court stated that "accused persons do not have to remain too long in a state of uncertainty as to the outcome of the criminal accusations against them".

¹⁸⁷*Bendenoun v. France*, 24 Feb. 1994, §§46-47; *A.P., M.P. and T.P. v. Switzerland*, 29 Aug. 1997, §39.

¹⁸⁸*Wemhoff v. Germany*, § 18

¹⁸⁹*Kart v. Turkey* [GC], § 68,

In its jurisprudence, the Court determined the starting-point and the end of the period to be considered for evaluating the length of proceeding and its compliance with article 6 of the Convention.

a) Starting-point of the period to be taken into consideration

The period to be taken into consideration begins on the day on which a person is 'charged'¹⁹⁰. This means from the moment that the situation of the accused is "substantially affected"¹⁹¹. The "reasonable time" may begin to run prior to the case coming before the trial court¹⁹². Time can start to run from the time of arrest.¹⁹³ It may start to run from the time at which a person is charged.¹⁹⁴ The calculations to define if the procedure has been accomplished within a reasonable time may begin from the institution of the preliminary investigation.¹⁹⁵

Example. In *Malkov v. Estonia*¹⁹⁶ the applicant was convicted of murdering a taxi driver in 2008. The criminal investigation had started on 6 August 1998. The applicant complained about the excessive length of the proceedings. The ECtHR reiterated that, in criminal matters, time begins to run as soon as the person is "charged", which may occur before a case comes before a court. The term 'charge' corresponds to the test of whether the suspect's situation has been substantially affected. The Court took 17 August 2001 as the starting date – the day on which a police investigator drew up charges against the applicant, and he was declared a fugitive. The end date of the proceedings was 22 April 2009, when the Supreme Court declined the applicant's appeal. In total, the proceedings lasted seven years and eight months at three levels of jurisdiction and the ECtHR concluded that the proceedings took an excessively long time, violating Article 6 (1) of the ECHR. This situation was remedied by a reduction of the applicant's sentence.

b) End of the period

The Court has held that in criminal matters the period to which Article 6 is applicable covers the whole of the proceedings in question¹⁹⁷, including appeal proceedings¹⁹⁸. Article 6 § 1, furthermore, indicates as the final point the judgment determining the charge; this may be a decision given by an appeal court when such a court pronounces upon the merits of the charge¹⁹⁹. **The period to be taken into consideration lasts at least until acquittal or conviction**²⁰⁰. The execution of a judgment given by any court

190 For the purposes of Article 6 § 1 'charge' may be defined as "the official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence" (*Deweer v. Belgium*, § 46), a definition that also corresponds to the test whether the situation of the suspect has been "substantially affected" (*ibid.*; *Neumeister v. Austria*, § 13; *Eckle v. Germany*, § 73; *McFarlane v. Ireland* [GC], § 143).

191 *Tychko v. Russia* No. 56097/07, 11 June 2015, para 63.

192 *Deweer v. Belgium* § 42.

193 *Wemhoff v. Germany*, § 19

194 *Neumeister v. Austria*, § 18.

195 *Ringeisen v. Austria*, § 110.

196 Application no. 31407/07, judgment of 4 February 2010

197 *König v. Germany*, § 98

198 *Delcourt v. Belgium*, §§ 25-26; *König v. Germany*, § 98; *V. v. the United Kingdom* [GC], § 109

199 *Neumeister v. Austria*, § 19

200 *Eckle v. Germany*, § 77; *Ringeisen v. Austria*, § 110; *V. v. the United Kingdom* [GC], § 109

must be regarded as an integral part of the trial for the purposes of Article 6 of the Convention. In the case *Assanidze v. Georgia*, the Court underlined the following: “The guarantees afforded by Article 6 of the Convention would be illusory if a Contracting State's domestic legal or administrative system allowed a final, binding judicial decision to acquit to remain inoperative to the detriment of the person acquitted. Criminal proceedings form an entity and the protection afforded by Article 6 does not cease with the decision to acquit. If the State administrative authorities could refuse or fail to comply with a judgment acquitting a defendant, or even delay in doing so, the Article 6 guarantees previously enjoyed by the defendant during the judicial phase of the proceedings would become partly illusory²⁰¹.”

➤ **Case study 1**

Facts. The applicant was born in 1977. He was detained when the application was lodged before the ECHR and still detained when the Court pronounced the judgement.

A. The criminal proceedings. On 5 December 2006, the applicant was arrested and placed in custody in Austria, pursuant to an international arrest warrant. On 20 December 2006 the Ministry of Justice of the Republic of Serbia (*Министарство правде Републике Србије*; “the Ministry of Justice”) requested the applicant’s extradition for the purpose of conducting several sets of criminal proceedings against him unrelated to the present case. On 11 January 2007 the investigating judge of the Belgrade District Court (“the District Court”) opened an investigation against the applicant, who was suspected of having participated in aggravated murder with unauthorised use of another person’s vehicle and forgery. In the meantime, on 16 April 2007 the competent court in Austria found the applicant guilty of possession of an unlicensed firearm, which had been found on him at the time of his arrest, and sentenced him to seven months’ imprisonment. On 6 July 2007, the applicant was extradited to Serbia.

14. On 31 December 2007 the public prosecutor issued an indictment against the applicant and two other persons. On 7 May 2008 the first hearing was held before the District Court. It was decided that V.S. and B.A. would be tried *in absentia*. Subsequently, forty-one hearings were scheduled, of which nineteen were adjourned: four at the request of the applicant’s counsel and fifteen for various procedural reasons, such as the absence of the co-accuser’s defence counsel, the absence of duly summoned witnesses and/or experts, erroneous delivery of summons, and delays concerning experts’ opinions. Furthermore, the trial had to start anew six times because the presiding judge and/or the composition of the trial chamber changed. From March 2010, following a reform of the domestic judicial system, the Belgrade High Court (“the High Court”) took over the case. On 1 April 2014 the High Court found the applicant guilty of complicity in aggravated murder, unauthorised use of another person’s vehicle and forgery. It sentenced him to twenty years’ imprisonment. On 4 and 17 July 2014, respectively, the applicant and the public prosecutor appealed against the High Court judgment. On 31 October 2014 the Belgrade Court of Appeal (“the Court of Appeal”), quashed the High Court judgment of 1 April 2014 and remitted the case for a re-trial.

²⁰¹ *Assanidze v. Georgia* [GC], § 181.

B. The applicant's detention. On 11 January 2007, the investigating judge issued a detention order against the applicant in his absence, on the following grounds: (1) the risk of absconding; (2) the risk of obstructing the course of justice by exerting pressure on witnesses and his co-accused; (3) the risk of reoffending; and (4) the gravity of the criminal offences of which he was accused and the sentence that might be imposed on him. After his extradition to Serbia on 6 July 2007, the applicant was detained pursuant to the above order. On 6 August and 4 October 2007, respectively, the District Court and the Supreme Court of Serbia ("the Supreme Court") further extended the applicant's detention, relying on the same grounds as before. They noted in particular that he had already been in hiding and had been arrested pursuant to an international warrant. Thereafter, the applicant's detention was regularly examined and extended every two months by the District Court, the Supreme Court and, following a reform of the domestic judicial system, by the High Court and the Court of Appeal. In addition to those automatic reviews, the applicant repeatedly challenged his detention. On 31 October 2014, in a decision by which it quashed the High Court's judgment of 1 April 2014 and remitted the case for a re-trial (see paragraph 19 above), the Court of Appeal ordered the applicant's detention on the grounds that he might abscond and reoffend.

C. Proceedings before the Constitutional Court.

On 29 December 2011 the applicant lodged a constitutional appeal, complaining that his pre-trial detention was unlawful and its length had become excessive. He also complained about the length of the criminal proceedings and alleged that his right to be presumed innocent had been violated. On 26 September 2012, the Constitutional Court rejected the applicant's appeal. As regards the complaint about the length of the criminal proceedings, the Constitutional Court noted that the case at issue was a complex one; the case file contained more than one thousand pages and extensive photographic documentation. Furthermore, the court proceedings had had to start anew several times because of changes of presiding judge. Many procedural steps had been taken, numerous witnesses had been heard and a few expert testimonies had been taken. Lastly, the Constitutional Court rejected the applicant's complaint concerning the presumption of innocence as unsubstantiated.

The applicant's subsequent constitutional appeals, containing the same complaints, were rejected on 26 and 27 September, and 10 October 2012 and 20 November 2013 for the same reasons as before.

Questions.

1. *Could you please indicate the starting period to take into consideration for the evaluation of the length of proceedings?*
2. *Could you please indicate the starting period to take into consideration for the evaluation of the length of proceedings?*
3. *Do you think that the described procedure is in line with the principle of fair trial within a reasonable time? Why?*
4. *Which circumstances are you considering in order to evaluate the reasonableness of the length of proceedings?*

The Court's assessment. In the case under examination (GRUJOVIĆ v. SERBIA) the court has concluded as follows.

60. The Court reiterates that the reasonableness of the length of proceedings must be assessed in the light of the circumstances of the case and with reference to the following criteria: the complexity of the case, the conduct of the applicant and the relevant authorities and what was at stake for the applicant in the dispute (see, among many other authorities, *Sürmeli v. Germany* [GC], no. 75529/01, § 128, ECHR 2006-VII). Article 6 is, in criminal matters, designed to ensure that a person charged does not remain too long in a state of uncertainty about his fate (see *Nakhmanovich v. Russia*, no. 55669/00, § 89, 2 March 2006, and *Veliyev v. Russia*, no. 24202/05, § 173, 24 June 2010). The Court considers that much was at stake for the applicant in the present case, bearing in mind that he risked imprisonment, that he was detained throughout the trial proceedings and that he is still detained pending re-trial proceedings.

61. The Court observes that the period under consideration in the present case began on 6 July 2007 when the applicant was extradited to Serbia (see *Nedyalkov*, cited above, § 86, and *Berhani v. Albania*, no. 847/05, § 65, 27 May 2010). The trial proceedings began on 7 May 2008 and ended on 1 April 2014. They were followed by the appeal proceedings which ended on 31 October 2014 when the Court of Appeal remitted a case for a re-trial. From the information available, it would appear that the proceedings are still pending before the trial court. It follows that the criminal proceedings against the applicant have so far lasted for almost eight years for two levels of jurisdiction.

62. As the Court has already noted in the preceding paragraphs concerning Article 5 § 3, the present case did not involve complex legal or factual issues which would justify such an excessive length, nor did it concern organised crime.

63. As to the applicant's conduct, the Court reiterates that an applicant cannot be required to co-operate actively with the judicial authorities, nor can he be criticised for having made full use of the remedies available under the domestic law in the defence of his interests (see, among other authorities, *Rokhlina v. Russia*, no. 54071/00, § 88, 7 April 2005).

64. As to the conduct of the relevant authorities, the Court has already noted that the trial court scheduled in total forty-two hearings, of which nineteen were adjourned, mainly for different procedural reasons that were not imputable to the applicant (see paragraph 16 above). Moreover, the trial had to start anew six times because the presiding judge and/or the composition of the trial chamber changed. The Government did not offer any explanation for those changes.

65. The applicant remained in custody throughout the proceedings and is still detained. In this connection, the Court recalls that persons kept in detention pending trial are entitled to "special diligence" on the part of the authorities. Consequently, in cases where a person is detained pending the determination of a criminal charge against him, the fact of his detention is itself a factor to be considered in assessing whether the requirement of a decision on the merits within a reasonable time has been met (see, for

example, *Abdoella v. the Netherlands*, 25 November 1992, § 24, Series A no. 248-A; *Jabłoński v. Poland*, no. 33492/96, § 102, 21 December 2000; *Mötsnik v. Estonia*, no. 50533/99, § 40, 29 April 2003; and *Bąk v. Poland*, no. 7870/04, § 81, 16 January 2007).

66. The domestic authorities were required to organise the trial efficiently and ensure that the Convention guarantees were fully respected in the proceedings. However, in the circumstances of the case, the Court is not satisfied that the conduct of the authorities was consistent with the fair balance which has to be struck between the various aspects of this fundamental requirement.

67. Having regard to all the circumstances of the case and the overall length of the proceedings, the Court considers that the “reasonable time” requirement of Article 6 § 1 of the Convention has not been respected. Consequently, there has been a violation of this provision.

➤ Case study 2

Facts. The applicants were born in 1992 and 1996 respectively and live in Belgrade. On 28 December 2000, the Third Municipal Court (*Treći opštinski sud*) in Belgrade dissolved the marriage between the applicants' parents and ordered their father (hereinafter “the defendant”) to pay each of them 25% of his monthly income in child maintenance.

9. On 27 June 2001 this judgment became final. On 2 April 2003, the applicants' mother filed a criminal complaint against the defendant, alleging his failure to pay the child maintenance awarded. On 13 May 2003, the Third Municipal Public Prosecutor's Office requested the opening of the investigation. On 29 May 2003, in the course of the preliminary proceedings before the Third Municipal Court, the applicants' mother, acting on behalf of the applicants, sought payment of the child maintenance accrued on the bases of the judgment adopted on 28 December 2000 (i.e. submitted a “civil-party complaint”; “*podnela predlog za ostvarivanje imovinsko-pravnog zahteva*”). On 14 July 2003, the Third Municipal Public Prosecutor's Office formally indicted the defendant in this respect. The first hearing scheduled for 9 December 2003 was adjourned. Between March 2004 and April 2005 two hearings were held whilst another three hearings were adjourned on various procedural grounds. On 25 April 2005 the Third Municipal Court decided to consider the applicants' civil complaint on the merits and requested an expert opinion in respect of the amount of accrued maintenance between January 2001 and June 2005. The expert produced his report on 7 July 2005. Between August 2005 and October 2006, four hearings were adjourned either because of the failure of the defendant's lawyer to appear before the court or the court's failure to summon him properly. In view of a possibility of settling the problem with the defendant, the applicants' legal representative requested the court to grant a short adjournment of the hearing of 22 November 2006. The court rescheduled the hearing for 8 December 2006. Between December 2006 and October 2007, another two hearings were held whilst three hearings were adjourned on procedural grounds, one of them because of the presiding judge's “other commitments” (*zbog sprečenosti*). In a letter of 11 September 2007, addressed to the President of the Third Municipal Court, the applicants alleged that the presiding judge had herself indicated that she “did not know what to do with the case” and would gladly

be replaced by another judge. On 22 November 2007, the Third Municipal Court requested an updated version of the expert's opinion. The expert submitted his report on 8 January 2008. The court served this report on the parties at the hearing of 8 February 2008, which was adjourned to allow them to submit their written comments. The hearing scheduled for 6 March 2008 was adjourned because the prosecutor and the applicants' representative had failed to appear, and re-scheduled for 1 April 2008. Given the defendant's failure to appear in court, the court adjourned the hearing of 1 April 2008 and scheduled the next hearing for 9 July 2008. This hearing would appear to have been also adjourned. On 8 October 2008 the Third Municipal Court found the defendant guilty of failing to pay child maintenance and sentenced him to three months' in prison, suspended for one year. The court further advised the applicants, under Article 206 of the Criminal Proceedings Act (see paragraph 35 below), to pursue the compensation claims which they had made in the course of the criminal proceedings by means of a separate civil action before the civil courts. It was noted that the data collected in the course of the criminal proceedings were not sufficient to determine the matter in the criminal context. It would appear that this judgment was not served on the applicants' representative. On 12 February 2009, the District Court (*Okružni sud*) in Belgrade quashed the Third Municipal Court's judgment and remitted the case for re-consideration. The Third Municipal Court subsequently adjourned the hearing scheduled for 22 June 2009 in view of the defendant's failure to appear in court. On 16 July 2009, the Third Municipal Court discontinued the proceedings because the prosecution had become time-barred. It further advised the applicants that they could pursue their claim for damages in a separate civil suit. No appeal having been submitted, this decision became final on 9 October 2009.

Questions.

1. *Could you please indicate if in the described situation article 6 would be applicable under the civil limb or under the criminal limb?*
2. *Do you think that the described procedure is in line with the principle of fair trial within a reasonable time? Why?*
3. *Which circumstances are you considering in order to evaluate the reasonableness of the length of proceedings?*

The Court's assessment. *The facts have been taken from the case Ristic v. Serbia, n. 32181/08, 18 January 2011. The Court notes at the outset that the applicants were not accused in the criminal proceedings complained of, but participated as the injured parties. In this connection, it notes that Article 6 does not apply to criminal proceedings in respect of the right to have third parties prosecuted or sentenced for a criminal offence. It may, however, apply under its "civil head" to criminal proceedings involving a determination of pecuniary claims asserted by the injured parties (so-called "civil-party complaints") and, even in the absence of such claims, to those criminal proceedings the outcome of which is decisive for the "civil right" in question (see Perez v. France [GC], no. 47287/99, §§ 57-72, ECHR 2004-I). Article 6 is applicable under its civil limb to the criminal proceedings from the moment when the victims join as civil parties, namely as of when they bring their action for the damage suffered as a result of a criminal offence (Atanasova v. Bulgaria, no. 72001/01, 2 October 2008, § 51; and Boris Stojanovski v. "the former Yugoslav Republic of Macedonia", no. 41916/04, 6 May 2010, § 40), even if this happens during the preliminary*

investigation stage of the case (see *Tomasi v. France*, 27 August 1992, Series A no. 241-A; and *Perez v. France*, cited above, § 40). In particular the court concluded as follows.

45. The Court further recalls that the reasonableness of the length of proceedings must be assessed in the light of the circumstances of the case and with reference to the following criteria: the complexity of the case, the conduct of the applicant and the relevant authorities and what was at stake for the applicant in the dispute (see, among many other authorities, *Cocchiarella v. Italy* [GC], no. 64886/01, ECHR 2006-V; *Frydlender v. France* [GC], no. 30979/96, CEDH 2000-VII; *Zimmerman and Steiner v. Switzerland*, 13 July 1983, Series A no. 66, and *Jablonski v. Poland*, no. 33492/96, 21 December 2000).

46. Turning to the present case, the **Court firstly notes that Article 6 is applicable as of 29 May 2003, which was when the applicants' mother, acting on behalf of the applicants, filed the civil-party complaints in the course of the criminal investigation and they thus acquired the status of civil parties to the criminal trial.** The complaints were obviously designed to secure a conviction which would have enabled the applicants to exercise their civil rights, i.e. the right to child maintenance as ordered by the judgment of 28 December 2000.

47. The Court secondly notes that, for the purposes of this case, **the impugned proceedings lasted between 29 May 2003 and 9 October 2009, when the court's decision of 16 July 2009 became final.** On 3 March 2004, the date when the Convention came into force in respect of Serbia, they had thus been pending for nine months, while following this date, they came within the Court's competence *ratione temporis* for a period of five years and seven months before two levels of jurisdiction (see, among other authorities, *Styranowski v. Poland*, judgment of 30 October 1998, Reports of Judgments and Decisions 1998-VIII, § 46).

48. **Thirdly, the proceedings at issue were not particularly complex,** they involved issues of great importance to the applicants, and furthermore, the Convention as well as the relevant domestic law require exceptional diligence in all child-related matters.

49. **Fourthly, the applicants' conduct did not contribute to the procedural delay complained of, except, perhaps, in respect of their request for the adjournment of the hearing scheduled for 22 November 2006 for sixteen days in order to try to achieve a settlement, and only partially in respect of the hearing fixed for 6 March 2008, as their representative failed to appear, together with the prosecutor (see paragraphs 19 and 25 above). Furthermore, the second expert financial report was needed to calculate the maintenance, as well as the statutory interest, accrued in the course of the proceedings themselves.**

50. **Fifthly, while the domestic courts need to protect the due process in respect of the defendant, they should also afford adequate protection to the victims, particularly where they happen to be young and vulnerable.**

51. **Sixthly, the Court observes that the prosecution of the defendant became time-barred and that as a result it became impossible for the applicants to obtain a decision on their claim in the criminal proceedings.**

2. In view of the above, as well as the fact that **there were several significant periods of judicial inactivity and a number of unwarranted adjournments, the Court finds that the protracted character of the proceedings was mainly imputable to the respondent State's judicial authorities.**

53. The Court is therefore of the opinion that the length of the proceedings complained of has failed to satisfy the reasonable time requirement. There has, accordingly, been a violation of Article 6 § 1 of the Convention.'

3. Criteria determining the reasonableness of the length of proceeding

The Court considers that the reasonableness of the length of Criminal proceedings is to be assessed in the light of the particular circumstances of the case, regard being had to the criteria laid down in the Court's case law, in particular the complexity of the case, the applicants' conduct and that of the competent authorities, and the importance of what was at stake for the applicants in the litigation.²⁰²

a) The complexity of a case

Complexity relates both to the facts and to the law. A complex case may involve issues regarding for example an applicant's state of health²⁰³ or a large number of persons affected²⁰⁴ or may deemed necessary to analyse a high volume of evidence or²⁰⁵ complex legal issues²⁰⁶ or may require interviewing a large number of witnesses.²⁰⁷ Some cases may appear more complex by their nature – for example, if they involve both community and individual interests.²⁰⁸ It may stem, for example, from the number of charges, the number of people involved in the proceedings, such as defendants and witnesses, or the international dimension of the case.

Example. In the case *Neumeister v. Austria*²⁰⁹, the transactions at issue had ramifications in various countries, requiring the assistance of Interpol and the implementation of treaties on mutual legal assistance, and 22 persons were concerned, some of whom were based abroad. The Court has considered those circumstances to evaluate the reasonable time of the domestic procedure (international dimension)

202 See *Süßmann v. Germany*, 16 September 1996, § 48, Reports 1996-IV, and *Gast and Popp v. Germany*, no. 29357/95, § 70, ECHR 2000-II.

203 *Yaikov v. Russia*, No. 39317/05, 18 June 2015, para. 76.

204 *Papachelas v. Greece*, No. 31423/96, 25 March 1999, para. 39 (complexity of the facts).

205 *Eckle v. Germany*, No. 8130/78, 15 July 1982.

206 *Breinesberger and Wenzelhuemer v. Austria*, No. 46601/07, 27 November 2012, paras. 30–33.

207 *Mitev v. Bulgaria*, No. 40063/98, 22 December 2004, para. 99.

208 *Wiesinger v. Austria*, No. 11796/85, 30 October 1991, para. 55.

209 *Neumeister v. Austria*, § 20

A case may also be extremely complex where the suspicions relate to “white-collar” crime, that is to say, large-scale fraud involving several companies and complex transactions designed to escape the scrutiny of the investigative authorities, and requiring substantial accounting and financial expertise.²¹⁰

Even though a case may be of some complexity, the Court cannot regard lengthy periods of unexplained inactivity as “reasonable”.

Example. In *Matoń v. Poland*,²¹¹ the applicant was charged with drug trafficking, unlawful possession of firearms and membership in an organised criminal gang. There were 36 defendants and 147 witnesses in the case. The applicant was convicted in 2008. He appealed to the regional court, which had not yet determined his appeal at the time of the ECtHR hearing. He also lodged a complaint with the court of appeal, alleging a breach of the right to a trial within a reasonable time. That court rejected his application. The ECtHR accepted that the case was very complex, involving a number of defendants and voluminous evidence. However, it stated that this could not justify the overall length of the criminal proceedings. Even considering the significant difficulties faced by domestic authorities, they were required to organise the trial efficiently and ensure respect for ECHR guarantees. The criminal proceedings, which lasted over eight years, did not respect the reasonable time requirement. Article 6 of the ECHR was breached (large number of person affected and high volume of evidence)

Example. In the case *Adiletta v. Italy*²¹², there was an overall period of thirteen years and five months, including a delay of five years between the referral of the case to the investigating judge and the questioning of the accused and witnesses, and a delay of one year and nine months between the time at which the case was returned to the investigating judge and the fresh committal of the applicants for trial. The case was of some complexity, in particular at the stage of the preliminary investigation. In addition, the applicants themselves caused delays by several requests for the hearing to be adjourned. Nevertheless, the Court considered that it cannot be regarded as “reasonable” in the instant case a lapse of time of thirteen years and five months (complexity of preliminary investigations)

210 *C.P. and Others v. France*, § 30

211 *Matoń v. Poland*, 483 on 19 June 2000

212 *Adiletta v. Italy*, § 17

b) The applicant's conduct

The applicant's behaviour is an objective feature of proceedings therefore, it has to be taken into account when determining whether or not a reasonable time period has been exceeded.²¹³

The two following examples show cases in which an applicant's conduct must be taken into account.

Example. In *Eckle v. Germany*, the applicants increasingly resorted to actions likely to delay the proceedings, such as systematically challenging judges; some of these actions could even suggest deliberate obstruction. The State cannot be considered to be responsible for delays linked to the applicant's conduct.²¹⁴

Example. In the case *I.A. v. France*, the applicant, among other things, waited to be informed that the transmission of the file to the public prosecutor was imminent before requesting a number of additional investigative measures.²¹⁵

However, an applicant's conduct must not be used to justify periods of inactivity by the authorities.

Example. In *Veliyev v. Russia*, the applicant was arrested and detained on 26 February 2004 on suspicion of having taken part in multiple organised armed robberies. The first instance judgment was rendered on 21 June 2006. The conviction was confirmed on appeal. The government argued that the proceedings were prolonged because of deliberate acts by the co-accused, translation from Russian to Azeri, and occasional illness of the applicant, co-accused and lawyers. The ECtHR reiterated that an applicant cannot be obliged to cooperate actively with the judicial authorities and cannot be criticised for making full use of the available domestic remedies. In this case, the applicant did not contribute significantly to the length of the proceedings, and certain delays could be attributed to the domestic authorities. Article 6 requires judicial proceedings to be expeditious, and it also lays down the general principle of proper administration of justice. The Court concluded that the domestic authorities did not strike a fair balance between the various aspects of this fundamental requirement, breaching Article 6 of the ECHR.²¹⁶

c) The conduct of the relevant authorities

In evaluating the reasonableness of the length of proceedings, the Court considers delays attributable to the State.²¹⁷ Article 6 § 1 imposes on the Contracting States the duty to organise their judicial systems in such a way that their courts can meet each of its requirements.²¹⁸ States should seek ways of ensuring that their judicial systems do not create delays in proceedings. States must organise their legal systems to enable

²¹³ *Wiesinger v. Austria*, No. 11796/85, 30 October 1991, para. 57

²¹⁴ *Eckle v. Germany*, § 82

²¹⁵ *I.A. v. France*, § 121

²¹⁶ *Veliyev v. Russia*.

²¹⁷ *Buchholz v. Germany*, No. 7759/77, 6 May 1981, para. 49; *Yagtzilar and others v. Greece*, No. 41727/98, 6 December 2001

²¹⁸ *Abdoella v. the Netherlands*, § 24; *Dobbertin v. France*, § 44

their courts to guarantee the right to obtain a final decision within a reasonable time.²¹⁹ However, the key responsibility for preparing a case and for the speedy conduct of a trial lies with the judge.²²⁰ The ECtHR has found that repeated changes of judge “cannot exonerate the State, which is responsible for ensuring that the administration of justice is properly organised”²²¹ Likewise, a “chronic overload” of cases does not justify excessively lengthy proceedings.²²²

Example. In *Sociedade de Construções Martins & Vieira, Lda. and Others v. Portugal*, the Porto prosecuting authorities started an investigation into the applicants’ past fiscal activities on 17 September 1999. Subsequently, two separate criminal proceedings were instituted before the Porto and Barcelos criminal courts. At the time of the hearing before the ECtHR, they were both still pending. The ECtHR noted that the proceedings already exceeded 14 years. They also came to a standstill for almost four years between December 1999, when the applicants became defendants, and April and November 2003, when charges were brought against them. A further delay of two years followed between 2003 and 2005, when a trial date was set. This showed that, from the beginning, the domestic courts did not demonstrate due diligence in handling the applicants’ case. The Court stated that it may be reasonable for domestic courts to await the outcome of parallel proceedings as a matter of procedural efficiency, but that this had to be proportionate as it would keep the accused in a prolonged state of uncertainty. The Court found a violation of Article 6 of the ECHR.²²³

Example. In *Kaciu and Kotori v Albania* the Court considered that ‘the main problem in the instant case [...] consisted of the frequent remittals of the case from higher courts to lower courts (see *Marini v. Albania*). The Court notes, in particular, that after the case was heard by the Supreme Court on 15 January 2003 it was remitted to the District Court for fresh examination. In the new proceedings, the trial court did not comply with the instructions of the Supreme Court and that failure resulted in another set of proceedings, which lasted approximately two years until the adoption of the Court of Appeal’s decision of 15 October 2004 upholding the applicants’ convictions. The Court considers that this delay was entirely attributable to the domestic courts.”²²⁴

d) What is at stake for the applicant

The importance of what is at stake for the complainant is another criterion to be taken into account when assessing the length of proceedings. For example, where a person is held in pre-trial detention, this is a factor to be considered in assessing whether the charge has been determined within a reasonable time as in this case the proceedings shall be particularly expeditious.

219 *Cocchiarella v. Italy*, No. 64886/01, 29 March 2006, para. 119; For a criminal case, *Dobbetin v. France*, No. 13089/87, 25 February 1993, para. 44.

220 *Capuano v. Italy*, No. 9381/81, 25 June 1987, paras. 30-31).

221 *Lechner and Hess v. Austria*, No. 9316/81, 23 April 1987, para. 58.

222 *Probstmeier v. Germany*, No. 20950/92, 1 July 1997, para. 64.

223 *Sociedade de Construções Martins & Vieira, Lda. and Others v. Portugal*, 498

224 See reference mentioned above

Example. In *Abdoella v. the Netherlands*,²²⁵ the time required to forward documents to the Supreme Court on two occasions amounted to more than 21 months of the 52 months taken to deal with the case. The Court found such protracted periods of inactivity unacceptable, especially as the accused was in detention.

A more rigorous standard applies if the accused is in custody, requiring “special diligence” on the authorities’ with a view to ensure that the length of proceedings is reasonable. For example, in *Jablonski v. Poland*, the Court recall that it has stressed on many occasions, in the context of Article 5 § 3, that persons kept in detention pending trial are entitled to “special diligence” on the part of the authorities. Consequently, in cases where a person is detained pending the determination of a criminal charge against him, the fact of his detention is itself a factor to be considered in assessing whether the requirement of a decision on the merits within a reasonable time has been met.²²⁶

Cases concerning children or life-threatening illness also merit speedier determination.²²⁷ For example, in a claim for the return of children to Norway under the International Child Abduction Convention, the ECtHR emphasised “the critical importance” of the passage of time in these types of proceedings, where delays may effectively determine the case outcome.²²⁸ Special diligence is also required in proceedings to determine compensation for victims of road traffic accidents²²⁹ and in proceedings to determine compensation in employment disputes.

Example. In *Mikulić v. Croatia*, the applicant and her mother filed a paternity suit against H.P. This led to 15 scheduled hearings, six of which were adjourned because H.P. failed to appear. He also persistently failed to appear for DNA testing. By the time the case got to the ECtHR, the proceedings had already taken four years and were still ongoing. The case focused on an alleged breach of Article 8, but the ECtHR reiterated that diligence is required in cases concerning civil status and capacity. Here, in view of what was at stake for the applicant, and that it was her right to have paternity established or refuted to eliminate uncertainty regarding her natural father’s identity, Article 6 required the competent national authorities to act with particular diligence. There was a violation of Article 6 (1) of the ECHR.

➤ Case study 3

Facts.

A. Criminal proceedings conducted against the applicant. On 2 June 2005 the applicant was arrested on suspicion of misuse of explosives. On 11 May 2007 the Central Investigation Prosecutor’s Office indicted the applicant in the Pest County Regional Court on charges of incitement to aggravated murder and unlawful

²²⁵ *Abdoella v. the Netherlands*, § 24

²²⁶ *Jablonski v. Poland*, No. 33492/96, 21 December 2000, para. 102; *Chudun v. Russia*, No. 20641/04, 12 June 2011, para. 112.

²²⁷ *Hokkanen v. Finland*, No. 19823/92, 23 September 1994, para. 72 (it is “essential that [child] custody cases be dealt with speedily”; *X v. France*, No. 18020/91, 31 March 1992, para. 45, case ought to have been dealt with as a matter of urgency because of the life expectancy of the persons concerned.

²²⁸ *Hoholm v. Slovakia*, No. 35632/13, 13 January 2015, para. 51.

²²⁹ *Martins Moreira v. Portugal*, No. 11371/85, 26 October 1988.

possession of firearms and explosives. The first hearing in the case took place before the Pest County Regional Court on 17 December 2007. Up until 10 March 2009 the trial judge, Ms K.B.H., held 24 hearings. Later, the applicant was charged by the Budapest Chief Prosecutor's Office with armed robbery. The two sets of criminal proceedings were joined by the Pest County Regional Court on 22 June 2009. The applicant challenged the trial judge for bias, which motion was dismissed. At the applicant's renewed request, the trial judge recused herself. A new judge, Ms Gy.Sz., was appointed to try the case. She held 11 hearings in the period June to December 2009. This judge eventually declared herself biased; and the case was assigned to yet another judge, Ms A.F., who held 23 hearings between September 2010 and April 2011. Meanwhile, on 25 October 2010 the applicant was indicted by the Komárom-Esztergom Regional Prosecutor's Office for aggravated murder. The case was joined to the ongoing criminal proceedings on 28 January 2011 by the Pest County Regional Court. On 17 April 2011 applicant challenged Ms A.F. for bias. On 24 June 2011 the Budapest Court of Appeal dismissed this motion. It pointed out that the trial judge had declared herself impartial, along with the four other eligible judges of the Pest County Regional Court. Despite the decision of the Court of Appeal, the trial judge eventually recused herself, since, in her view, the applicant's letters addressed to the Regional Court had infringed her dignity. Subsequently, in July 2011 the case was assigned to another judge at the Pest County Regional Court, Mr S.P., who did not hold any hearing. On 25 January 2012 he also recused himself following the applicant's different motions, apparently containing insinuations. The remaining three judges of the Pest County Regional Court declared themselves biased as well. On 31 January 2012 the Budapest Court of Appeal appointed the Budapest High Court to try the case. The trial judge at the High Court held the first hearing on 7 May 2012. On 28 February 2014 the applicant was found guilty and sentenced to life imprisonment with the possibility of parole after 30 years. On 2 July 2015 the second-instance court quashed this judgment and remitted the case to the first-instance. The case is currently pending there.

B. The applicant's pre-trial detention and house arrest. In the context of the above proceedings, on 4 June 2005 the Kaposvár District Court remanded the applicant in custody. His detention was repeatedly prolonged at the statutory intervals until 30 May 2008 when the Budapest Court of Appeal suspended his detention and ordered him to serve a prison sentence which had become enforceable in connection to other criminal proceedings unrelated to the present case. On 21 May 2010, on the new charges of aggravated murder put forward by the Komárom-Esztergom Regional Prosecutor's Office, the Tatabánya District Court again remanded the applicant in custody. The decision was upheld on appeal by the Komárom-Esztergom Regional Court on 1 June 2010. The applicant was actually placed in pre-trial detention again on 2 February 2011, after having served his prison sentence. He submitted that under the law, his detention should have been reviewed within six months, that is, on 2 August 2011 at the latest but that this had not taken place. On 10 February 2011 the applicant filed an interlocutory application for his immediate release and placement in house arrest with the Pest County Regional Court. The court dismissed the application on the same day. The applicant appealed without success. His further requests for release or, alternatively, a less coercive measure were to no avail. On 21 November 2011 the Budapest Appellate Public Prosecutor's Office requested the Budapest Court of Appeal to review the

applicant's pre-trial detention under section 132(2) of the Code of Criminal Procedure. On 5 December 2011 the detention was extended until the delivery of the first-instance judgment under section 129(1)(b) and (d) of the Code of Criminal Procedure (risks of absconding and of reoffending). The Budapest Court of Appeal held that there was a risk that the applicant might abscond given the seriousness of the charges and the gravity of the punishment and reoffend given that he was a multiple recidivist and the number of offences he was charged with. The Kúria endorsed this decision on 6 January 2012, holding that the impending severe punishment substantiated the risk of absconding, due to which the applicant's presence at the proceedings could not be ensured in any other way. It also observed that the last offence had been committed by the applicant during his conditional release from his nine-year imprisonment, thus there was a real risk of reoffending. The court dismissed the arguments put forward by the applicant concerning his health status, unspecified, and concluded that his personal conditions did not militate for a less severe measure. The applicant's pre-trial detention reached the statutory time-limit of four years on 2 February 2012. On 23 January 2012 the Budapest Surroundings High Court placed the applicant under house arrest with continuous police surveillance, to be carried out in the flat of Ms I.T, an acquaintance of the applicant. The applicant was allowed to leave the flat every second Wednesday of the month, between 8 a.m. and 4 p.m. The court noted that the reasons for the applicant's detention were still valid, and a less restrictive measure was to be applied only because the statutory four-year time-limit for pre-trial detention had expired. The court also dismissed the applicant's request for release on the undertaking not to leave his place of residence. According to the court, the applicant's argument concerning his mother's ill health and the modest financial situation of his host could not serve as a ground for the application of a less stringent measure. On 8 February 2012 the Budapest High Court extended the applicant's house arrest until the adoption of the first-instance judgment. It noted that the applicant was charged with a crime punishable with 10 to 15 years', or life, imprisonment which in itself demonstrated the risk of absconding. It also relied on the applicant's previous criminal conduct and the number of offences the applicant had been charged with to find that there was a risk of reoffending. On 5 March 2012 the Budapest High Court granted the applicant's request for leave for 21 March 2012 to visit his mother in hospital between 8 a.m. and 12 noon and to undergo dental treatment. On 8 March 2012 the applicant requested his release from house arrest, pointing out that he had no income on his own and intended to work. He also produced a job offer from a company. His request was dismissed on 14 March 2012 by the Budapest High Court on the ground that no new circumstances existed that would affect the necessity of the house arrest. On 16 April 2012 the applicant was granted exceptional leave from house arrest for every last Friday of the month between 9 a.m. to 3 p.m. to visit his hospitalised mother. The remainder of the applicant's request, that is leave from house arrest twice a week, was dismissed. His further request for extraordinary leave to visit his mother for five hours on 21 June 2012 and to study his case file at the premises of a non-governmental organisation was granted on 18 June 2012. On 16 July 2012 the applicant was granted leave to visit his father in the town of Pápa on 28 July 2012 between 6 a.m. and 6 p.m. The applicant's further request for leave for medical reasons was granted on 18 July 2012. However, the Budapest High Court dismissed his application for leave so as to look after his mother on a daily basis, in particular to assist her with insulin injections. The court reasoned

that Ms I.T., the applicant's acquaintance and a co-defendant in the criminal proceedings, who lived in the flat of the applicant's mother, could do so in his stead. The court also stated that lengthy daily leave would be incompatible with the house arrest. The applicant's further motions for leave to accompany his mother to medical examinations were granted on 20 July and 1 August 2012 for 23 July (between 3 p.m. and 10 p.m.) and 3 and 15 August 2012, respectively. The applicant lodged further requests for leave in August 2012 to visit his terminally ill father in Pápa twice a month, to take his mother home after her hospitalisation and to make certain arrangements with her bank and her previous workplace, since she was under guardianship proceedings. By a decision of 14 August 2012 the Budapest High Court granted the applicant leave to visit his father every fourth Saturday between 6 a.m. and 6 p.m., and to accompany his mother coming home from hospital on 22 August between 7 a.m. and 10 a.m. His request to visit his mother's financial institution and workplace was dismissed, since he had not specified their addresses, whereas under section 138(1) of the Criminal Procedure Code, leave could be granted only for a specific time and destination. As regards the applicant's more frequent visits to his father, the court noted that regular, long-term leave from the house arrest would jeopardise its purpose of securing the applicant's presence throughout the proceedings. The applicant appealed, arguing that the time period to assist his mother was too short, that his father's health was deteriorating fast, requiring more frequent visits, that is, every second week, and that he had already submitted the contact details of his mother's financial institution and workplace. On 1 October 2013 the Budapest Court of Appeal, acting as a second-instance court, found that the applicant's appeal concerning the restricted time to assist his mother was well-founded, nonetheless no longer pertinent, because she had already left the hospital. The remainder of the applicant's appeal was dismissed. The applicant's further requests for leave to visit his ill father, lodged on 14 August and 2 September 2012, were not granted. The applicant's father died on 8 October 2012. On 10 October 2012 the court granted the applicant leave for the period 15 to 17 October 2012 to make arrangements concerning the funeral of his father. On 3 December 2012 the Budapest High Court released the applicant from house arrest with an undertaking not to leave his place of residence. The court observed that there were no grounds to believe that the applicant would pervert the course of justice or reoffend. Nonetheless, in its view, he was charged with a serious offence requiring a coercive measure. On appeal, the Budapest Court of Appeal reversed the first-instance decision and placed the applicant under house arrest on 20 December 2012. It noted that given the seriousness of the offence there existed a danger of his absconding and given his previous multiple convictions, a risk of reoffending. On 21 December 2012 the Budapest High Court dismissed the applicant's motion for leave to attend Mass on every Sunday between 7 a.m. and 11 a.m. and his further request for leave on 27 and 28 December 2012 and 2 and 4 January 2013. The court observed that the applicant, being a teacher of religion by profession, was not disproportionately restricted in the exercise of his religious conviction. This decision was upheld on appeal on 24 January 2013, the Court of Appeal holding that the applicant's religious conviction did not justify the granting of permissions of leave from the house arrest; and that such permissions were normally to reflect an intervening change in the detainee's personal circumstances. The court noted that such a request could only be granted if it was submitted concerning a specific place and purpose. Meanwhile, the applicant's host, Ms I.T. complained on a

number of occasions to various authorities that the police officers surveying the applicant interfered with her private life. She also submitted that, as she had indicated from the beginning of the house arrest, she did not have the necessary financial means to accommodate the applicant. On 7 January 2013 Ms I.T. submitted a motion to the Budapest High Court stating that the applicant was to leave her flat since she could not further provide for him. On the same day, the applicant requested the court to establish the place of his house arrest at a camping site in Nagyteve. He was informed by the court that, according to information received by the relevant authorities, the camping site was not suitable for residence during the winter. Notwithstanding this information, the applicant maintained his request. A new decision was issued by the investigating judge on 8 January 2013 establishing the place of the applicant's house arrest at the Nagyteve camping site. On 8 January 2013 the Pápa Police Department issued a report on the applicant's presence at the camping site, stating that the "weather conditions, the lack of food supply and the poor hygienic conditions" endangered the applicant's health. On 9 January 2013 the Veszprém County Chief Police Department lodged a request with the Budapest High Court to amend its decision of 8 January 2013 since the camp site was unsuitable for long-term residence. On 14 January 2013 the applicant sought the termination of his house arrest again. His motion was dismissed on 16 January 2013 by the Budapest High Court, which stated that there was no reason to overturn the decision of 20 December 2012 and that he had been aware of the conditions of the camping site when he had requested to be committed there. On 18 January 2013 the local general practitioner arranged for the applicant to be admitted to Pápa Hospital. The examinations carried out at the hospital did not result in the finding of any such disease as warranting the applicant's further treatment, so he was released on the same day and placed in a social care institution in Pápa. On 21 January 2013 the Budapest High Court amended its decision of 8 January 2013 and ordered the applicant's house arrest to be carried out in the flat of Ms I.T. again. The applicant's appeal against this decision was to no avail. In its decision of 26 February 2013 the Budapest Court of Appeal reiterated that the applicant was a multiple reoffender charged with serious crimes, thus the risk of absconding and reoffending existed. The court also noted that had the statutory maximum of detention on remand not expired, the most restrictive measure should have been applied. It further argued that the measure was not disproportionate, since the protraction of the proceedings had been compensated for by the statutory discontinuation of the applicant's detention on remand. The court also dismissed the applicant's argument that some co-defendants were released from house arrest. On 10 July 2013 the Budapest High Court carried out the statutory review of the applicant's house arrest and, at the same time, decided on the applicant's request for release. During the court hearing the judge presented to the applicant and the prosecutor a letter allegedly originating from one of the applicant's previous cellmates. The writer of the letter informed the court that the applicant intended to obstruct the criminal proceedings by physically threatening the investigating judge and subsequently requesting his exclusion for bias, initiating criminal proceedings against the trial judge for judicial errors and absconding and inciting the co-accused to do so. The applicant sought direct access to the document, arguing that without receiving information on the author's identity he was unable to challenge this latter's motivation and the credibility of the content of the letter. Relying on the protection of the author's personal data as

provided in section 60(1) of the Criminal Procedure Code, the court dismissed the applicant's request. The court upheld the applicant's house arrest because of the risk of reoffending and absconding as provided in section 129(2)(b) and (d) of the Criminal Procedure Code. In its decision the court relied on the seriousness of the crimes and the gravity of the impending punishment in holding that there was a likelihood that the applicant would abscond. It also held that given the fact that the applicant was a recidivist, there was a risk of reoffending. In its decision the court mentioned the letter as one of the factual elements to consider. On 22 July 2013 the Budapest High Court authorised the applicant to leave house arrest to undergo physiotherapy every second weekday in the period 22 July to 15 August 2013. On 8 August 2013 the applicant's request for leave to take up a job and to look after his ill mother on a daily basis was dismissed by the Budapest High Court, which found that such a daily leave would defeat the purpose of house arrest. On 12 September 2013 the applicant was appointed as his mother's guardian. The applicant stayed in house arrest until 8 November 2013, when he was placed in pre-trial detention in connection with criminal proceedings concerning another offence. As of 2 July 2015 the applicant has been again in pre-trial detention following the second-instance court's decision to quash his conviction and remit the case to the first-instance.

Questions

1. *Was the length of the applicant's pre-trial detention in breach of the "reasonable time" requirement of Article 5 § 3 of the Convention? In particular, did the authorities produce an individualised assessment of his situation when repeatedly prolonging the measure?*
2. *Is the length of the criminal proceedings conducted against the applicant in compliance with the reasonable time requirement of Article 6 § 1 of the Convention?*

The Court's Assessment. The facts are taken from the case *Süveges v. Hungary*, no. 50255/12, § 77, 5 January 2016. The Court has concluded as follows.

88. *The Court reiterates that the question whether a period of time spent in pre-trial detention is reasonable cannot be assessed in the abstract. Whether it is reasonable for an accused to remain in detention must be assessed on the facts of each case and according to its specific features. Continued detention can be justified in a given case only if there are actual indications of a genuine requirement of public interest which, notwithstanding the presumption of innocence, outweighs the rule of respect for individual liberty laid down in Article 5 of the Convention (see, among other authorities, Kudła, cited above, §§ 110 et seq.).*

89. *The existence and persistence of a reasonable suspicion that the person arrested has committed an offence is a condition sine qua non for the lawfulness of the continued detention. However, after a certain lapse of time it no longer suffices. In such cases, the Court must establish whether the other grounds given by the judicial authorities continued to justify the deprivation of liberty. Where such grounds are "relevant" and "sufficient", the Court must also ascertain whether the competent national authorities displayed "special diligence" in the conduct of the proceedings (see *Labita v. Italy [GC]*, no.*

26772/95, §§ 152 and 153, ECHR 2000-IV). Justification for any period of detention, no matter how short, must be convincingly demonstrated by the authorities (see *Shishkov v. Bulgaria*, no. 38822/97, § 66, ECHR 2003-I (extracts)). When deciding whether a person should be released or detained, the authorities are obliged to consider alternative measures of ensuring his appearance at trial (see *Jabłonski v. Poland*, no. 33492/96, § 83, 21 December 2000).

90. The responsibility falls in the first place on the national judicial authorities to ensure that, in a given case, the pre-trial detention of an accused person does not exceed a reasonable length. To this end they must examine all the arguments for and against the existence of a public interest justifying a departure from the rule in Article 5, paying due regard to the principle of the presumption of innocence, and must set them out in their decisions on applications for release. It is essentially on the basis of the reasons given in these decisions and of the established facts stated by the applicant in his appeals that the Court is called upon to decide whether or not there has been a violation of Article 5 § 3 (see, for example, *McKay v. the United Kingdom* [GC], no. 543/03, § 43, ECHR 2006-X).

(ii) Application of the general principles to the present case

91. The Court observes that during the period under consideration the grounds for the applicant's continued detention were examined by the domestic courts on a number of occasions (see paragraphs 20-21, 25, 37-38, 43, and 46-47 above). Each time the domestic authorities noted that the applicant's detention was extended in accordance with the rules of criminal procedure and referred to the existence of reasonable suspicion against the applicant and the risks of absconding and reoffending. In respect of the first ground, they referred to the gravity of charges, and in respect of the latter ground, to his recidivism and previous convictions.

92. As regards the existence of the risk of absconding, the Court recalls that such a danger cannot be gauged solely on the basis of the severity of the sentence faced. It must be assessed with reference to a number of other relevant factors which may either confirm the existence of a danger of absconding or make it appear so slight that it cannot justify detention pending trial (see *Panchenko v. Russia*, no. 45100/98, § 106, 8 February 2005). The risk of absconding has to be assessed in light of the factors relating to the person's character, his morals, home, occupation, assets, family ties and all kinds of links with the country in which he is being prosecuted (see *Becciev v. Moldova*, no. 9190/03, § 58, 4 October 2005).

93. In the present case, the Court acknowledges that in view of the seriousness of the accusations against the applicant, the authorities could justifiably have considered that the initial risk of absconding was established (see *Ilijkov v. Bulgaria*, no. 33977/96, §§ 80-81, 26 July 2001). However, during the period under consideration, the gravity of charges was the only factor for the assessment of the applicant's potential to abscond. In particular, in the appeal decision of 6 January 2012, the Kúria found that the gravity of charges was decisive compared to the specific circumstances militating in favour of the applicant's release, such as his health condition (see paragraph 23 above).

94. In this connection the Court cannot overlook the fact that the applicant was granted permissions to visit his parents on a number of occasions, also in another town, and yet he

did not abscond. However, the authorities extended his pre-trial detention and house arrest on the ground that these were the only means to prevent him from absconding. For the Court, the apparent contradiction between the applicant's abiding by the rules of these permissions and the authorities' insistence on him being a flight risk was not solved; and the authorities' reasoning remained limited to the possibility of a severe sentence, which alone cannot be considered sufficient, after a certain lapse of time, to justify continued detention.

95. As to the danger of repetition of offences, the Court reiterates that previous convictions could give a ground for a reasonable fear that the accused might commit a new offence (see Selçuk v. Turkey, no. 21768/02, § 64, 10 January 2006).

96. The Court notes that the decisions took account of the nature of the earlier offences and the number of sentences imposed as a result, although they differed to some extent from each other on that last point (see paragraphs 25, 38 and 47 above). It was noted that the last offence forming part of the charges had been committed by the applicant during his conditional release from a nine-year imprisonment (see paragraph 23 above).

97. The Court is of the view that the domestic authorities could reasonably fear in the circumstances of the case and in particular the past history of the applicant and his personality (see Clooth v. Belgium, 12 December 1991, § 40, Series A no. 225; and A.J.P v. France, no. 17020/05, § 71, 29 October 2009) that the applicant would commit new offences and this reason, at least initially, was "relevant" and "sufficient".

98. Nonetheless, the Court considers that such factors do not give the authorities unlimited power to prolong this preventive measure. With the passage of time, the initial grounds for pre-trial detention become less and less relevant and the domestic courts should rely on other "relevant" and "sufficient" grounds to justify the deprivation of liberty (see, Labita v. Italy [GC], no. 26772/95, § 153, ECHR 2000-IV). Furthermore, the Court cannot lose sight of the fact that the applicant was deprived of his liberty pending trial for two years and nine months, preceded by another three-year-long detention on remand. For the Court, when detention pending trial is extended beyond the period generally accepted under the Court's case-law, even in the specific circumstances of the case, particularly strong reasons would be required to justify this.

99. In the present case, however, the decisions extending the applicant's deprivation of liberty were worded in a rather stereotypical and summary form, not evolving to reflect the developing situation. While it is true that neither the risk of absconding nor that of reoffending can completely be negated by the lapse of time, the domestic authorities failed to assess whether after this very long time spent in pre-trial detention and house arrest, the grounds of detention still retained their sufficiency, outweighing the applicant's right to be tried within a reasonable time or release pending trial.

100. As to the diligence displayed by the authorities, the Court notes that the indictment against the applicant was submitted to the trial court on 11 May 2007 and the first hearing was held on 17 December 2007 (see paragraphs 7-8 above). The applicant's detention continued in this and the ensuing period; and the first-instance judgment was adopted only after more than another six years, on 28 February 2014 (see paragraph 14 above).

101. In the course of the proceedings there was no progress in the period between July 2011 and May 2012, where the trial court held no hearing at all. By that time the applicant had already been held in pre-trial detention for a long period of time and for the Court this period of inactivity raises further concerns as to the reasonableness of the applicant's continued detention (see *Dragin v. Croatia*, no. 75068/12, § 118, 24 July 2014). The domestic courts should have examined whether he could be released provisionally pending trial, as required under Article 5 § 3 of the Convention (see *Vlasov v. Russia*, no. 78146/01, § 104, 12 June 2008).

102. Having regard to these delays in the proceedings and the fact that the applicant had been held for a very long period in custody, the Court finds that the trial court did not proceed with the special diligence in conducting the applicant's trial.

103. Therefore, the Court concludes that the length of the applicant's detention cannot be regarded as reasonable. There has accordingly been a violation of Article 5 § 3 of the Convention.

B. Civil limb

1. Scope of the right to a hearing within a reasonable in proceedings relating to "civil rights and obligations"

The concept of a civil case is interpreted very broadly. It covers "all proceedings the result of which is decisive for private rights and obligations" and encompasses the whole of what continental law defines as private law, regardless of the law governing a particular case – civil, commercial, administrative, etc. – or the authority with jurisdiction to settle the dispute – whether civil courts or criminal courts, administrative courts, constitutional courts, professional tribunals, or even administrative bodies. Civil cases thus include disputes relating to the status of individuals, family law, private property, etc.

Generally speaking, the determining factor in delimiting the scope of Article 6 is whether or not the applicant's action has pecuniary implications. If it does, the proceedings are held to be a civil case. The sphere of proceedings relating to "civil rights and obligations" has thus expanded considerably to take in an assortment of disputes. The pecuniary nature of a dispute, for example, has made it possible to class as a civil case preceding which, in domestic law, would come under public law. Thus, Article 6 is applicable to disputes between private individuals and a public authority – regardless of whether the latter is acting as a private individual or the depositary of public authority.²³⁰

However, some matters fell outside the scope of Article 6; those are dispute involving taxpayers, litigation concerning immigration-control measures, disputes about political representation and disputes concerning certain categories of public servant.

²³⁰ See the pertinent chapter in section II.

2. Determination of the length of the proceedings

The reasonableness of the length of civil proceedings coming within the scope of Article 6 § 1 is assessed by the Court according to the circumstances of the case²³¹ and the criteria laid down in its case law such as the exact period to be taken into consideration, the degree of complexity of the case, the parties' conduct. However, it is possible that some cases call for a global assessment, for example in the case *Obermaier v. Austria* – concerning an employee who has been suspended by his employer – the Court estimated that an employee who considers that he has been wrongly suspended by his employer has an important personal interest in securing a judicial decision on the lawfulness of that measure promptly and, without analysing in details the different criteria, it concluded that a period of nine years without reaching a final decision exceeds a reasonable time.²³²

The whole of the proceedings is taken into account to evaluate the reasonableness of the length of proceedings.²³³ While different delays may not in themselves give rise to any issue, they may, when viewed together and cumulatively, result in a reasonable time being exceeded.²³⁴ A delay during a particular phase of the proceedings may be permissible provided that the total duration of the proceedings is not excessive²³⁵, however, in the case *Beaumont v. France*²³⁶, the Court underlined that "Long periods during which the proceedings [...] stagnate [...]" without any explanations being forthcoming are not acceptable.

As concerns the existence of a considerable backlog, the Court considers the following. 'Since it is for the member States to organise their legal systems in such a way as to guarantee the right to obtain a judicial decision within a reasonable time, an excessive workload cannot be taken into consideration (*Vocatur v. Italy*, § 17; *Cappello v. Italy*, § 17). Nonetheless, a temporary backlog of business does not involve liability on the part of the State provided the latter has taken reasonably prompt remedial action to deal with an exceptional situation of this kind (*Buchholz v. Germany*, § 51). Methods which may be considered, as a provisional expedient, include choosing to deal with cases in a particular order, based not just on the date when they were brought but on their degree of urgency and importance and, in particular, on what is at stake for the persons concerned. However, if a state of affairs of this kind is prolonged and becomes a matter of structural organisation, such methods are no longer sufficient and the State must ensure the adoption of effective measures (*Zimmermann and Steiner v. Switzerland*, § 29; *Guincho v. Portugal*, § 40). The fact that such backlog situations have become commonplace does not justify the excessive length of proceedings (*Unión Alimentaria Sanders S.A. v. Spain*, § 40).²³⁷

As concerns preliminary proceedings, those will be taking into account for the evaluation of the reasonableness of the length of civil proceedings if certain conditions

²³¹ *Frydlender v. France* [GC], § 43

²³² *Obermaier v. Austria*, 11761/85, 28 June 1990, § 72; *Comingersoll S.A. v. Portugal* [GC], § 23

²³³ *König v. Germany*, § 98

²³⁴ *Deumeland v. Germany*, § 90

²³⁵ *Pretto and Others v. Italy*, § 37

²³⁶ *Beaumont v. France*, § 33.

²³⁷ Par. 295

are fulfilled. In *Micallef v. Malta*²³⁸, the Court recall that article 6 in its civil “limb” applies only to proceedings determining civil rights or obligations, that not all interim measures determine such rights and obligations and that the applicability of Article 6 will depend on whether certain conditions are fulfilled. Firstly, the right at stake in both the main and the injunction proceedings should be “civil” within the autonomous meaning of that notion under Article 6 of the Convention.²³⁹ Secondly, the nature of the interim measure, its object and purpose as well as its effects on the right in question should be scrutinised. Whenever an interim measure can be considered effectively to determine the civil right or obligation at stake, notwithstanding the length of time it is in force, Article 6 will be applicable.

However, the Court accepts that in exceptional cases – where, for example, the effectiveness of the measure sought depends upon a rapid decision-making process – it may not be possible immediately to comply with all of the requirements of Article 6. Thus, in such specific cases, while the independence and impartiality of the tribunal or the judge concerned is an indispensable and inalienable safeguard in such proceedings, other procedural safeguards may apply only to the extent compatible with the nature and purpose of the interim proceedings at issue. In any subsequent proceedings before the Court, it will fall to the Government to establish that, in view of the purpose of the proceedings at issue in a given case, one or more specific procedural safeguards could not be applied without unduly prejudicing the attainment of the objectives sought by the interim measure in question.

Proceedings before a Constitutional Court are taken into consideration where, although the court has no jurisdiction to rule on the merits, its decision is capable of affecting the outcome of the dispute before the ordinary courts²⁴⁰. Nevertheless, in *Oršuš and Others v. Croatia* the Court underlined that obligation for the Constitutional Court to hear cases within a reasonable time cannot be construed in the same way as for an ordinary court due to the Constitutional Court’s role of guardian of the Constitution which sometimes makes it particularly necessary for it to take into account considerations other than the mere chronological order in which cases are entered on the list, such as the nature of a case and its importance in political and social terms its role as the guardian of the Constitution.²⁴¹

As regards the intervention of third parties in civil proceedings, in *Scordino v. Italy* the Court observes that its case law on the intervention of third parties in civil proceedings makes the following distinction: where the applicant has intervened in domestic proceedings only on his or her own behalf the period to be taken into consideration begins to run from that date, whereas if the applicant has declared his or her intention to continue the proceedings as he or she can complain of the entire length of the proceedings. Hence, in case of third party intervention the period to be considered may vary.²⁴²

238 *Micallef v. Malta* [GC], 17056/06, 15 October 2009, §§ 83-86,

239 See, *inter alia*, *Stran Greek Refineries and Stratis Andreadis v. Greece*, 9 December 1994, § 39, Series A no. 301-B; *König v. Germany*, 28 June 1978, §§ 89-90, Series A no. 27; *Ferrazzini v. Italy* [GC], no. 44759/98, §§ 24-31, ECHR 2001-VII; and *Roche v. the United Kingdom* [GC], no. 32555/96, § 119, ECHR 2005-X.

240 *Deumeland v. Germany*, § 77; *Pammel v. Germany*, §§ 51-57; *Süßmann v. Germany* [GC], § 39

241 *Oršuš and Others v. Croatia* [GC], 15766/03, 16 March 2010, § 109.

242 *Scordino v. Italy* (no. 1) [GC], 36813/97, 29 March 2006, § 220.

As concerns the procedure related to the referral of a question to the Court of Justice of the European Union (CJEU), in *Pafitis and Others v. Greece*²⁴³, the Court considered that as regards the proceedings before the Court of Justice although it lasted two years, seven months and nine days it cannot be taken into consideration in its assessment of the length of each particular set of proceedings. The Court underlined that even though it may at first sight appear relatively long, to take it into account would adversely affect the system instituted by EU law. Hence, the proceedings concerning the referral of a question to the CJEU for a preliminary ruling are not taken into consideration when evaluating the reasonableness of the length of proceedings.

a) Starting-point of the period to be taken into consideration

As regards the starting-point of the relevant period, time normally begins to run from the moment the action was instituted before the competent court,²⁴⁴ unless an application to an administrative authority is a prerequisite for bringing court proceedings, in which case the period may include the mandatory preliminary administrative procedure.²⁴⁵ Thus, in some circumstances, the reasonable time may begin to run even before the issue of the writ commencing proceedings before the court to which the claimant submits the dispute.²⁴⁶ However, this is exceptional and has been accepted where, for example, certain preliminary steps were a necessary preamble to the proceedings.²⁴⁷

Article 6 § 1 may also apply to proceedings which, although not wholly judicial in nature, are nonetheless closely linked to supervision by a judicial body. In *Siegel v. France*,²⁴⁸ for example, concerning a procedure for the partition of an estate which was conducted on a non-contentious basis before two notaries, but was ordered and approved by a court, the duration of the procedure before the notaries was therefore taken into account in calculating the reasonable time.

However, when the unreasonableness of the length of proceedings concern the execution process of a final judgment, the starting period is individuated on the date the judgement which has not been executed has become final.

Example. In the case *Shehu c. Albania*,²⁴⁹ the Court notes that the period to be taken into consideration began on an unspecified date in 1996 when the Tepelenë District Court's judgment of 21 June 1996 became final [...] It ended on 8 December 2009 when it was fully enforced. The enforcement proceedings thus lasted thirteen years and

²⁴³ *Pafitis and Others v. Greece*, 20323/92, 26 February 1998, par. 95.

²⁴⁴ *Poiss v. Austria*, § 50; *Bock v. Germany*, § 35

²⁴⁵ *König v. Germany*, § 98; *X v. France*, § 31; *Kress v. France* [GC], § 90.

²⁴⁶ *Golder v. the United Kingdom*, § 32 *in fine*; *Erkner and Hofauer v. Austria*, § 64; *Vilho Eskelinen and Others v. Finland* [GC], § 65

²⁴⁷ *Blake v. the United Kingdom*, § 40

²⁴⁸ *Siegel v. France*, §§ 33-38.

²⁴⁹ *Application*, n. 33704/09, *Judgment (Merits and Just Satisfaction)*, 06 October 2016, par 18,19,21; *he Court has found violations of Article 6 § 1 of the Convention in cases of civil proceedings raising issues similar to the one in the present case (see Luli and Others v. Albania, nos. 64480/09, 64482/09, 12874/10, 56935/10, 3129/12 and 31355/09, 1 April 2014; and Gjyli, cited above, §§ 43-47).*

mostly six months. The final judgment of 25 April 2008 recognised the accrued interest as a result of the non-enforcement of the final judgment of 21 June 1996 and it was enforced after one year and six months. The Court further notes that the Government did not provide any convincing explanations for such an excessive period of inactivity and delay in the enforcement of the final judgment of 21 June 1996. Indeed, in contrast to their submissions (see paragraph 16 above), the delay in the enforcement proceedings seems to have been caused by the conduct of the authorities, and not by the fact that the applicant had failed to pay in due time the bailiff tax. There is no indication that the inactivity and delay was due to the complexity of the case or the applicant's conduct. On the contrary, on many occasions the applicant requested the enforcement of the final judgment in her favour. [...]. In the light of all the material submitted to it, the Court considers that the Government have not put forward any fact or argument capable of persuading it to reach a different conclusion in the present case. Having regard to its case-law on the subject, it accordingly holds that the length of the enforcement proceedings in respect of the final judgment of 21 June 1996 was excessive and failed to meet the "reasonable time" requirement. There has accordingly been a breach of Article 6 § 1 of the Convention.'

When the complaint about the excessive length of several proceedings which have commenced on an unspecified date and before the recognition of the right of individual petition by the State, the Court may consider that the period to be taken into consideration in respect of length of proceeding is when the right to individual petition took effect.

Example. In *Marini v. Albania*, the Court observes that the applicant complained about the excessive length of five sets of proceedings. The first set commenced on an unspecified date in 1993, when the applicant lodged his application with the State Arbitration Commission. It continued with the proceedings for the enforcement of the decision in the applicant's favour and ended on 20 November 2003, when the Marini-Albplastik company was wound up, rendering further proceedings moot. The second set began on an unspecified date in January 1997, when the applicant challenged in the courts the validity of the decision to privatise the factory. It continued with the proceedings for the enforcement of the final decision in the applicant's favour and ended on 13 April 2006. The third set of proceedings (concerning the validity of the first lease agreement) began in 2000 and ended with the Supreme Court's final judgment of 23 December 2002. The fourth set of proceedings began in 2001, when the applicant challenged in the courts the validity of the second lease agreement, and ended on 27 January 2006. The fifth set of proceedings began in 2003 and ended on 27 April 2005 when the applicant's complaint was dismissed by the Constitutional Court as a result of a tied vote.

The period to be taken into consideration in respect of the complaints as a whole began on 2 October 1996, when the recognition by Albania of the right of individual petition took effect.²⁵⁰

²⁵⁰*Application n. 3738/02, Judgment (Merits and Just Satisfaction), 18 December 2007 Marini, par 138-140*

b) End of the period to be taken into consideration

As to when the period ends, in *Estima Jorge v. Portugal*, the Court has established that time does not stop running until the right asserted in the proceedings actually becomes effective.²⁵¹ The period to be taken into account normally covers the whole of the proceedings in question, including appeal proceedings²⁵² and extends right up to the decision which disposes of the dispute.²⁵³ Hence, the reasonable-time requirement applies to all stages of the legal proceedings aimed at settling the dispute, not excluding stages subsequent to judgment on the merits.²⁵⁴ The execution of a judgment is therefore to be considered as an integral part of the proceedings for the purposes of calculating the relevant period.²⁵⁵

For example, in the case *Shehu c. Albanie*,²⁵⁶ mentioned above, the Court notes that the period to be taken into consideration ended on 8 December 2009 when the Tepelenë District Court's judgment of 21 June 1996 was fully enforced.

➤ Case Study 1

Facts. The applicants owned a plot of land that was subject to a request for expropriation by the Public Construction Fund in Podgorica for the construction of a road. On 14 September 1995 the applicants requested that their house and remainder of their land be also expropriated. On 11 October 1996 the Real Estate Office in Podgorica (REOP) expropriated only the applicants' plot without considering their application in respect of the remainder of their land. On 29 October 1996 the applicants appealed but the appeal was rejected. On 5 February 1998 the Supreme Court quashed the above decisions. On 18 February 2005 the applicants sought an "inspection" (*inspekcijski nadzor*) of the proceedings at issue. By 16 March 2005 the Ministry of Justice had "established irregularities" in the proceedings and ordered that they be rectified (*otklanjanje utvrđenih nepravilnosti*). On 28 March 2005 the REOP accepted both expropriation requests of the applicants and this decision was confirmed on 1 September 2005. Between 6 June 2006 and 16 December 2008 the decisions of the REOP were subject to proceedings before the Administrative Court and the Ministry of Finance. As of May 2010 the proceedings were still pending before the Administrative Court.

Questions.

1. Could you please identify the start and the end period to be taken into account for the evaluation of the reasonableness of the light of proceedings?
2. Do you think that the procedure was expeditious in this case?
3. What criteria you can consider in order evaluating the compatibility with the right to a fair trial within a reasonable time?

²⁵¹*Estima Jorge v. Portugal*, §§ 36-38

²⁵²*König v. Germany*, § 98

²⁵³*Poiss v. Austria*, § 50

²⁵⁴*Robins v. the United Kingdom*, §§ 28-29

²⁵⁵*Martins Moreira v. Portugal*, § 44; *Silva Pontes v. Portugal*, § 33; *Di Pede v. Italy*, § 24.

²⁵⁶*Application, n. 33704/09, Judgment (Merits and Just Satisfaction)*, 06 October 2016, par 18

The Court's assessment: facts are extracted from the case CASE OF Živalević v. Montenegro (Application no. [17229/04](#)), judgment 8 March 2011, (§§5-25). In its judgment, the Court held the following.

72. *The Court reiterates that the reasonableness of the length of proceedings must be assessed in the light of the circumstances of the case and with reference to the following criteria: the complexity of the case, the conduct of the applicants and the relevant authorities and what was at stake for the applicants in the dispute (see, among many other authorities, Frydender v. France [GC], no. [30979/96](#), § 43, ECHR 2000-VII).*

73. *The Court also reiterates that, in order to determine the reasonableness of the delay at issue, regard must be had to the state of the case on the date of ratification (see, mutatis mutandis, Styranowski v. Poland, judgment of 30 October 1998, Reports of Judgments and Decisions 1998-VIII).*

74. *It must be further noted that repeated re-examination of a single case following remittal may in itself disclose a serious deficiency in a given State's judicial system (see Pavlyulynets v. Ukraine, no. [70767/01](#), § 51, 6 September 2005).*

75. *It is noted that the period to be taken into account began on 29 October 1996, the date on which the applicants lodged their appeal against the decision rendered at first instance (see, mutatis mutandis, Počuča v. Croatia, no. [38550/02](#), § 30, 29 June 2006). The Court observes that the proceedings are apparently still pending before the Administrative Court (see paragraph 25 above). Since the Convention entered into force in respect of Montenegro on 3 March 2004 (see Bijelić v. Montenegro and Serbia, no. [11890/05](#), § 69, 28 April 2009), the proceedings in question have thus been within the Court's competence *ratione temporis* for a period of more than six years and eleven months. In addition, they had already been pending for more than seven years and four months before that date.*

76. *The Court observes that the present case concerns expropriation of the applicants' house and land. While it can be accepted that some expropriation cases may be more complex than others, the Court does not consider the present one of such complexity as to justify proceedings of this length.*

77. *Further, the domestic legislation specifies periods within which administrative bodies need to give their decisions, these periods being one month or two months at one level of jurisdiction (see paragraphs 33-36 above). The Court notes that the special diligence requirement is of particular relevance in respect of States where the domestic law provides that cases must be terminated with particular urgency (see, mutatis mutandis, Stevanović v. Serbia, no. [26642/05](#), §§ 53 and 55, 9 October 2007). In the present case, the Court notes that, after the respondent State's ratification of the Convention on 3 March 2004, the first decision was given on 28 March 2005, which is more than a year after the ratification. After this decision had been quashed on 3 October 2006, it then took more than a year for another first-instance decision to be given, on 3 November 2007. Lastly, the case has been pending before the Administrative Court since 16 December 2008, that is for more than two years and one month. There is nothing in the case file to suggest that this has been caused by the conduct of the applicants, but rather by the failure of the*

authorities to act in accordance with the law and time-limits provided therein (see paragraphs 33-36 above).

78. In view of the criteria laid down in its jurisprudence and the relevant facts of the present case, the Court is of the opinion that the length of the proceedings complained of has failed to satisfy the reasonable time requirement. There has accordingly been a violation of Article 6 § 1 of the Convention.'

For the discussion, it will be useful to refer also so mutatis mutandis, to the case *Počuča v. Croatia*, no. [38550/02](#), § 30, 29 June 2006) as well as to the case *Stanka Mirković and Others v. Montenegro* (nos. [33781/15](#), [33785/15](#), [34369/15](#) and [34371/15](#)) related to the length of administrative proceedings

3. Criteria determining the reasonableness of the length of proceeding

Likewise, criminal proceedings, the reasonableness of the length of civil proceedings must be assessed in the light of the following criteria established by the Court's case law: the complexity of the case, the conduct of the applicant and of the relevant authorities and what was at stake for the applicant in the dispute.²⁵⁷

For example, in *Mishgjoni v. Albania* the Court reiterates that the reasonableness of the length of proceedings must be assessed in the light of the circumstances of the case and with reference to the complexity of the case, the conduct of the applicant and the relevant authorities and what was at stake for the applicant in the dispute.²⁵⁸

a) Complexity of the case

The Court reiterates that in requiring cases to be heard within a "reasonable time", the Convention underlines the importance of administering justice without delays which might jeopardise its effectiveness and credibility. However, in some circumstances the complexity of the domestic proceedings may explain their length.²⁵⁹

The complexity of a case may relate both to the facts and to the law. For example, in the case *Papachelas v. Greece*²⁶⁰ [GC] - concerning an expropriation of more than 150 properties some of which belonged to the applicants and included an area of 8,402 sq. m part of a larger piece of land – the Court found that the case was relatively complex, owing in particular to the number of properties expropriated by the same ministerial decision and concluded that, in the light of the facts of the case the length of the proceedings was not unreasonable. In the case *Katte Klitsche de la Grange v. Italy*²⁶¹ - concerning domestic procedures linked to town planning and the protection of the environment which would have important repercussions on the Italian case law on the distinction between a right and a legitimate interest - the Court considered that at least three periods of the procedure appeared abnormal, nevertheless, regard being

²⁵⁷ *Comingersoll S.A. v. Portugal* [GC]; *Frydlender v. France* [GC], § 43; *Sürmeli v. Germany* [GC], § 128.

²⁵⁸ *Application n. 18381/05 Judgment (Merits and Just Satisfaction)*, 07 December 2010 Par 44; see also *Gjonbocari and Others v. Albania*, no. [10508/02](#), § 61, 23 October 2007.

²⁵⁹ *Tierce v. San Marino*, *Application 69700/01*, 17 June 2003, § 31

²⁶⁰ *Papachelas v. Greece* [GC], *Application 31423/96*, 25 March 1999, § 39

²⁶¹ *Katte Klitsche de la Grange*, *Application 12539/86*, 27 October 1994

had to all the circumstances of the case and the complexity of the facts and the legal issues involved, these periods did not warrant the conclusion that the length of the proceedings was excessive.

The complexity of the case may also be linked to the **involvement of several parties in the case** or to the **various items of evidence that have to be obtained**, for example in the case *H. v. the United Kingdom*²⁶² the Court considered that, the proceedings were complex because there were several parties thereto - the applicant, her husband, the prospective adopters, the Official Solicitor in his capacity as guardian *ad litem* and the Council – and that a considerable amount of evidence had to be collected and filed and its assessment was a most difficult task.

b) The applicant's conduct

Applicants' behaviour constitutes an objective fact which must be taken into account for the purpose of determining whether or not the reasonable time referred to in Article 6 § 1 has been exceeded.²⁶³

Article 6 § 1 does not require applicants to actively cooperate with the judicial authorities, nor can they be blamed for making full use of the remedies available to them under domestic law.²⁶⁴ The person concerned is required only to show diligence in carrying out the procedural steps relating to him, to refrain from using delaying tactics and to avail himself of the scope afforded by domestic law for shortening the proceedings.²⁶⁵

Although the domestic authorities cannot be held responsible for the conduct of applicants, an applicant's conduct cannot by itself be used to justify authorities' periods of inactivity. In *Mincheva v. Bulgaria*,²⁶⁶ the Court has underlined that delaying tactics used by one of the parties do not absolve the authorities from their duty to ensure that the proceedings are conducted within a reasonable time.

c) Conduct of the competent authorities

The State is responsible for delays in proceedings which are attributable to its conduct²⁶⁷ however, the efforts made by the State to reduce any delay in proceedings are taken into account for the purposes of determining whether the requirement of article 6 of the Convention has been complied with.²⁶⁸ It is for the Contracting States to organise their legal systems in such a way that their courts can guarantee the right of everyone to obtain a final decision on disputes relating to civil rights and obligations within a reasonable time.²⁶⁹

²⁶² *H. v. the United Kingdom*, Application 9580/81, 08 July 1987, § 72

²⁶³ *Poiss v. Austria*, § 57; *Wiesinger v. Austria*, § 57; *Humen v. Poland [GC]*, § 66

²⁶⁴ *Erkner and Hofauer v. Austria*, § 68

²⁶⁵ *Unión Alimentaria Sanders S.A. v. Spain*, § 35

²⁶⁶ *Mincheva v. Bulgaria*, § 68.

²⁶⁷ *Buchholz v. Germany*, § 49; *Papageorgiou v. Greece*, § 40; *Humen v. Poland [GC]*, § 66).

²⁶⁸ *Papageorgiou v. Greece*, § 47.

²⁶⁹ *Scordino v. Italy (no. 1) [GC]*, § 183

Even in legal systems applying the principle that the procedural initiative lies with the parties, the latter's attitude does not absolve the courts from the obligation to ensure the expeditious trial required by Article 6§1.²⁷⁰The same applies where the cooperation of an expert is necessary during the proceedings: responsibility for the preparation of the case and the speedy conduct of the trial lies with the judge.²⁷¹

Where repeated changes of judge slow down the proceedings because each of the judges has to begin by acquainting himself with the case, this cannot absolve the State from its obligations regarding the reasonable-time requirement, since it is the State's task to ensure that the administration of justice is properly organised (*Lechner and Hess v. Austria*, § 58).

A chronic overload in court cases cannot justify excessive length of proceedings.²⁷²Nonetheless, a temporary backlog of cases does not involve liability on the part of the State provided the latter has taken reasonably prompt remedial action to deal with an exceptional situation of this kind.²⁷³

The State may also be held to be responsible for the failure to comply with the reasonable-time requirement in cases where there is an excessive amount of judicial activity. For example, in *Bock v. Germany*, a lot of judicial activities were focusing on the applicant's mental state as the domestic courts continued to have doubts in that regard despite the existence of five reports attesting the applicant's soundness of mind and the dismissal of two guardianship applications; moreover, the litigation lasted for over nine years.²⁷⁴

Examples. In *Gjonbocari v Albania*, the Court considered the following. 'As to the authorities' conduct, the Court observes that three instances were involved. The domestic courts cannot be said to have been inactive. However, it has nevertheless taken over seven years to determine the applicants' title to the relevant property and that issue has still not been settled. Such situation led the Court to find above a violation of Article 6 § 1 as regards the failure to enforce the judgment of 6 March 2003 [...]. Moreover, having regard to the multiplications of the proceedings the Court will assess the authorities' management of the sets of related proceedings. The three sets of proceedings related to the same issue, the validity of the applicants' title over the relevant property. The authorities allocated the relevant property in the first place to the applicants, then to A.L through a lease contract and finally to A.L.'s mother. Furthermore, it would appear that the initiation of separate proceedings was designed to circumvent previous courts' findings. The domestic courts were aware of the parallel proceedings in that they frequently cross-referred to them [...]. Most importantly it would have been legally possible to join all the proceedings. The Court considers that better management of the parallel inter-related proceedings would certainly have contributed positively to the speedy clarification of the applicants' title. For the Court, the existence of prior proceedings

²⁷⁰ *Pafitis and Others v. Greece*, § 93; *Tierce v. San Marino*, § 31; *Sürmeli v. Germany [GC]*, § 129.

²⁷¹ *Capuano v. Italy*, §§ 30-31; *Versini v. France*, § 29; *Sürmeli v. Germany [GC]*, § 12.

²⁷² *Probstmeier v. Germany*, § 64; *Vocaturò v. Italy*, § 17; *Cappello v. Italy*, § 17.

²⁷³ *Buchholz v. Germany*, § 51.

²⁷⁴ *Bock v. Germany*, § 47

raising the same legal issue must be taken into account in assessing the reasonableness of the length of the third set of proceedings. In this respect the Court recalls that under Article 6 of the Convention, everyone has the right to a final decision, within a reasonable time, on disputes (contestations) over civil rights and obligations. The Contracting States accordingly have the obligation to organise their legal systems so as to allow the courts to comply with this requirement (see *Unión Alimentaria Sanders S.A. v. Spain*, judgment of 7 July 1989, Series A no. 157, pp.14-15, § 38). The Court considers that it was the domestic courts' task to identify related proceedings and, where necessary, join them, suspend them or reject the further institution of new proceedings on the same matter. Having regard, in particular, to the overall length of the proceedings, the Agency's decision to stay the proceedings [...] and the failure of the judicial system to manage properly the multiplication of proceedings on the same issue, the Court finds that the length of the third set of proceedings cannot be considered to comply with the requirements of Article 6. For all the above reasons there has accordingly been a violation of Article 6 § 1 of the Convention in this respect.²⁷⁵

*In line with the above mentioned Gjonbocari case, in Marini v Albania, the Court considered that "As to the second set of proceedings, the Court observes that the case was repeatedly referred back for fresh examination. It notes that in similar cases where the protracted length of proceedings was to a large extent caused by the rehearing of the cases, it has held that, since remittal had been ordered because of errors committed by the lower courts, the repetition of such orders within the same set of proceedings revealed a serious deficiency in the judicial system (see, Wierciszewska v. Poland). Thus, the Court considers that by giving a number of contradictory decisions at several levels of jurisdiction, the Albanian authorities demonstrated a shortcoming in the judicial system for which they are responsible."*²⁷⁶

*In Topallaj v. Albania and in Luli & others v. Albania the Court considered that domestic courts contributed to the excessive length of proceedings by repeatedly referring the case back to lower courts for fresh examination. In this respect – considered the Court - the right to have one's claim examined within a reasonable time would be devoid of all sense if domestic courts examined a case numerous times, by shifting it from one court to another, even if at the end the length of proceedings at each instance did not appear particularly excessive. The Court reiterates that it is incumbent on respondent States to organize their legal systems in such a way that their courts can meet the requirements of Article 6 of the Convention, including the obligation to hear cases within a reasonable time.*²⁷⁷

²⁷⁵ Application n. 10508/02, Judgment (Merits and Just Satisfaction) 23 October 2007, Par 65-68

²⁷⁶ Application n. 3738/02, Judgment (Merits and Just Satisfaction), 18 December 2007 Marini, par 138-140

²⁷⁷ See reference mentioned above

d) What is at stake in the dispute

According to the case law of the Court some categories of cases by their nature call for particular expedition of domestic procedures.

In *Mikulić v. Croatia*, the Court reiterated that particular diligence is required in **cases concerning civil status and capacity**. In view of what was at stake for the applicant in case Mikulić, that is her right to have her paternity established or refuted and thus to have her uncertainty as to the identity of her natural father eliminated, the Court considers that the competent national authorities were required by Article 6 § 1 to act with particular diligence in ensuring the progress of the proceedings.²⁷⁸

In *Niederböster v. Germany*, the Court reiterated that the reasonableness of the length of proceedings is to be determined with reference to the criteria laid down in the Court's case law, in particular the complexity of the case, and the conduct of the parties and of the authorities. On the latter point, what is at stake for the applicant in the litigation has to be taken into account. It is thus essential that **custody cases** be dealt with speedily.²⁷⁹

In *Laino v. Italy*, the Court considers that, having regard to what was at stake for the applicant (**parental responsibility and contact rights**), the domestic courts failed to act with the special diligence required by Article 6 § 1 of the Convention in such cases. Hence the Court concluded that the various periods of inactivity attributable to the State failed to satisfy the "reasonable time" requirement.²⁸⁰

The Court has concluded that also cases concerning **employment disputes**²⁸¹ and case of **applicants with "incurable disease" and "reduced life expectancy"**²⁸² need to be dealt with particular expedition by domestic jurisdictions.

Example. In *Mishgjoni v. Albania* the Court considers that the proceedings concerning salary arrears started on 10 April 2003 and ended on 3 July 2007, thus lasting a little more than four years over four instances. In view of the number of instances involved, the Court does not find the length of the proceedings concerning the salary arrears to be unreasonable, even having regard to what was at stake for the applicant (see, for example, *Gjonbocari and Others*, cited above, § 62). The same time, the Court reiterates that an employee who considers that he or she has been wrongly suspended or dismissed by his or her employer has an important personal interest in securing a judicial decision on the lawfulness of that measure promptly, since employment disputes by their nature call for expeditious decision, in view of what is at stake for the person concerned, who through dismissal loses his or her means of subsistence (see

²⁷⁸ *Mikulić v. Croatia*, Application 53176/99, judgment 7 February 2012; see also *Bock v. Germany*, Application 11118/84, judgment of 29 March 1989, § 49, *Laino v. Italy* [GC], Application 33158/96, judgment 18 February 1999, § 18

²⁷⁹ *Niederböster v. Germany*, § 39, see also *Glaser* § 93; *Nuutinen v. Finland*, no. 32842/96, § 110, ECHR 2000-VIII; and *Mark v. Germany* (dec.), no. 45989/99, 31 May 2002, *Hokkanen v. Finland*, § 72; *Tsikakis v. Germany*, §§ 64 and 68)

²⁸⁰ See the *Maciariello and Paulsen-Medalen and Svensson* judgments cited above, pp. 10 and 142, §§ 18 and 39, *Paulsen-Medalen and Svensson v. Sweden*, § 39; *Laino v. Italy* [GC], § 22;

²⁸¹ *Vocaturu v. Italy*, § 17; *Thlimmenos v. Greece* [GC], §§ 60 and 62

²⁸² *X v. France*, § 47; *A. and Others v. Denmark*, §§ 78-81

Frydlender v. France). Moreover, the Court recalls that it is for the Contracting States to organise their legal systems in such a way that the competent authorities can meet the requirements of Article 6 of the Convention, including the obligation to hear cases within a reasonable time (see Makarova v. Russia). The Court considers that an overall delay of almost four years taken by the HCJ to re-examine the applicant's case did not satisfy the "reasonable-time" requirement under the Convention."

➤ Case Study 2

Facts.

A. First set of proceedings. The applicant was born in 1950 and lives in Belgrade, Serbia. The relevant facts of the case, as submitted by the parties, may be summarized as follows. A. The first set of proceedings. On 18 September 1995, the applicant and her family members instituted proceedings before the Court of First Instance (Osnovni sud) in Herceg Novi, seeking division of their joint property. On 5 May 1997 the Court of First Instance in Herceg Novi discontinued these proceedings and instructed the parties to initiate a separate civil case given a number of contentious issues.

B. The second set of proceedings. On 8 September 1997 the applicant's cousins brought a claim against the applicant and her parents before the Court of First Instance in Herceg Novi. On 30 December 1997, the cousins lodged an additional claim concerning the same matter. Both claims were subsequently joined and examined in the same civil proceedings. On 1 October 2002 the Court of First Instance in Herceg Novi ruled against the applicant and her parents. On 25 June 2004 the High Court (Viši sud) in Podgorica upheld this judgment on appeal. The judgment, thereby, became final. It was served on the applicant on 15 July 2004. On 17 August 2004 the applicant lodged an appeal on points of law (revizija) with the Supreme Court of Montenegro. This appeal was misplaced until 20 January 2006, when the applicant's lawyers intervened and urged the authorities to find it. On 12 January 2007 the applicant amended her appeal on points of law. On 14 February 2008 the Supreme Court of Montenegro rejected the applicant's appeal on points of law as unfounded. This decision was served on the applicant on 6 March 2008.

Questions.

1. *Could you please identify the start and the end period to be taken into account for the evaluation of the reasonableness of the light of proceedings?*
2. *Do you think that the procedure was expeditious in this case?*
3. *What criteria you can considers in order to evaluate the compatibility with the right to a fair trial within a reasonable time?*

The Court Assessment. The fact are taken from the case *Svorcan v. Montenegro*, no. [1253/08](#), judgment of 13 June 2017.

The Court has concluded as follows.

24. *The proceedings in question took place between 18 September 1995 and 6 March 2008. That is for a period of more than twelve years and five months in three levels of jurisdiction.*

25. *However, the Court can only examine the period between 3 March 2004, when the Convention had entered into force in respect of Montenegro, and 6 March 2008, when the decision of the Supreme Court was served on the applicant, that being more than four years for two levels of jurisdiction.*

26. *The Court reiterates that the reasonableness of the length of proceedings must be assessed in the light of the circumstances of the case and with reference to the following criteria: the complexity of the case, the conduct of the applicant and the relevant authorities and what was at stake for the applicant in the dispute (see, among many other authorities, *Frydlander v. France* [GC], no. [30979/96](#), § 43, ECHR 2000-VII).*

27. *The Court has already found a breach of Article 6 § 1 of the Convention on account of the length of proceedings before only one instance or level of jurisdiction (see, among others, *Bunkate v. the Netherlands*, 26 May 1993, § 23, Series A no. 248-B, and *Kudła v. Poland* [GC], no. [30210/96](#), § 130, ECHR 2000-XI).*

28. *Having examined all the material submitted to it, the Court considers that the Government have not put forward any fact or argument capable of persuading it to reach a different conclusion in the present case. The unreasonable delay before the Supreme Court, in particular, which amounted to almost three years and seven months, as well as the lack of any explanation justifying such a delay, demonstrate that the domestic authorities failed to act with the required diligence under Article 6 § 1 of the Convention. Accordingly, there has been a violation of Article 6 § 1 of the Convention.'*

C. Delay in the implementation of a final and binding judicial decision

Article 6 § 1 protects the implementation of final, binding judicial decisions (as distinct from the implementation of decisions which may be subject to review by a higher court) (*Ouzounis and Others v. Greece*, § 21). 93. The right to execution of such decisions, given by any court, is an integral part of the "right to a court" (*Hornsby v. Greece*, § 40; *Scordino v. Italy* (no. 1) [GC], § 196). Otherwise, the provisions of Article 6 § 1 would be deprived of all useful effect (*Burdov v. Russia*, §§ 34 and 37).

This is of even greater importance in the context of administrative proceedings. By lodging an application for judicial review with the State's highest administrative court, the litigant seeks not only annulment of the impugned decision but also and above all the removal of its effects.

The effective protection of the litigant and the restoration of legality therefore presuppose an obligation on the administrative authorities' part to comply with the judgment (*Hornsby v. Greece*, § 41; *Kyrtatos v. Greece*, §§ 31-32).

Thus, while some delay in the execution of a judgment may be justified in particular circumstances, the delay may not be such as to impair the litigant's right to enforcement of the judgment (*Burdov v. Russia*, §§ 35-37).

Understood in this way, execution must be full and exhaustive and not just partial (*Matheus v. France*, § 58; *Sabin Popescu v. Romania*, §§ 68-76), and may not be prevented, invalidated or unduly delayed (*Immobiliare Saffi v. Italy* [GC], § 74).

The refusal of an authority to take account of a ruling given by a higher court – leading potentially to a series of judgments in the context of the same set of proceedings, repeatedly setting aside the decisions given – is also contrary to Article 6 § 1 (*Turczanik v. Poland*, §§ 49-51).

An unreasonably long delay in enforcement of a binding judgment may breach the Convention. The reasonableness of such delay is to be determined having regard in particular to the complexity of the enforcement proceedings, the applicant's own behaviour and that of the competent authorities, and the amount and nature of the court award (*Raylyan v. Russia*, § 31).

For example, the Court held that by refraining for more than five years from taking the necessary measures to comply with a final, enforceable judicial decision the national authorities had deprived the provisions of Article 6 § 1 of all useful effect (*Hornsby v. Greece*, § 45).

In another case, the overall period of nine months taken by the authorities to enforce a judgment was found not to be unreasonable in view of the circumstances (*Moroko v. Russia*, §§ 43-45).

The Court has found the right to a court under Article 6 § 1 to have been breached on account of the authorities' refusal, over a period of approximately four years, to use police assistance to enforce an order for possession against a tenant (*Lunari v. Italy*, §§ 38-42), and on account of a stay of execution – for over six years – resulting from the intervention of the legislature calling into question a court order for a tenant's eviction, which was accordingly deprived of all useful effect by the impugned legislative provisions (*Immobiliare Saffi v. Italy* [GC], §§ 70 and 74).

A person who has obtained judgment against the State at the end of legal proceedings may not be expected to bring separate enforcement proceedings (*Burdov v. Russia* (no. 2), § 68). The burden to ensure compliance with a judgment against the State lies with the State authorities (*Yavorivskaya v. Russia*, § 25), starting from the date on which the judgment becomes binding and enforceable (*Burdov v. Russia* (no. 2), § 69).

A successful litigant may be required to undertake certain procedural steps in order to allow or speed up the execution of a judgment. The requirement of the creditor's cooperation must not, however, go beyond what is strictly necessary and does not relieve the authorities of their obligations (*ibid.*).

It follows that the late payment, following enforcement proceedings, of amounts owing to the applicant cannot cure the national authorities' long-standing failure to comply with a judgment and does not afford adequate redress (*Scordino v. Italy* (no. 1) [GC], § 198).

A litigant may not be deprived of the benefit, within a reasonable time, of a final decision awarding him compensation for damage (*Burdov v. Russia*, § 35), or housing (*Teteriny v. Russia*, §§ 41-42), regardless of the complexity of the domestic enforcement procedure or of the State budgetary system. It is not open to a State authority to cite lack of funds or other resources as an excuse for not honouring a judgment debt (*Burdov v. Russia*, § 35; *Amat-G Ltd and Mebaghishvili v. Georgia*, § 47; *Scordino v. Italy* (no. 1) [GC], § 199). Nor may it cite a lack of alternative accommodation as an excuse for not honouring a judgment (*Prodan v. Moldova*, § 53).

A distinction has to be made between debts owed by the State (*Burdov v. Russia* (no. 2), §§ 68- 69, 72 et seq.) and those owed by an individual: the responsibility of the State cannot be engaged on account of non-payment of an enforceable debt as a result of the insolvency of a "private" debtor (*Sanglier v. France*, § 39; *Ciprová v. the Czech Republic* (dec.); *Cubanit v. Romania* (dec.)). Nevertheless, the State has a positive obligation to organise a system for enforcement of final decisions in disputes between private persons that is effective both in law and in practice (*Fuklev v. Ukraine*, § 84). The State's responsibility may therefore be engaged if the public authorities involved in enforcement proceedings fail to display the necessary diligence, or even prevent enforcement (*ibid.*, § 67). The measures taken by the national authorities to secure enforcement must be adequate and sufficient for that purpose (*Ruianu v. Romania*, § 66), in view of their obligations in the matter of execution, since it is they who exercise public authority (*ibid.*, §§ 72-73).

➤ **Case study 3**

Facts. The applicant was born in 1936 and lives in Sofia.

A. Applicant awarded compensation. In 1997 the Compensation for Owners of Nationalised Real Property Act ("the 1997 Compensation Law") entered into force. It regulated the granting of compensation for property taken under several laws of a punitive or redistributive nature and which could not be returned physically. On 27 November 1997 the applicant requested from the regional governor of Sofia region compensation for an apartment which had belonged to his ancestor at the time of its nationalisation in 1949. As he received no reply, at some point in 1998 the applicant challenged the governor's silence in court. The Sofia City Court quashed the governor's tacit refusal on 18 June 1999, finding that the applicant had to be compensated with "housing compensation bonds" (жилищни компенсаторни записи) as restitution was not possible. The applicant appealed, challenging the type of compensation awarded to him. On 9 April 2001 the Supreme Administrative Court upheld the lower court's judgment and returned the case to it for the compensation amount to be determined. Instead of ruling on the compensation, the Sofia City Court archived the case; it was only put back on the case roll on 5 July 2002 when the applicant complained. The Sofia City Court, sitting in its administrative bench, delivered a decision on 19 July 2005. It determined that the amount of total compensation due in respect of the property in question was BGN 23,604, and that the regional governor was liable for costs.

The court also ruled that the applicant was to receive compensation in the form of “housing compensation bonds”, in accordance with his share as an heir. The court went on to state that, as evidenced by the heirs certificate issued in 1994 and presented during the proceedings, the applicant and his brother were the two heirs of the owner of the confiscated property. Consequently, the applicant’s share of the inheritance stemmed directly from the law, which provided that the children of the deceased inherited in equal parts. The decision became enforceable on 6 September 2005.

B. The applicant’s requests for enforcement from the regional governor. On 26 June 2006 the applicant transmitted to the regional governor a copy of the final court decision of 19 July 2005, asking that it be enforced. He sent another request to that effect on 8 August 2006. The deputy regional governor replied in writing on 14 February 2007 that the applicant needed to submit a certified copy of the court decision, as well as a certificate attesting to his status as heir and a declaration certified by a notary. On 19 February 2007 the applicant submitted a certified copy of the court decision of 19 July 2005. He signalled that enforcement continued to be outstanding and emphasised that he had already submitted a certificate attesting to his status as heir to the regional governor, together with his initial request for compensation of 27 November 1997 (see paragraph 7 above). He also pointed out that it was clear from the judicial decision that the heirs in question were two – himself and a sibling of his; pursuant to section 5(1) of the Inheritance Act 1949 he was eligible to receive half of the inheritance and, therefore, half of the compensation awarded by the court. He sought clarification in respect of the declaration requested by the governor. The deputy governor replied on 5 March 2007 that the declaration was necessary pursuant to section 5 of Ordinance No. 9 of 1998; the latter governed the conditions and order for the payment of experts included in the list under § 4 of the 1997 Compensation Law.

C. Forced enforcement proceedings. In the meantime, on 19 January 2007, the applicant requested to be issued with a writ of execution on the basis of the 19 July 2005 judgment and, more specifically, in respect of its part concerning the amount of compensation and his consequent share of it. On 16 March 2007 he was issued with a writ of execution in respect of the compensation owed to him. On 30 March 2007 he asked the bailiff to start forced enforcement proceedings and to collect the related costs and expenses. On 3 April 2007 the bailiff sent an invitation for voluntary compliance to the governor, signalling that a failure to act upon the 19 July 2005 decision attracted a pecuniary sanction. The deputy regional governor replied on 20 April 2007 that the compensation proceedings had not been completed because of the applicant’s failure to submit the requested declaration certified by a notary (see paragraphs 11 and 13 above). He also indicated that an original writ of execution was needed in order for his office to pay costs and expenses. On 25 April 2007 the applicant wrote to the regional governor that the ordinance in question did not apply to his case, as it only concerned situations in which the administrative body itself was called upon to determine the compensation amount. In the applicant’s case that amount had been determined in court, which had also ruled that the applicant and his sibling were the only heirs, and the property had to be evenly split between the two of them. The bailiff sent another letter to the regional governor on 27 April 2007, inviting him to enforce the court decision. He reiterated that the writ of execution had been issued following a final judicial decision which was binding in respect of the parties and in which the court had established all relevant facts as well as the compensation due to the applicant. The bailiff specified that the costs and expenses which the governor was requested to pay related to the enforcement proceedings, that a writ of execution was not necessary in order to claim or collect those expenses, and that they had increased with the passage of time. Finally, the bailiff reiterated

that a weekly fine in the amount of BGN 200 would be imposed on the governor in the event of failure to enforce the court decision. On 10 May 2007 the regional governor challenged in court the bailiff's acts. He claimed that the lack of enforcement was caused entirely by the applicant's refusal to submit the notary declaration. On 2 July 2007 the Sofia City Administrative Court held that the governor's application for judicial review was inadmissible. The court found in particular that the bailiff's invitations to the governor for voluntary compliance were not acts of forced enforcement and were not therefore subject to judicial review. This decision was confirmed by the Supreme Administrative Court on 21 December 2007 in a final decision.

D. Continuation of forced enforcement proceedings. As no further action by the regional governor followed, in March 2009 the applicant once again asked the bailiff to enforce the court decision of 19 July 2005. The bailiff wrote to the governor on 31 March 2009, requesting enforcement and with a reminder that failure to enforce could result in weekly fines of BGN 1,200 and in prosecution. The deputy regional governor replied on 27 April 2009 that the compensation proceedings had not been completed because of the applicant's failure to submit the requested declaration about his share of the inheritance in accordance with the Inheritance Act 1949. Two days later the regional governor himself fined the applicant BGN 1,000, to be applied weekly. On 11 May 2009 the applicant challenged the fine in court. The Sofia City Administrative Court quashed the fine on 8 January 2010, finding that in this case the regional governor was not competent to impose fines as he was not an enforcement body but a debtor, and Mr Yanakiev was not a debtor but a creditor. By a letter of 19 August 2013 the applicant's lawyer informed the Court that the final court decision of 19 July 2005 remained unenforced

Questions.

1. *Do you think that in case a final, binding judicial decision to remain inoperative the right to a court under Article 6 § 1 would be respected?*
2. *In the present case, the applicant did not had access to the compensation recognize by the domestic Court. Do you think that this is in line with the Convention?*
3. *There is in this case a violation of the right to a fair trial within a reasonable time?*

70. The right of access to a court includes a right to have a court decision enforced without undue delay (see *Immobiliare Saffi v. Italy* [GC], no. [22774/93](#), § 66, ECHR 1999-V). While delays in enforcement might be justified in exceptional circumstances, only periods strictly necessary to enable the authorities to find a satisfactory solution are covered (see *Immobiliare Saffi* [GC], cited above, § 69; and *Sokur v. Ukraine*, no. [29439/02](#), § 30, 26 April 2005).

71. Turning to the case at hand, the Court observes that the Sofia City Court's judgment of 19 July 2005 determined the amount of compensation which the applicant had to receive in the form of "housing compensation bonds". According to the relevant procedure the regional governor had to act in order to ensure that compensation bonds were issued to the applicant in implementation of the judgment. However, the regional governor failed to do so over the period of several years, namely between June 2006 when the applicant sent him the judgment asking that it be enforced and at least April 2014 at the time of submission of the applicant's observations before the Court. This delay is sufficient to e

The Court's Assessment. The Fact are extracted from the case *DIMITAR YANAKIEV v. BULGARIA* (No. 2), no. [50346/07](#), judgment 31 March 2016. The Court has concluded as

follows.

69. *The Court reiterates that the right to a court under Article 6 § 1 of the Convention would be illusory if a Contracting State's domestic legal system allowed a final, binding judicial decision to remain inoperative to the detriment of one party. Execution of a judgment given by a court must therefore be regarded as an integral part of the "trial" for the purposes of Article 6 of the Convention (see Hornsby v. Greece, 19 March 1997, § 40, Reports of Judgments and Decisions 1997-II; and Burdov (no. 2), cited above, § 65).*

70. *The right of access to a court includes a right to have a court decision enforced without undue delay (see Immobiliare Saffi v. Italy [GC], no. 22774/93, § 66, ECHR 1999-V). While delays in enforcement might be justified in exceptional circumstances, only periods strictly necessary to enable the authorities to find a satisfactory solution are covered (see Immobiliare Saffi [GC], cited above, § 69; and Sokur v. Ukraine, no. 29439/02, § 30, 26 April 2005).*

71. *Turning to the case at hand, the Court observes that the Sofia City Court's judgment of 19 July 2005 determined the amount of compensation which the applicant had to receive in the form of "housing compensation bonds". According to the relevant procedure the regional governor had to act in order to ensure that compensation bonds were issued to the applicant in implementation of the judgment. However, the regional governor failed to do so over the period of several years, namely between June 2006 when the applicant sent him the judgment asking that it be enforced and at least April 2014 at the time of submission of the applicant's observations before the Court. This delay is sufficient to enable the Court to conclude that in the present case there has been a violation of the applicant's right to have a final judgment in his favour enforced, as guaranteed by Article 6 § 1 of the Convention (see, for comparison in respect of the period of non-enforcement, Kravchenko and Others (military housing) v. Russia, nos. 11609/05, 12516/05, 17393/05, 20214/05, 25724/05, 32953/05, 1953/06, 10908/06, 16101/06, 26696/06, 40417/06, 44437/06, 44977/06, 46544/06, 50835/06, 22635/07, 36662/07, 36951/07, 38501/07, 54307/07, 22723/08, 36406/08 and 55990/08, §§ 33-35, 16 September 2010; Kalinkin and Others, cited above, §§ 44 and 48).*

72. *There has accordingly been a violation of Article 6 § 1 of the Convention.*

Recommended readings

- ECtHR Guide on Article 6 (Civil Limb)
- ECtHR Guide on Article 6 (Criminal Limb)
- European Union Agency for Fundamental Rights, Handbook on European law relating to access to justice, Chapter 3 - A fair and public hearing before an independent and impartial tribunal and other bodies (June 2016)
- <http://fra.europa.eu/en/publication/2016/handbook-european-law-relating-access-justice>
- Article 6: Self-learning course, Human Rights Education for Legal Professionals, Council of Europe (2014)
- <http://help.elearning.ext.coe.int/course/info.php?id=532>
- Nuala Mole and Catharina Harby, Right to a fair trial: A Guide to implementation of Article 6 of the European Convention on Human Rights, Human Rights Handbooks. No. 3, Council of Europe (2006, 2nd edn.)

- *Council of Europe, (CEPEJ) (2013), States appeal and supreme courts' lengths of proceedings;*
- *Article 6: Self-learning course, Council of Europe, Human Rights Education for Legal Professionals, 2014,*
<http://help.elearning.ext.coe.int/course/info.php?id=532>
- *European Union Agency for Fundamental Rights, Handbook on European law relating to access to justice, Limitations on access to justice: length of proceedings (Chapter 7) (June 2016),*
<http://fra.europa.eu/en/publication/2016/handbook-european-law-relating-access-justice>

II–Remedies for protection of right to trial within a reasonable time

A. Convention Remedies

1. Article 13 of the Convention

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

Article 13 requires a national authority to provide an individual who has an arguable claim that one of his rights under the Convention has been violated with a remedy or remedies in national law that provide effective protection of those rights. Article 13, together with the requirement for exhaustion of domestic remedies under Article 35(1), provide the basis for the doctrine of subsidiarity (see below) which places primary responsibility on the Contracting States to secure effective protection of Convention rights.

The following key principles of Article 13 can be derived from the case law of the European Court. 1. An independent convention obligation. 2. The doctrine of subsidiarity. 3. Requirement for an 'arguable complaint'. 4. Access to an effective remedy. 5. Institutional requirements of an effective remedy.

1.1. Key Article 13 Principles

1.1.1. An independent Convention obligation.

Article 13 of the Convention is a substantive right capable of violation independently of the applicant establishing the violation of another convention right.

Case law: *Klass v Germany*²⁸³ (plenary Court): 'Article 13 (art. 13) states that any individual whose Convention rights and freedoms "are violated" is to have an effective remedy before a national authority even where "the violation has been committed" by persons in an official capacity. This provision, read literally, seems to say that a person is entitled to a national remedy only if a "violation" has occurred. However, a person cannot establish a "violation" before a national authority unless he is first able to lodge with such an authority a complaint to that effect. Consequently, as the minority in the Commission stated, it cannot be a prerequisite for the application of Article 13 (art. 13) that the Convention be in fact violated. In the Court's view, Article 13 (art. 13) requires that where an individual considers himself to have been prejudiced by a measure allegedly in breach of the Convention, he should have a remedy before a national authority in order both to have his claim decided and, if appropriate, to obtain redress. Thus Article 13 (art. 13) must be interpreted as guaranteeing an "effective remedy before a national authority" to everyone who claims that his rights and freedoms under the Convention have been violated. Accordingly, although the Court has found no breach of the right guaranteed to the applicants by Article 8 (art. 8), it falls to be ascertained whether German law afforded the applicants "an effective remedy before a national authority" within the meaning of Article 13 (art. 13).' §§64-65.

²⁸³ Application no. 5029/71, Judgment of 6 September 1978.

1.1.2. The doctrine of subsidiarity

Art. 35(1) of Convention provides: 'The Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law, and within a period of six months from the date on which the final decision was taken.'

The principle of subsidiarity affirms that it is the primary responsibility of the national authorities to secure the rights and freedoms protected by the Convention. The principle of subsidiarity is embodied in Article 35(1) of the Convention and endorsed in the 2010 Interlaken Declaration²⁸⁴ and the 2012 Brighton Declaration on the Future of the European Court of Human Rights.²⁸⁵ Protocol No. 15 of the Convention (not yet in force) adds a new preamble to the Convention making specific reference to the principle of subsidiarity in affirming that the Contracting States have 'the primary responsibility to secure the rights and freedoms' defined in the Convention and its Protocols.²⁸⁶

Case law: *Surmeli v Germany* [GC]²⁸⁷: 'Under Article 1 of the Convention, which provides that "[t]he High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of [the] Convention", the primary responsibility for implementing and enforcing the rights and freedoms guaranteed by the Convention is laid on the national authorities. The machinery of complaint to the Court is thus subsidiary to national systems safeguarding human rights. This subsidiary character is articulated in Article 13 and Article 35 § 1 of the Convention[...]' §97.

***McFarlane v. Ireland* [GC]²⁸⁸:** 'The Court reiterates that under Article 35 § 1 it may only deal with a matter after all domestic remedies have been exhausted. Applicants must have provided the domestic courts with the opportunity, in principle intended to be afforded to Contracting States, of preventing or putting right the violations alleged against them. That rule is based on the assumption, reflected in Article 13 of the Convention – with which it has close affinity – that there is an effective remedy available in the domestic system in respect of the alleged breach. The only remedies which Article 35 § 1 requires being exhausted are those that relate to the breach alleged and are available and sufficient. The existence of such remedies must be sufficiently certain not only in theory but also in practice, failing which they will lack the requisite accessibility and effectiveness: it falls to the respondent State to establish that these conditions are satisfied [...]' §107.

Siništaj and others v. Montenegro 'The Court points out that the purpose of Article 35 is to afford the Contracting States the opportunity of preventing or putting right the violations alleged against them before those allegations are submitted to the Convention institutions. Consequently, States are exempted from answering for their

²⁸⁴http://www.echr.coe.int/documents/2010_interlaken_finaldeclaration_eng.pdf

²⁸⁵http://www.echr.coe.int/Documents/2012_Brighton_FinalDeclaration_ENG.pdf

²⁸⁶http://www.echr.coe.int/Documents/Protocol_15_ENG.pdf

²⁸⁷ Application no. 75529/01, Judgment of 8 June 2006.

²⁸⁸ Application no. 31333/06, Judgment of 10 September 2010.

acts before an international body until they have had an opportunity to put matters right through their own legal system and those who wish to invoke the supervisory jurisdiction of the Court as concerns complaints against a State are thus obliged to use first the remedies provided by the national legal system [...] The rule of exhaustion of domestic remedies referred to in Article 35 of the Convention requires that normal recourse should be had by an applicant only to remedies that relate to the breaches alleged and at the same time are available and sufficient. The existence of such remedies must be sufficiently certain not only in theory but also in practice, failing which they will lack the requisite accessibility and effectiveness [...]; it falls to the respondent State to establish that these various conditions are satisfied [...]. To be effective, a remedy must be capable of remedying directly the impugned state of affairs and must offer reasonable prospects of success [...]. However, the existence of mere doubts as to the prospects of success of a particular remedy which is not obviously futile is not a valid reason for failing to exhaust that avenue of redress [...]

1.1.3. Requirement for an 'arguable complaint'

In order to meet the threshold for the applicability of Article 13, an applicant must establish that there is an 'arguable' claim that he/she is a victim of a violation of one or more of the Convention rights. In determining whether a claim of a violation of the Convention is 'arguable, the European Court has refrained from giving an abstract definition. However, if a claim is declared inadmissible as 'manifestly ill-founded' under Article 35(3)(a) of the Convention it is also likely to be qualified as not arguable for the purposes of Article 13.

Case law. *Boyle and Rice v UK (plenary Court)*²⁸⁹: 'However, Article 13 (art. 13) cannot reasonably be interpreted so as to require a remedy in domestic law in respect of any supposed grievance under the Convention that an individual may have, no matter how unmeritorious his complaint may be: the grievance must be an arguable one in terms of the Convention [...]. The Court is thus competent to take cognisance of all questions of fact and of law arising in the context of the complaints before it under Article 13 (art. 13) (ibid.), including the arguability or not of the claims of violation of the substantive provisions. In this connection, the Commission's decision on the admissibility of the underlying claims and the reasoning therein, whilst not being decisive, provide significant pointers as to the arguable character of the claims for the purposes of Article 13 (art. 13). The Court does not think that it should give an abstract definition of the notion of arguability. Rather it must be determined, in the light of the particular facts and the nature of the legal issue or issues raised, whether each individual claim of violation forming the basis of a complaint under Article 13 (art. 13) was arguable and, if so, whether the requirements of Article 13 (art. 13) were met in relation thereto.' §§52, 54-55.

*Momčilović v. Serbia*²⁹⁰: 'Turning to the present case, the Court observes that the applicant was wholly able to present his case before the three judicial instances. The impugned Supreme Court's judgments are fully and well reasoned and nothing in the

²⁸⁹ Application no. 9659/82; 9658/82, Judgment of 27 April 1988.

²⁹⁰ Application no. 23103/07, Judgment of 2 April 2013.

case file indicates that these decisions were arbitrary. The fact that the domestic judicial authorities provided a forum for the determination of a private-law dispute between the two claimants, in which the applicant was unsuccessful, does not necessarily give rise to interference by the State with property rights under Article 1 of Protocol No. 1 to the Convention. Even assuming that the applicant's "claim" is "sufficiently established to be enforceable" to attract the guarantees of Article 1 of Protocol No. 1 [...] the Court finds, in view of the above considerations, that the applicant's complaint under this provision is manifestly ill-founded within the meaning of Article 35 §3 of the Convention and must be rejected pursuant to Article 35 §4 of the Convention [...]. Lastly, the applicant complained under Article 13 of the Convention that there was no effective remedy available to him in respect of the matters complained of above (see paragraphs 34 and 35). The Court reiterates that Article 13 only applies where an individual has an "arguable claim" to be the victim of a violation of a Convention right (see *Boyle and Rice v. the United Kingdom* ... In view of its findings above, the Court concludes that the applicant had no such "arguable claim" and Article 13 is, therefore, not applicable. It follows that this complaint is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.' §§36-37.

1.1.4. Access to an effective remedy

Article 13 guarantees the availability of a national remedy to enforce Convention rights and freedoms. Article 13 does not define what constitutes a remedy and does not require any particular form of remedy. The national authority referred to in Article 13 does not necessarily need to be a judicial body. However, the remedy must be effective in practice as well as law.

Case law. *Keenan v UK* : 'The Court reiterates that Article 13 of the Convention guarantees the availability at the national level of a remedy to enforce the substance of the Convention rights and freedoms in whatever form they might happen to be secured in the domestic legal order. The effect of Article 13 is thus to require the provision of a domestic remedy to deal with the substance of an "arguable complaint" under the Convention and to grant appropriate relief, although Contracting States are afforded some discretion as to the manner in which they conform to their Convention obligations under this provision. The scope of the obligation under Article 13 varies depending on the nature of the applicant's complaint under the Convention. Nevertheless, the remedy required by Article 13 must be "effective" in practice as well as in law. In particular, its exercise must not be unjustifiably hindered by the acts or omissions of the authorities of the respondent State [...]. Given the fundamental importance of the right to the protection of life, Article 13 requires, in addition to the payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of those responsible for the deprivation of life, including effective access for the complainant to the investigation procedure[...]'§123.

McFarlane v. Ireland [GC]²⁹¹: 'The scope of a Contracting Party's obligations under Article 13 varies depending on the nature of the complaint. However, the remedy required by Article 13 must be "effective" in practice as well as in law[...] The term "effective" means that the remedy must be adequate and accessible[...] An effective remedy for delay in criminal proceedings must, inter alia, operate without excessive delay and provide an adequate level of compensation [...] Article 13 also allows a State to choose between a remedy which can expedite pending proceedings or a remedy post factum in damages for delay that has already occurred. While the former is preferred as it is preventative of delay, a compensatory remedy may be regarded as effective when the proceedings have already been excessively long and a preventative remedy did not exist [...]'^{§108.}

1.1.5. Institutional requirements of an effective remedy

Article 13 provides a right to a remedy before a 'national authority'. While the European Court has held that the authority referred to in Article 13 need not necessarily be a judicial authority, complaints to a body which does not have the power to issue legally enforceable decisions generally do not constitute an effective remedy for the purposes of Article 13. In determining whether a body is able to provide an effective remedy, the facts of the case, the nature of the right at issue, and the powers and guarantees of the body must be considered.²⁹²

Case law. *Ramirez Sanchez v France* [GC]²⁹³: 'The "effectiveness" of a "remedy" within the meaning of Article 13 does not depend on the certainty of a favourable outcome for the applicant. Nor does the "authority" referred to in that provision necessarily have to be a judicial authority; but if it is not, its powers and the guarantees it affords are relevant in determining whether the remedy before it is effective. Also, even if a single remedy does not by itself entirely satisfy the requirements of Article 13, the aggregate of remedies provided for under domestic law may do so. It was not until 30 July 2003 that the Conseil d'Etat changed its jurisprudence and ruled that an application for judicial review could be made in respect of decisions concerning solitary confinement and the decision quashed if appropriate.¹⁶⁵ The Court notes that the applicant has made only one application to the Administrative Court since the change in the case law. Although he only challenged the lawfulness of the measure imposed on him on 17 February 2005, it is of the view that, having regard to the serious repercussions which solitary confinement has on the conditions of detention, an effective remedy before a judicial body is essential. The aforementioned change in the case law, which would warrant being brought to the attention of a wider audience, did not in any event have retrospective effect and could not have any bearing on the applicant's position.¹⁶⁶ The Court accordingly considers that in this case there has been a violation of Article 13 of the Convention on account of the lack of a remedy in domestic law that would have allowed the applicant to challenge the decisions to prolong his solitary confinement taken between 15 August 1994 and 17 October 2002.' §§ 159, 164-166.

²⁹¹ Application no. 31333/06, Judgment of 10 September 2010.

²⁹² European Union Agency for Fundamental Rights, *Handbook on European law relating to access to justice, Chapter 5, Right to an effective remedy* (June 2016) 99.

²⁹³ Application no. 59450/00, Judgment of 4 July 2006.

B. Albanian domestic system on the right to a fair trial within a reasonable time

1. Obligation to respect the right fair trial within a reasonable time

The standard of the right to a fair and public hearing within a reasonable time is a binding statement for the Albanian High Contracting Party based on the Article 6 of the Convention and Article 42 of the Constitution of Albania.

Article 6 of the Convention:

"In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law..."

Under this provision, Article 6 of the Convention implies that all High Contracting Parties have the obligation to offer the due safeguards in respect of the reasonable time requirement by (1) identifying the types of proceedings which are subject to its reasonable time requirement (2) identifying the relevant period for assessing the overall duration of proceedings. These duties are essential for member states for an effective functioning of domestic mechanisms aiming both, the expedition of pending proceedings but also for the correct calculation of compensation.

The Albanian Constitution complies with the Convention setting out the same standards in this respect, by providing the right to a fair trial within a reasonable time (Article 42), the right of individuals for compensation in case their legitimate interests were hindered by a public authority (Article 44), the limits for the restrictions of the individuals' rights, which should be in line with the Convention standards (Article 17), the obligation of state bodies for respect of individual rights and freedoms (Article 15/2).

Article 42-Everyone, for the protection of his constitutional and legal rights, freedoms, and interests, or in the case of an accusation were raised against him, has the right to a fair and public trial, within a reasonable time, by an independent and impartial court specified by law.

Article 44-Everyone has the right to be rehabilitated and/or indemnified in compliance with law if he is damaged because of an act, unlawful act or omission from state bodies.

Article 17-The limitation of the rights and freedoms may be established only by law for a public interest or for the protection of the rights of others. A limitation shall be in proportion with the situation that has dictated it. These limitations may not infringe the essence of the rights and freedoms and in no case may exceed the limitations provided for in the European Convention on Human Rights

Article 15/2 -State bodies while exercising their functions must afford respect for the rights and freedoms of individuals likewise must contribute in their realization.

1.1. The types of proceedings subject to requirement for the reasonable length

Taking reference to the Article 42 of the Constitution, it follows that subject of reasonable time requirement are all those types of proceedings that result in the determination of the individual claims for violation of constitutional and legal rights, freedoms and interests addressed before an independent and impartial court established by law. Consequently, these proceedings may be criminal, civil and administrative depending to the nature of claims and the type of court that has jurisdiction to rule over them, respectively.

1.2. The assessment of the overall duration of proceedings (criminal, civil, administrative)

a. Criminal proceedings

Convention standard for the criminal proceedings imposes that the period for assessment begins on the day on which a person is 'charged' and ends when the final court decision has been effectively put into force. Depending from the case the overall period includes apart the trial at first instance, also the appeal and recourse proceedings before the higher courts, including also the constitutional complaint²⁹⁴and the enforcement procedure of the final court decision. The Albanian Code of Criminal Procedure (CCrP) before the latest amendments contained no time limits for the length of the judicial process. It also was formulated in a way that makes it hard for the citizen to predict how long a criminal case will last, thus failing the *foreseeability* requirement. Article 342 in the CCrP states that criminal trials should be completed within one hearing and if impossible, they should be finalized during the next working day. Only for good reasons trials can be postponed up to fifteen days. The CCrP provides only time-frames for some intermediate procedural steps e.g. the deadline for issuing the judgement is 5 days (CCrP, Art.113).

Table of legal deadlines relevant for assessment of overall length of criminal proceedings

Registration	Prelim. Hearing	Hearing	Prelim Presentation	Judgement	Appeal	Recourse	Execution
Art.323-3 months from the date of registrat. of the criminal investigation (no longer than 2 years)	Art 338- efforts for reconciliation	Art.342- Trial within 1 hearing Finalisation the next day for good reasons	Art.378 – no deadline for the final objections	Art 263- issuing of decision from the date of registration 2-12 months	Art.263 -Date of sentence up to the decision of the appeal court 2-9 months	Art 435- recourse within 30 days	Art.462-enforce. immediately the conviction has become final
Art.248 Evaluation of security measures	Art.263- detenti 3-12 months	Postp. 15 days		Art.415- appeal within 15 days	Art.426 prelim. trial actions 10 days	Art 263 - remittal for examinin. 10 months up to 3 years	Art 482- registrat. in the criminal record

²⁹⁴ Only when it has impact on the overruling of the court decision

b. Civil proceedings

For civil proceedings the overall period for the assessment of duration of proceedings should start from the date of filing a civil claim with the court and should end when the final court decision has been effectively enforced. The Code of Civil Procedure (CCvP), before the latest amendment,²⁹⁵ contained no time limits for the length of judicial process. In addition, the CCvP did not lay down any maximum length of time between hearings. Similarly, CCvP used to provide only time frames for certain intermediate procedural steps e.g the CCvP (Art. 308) puts a deadline of 10 days for issuing the judgments in civil cases.

Table of legal deadlines for criminal proceedings for assessment of overall length of proceedings

Registration	Prelim. Hearing	Hearing	Prelim Presentation	Judgement	Appeal	Recourse	Execution
Art.158-regust. Of lawsuit	158/a &b- preparatory actions and reconciliati on-no deadline	Dart 172-178- do not lay down any maximum length of time between hearings.	Art 302-5 days	Art.308 – 10 days and postponement 5 days	Art.443 - 15 days Art. 472-10 days notification of date of the trial	Art 443-30 days	Art 510-515 Enforcement starts 15 days from the request of creditor
Art.155- prelim. notification of lawsuit not less than 10 days					Art.445 appeals no later than 1 year		

c. Administrative proceedings

For administrative proceedings the overall period for the duration of proceedings should start from the date on which the applicant first refers the matter to the administrative authorities and should end when the final court decision has been effectively put into force. It should be highlighted that the Court has already maintained that the duration of administrative proceedings should include the mandatory preliminary administrative procedure only if an application to an administrative authority is a prerequisite for bringing court proceedings (*König v. Germany*).²⁹⁶

The Law 49/2012 “On the administrative courts and the settlement of administrative disputes”, in its Article 16 provides: “Exhaustion of the administrative appeal is a condition to bring a lawsuit against an administrative action before the administrative courts.”

²⁹⁵ Law no.38/2017, for the amendment of the Code of Civil Procedures.

²⁹⁶ Application no.6232/73, Judgement (Merits), date on28 June 1978, <http://hudoc.echr.coe.int/eng/?i=001-57511>

Therefore the overall length of administrative proceedings includes both the administrative procedures before an administrative authority and the proceedings before the administrative courts. This period includes also the appeal, recourse and constitutional proceedings, as well as the execution procedures of the final administrative decision. This is why the respondent state in administrative proceedings is typically responsible for not just the judicial organs concerning the excessive delays of judicial proceedings, but also for all public institutions implicated during the administrative proceedings in the violation of Convention.

Table of legal deadlines for administrative proceedings for assessment of overall length of proceedings

2 stages	Registration	Prelim. Hearing	Hearing	Judgement	Appeal	Recourse	Execution
Administrat. Procedures	Art.134 file the complaint	Art. 69 reconciliation.	Art. 87	Art.91-92	-	-	Article 182
Code of Admin. Procedures	Art.130- Compl. on procedural aspects	no time limit provided	Decision on the date and time limit of the process	Time limit for the decision making process is 60 days			no deadline for the execution procedures it provides the right of postponement of execution
Judicial administrat. procedures	Art. 45 days submission of lawsuit	Art . 25 7 days the preparatory actions	Art 27 15 days from prep. actions	Art.42 postp. 5 days of delivering the decision 15 days transfer of the file	Art.48 30 days adjudication at appeal level 15 days submission of counter recourse	Art 60 10 days transfer of the file 90 days adjudication at supreme court level	Art 66 Judge decides for the time period of mandatory execution

1.3. ECtHR' case-law on Albania related to the undue length of judicial proceedings

In almost all the ECtHR' Judgments for Albania which concerned to individual' claims for unjustified delays of proceedings the violations found were attributable to the domestic courts. In these cases, the Court has reiterated that the domestic judicial system in Albania needed better management for the judicial proceedings and better organization of the domestic legal system emphasizing the importance for the protection of Convention rights both in law and in practice.

Example: in "Gjonbocari v. Albania,"²⁹⁷ the Court argued "Moreover, having regarded to the multiplications of the proceedings the Court will assess the authorities' management of the sets of related proceedings. The three sets of proceedings related to the same issue, the validity of the applicants' title over the relevant property. The authorities allocated the relevant property in the first place to the applicants, then to A.L through a lease contract and finally to A.L.'s mother. Furthermore, it would appear that the initiation of separate proceedings was designed to circumvent previous courts' findings. The domestic courts were aware of the parallel proceedings in that they frequently cross-referred to them. Most importantly it would have been legally possible to join all the proceedings. The Court considers that better management of the parallel inter-related proceedings would certainly have contributed positively to the speedy clarification of the applicants' title. For the Court, the existence of prior proceedings raising the same legal issue must be taken into account in assessing the reasonableness of the length of the third set of proceedings."

Example: in "Marini v. Albania,"²⁹⁸ the Court argued "As to the second set of proceedings, the Court observes that the case was repeatedly referred back for fresh examination. It notes that in similar cases where the protracted length of proceedings was to a large extent caused by the rehearing of the cases, it has held that, since remittal had been ordered because of errors committed by the lower courts, the repetition of such orders within the same set of proceedings revealed a serious deficiency in the judicial system (see, *Wierciszewska v. Poland*). Thus, the Court considers that by giving a number of contradictory decisions at several levels of jurisdiction, the Albanian authorities demonstrated a shortcoming in the judicial system for which they are responsible." In this case the complaint concerned 5 different sets of civil judicial proceedings were the first 2 were found in breach of the standards, accordingly lasting 7 and 9 years, resulting in a breach of Convention.

Example: in "Mishjoni v. Albania"²⁹⁹ the Court reiterates that "an employee who considers that he or she has been wrongly suspended or dismissed by his or her employer has an important personal interest in securing a judicial decision on the lawfulness of that measure promptly, since employment disputes by their nature call for expeditious decision, in view of what is at stake for the person concerned, who through dismissal loses his or her means of subsistence (see *Frydlender v. France*). Moreover, the Court recalls that it is for the Contracting States to organise their legal systems in such a way that the competent authorities can meet the requirements of Article 6 of the Convention, including the obligation to hear cases within a reasonable time (see *Makarova v. Russia*). The Court considers that an overall delay of almost four years taken by the HCJ to re-examine the applicant's case did not satisfy the "reasonable-time" requirement under the Convention." In this case, the Court found a violation of Article 6 and 13 of the Convention in respect of the length of administrative and judicial proceedings and lack of effective remedies.

²⁹⁷ Application no. 10508/02, ECtHR Judgment (*Merits and Just Satisfaction*), date 23 October 2007, <http://hudoc.echr.coe.int/eng?i=001-82863>,

²⁹⁸ Application no. 3738/02, ECtHR Judgment (*Merits and Just Satisfaction* 18 December 2007, <http://hudoc.echr.coe.int/eng?i=001-84061>,

²⁹⁹ Application no. 18381/05, ECtHR Judgment (*Merits and Just Satisfaction*) date 07 December 2010, <http://hudoc.echr.coe.int/eng?i=001-102133>,

Example: in "Kaçiu and Kotori v. Albania"³⁰⁰ (criminal case) the Court argued: "the main problem in the instant case, which the Court has examined in a previous case against the respondent State, consisted of the frequent remittals of the case from higher courts to lower courts (see *Marini v. Albania*). The Court notes, in particular, that after the case was heard by the Supreme Court on 15 January 2003 it was remitted to the District Court for fresh examination. In the new proceedings the trial court did not comply with the instructions of the Supreme Court and that failure resulted in another set of proceedings, which lasted approximately two years until the adoption of the Court of Appeal's decision of 15 October 2004 upholding the applicants' convictions. The Court considers that this delay was entirely attributable to the domestic courts. In *this case* the criminal proceedings lasted 6 years and 11 months-which resulted in a violation attributable to the domestic courts.

Example: in "Topallaj v. Albania,"³⁰¹ the Court argued that "the case was examined in three sets of proceedings. It stresses that it is of vital importance that the domestic courts be the ultimate guarantor of the rule of law. However, in the instant case, they contributed to the delay by repeatedly referring the case back to lower courts for fresh examination. In this respect, the right to have one's claim examined within a reasonable time would be devoid of all sense if domestic courts examined a case numerous times, by shifting it from one court to another, even if at the end the length of proceedings at each instance did not appear particularly excessive. The Court reiterates that it is incumbent on respondent States to organize their legal systems in such a way that their courts can meet the requirements of Article 6 of the Convention, including the obligation to hear cases within a reasonable time. Given that the remittal of the case for re-examination was frequently ordered as a result of errors committed by the lower courts, the repetition of such remittal orders discloses a deficiency in the judicial system, which deficiency alone prevented the applicant from having his "civil rights and obligations", as at issue in the proceedings in question, determined within a reasonable time." In "*Topallaj v. Albania*" the complaint concerned to a civil judicial proceeding that lasted 9 years, resulting in a breach of the Convention.

Example: in "Luli & others v. Albania,"³⁰² the Court criticised in particular, the failure of the judicial system to manage properly a multiplication of proceedings before various courts on the same issue and repeated referrals of a case to a lower level of jurisdiction (violations of Article 6§1). The Court noted that the excessive length of proceedings was becoming a serious deficiency in domestic legal proceedings in Albania and that general measures at national level were undoubtedly called for in the execution of the judgment, in particular, introducing a domestic remedy as regards undue length of proceedings.

³⁰⁰ Application no. 33192/07 33194/07, ECtHR Judgment (Merits and Just Satisfaction), date 25 June 2013, <http://hudoc.echr.coe.int/eng/?i=001-121770>,

³⁰¹ Application no. 32913/03, ECtHR Judgment (Merits and Just Satisfaction), date 21 April 2016, <http://hudoc.echr.coe.int/eng/?i=001-162114>,

³⁰² Application no. 64480/09 64482/09 12874/10, ECtHR Judgment (Merits and Just Satisfaction) date 01 April 2014, <http://hudoc.echr.coe.int/eng/?i=001-142305>,

1.4. Excessive length of proceedings caused due to non-execution of judicial and quasi-judicial final decisions

Example: in "Qufaj v. Albania,"³⁰³ the Court reiterated 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 it embodies the "right to a court", of which the right of access, that is the right to institute proceedings before courts in civil matters, constitutes one aspect. However, that right would be illusory if a Contracting State's domestic legal system allowed a final, binding judicial decision to remain inoperative to the detriment of one party. It would be inconceivable that Article 6§1 should describe in detail procedural guarantees afforded to litigants – proceedings that are fair, public and expeditious – without protecting the implementation of judicial decisions; to construe Article 6 as being concerned exclusively with access to a court and the conduct of proceedings would be likely to lead to situations incompatible with the principle of the rule of law which the Contracting States undertook to respect when they ratified the Convention. Execution of a judgment given by any court must therefore be regarded as an integral part of the "trial" for the purposes of Article 6."

Example: in "Driza v. Albania"³⁰⁴ the Court argued "the same judgment was quashed a second time by a judgment delivered in a parallel set of proceedings. The Court recalls that by virtue of Article 1 of the Convention the primary responsibility for implementing and enforcing the guaranteed rights and freedoms is laid on the national authorities (see *Kudła v. Poland*). In this connection, it is the State's responsibility to organise the legal system in such a way as to identify related proceedings and where necessary to join them or prohibit the further institution of new proceedings related to the same matter, in order to circumvent reviewing final adjudications treated as an appeal in disguise, in the ambit of parallel sets of proceedings (see, *Roşca v. Moldova*)."

Example: in "Rramadhi v. Albania,"³⁰⁵ the Court observed that "irrespective of whether the final decision to be executed takes the form of a court judgment or a decision by an administrative authority, domestic law as well as the Convention provides that it is to be enforced. No steps have been taken to enforce the Commission's decisions in the applicants' favor. The Court notes that none of the Property Acts or any related domestic provision governed the enforcement of the Commission's decisions. In particular, the Property Acts did not provide either for any statutory time-limit for appealing against such decisions before the domestic courts or for any specific remedy for their enforcement. The Court further notes that the Property Acts left the determination of the appropriate form and manner of compensation to the Council of Ministers, which was to define the detailed rules and methods for such compensation. To date no such measures have been adopted and the Government proffered no explanation for this. That the authorities are committed, as the Government maintained, to the restitution of property and the payment of appropriate compensation did not lead to the enforcement of the decisions in the applicants' favor, now unenforced for 12 and 11 years, respectively."

³⁰³ Application no. 54268/00, Judgment (Merits and Just Satisfaction), date 18 November 2004, <http://hudoc.echr.coe.int/eng?i=001-67514>

³⁰⁴ Application no. 33771/02, ECtHR Judgment (Merits and Just Satisfaction), date 13 November 2007, <http://hudoc.echr.coe.int/eng?i=001-83245>

³⁰⁵ Application no. 38222/02, ECtHR Judgment (Merits and Just Satisfaction), date 13 November 2007, <http://hudoc.echr.coe.int/eng?i=001-83249>

If we look closer to the Constitutional Court' case law concerning to the requests for undue delays of proceedings, we can understand more on the nature of delays encountered during the criminal, civil and administrative proceedings.

Case-law of Constitutional Court (CC) in civil cases:

In Decision no.12/2012³⁰⁶ – CC found from the files that it results that up to the date of the review of this request at the plenary session by the Constitutional Court, a total of 36 court hearings were held in the District Court of Tirana, where the time period from one session to another is openly in violation of the principle of the right to a trial within a reasonable time (See the following sessions of dates 30.01.2007, 14.03.2007, 27.04.2007, 01.06.2007), a practice based on the type and nature of the disagreement in Judgment and the legal provisions of Article 327 of the CCC, in the assessment of the Court. The Constitutional Court finds that they have been postponed due to the fact that the judge was in a medical report, lack of service of notification to the parties' to be heard by the court. Inform the parties in absentia or give them time to get acquainted with the acts of the case, because of the failure of the expert to appear and in some cases no cause for postponement of the hearing was given.

Case –Law of Constitutional Court in criminal cases:

In Decision no.47/2011- CC finds that a large number of hearings have been postponed for reasons attributable to the proceeding authority (the court and the prosecution jointly). Referring to the minutes of hearings in the court file, it is noted that the delay was caused due to the lack of judges for objective reasons among which health report, or taking the time to get to know the case. Judicial hearings have also been postponed due to the lack of prosecutors for reasons mainly related to their replacement or taking time to get to know the case. Apart from the lack of judges and prosecutors, the hearings have been postponed due to the lack of a secretary of the court. Under these conditions, the Court underlines that the conduct of the procedural body as a whole has caused delays in the trial...the applicant's conduct was taken into consideration and assessed by the Court in complexity with the other criteria established by the ECtHR. From the minutes of court sessions, it is noticed that the absence of the defence counsel of the applicant or defenders of the other co-defendants, mainly with the motivation of participating in other courts, has often been the cause of postponement of the hearings. In some cases the hearings have been postponed because the defence did not provide written evidence or were formally reported irregularly. The Court finds in the concrete case that in the cases of the absence of the defendants, the First Instance Court for Serious Crimes has not shown any passivity in relation to that conduct of the party but has informed the Ministry of Justice and the Chamber of Advocates to undertake disciplinary measures against lawyers.

³⁰⁶See also CC Decision no.12/2013; Decision no.35/2013

Case –Law of Constitutional Court in administrative cases:

In Decision no. 42/2017³⁰⁷ - CC pointed out that the justification that the high number of cases is the cause of delay in considering the case is in these courts is not grounded. The overburden of the courts' workload is not a constitutional argument that could justify their failure to act within the deadlines set by the lawmaker. On the contrary, it is the duty of the latter to take the measures and to find the means to change the factual situation (delay in adjudicating cases at the High Court) in order for the law to be applied and the courts of all levels to function normally (see Decisions No.69, dated 17.11.2015, No. 59, dated 16.09.2016 of the Constitutional Court). In this sense, the allegation of the interested party that the delay in adjudicating the case is due to the backlog of the court is unfounded.

➤ Case study "Hozee v. Netherlands"³⁰⁸

The case was referred to the Court by a Netherlands national, Mr. Wilhelmus Hozee on 14 August 1997, who relied on Article 6 § 1 of the Convention, complaining of the length of the criminal proceedings against him.

Facts: The applicant was the managing director of the cleaning agencies. In September 1980 the Netherlands tax authorities between 1981 and 1984 inspected the accounts of applicant agencies and issued on 31 December 1981 the supplementary tax by way of a fiscal penalty. Having the agencies challenged these supplementary tax assessments, in May 1984 the Audit Division of the Department of Direct Taxes of the Hague handed over the investigation against applicant' agencies to the Fiscal Intelligence and Investigation Department, where the applicant was interrogated as a suspect on 14 June 1984. In the same month the FIOD seized his accounts for the purposes of the investigation. On 8 May 1985 the applicant was arrested on suspicion of fraud and detained on remand and was conditionally released on 17 June 1985. On 10 May 1985 a preliminary judicial investigation against the applicant was opened, during which the investigating judge heard the applicant on four occasions. The investigating judge further examined twenty-five witnesses and three experts, most of them at the applicant's request. The preliminary judicial investigation was closed in January 1989. The applicant was subsequently summoned to appear before the Regional Court of the Hague on 13 April 1989 on five counts of fraud and one count of participation in a criminal organization.

Complaint: The applicant lodged an objection (bezwaar) against the summons, and on 10 August 1989 the Regional Court acquitted the applicant of participation in a criminal organization but convicted him on five counts of fraud. It sentenced him to twenty-four months' imprisonment, six months of which were suspended for a probationary period of two years, and a fine of NLG 500,000. The time the applicant had spent in pre-trial detention was credited against his prison sentence. Both the applicant and the public prosecutor filed appeals against this judgment to the Court of Appeal of the Hague. On 11 July 1991 the Court of Appeal quashed the Regional Court's judgment, convicted the

³⁰⁷ See also CC Decision no.14/2016; Decision no.22/2017; Decision no.59/2016; Decision no.26/2017, Decision no.230/; Decision no. 32/2017

³⁰⁸ Application no.21961/93, Judgment (Merits and Just Satisfaction), date on22 June 1998, <http://hudoc.echr.coe.int/eng?i=001-58170>

applicant on three counts of fraud and acquitted him on two other counts of fraud. Taking into account another conviction which had occurred in the meanwhile, as required by Article 63 of the Criminal Code (Wetboek van Strafrecht – see paragraph 26 below), it sentenced him to six months' imprisonment, three months of which were suspended for a probationary period of two years, and a fine of NLG 25,000. The applicant's subsequent appeal on points of law was rejected by the Supreme Court (Hoge Raad) on 1 December 1992.

List of Questions:

- Discuss the applicant' claims for violation of his right to have the charges determined within a reasonable time and what decision the ECtHR should make on this allegation.
- How would you assess the overall period for the consideration of the right to a fair trial within a reasonable time (art.6.1 of Convention) in this case?

1.5. Nature of delays of judicial proceedings according to the ECtHR' case-law

ECtHR' case-law differentiates three types of reasons that lay on the root of delays in judicial proceedings (1) ones related to external reasons from that of the legal and judicial systems (2) reasons that are common to all types of proceedings (3) reasons that apply to a certain category of proceedings.

I. Example of external delays to the legal and judicial systems:

(1) in *Süssmann v. Germany*³⁰⁹ the delay were caused due to major political events
(2) in *Zouhar v. Czech Republic*³¹⁰ judgment of 11 October 2005 the delay was caused due to the transition from a planned to a market economy

II. Example of reasons that are common to all types of proceedings:

(1) in *Union Alimentaria Sanders SA v. Spain*³¹¹ the delay was caused due to geographical problems
(2) in *Nankov v. the former Yugoslav Republic of Macedonia*³¹² the delay was caused due to transfers and insufficient numbers of judges, and non-replacement of transferred or unavailable judges.
(4) in *Piron v. France*³¹³ the delay was caused due to inaction by the judicial authorities
(6) in *Roubies v. Greece*³¹⁴ failure to summon parties, witnesses or defendants or unlawful summons caused the delay
(7) in *Martins Moreira v. Portugal*³¹⁵ late deposition of the case file by the lower court to the court of appeal, or delay in serving evidence caused the delay

III. Example of reasons that apply to a particular category of proceedings:

(a) in *Martins Moreira v. Portugal*³¹⁶ problems relating to expert witnesses caused the delay (*Delays in appointing experts owing to judicial inertia, failure of experts to comply with their mandate, non extension of time granted to them to an exaggerated degree, failure to penalize experts for lack of diligence, difficulties in obtaining medical reports etc*)
(b) in *Vaz Da Silva Girao v. Portugal* numerous adjournments of hearings, either of the court's own motion or at the parties' request, and excessive intervals between hearings caused the delay
(c) in *Buchholz v. Germany*³¹⁷ the excessive lapse of time between the handing down of judgment and its notification to the court registry or to the parties caused the delay.

³⁰⁹ Application no. 20024/92, Judgment (Merits and Just Satisfaction), date 16 September 1996, <http://hudoc.echr.coe.int/eng?i=001-57999>

³¹⁰ Application no. 8768/03, Judgment (Merits and Just Satisfaction), date on 11 October 2005, <http://hudoc.echr.coe.int/eng?i=001-70565>

³¹¹ Application no. 11681/85, Judgment (Merits and Just Satisfaction), date on 07 July 1989, <http://hudoc.echr.coe.int/eng?i=001-57618>

³¹² Application no. 26541/02, Judgment (Merits and Just Satisfaction), date on 29 November 2007, <http://hudoc.echr.coe.int/eng?i=001-83627>

³¹³ Application no. 36436/97, Judgment (Merits and Just Satisfaction), date on 14 November 2000, <http://hudoc.echr.coe.int/eng?i=001-58984>

³¹⁴ Application no. 22525/07, Judgment (Merits and Just Satisfaction), date on 30 April 2009, <http://hudoc.echr.coe.int/eng?i=001-92529>

³¹⁵ Application no. 11371/85, Judgment (Merits and Just Satisfaction), date on 26 October 1988, <http://hudoc.echr.coe.int/eng?i=001-57535>

³¹⁶ *Ibid.*

³¹⁷ Application no. 7759/77, Judgment (Merits), date on 06 May 1981, <http://hudoc.echr.coe.int/eng?i=001-57451>

1.6. Standards of procedural phases and overall period according to ECtHR case - law

The Court set out that the due standard for the duration of a set of proceedings should be less than 2 years in order it can be considered as reasonable.³¹⁸

Example: in "Dostal v. Czech Republic" judgment,³¹⁹ the Court noted as regards the procedure on the merits of the case, that no action has been taken by the municipal court since the receipt of the expert report on 31 October 2001 until the adoption of the judgment of 17 September 2003, even though from 20 August 2002 the Municipal Court had sufficient evidence to rule on the merits. Nor was the procedure following the judgment of 17 September 2003 continuing at a sustained pace, owing in particular to the need to rectify errors in the judgment, which resulted in several file transfers.

The assessment of claims for undue length of judicial proceedings should take into account: (1) the determination of a right entailing all stages (2) the court ruling on the existence of an obligation (3) the court' ruling on the amount owed. The obligation that is borne in this respect for the respondent state follows the purposes of Article 6 .1 of Convention according to which: "a civil right is not "determined" until the amount has been decided."³²⁰ This period includes the adjudication before the Constitutional Court,³²¹ also the time taken for any enforcement proceedings.³²²

Example: in "Kačiu & Kotorri" case,³²³ the main problem consisted of the frequent remittals of the case from higher courts to lower courts. The Court noted in particular that after the case was heard by the Supreme Court on 15 January 2003 it was remitted to the District Court for fresh examination. In the new proceedings the trial court did not comply with the instructions of the Supreme Court and that failure resulted in another set of proceedings, which lasted approximately two years until the adoption of the Court of Appeal's decision of 15 October 2004 upholding the applicants' convictions. The Court considers that the delay after the Supreme Court decision was entirely attributable to the domestic courts. Overall, the proceedings started on 18 April 2000, when the applicants were arrested, and ended on 6 February 2007 with the Constitutional Court's decision, approximately 6 years and 11 months.

Examples of optimum timeframes according to ECtHR' case-law has been rendered in the table below:

³¹⁸ If longer than 2 years- no violation found - the applicant's behavior. In 12 out of 23 complex cases- no rights were violated – it is the applicant's conduct

³¹⁹ Application no. 26739/04, Judgment (Merits), date on 21 February 2006, <http://hudoc.echr.coe.int/eng?i=001-72507>

³²⁰ Application Pudas v. Sweden no. 10426/83, Judgment (Merits and Just Satisfaction), date on 27 October 1987

³²¹ Application Deumeland v. Germany , no. 9384/81, Judgment (Merits and Just Satisfaction), date on 20 May 1986

³²² Application Hornsby v. Greece, no. 18357/91, Judgment (Merits), date on 19/03/1997

³²³ See footnote 7

ECtHR case law where the overall length of proceedings was found reasonable					
Type of Proceedings				Cassation	Total
Simple civil cases (dispute over co-ownership)	<i>Lemoine v. France</i> ³²⁴ <i>judgment, 29 April 2003</i>	1 year and 10 months	1 year and 8 months	1 year and 9 months	5 years and 5 months
Simple criminal cases (banking fraud)	<i>Guichon v. France</i> ³²⁵ <i>judgment, 21 March 2000</i>	1 year and 7 months	1 year and 9 months	1 year and 9 months	5 years and 1 month
Complex cases (fraud and conspiracy)	<i>Hozee v. Netherlands</i> ³²⁶ <i>judgment, 22 May 1998</i>	Preparatory investigation of 4 years and 7 months	3 years and 10 months	3 years and 10 months	8 years and 5 months

List of questions:

- What criteria should a judge bear in mind for the assessment of the overall period of criminal proceedings? (See *Kaciù and Kotorri ECtHR' judgement, Decision 12/2011 of Constitutional Court in Adriana Koliqi case*)
- What criteria should a judge bear in mind for the assessment of the overall period of civil proceedings? (See *Marini v Albania*)
- What criteria should a judge bear in mind for the assessment of the overall period of administrative proceedings? (See *X v. France; Kress v. France*)
- What is the Convention standard for the reasonable duration of a procedural phase (at 1st instance level, appeal level, recourse level) - Discuss the *Hozee v. Netherlands judgment, 22 May 1998*
- What factors affect the reasonable duration of a procedural phase? Discuss the ECtHR' finding in the *Kaçiu & Kotorricase* where due to remittal of the case because of the errors of law from the lower courts, there was another set of proceedings from 15 January 2003-15 October 2004? Is the duration of 1 year and 10 months at this particular set of proceedings excessive as compared to the standards imposed by the Convention? How does it affect the overall period which in total is 6 years and 11 months?

Recommended hearing:

- ECtHR' judgement "Kaçiu and Kotorri v. Albania"³²⁷
- ECtHR judgement "Marini v. Albania"
- Decision 12/2011 of Constitutional Court in Adriana Koliqi case
- ECtHR judgement "X v. France"³²⁸
- ECtHR judgement "Kress v. France"³²⁹
- ECtHR judgment "Hozee v. Netherlands"³³⁰

³²⁴ Application no.26242/95, Judgment (Lack of Jurisdiction), date on 01 April 1999

³²⁵ Application no.40491/98, Judgment (Merits), date on 21 March 2000

³²⁶ Application no.21961/93, Judgment (Merits and Just Satisfaction), date on 22 May 1998

³²⁷ See footnote 7

³²⁸ Application no.18020/91, Judgment (Merits and Just Satisfaction), date on 31 March 1992, <http://hudoc.echr.coe.int/eng?i=001-57801>

³²⁹ Application no.39594/98, Judgment (Merits and Just Satisfaction), date on 07 June 2001, <http://hudoc.echr.coe.int/eng?i=001-59511>

³³⁰ See footnote 30

2. Effective remedy for unduly long proceedings in Albanian domestic system

Failure of domestic courts to guarantee the conduction of proceedings within a reasonable time results not only to the breach of Article 6 of Convention, but also it may give rise to violation of Article 13 of Convention if the domestic system does not afford effective remedies for the protection of this right. Before the latest amendments in the civil procedural law, Albanian domestic system did not guarantee specific legal avenues through which individuals could seek determination of the amount of compensation in case of unjustified delays of judicial proceedings. The existence of the available remedies was considered not sufficiently certain, either in practice as well as in theory.

Example: in Decision No.47/2011 the Albanian Constitutional Court maintained that "notwithstanding the delays were attributable to the investigative body, due to objective reasons as the legal system allowed for the remittal of the case in several proceedings, it found that the prolongation of proceedings was not justified. Even though there is lack of a specific remedy for the compensation of damage resulting to the breach of the constitutional standard for a trial within a reasonable time, it underlined that it is a duty of competent authorities including the Prosecution office, the Ministry of Justice and the High Council of Justice to envisage measures that could guarantee the administration of judicial proceedings and avoid the unjustified delays."

Example: in Decision No.12/2012 the Constitutional Court recalled that Article 13 of the ECHR provides an alternative: a means is "effective" if it can be used or to accelerate the issuance of a judgment by a court or tribunal to adjudicate a case or to provide the litigants with appropriate remedies for delays that have already happened. However, the ECtHR emphasizes, the best solution is obviously prevention. When a judicial system has deficiencies with regard to the requirement in Article 6/1 of the Convention - for a reasonable time, a tool designed to expedite the process in order to prevent this prolonged process is the most effective solution. Such a tool provides an undeniable advantage over a tool that only provides compensation, considering that it also prevents subsequent violations of the same processes and does not merely repair a posteriori breach, as does the compensation. Some countries have chosen a combination of two types of tools, one designed to speed up the process and the other to provide compensation. In this regard, the Constitutional Court finds that the country's legal system does not foresee any special legal remedy that the applicant could use to seek redress of the excessive length of the trial.

In this connection, the Constitution of Albania, provides in its Article 131/f the individual right to claim for the violation of their constitutional rights to a fair hearing, after all legal means for the protection of those rights have been exhausted. Therefore theoretically, individuals could address before this court based on Article 131/f and 42 of Constitution for any violation concerning the standard of the fair trial. Notwithstanding as such Constitutional Court was not deemed as an effective remedy in compliance with Article 13 of the Convention.

Example: in *“Marini v. Albania”*(2007),³³¹the Court reiterates that Article 13 offers an alternative: a remedy is “effective” if it can be used either to expedite a decision by the courts dealing with the case, or to provide the litigant with adequate redress for delays that have already occurred (ibid., § 159). The Court observes that apart from the constitutional complaint, the Albanian legal system did not provide for any particular remedy like those referred to by the Court in *“Kudła v. Poland,”*³³² which the applicant could have had at his disposal in order to find redress for the excessive length of proceedings. The Government invoked a constitutional complaint under Article 131 of the Constitution, which allows individuals to lodge a complaint with the Constitutional Court if and when they allege a breach of Article 6 of the Convention. Such a complaint will be considered by the Constitutional Court only after the exhaustion of remedies in the lower courts, notwithstanding any further delays that this may cause. The Court further observes that, even assuming that the Constitutional Court could in theory offer adequate redress in respect of the excessive length complaints, the Government failed to produce any case in which the Constitutional Court had ruled on a complaint about the length of proceedings. In the light of the foregoing, the Court considers that there is no evidence that a complaint under Article 131 of the Constitution could be regarded, with a sufficient degree of certainty, as constituting an effective remedy for the applicant’s complaint concerning the excessive length of the proceedings.

➤ **Case study “Scordino v. Italy”**

The applicant claimed before ECtHR violation of Article 6 (Civil proceedings) and Article 6-1(Reasonable time), concerning the ineffective compensatory remedy available to victims of excessively lengthy proceedings as there was a delay in payment of awards and also the amount awarded was insufficient.

Facts: The applicant decided to dispute the amount of compensation for expropriation in 1992 for an inherited land that had been expropriated in March 1983 with a view to the construction of housing. The new law for the assessment of the market value was recognized retroactive effect over the applicant case. Therefore, the new criteria have affected the assessment of the market value of the land, which was significantly reduced.³³³ The applicant challenged the award of compensation in the Court of Appeal (judgment of 17 July 1996) and then in the Court of Cassation (7 December 1998), which upheld the Court of Appeal’s judgment. On 18 April 2002 the applicants applied to the Court of Appeal under the “Pinto Act” of 24 March 2001, seeking compensation for the length of the proceedings to which they had been parties. In a judgment of 1 July 2002,³³⁴ the Court of Appeal found that the length of the proceedings had been excessive. It ordered the Ministry of Justice to pay the applicants a total sum of EUR 2,450 for non-pecuniary damage alone and apportioned the costs between the parties. **ECtHR after having examined the case, it found that there was a violation of Article 6 arguing that** the remedy before the courts of appeal introduced by the Pinto Act was accessible. It reiterated, furthermore, starting with the Italian Court of Cassation’s

³³¹ See footnote 5

³³² Application no.30210/96, Judgment (Merits and Just Satisfaction), date on 26 October 2000, <http://hudoc.echr.coe.int/eng?i=001-58920>

³³³ At the date of expropriation at ITL 165,755 per square metre and the compensation payable in accordance with the criteria introduced by the 1992 Law at ITL 82,890 per square metre

³³⁴ Deposited with the registry on 27 July 2002

judgment of 26 January 2004 that the courts of appeal had to determine the amounts to be awarded in "Pinto" proceedings on the basis of the ECHR's case-law.³³⁵ In that connection the Court argued that the period designed to enforce Pinto proceedings to redress the consequences of excessively lengthy proceedings should not exceed six months from the date on which the decision awarding compensation became enforceable. It also stressed that these kinds of proceedings might be subject to more summary procedural rules than ordinary applications for damages, but it must at any case be conform to the principles of fairness guaranteed by Article 6 of the Convention. For the court the rules regarding legal costs should avoid placing an excessive burden on litigants and the four-month period prescribed by the Pinto Act complied with the requirement of speediness necessary for a remedy to be effective. E.g the fee for registering the judicial decision might significantly hamper the efforts made by applicants to obtain compensation. However, no maximum period was fixed for the appeals to the Court of Cassation. In addition, a compensatory remedy had to be accompanied by adequate budgetary provision in order they could become immediately enforceable within 6 months from the date of registry.

Under Article 46, the Court asked the respondent State to ensure, by appropriate statutory, administrative and budgetary measures, that the right in question was guaranteed effectively and rapidly in respect of all claimants affected by the expropriation of property, in accordance with the principles of the protection of pecuniary rights, and in particular with the principles applicable to compensation arrangements. The Court invited the respondent State to take all measures necessary to ensure that the domestic decisions were not only in conformity with the case-law of the Court but also executed within six months of being deposited with the registry.

Under Article 41 it awarded the applicants in the nine cases various sums of money for non-pecuniary damage and for costs and expenses. It also awarded the applicants in the Scordino case an amount in respect of pecuniary damage.

List of questions:

- a) In view of the case, what makes a remedy for unjustified delays of proceedings compatible with standards set out in Article 13 of Convention?
- b) Critically discuss the judgment in "*Scordino v. Italy*" in terms of what the Court highlighted:
 - The ascertaining of obligation
 - The expedition of procedures
 - The compensation of damage

³³⁵From 26 July 2004, applicants had to make use of that remedy for the purposes of Article 35 §1 of the Convention

3. Justice reform in Albania and new domestic remedies for the undue delays of judicial proceedings

ECTHR' case-law has oriented the justice reforms by suggesting possible solutions that could address the situation concerning the root cause of delays of judicial proceedings. Some of the possible solutions were considered (1) improve the organization of the administration of justice³³⁶(2) improve the management of trial and court hearings(3) avoid the large discretion of judges (4)avoid the repeated changes of judges (5) improve the management of the "chronic overload" of cases etc. In this connection, justice reform in Albania led to the enactment of several laws that had direct impact in this respect.

- (1) Law no. 76/2016, dated 22/07/2016, for the amendment of Constitutional Law no. 84/17, dated 21.10.1998, as amended
- (2) Law no. 96/2016 "On the status of judges and prosecutors in the Republic of Albania", adopted on 10/06/2016
- (3) Law no. 115/2016 "On the governing bodies of the justice system", adopted on 03/11/2016
- (4) Law no. 98/2016 "On judicial power in the Republic of Albania", adopted on 10/06/2016
- (5) Law no.38/2017, dated 30.03.2017 on the amendment of the civil procedural code
- (6) Law no.35/2017, dated 30.03.2017 on the amendment of the criminal procedural code
- (7) Law no.98/2016 "On the organisation and functioning of the Constitutional Court"

Recalling the judgment "*Kudla v. Poland*,"³³⁷ the remedies in respect of excessive length of judicial proceedings are "effective" only if they cover all stages of the proceedings, they provide redress speedily, and expedite the length of the proceedings as a whole. The best mechanism satisfies both (1) the acknowledgement of the violation and where possible expedite the proceedings (2) provide compensation. Following this line, the new Law no.38/2017, date 30.03.2017 "On the amendment of the Code of Civil Procedure", provided new remedies in Article 399/4 of CCv.P for the right of the interested party to claim the undue length of proceedings, by making two separated requests: (1) to claim the ascertaining of the violation and the expedition of the proceedings (2) to claim the fair compensation (only after the first procedure has been exhausted). Therefore, compensation may be sought from the same authority that decides on the reasonableness of the length of proceedings.

Article 399/6 point 2 provides that the request for compensation shall be made after there is a decision to ascertain the violation and expedite the proceedings before the first instance court that decided on the ascertaining of the violation. The claim is prescribed within 6 months of the finding of the violation by a final decision.

Article 399/6 point 3 provides that the fair compensation consists on the a) the recognition of the offense (b) any expedition measure (c) the amount of compensation. The adjudication of this request shall be concluded within a 3 months' time – period.

³³⁶ Application *Lechner and Hess v. Austria* no.9316/81, date on 23 April 1987, <http://hudoc.echr.coe.int/eng?i=001-57520>

³³⁷See footnote 35

Article 399/6 point 3 complies with the Convention' standard, which considers that excessive length of proceedings for the purpose of compensation of damages, should qualify the violation in this respect as a "fault," "unlawful act," "malfunctioning of administration of justice," "denial of justice" or "irregularity in the conduct of proceedings."³³⁸In this connection, the award of compensation³³⁹ should not only be adequate and reasonable and speedy, but also it should be reasoned and executed very quickly .

Article 399.2 provides that "the parties in the proceedings may claim the ascertaining of the violation of the reasonable length of proceedings according to Article 399.6 point 1 even the above deadlines have not been lapsed, but taking in consideration the complexity of the case, the object of the dispute, the nature of adjudication, the behaviour of the trial panel, and or other participants, when they have arguable claims of the excessive duration of investigation, adjudication of execution procedures. For the time of adjudication or proceedings the suspension will not be taken into account, so will the postponement with request of the complainant or in case of objective circumstances that make the proceedings impossible."

3. 1 Determination of overall period based on the new Law No.38/2017, date 30.03.2017

Law no.38/2017, date 30.03.2017 made new provisions for the determination of the optimum timeframes for the judicial proceedings (civil, criminal, administrative, enforcement of final decision) and the competent court where to address the unjustified delays, having regard of Articles 399.2 and 399.6/1 of the CCvP.

Article 399.2 of the Code of Civil Procedure provides: "1. Reasonable time for the duration of investigation, the trial or execution procedure of a final court decision, in the light of Article 399.1 will be considered:

(a) the duration of the adjudication in the administrative cases at the 1st instance, and appeal court will be 1 year at each level (b) the adjudication in civil proceedings at 1st instance, appeal and recourse before the Supreme Court will last 2 years (c) the execution procedure of a civil or administrative decision, excluding the periodical obligations or pre-determined in time, the 1 year deadline will start from the date of file of the execution request (ç) the maximum duration of the investigation of criminal offense is determined according to CCrP (d) the adjudication in criminal proceedings at 1st instance, the duration is 2 years for criminal offence and for contraventions is 1 year, the duration of adjudication at appeal is 1 year for the crimes and 6 months for

³³⁸ e.g. that of a judge or another court official, the heavy workload of tribunals, an irregularity in proceedings such as non-compliance with an obligation to act within a statutory time limit or an unlawful act or omission

³³⁹ In Lithuania, Poland, Slovakia, U.K "the same criteria as those applied by the [Court] are used. The maximum amount of compensation is not set."

the contraventions, the duration of adjudication before the Supreme Court is 1 year for the crimes and 6 months for the contraventions.

Article 399/6 point 1 of the Code of Civil Procedure provides: (1) Where the violation is claimed at the court of first instance, the request shall be examined by the court of appeal (2) Where the violation is claimed at the courts of appeal - the request is examined by the relevant college of the Supreme Court (3) Where the violation is claimed at the Supreme Court - the referral will be reviewed by another College of the Supreme Court (4) Claims related to the execution procedure - the request is adjudicated by the court of first instance, competent for execution (5) Decision shall be made by a Counsel Chamber within 45 days from the date of registration of the complaint.

3. 2. Constitutional Complaint based on the new law

The enactment of the Law No.99/2016, date 6 October 2016 "On the organization of the Constitutional Court" brought in some positive changes, related to the constitutional complaint based on Article 131/f and Article 42 of the Constitution able to afford an effective remedy compatible with Article 13 of Convention. These changes consist on the following:

- The individuals may claim against any act of a public authority (art.)
- The jurisdiction has been extended as the Court adjudicates claims on the right of the fair trial also all the substantive rights provided in the Constitution (art.)
- 4 months (previously 2 years) is the time limit for submission of request from the date of the last final decision (art.)
- 3 months is the time limit for the duration of adjudication (art.)
- 30 days is the time limit for delivering the decision (*from the day of the final verdict in the hearing*)
- The CC' decision is final and binding for enforcement (*Article 76 of CC law and Article 132 of Constitution*)
- The unjustified delay of constitutional adjudication shall be claimed based on the Article 71/c of the law
- Compensation is determined at the sum 100000 leek per each year of delay.
- Claims can be raised only if the duration lasts over a year from the date of trial at the CC

Constitutional complaint is part of the overall assessment for the length of judicial proceedings, only if it affects the finality of a court decision. In such a case, the individual have the effective remedies to claim for the delays of constitutional adjudication as part of the overall period of judicial proceedings.

Example: in case of "Deumeland v. Germany",³⁴⁰ the starting point of the period in issue is 16 June 1970, the date on which the action was instituted before the Berlin Social Court. As far as the close of the period is concerned, the "time" whose reasonableness is to be reviewed covers in principle the entirety of the litigation, including the appeal proceedings. The Federal Constitutional Court is to be taken into account in this respect, in that, although it had no jurisdiction to rule on the merits, its decision was capable of affecting the outcome of the claim. On the other hand, the time spent by the Berlin Social Court of Appeal in examining the application for re-opening of the proceedings is not material, because this application involved a fresh set of proceedings. Consequently, the close of the period is 9 February 1981, when the Federal Constitutional Court rejected Mr. Deumeland's constitutional complaint. The period to be considered thus lasted ten years, seven months and three weeks.

3. 3. Procedural aspects of unjustified delays improved in the amendment of Code of Criminal Procedures

On the criminal limb, the enactment of Law No.35/2017, Date 30.03.2017 "On the amendment of the Code of Criminal Procedures" has improved some standards for the organisation of administration of justice with impact on the acceleration of criminal proceedings. Such as the following:

- Has avoided the abusive requests for the disqualification of judges - the parties will become liable for the justification of the decision
- Obligation to respect the deadlines for the filing of the case (Article 133-138)
- The request of leave to appeal out of time will be examined by a Counsel Chamber, strengthening the filtering mechanisms (Article 147)
- The request for the postponement of the hearing can be made only during the preliminary hearing (Article 354)
- In case of non-appearance of the parties (including the witnesses, experts, victims etc), gives the court grounds for imposition of a fine
- In case of non-appearance of the defence lawyer gives the court grounds to impose a fine between 5000-100000 leek and the expenses (Articles 49, 350)
- Non-appearance of the defendant does not prevent the continuance of the court session (Article 192)
- Introducing "the criminal order" of the Prosecutor and "the plea bargaining", which will be applicable for the first time in the judicial practice.

Note: The Criminal Order is a new procedure that entitled the prosecutor with the discretion to decide for the contravention offences only which are deemed to be sentenced by a fine. This decision should be taken within 3 months from the date of registration of the defendant. The prosecutor in this case will ask for the approval in the court from the judge assigned for the trial. No need to have the consent of the defendant.

³⁴⁰ECTHR judgement, application no. 9384/81, date 29 May 1986, <http://hudoc.echr.coe.int/eng/?i=001-57468>,

Note:the Plea Bargaining is a new form of adjudication which has been intended to reduce the costs and accelerate the proceedings. In this case, the request can be proposed by all the parties in the preliminary hearing. It is allowed only for the offences up to 7 years and the decision has to take the approval in the court session which decides within 30 days from the submission of the proposal (Article 406).

3. 4. Ombudsperson

*In Qufaj sh.p.k v. Albania*³⁴¹the Court maintained as regards the possibility of applying to the Ombudsperson, that while being an authority independent from the executive, the Ombudsperson cannot take enforceable decisions vis-à-vis governmental authorities. An application to the Ombudsperson cannot therefore be regarded as a remedy satisfying the requirements of Article 35.1. The Court reiterates that Article 35.1 of the Convention requires the exhaustion of domestic remedies, but there is no obligation under this provision to have recourse to remedies which are inadequate. In the "*Egmez v. Cyprus*" the Court found that the Ombudsperson was the only remedy available for the applicant, which however was not sufficient to exhaust his claims, therefore resulted in a violation of article 13 of the Convention on the right for effective remedies.

The Ombudsperson Institution is a constitutional body established based on the Constitution of the Republic of Albania, Articles 60 to 63³⁴² which define the function, principles of activity, status and competencies of the People's Advocate, while in Article 134, item "dh" it defines the Ombudsman's right to put in motion the Constitutional Court.³⁴³Based on the Law no. 9094 dt.03.07.2003 "On the ratification of the Optional Protocol to the Convention against Torture and Other Inhumane and Degrading Treatment or Punishment (OPCAT)", the People's Advocate Office was identified as the most adequate for the activity of the National Mechanism for the Prevention of Torture.

Pursuant to Article 60 of the Constitution and Article 2 of the relevant Law, the People's Advocate protects the rights, freedoms and legitimate interests of the individual from the unlawful and irregular acts or omissions of the public administration bodies or third parties acting on its behalf. Its jurisdiction includes the Government, ministries, other central and regional governmental bodies. The People's Advocate in Albania reviews the citizen's complaints or requests against the organs of the central administration, the local government and the third parties acting on their behalf, to the police, the secret services, the prisons, the armed forces and the judiciary, cooperates with non-governmental organizations and studies in the field of human rights and freedoms. The Torture Prevention Unit deals with inspections and visits to premises

³⁴¹See footnote 10

³⁴²Article 63 § 3 "The People's Advocate has the right to make recommendations and to propose measures when he finds violations of human rights and freedoms by the public authorities.

³⁴³Article 25. Persons and Acts outside the Jurisdiction of the People's Advocate "The following shall also be outside the jurisdiction of the People's Advocate (a) statutes and other legal acts; (b) military orders to the Armed Forces; (c) court decisions. Without prejudice to item (c) of this Article, the People's Advocate shall accept complaints, requests or notifications of human-rights violations arising from the administration of the judiciary and judicial procedures. The investigations of the People's Advocate shall not infringe the independence of the judiciary in deciding cases."

where the freedom of the individual is deprived, with a view to preventing cases of torture or other inhuman and degrading punishments.

Discuss: is the role of Ombudsman compatible with the standard of an effective remedy having in mind the Court's judgements in "*Qufaj v. Albania*" and "*Egmez v Cyprus*".

Hypothetical situation:

Case 1: Applicant X is following his lawsuit on civil claims in the Tirana 1st instance court. The proceedings before this court were lasting over 2 years and a half. He claims before the Appeal court for the ascertaining of the violation of the right to have the trial heard within a reasonable time. If you were the judge to decide on this request, how would you make your decision? Discuss making concrete references in the new provisions as amended in the Code of Civil procedures. In case the decision for the ascertaining of the violation of the right to fair trial within a reasonable time was not taken in consideration by the 1st instance court, where should the applicant X address his claim to have a compensation awarded in his favor for the due damages? If you were the judge to decide on the compensation, how would you substantiate your decision?

Case 2: Applicant Y is being charged of criminal offences before the Tirana 1st instance court. His trial in the appeal court was lasting about 1 year and 8 months. Where should the applicant address his complaint on the unjustified delays of proceedings? What decision would you make if you were to decide on the request? What is the scope of the decision in this respect? What happens if the delay goes on, even after the decision taken for the ascertaining of violation? What steps should the applicant follow next? When does the applicant obtain full relief on the claimed violation?

Case 3: In 25 of august 2015 the Applicant Z has won the rights based on a final court decision to be compensated in a certain sum due to the breach of a contract with a construction company. He started the execution procedure and filed the request on 15 September 2015. The Company refused to enforce the decision and the applicant decided to file a request for the enforcement of decision on 1 January 2017. Where should the applicant Z address this request? If you were the judge to decide on this request how would you reason the decision in this respect?

List of questions:

- a) If you were a judge to decide on a request for the violation of the right to a fair trial within a reasonable time, what decision would you make based on the new provisions of CCvP, respectively, in civil, criminal, administrative proceedings?
- b) If the request for the ascertaining of the obligation to expedite the judicial proceedings was confirmed by the 1st instance court, what steps should be followed next in both scenarios, where the Court continues to delay the proceedings? When the court has managed to stop the delay and enforce the court decision successfully in time? Is the applicant entitled to a right to claim for compensation in this case?

Recommended reading:

- ECtHR' judgement "Deumeland v. Germany"
- The Constitutional Law no. 8417, dated 21.10.1998, as amended by Law no. 76/2016, dated 22/07/2016
- Law no. 96/2016 "On the status of judges and prosecutors in the Republic of Albania", adopted on 10/06/2016
- Law no. 115/2016 "On the governing bodies of the justice system", adopted on 03/11/2016
- Law no. 98/2016 "On judicial power in the Republic of Albania", adopted on 10/06/2016
- Law no.38/2017, dated 30.03.2017 on the amendment of the civil procedural code
- Law no.35/2017, dated 30.03.2017 on the amendment of the criminal procedural code
- Law no.98/2016 "On the organisation and functioning of the Constitutional Court"

C. Effective domestic remedy for unreasonably long proceedings: European Practices

The excessive length of judicial proceedings is a major problem in most European Countries. Courts must deal with their caseload *within a reasonable time*, as stated by article 6 of the European Convention on Human Rights.³⁴⁴

Since 2000, following the important judgment, *Kudła v. Poland*, adopted on 26 October 2000, European states have been obliged to establish an effective remedy before a national authority for alleged judicial delay. In that judgment, the Court adopted the following position:

'In the Court's view, the time has come to review its case-law in the light of the continuing accumulation of applications before it in which the only, or principal, allegation is that of a failure to ensure a hearing within a reasonable time in breach of Article 6 paragraph 1. The growing frequency with which violations in this regard are being found has recently led the Court to draw attention to "the important danger" that exists for the rule of law within national legal orders when "excessive delays in the administration of justice" occur "in respect of which litigants have no domestic remedy".

[...]

"Article 13, giving direct expression to the States' obligation to protect human rights first and foremost within their own legal system, establishes an additional guarantee for an individual in order to ensure that he or she effectively enjoys those rights. The object of Article 13, as emerges from the travaux préparatoires [...], is to provide a means whereby individuals can obtain relief at national level for violations of their Convention rights before having to set in motion the international machinery of complaint before the Court. From this perspective, the right of an individual to trial within a reasonable time will be less effective if there exists no opportunity to submit the Convention claim first to a national authority; and the requirements of Article 13 are to be seen as reinforcing those of Article 6§1.'

[...]

In view of the foregoing considerations the Court considers that the correct interpretation of Article 13 is that that provision guarantees an effective remedy before a national authority for an alleged breach of the requirement under Article 6§1 to hear a case within a reasonable time.³⁴⁵

Hence, if such a remedy is not available the Court will find a breach of Article 13, either without ruling on Article 6§1 or in addition to a judgment against the state under Article 6§1.

Example. In *Gjyli v. Albania*³⁴⁶ the Court observes that the ineffectiveness of domestic remedies is being increasingly raised before this Court in cases concerning a failure to

³⁴⁴ CEPEJ-SATURNC(2015)2, *Saturn Guidelines for Judicial Time Management Comments and Implementation Examples* ; CEPEJ, *Report 2012, Length of court proceedings in the Member States of the Council of Europe based on the case-law*"

³⁴⁵ *Kudła v. Poland*, 26 Oct. 2000, §148-152-156

³⁴⁶ *Application 32907/07, Judgment (Merits)*, 29/09/2009, par49 and 55-61

enforce or delayed enforcement of final domestic judgments. It has therefore decided of its own motion to examine this issue under Article 13 of the Convention (see, for example, *Burdov v. Russia* (no. 2), no. [33509/04](#), §§ 89-117, 15 January 2009; *Beshiri and Others v. Albania*, no. [7352/03](#), 22 August 2006; and *Qufaj Co. Sh.p.k. v. Albania*, no. [54268/00](#), 18 November 2004).[...]

The Court observes first that in the Albanian legal system anyone who considers that there has been a violation of his right to a fair hearing can, if he has exhausted all domestic remedies, lodge a constitutional complaint with the Constitutional Court under Article 131 (f) of the Constitution. In its *Qufaj Co. Sh.p.k.* judgment, (cited above, § 42), the Court found that: "the Constitutional Court was competent to deal with the applicant company's complaint relating to non-compliance with a final judgment as part of its jurisdiction to secure the right to a fair trial". This element of the right to a fair hearing was embodied for the first time in the Constitutional Court's judgment no. [6/06](#), subsequently upheld in its judgments nos. [43/07](#), [1/09](#) and [6/09](#). In the present case, however, the Court notes that the applicant did not lodge a constitutional complaint with the Constitutional Court concerning the non-enforcement of the Durrës District Court's judgment of 27 September 2005. The Court must determine whether the above-noted remedy would have been "effective" in the sense either of preventing the alleged violation or its continuation or of providing adequate redress for any violation that had already occurred. The Court notes that the Constitutional Court judgments [...] recognised that there had been a violation of the appellants' right of access to court on account of the non-enforcement of domestic courts' judgments. However, their findings were declaratory so that the Constitutional Court did not offer any adequate redress. In particular, it did not make any awards of pecuniary and/or non-pecuniary damage, nor could it offer a clear perspective to prevent the alleged violation or its continuation. Furthermore, the Court notes that the bailiff's actions were not effective in the present case. Moreover, the Government did not contend the existence of any other alternative preventive remedy which, in the circumstances of the case, could have been relied upon by the applicant. The Court concludes that there has accordingly been a violation of Article 13 in conjunction with Article 6 § 1 of the Convention. On that account, the Government's preliminary objection based on non-exhaustion of domestic remedies must be dismissed.'

Following the *Kudła* judgment, several states have introduced arrangements to enable citizens who have suffered excessive lengthy proceedings or who are still awaiting completion of a particular stage to have their case expedited.

As stated in the *Kudła* judgment, "the Contracting States are afforded some discretion as to the manner in which they provide the relief required by Article 13 and conform to their Convention obligation under that provision". The Court thus allows the contracting states a certain degree of freedom regarding the type of effective remedy to be introduced. However, the Court regularly recalls that "the most effective solution" is a remedy intended to accelerate procedures, "*since it also prevents a finding of successive violations in respect of the same set of proceedings and does not merely repair the breach a posteriori [...]*" (eg Grand Chamber judgment *Scordino v. Italy* (No. 1) of 29 March 2006, §§ 183 and 184).

By allowing countries to choose between compensation for damage suffered from over-lengthy proceedings or the possibility of expediting proceedings, the Court has created the possibility of new remedies. Hence, various types of possible remedy for

excessively long proceedings exist in Council of Europe member states.³⁴⁷ Some examples will be provided in the following paragraphs.

As concerns **Italy**, following the *Kudta* judgment, an Italian law n.89 of 24 March 2001, known as the Pinto Act, introduced a domestic remedy affording victims of unreasonably long proceedings the possibility of obtaining redress. This remedy was considered to be effective in the *Brusco* case, a pilot decision in which the European Court of Human Rights invited the applicants who had referred the case on the grounds of reasonable time to withdraw it or otherwise face the risk of an inadmissibility decision on account of failure to exhaust domestic remedies..

Logically, applicants are required to exhaust the domestic remedies available at the time they lodge their applications with the European Court, but not any remedies established subsequently. There is one exception to this rule, and this is when a state introduces a domestic remedy in response to organisational failure in its judicial system: an applicant is then required to redirect his or her application to the new national authority concerned despite the fact that the domestic remedy became available only after he or she had applied to the European Court.

In its *Brusco v. Italy* admissibility decision of 6 September 2001, followed by many others in the same vein, the Court took the view that, 'having regard to the nature of the Pinto Act and the context in which it was passed, there were grounds for departing from the general principle that the exhaustion requirement should be assessed with reference to the time at which the application was lodged. [...]

The Court has held that applicants in cases against Italy which concern the length of proceedings should have recourse to the remedy introduced by the 'Pinto Act' notwithstanding that it was enacted after their applications had been filed with the Court.

A similar decision was taken in respect of cases introduced against Croatia following the entry into force of a constitutional amendment permitting the Constitutional Court to provide redress of both a preventive and a compensatory nature to persons complaining about undue delays in judicial proceedings.³⁴⁸ The European Court of Human Rights has taken the same line with Slovakia and Poland.³⁴⁹

³⁴⁷ An overview has been compiled by the Steering Committee for Human Rights in connection with implementation of Recommendation Rec (2004) 6 of the of the Council of Europe Committee of Ministers on the improvement of domestic remedies; CDDH (2006) 008 E (reform of ECHR), Steering Committee for Human Rights; Venice Commission report, "National Remedies in respect of Excessive Length of Proceedings" (Study No. 316/2004, CDL (2005) 092, English only, restricted, 8 Dec. 2005) and the reports presented at the seminar organised by the Constitutional Court of the Czech Republic, in cooperation with the Venice Commission, on the limits of constitutional review of the ordinary courts' decisions in constitutional complaint proceedings (14-15 Nov. 2005, Brno, CDL-JU (2005) 059-61 and 67-68 in English only)) and the European Commission for the Efficiency of Justice (CEPEJ) report, "Length of court proceedings in the Member States of the Council of Europe based on the case-law", 2012.

³⁴⁸ Admissibility decision, *Rocco Colacrai v. Italy*, 29 Nov. 2001, "The Law", §1; see also, *Giacometti and others v. Italy* (dec.), no. 34939/97.

³⁴⁹ Admissibility decision, *Andrášik and others v. Slovakia*, nos. 57984/00, 57984/00, 60237/00,

The Court has had occasion to consider whether the compensatory remedy introduced by the Pinto Act might be held to provide appropriate and sufficient redress for the violation of the right to have a hearing within a reasonable time. Concerning the requirement of appropriate and sufficient redress, in *Scordino v. Italy* judgment of 29 March 2006, the Court stated the following: 'the Court has already indicated that even if a remedy is "effective" in that it allows for an earlier decision by the courts to which the case has been referred or for the aggrieved party to be given adequate compensation for the delays that have already occurred, that conclusion applies only on condition that an application for compensation remains itself an effective, adequate and accessible remedy in respect of the excessive length of judicial proceedings'³⁵⁰ However, the Court held that the remedy introduced in Italy by the Pinto Act did not satisfy these criteria owing on the one hand to excessive delays in compensatory proceedings, and on the other to the low awards. These two considerations made the remedy ineffective, inappropriate and insufficient. In the *Scordino* judgment and eight other judgments delivered on the same day the Court therefore clarified the requirements to be met by domestic remedies for judicial delay and, more specifically, by actions for damages: a reasonable amount of compensation must be paid within a period that was itself reasonable.

The Court also stated that: "[...] it cannot be ruled out that excessive delays in an action for compensation will render the remedy inadequate." In various cases brought to the Court, the latter held it to be "unacceptable" that the applicants had had to wait for periods ranging between eleven months and over three years, and sometimes even bring execution proceedings before receiving the compensation awarded to them.³⁵¹ The Court can accept that the authorities need time in which to make payment. However, in respect of a compensatory remedy designed to redress the consequences of excessively lengthy proceedings that period should not generally exceed six months from the date on which the decision awarding compensation becomes enforceable. Beyond the six months period the execution stage of a decision awarding compensation would be unreasonable and would deprive the compensatory remedy of its effectiveness.³⁵²

In the *Scordino* case, the Court also held, that the amounts awarded by the Italian courts to the various applicants as compensation for delays in the judicial system were inadequate. Having noted the sums paid to each of the applicants in these different cases, "the Court observes that this amount is approximately [between 8% and 27%] of what it generally awards in similar Italian cases [by the Court in Strasbourg]. That factor in itself leads to a result that is manifestly unreasonable having regard to its case-law." States are therefore under an obligation to provide victims of judicial delay with a reasonable amount of compensation in comparison with the sums usually awarded by the European Court of Human Rights. Otherwise the violation of the right guaranteed by Article 6§1 will not have been sufficiently redressed, and the domestic

60242/00, 60679/00, 60680/00, 68563/01 and 60226/00; . Admissibility decision in *Charzyński v. Poland*, no. 15212/03.

³⁵⁰ *Scordino v. Italy*, 29 Mar. 2006, §195

³⁵¹ *Riccardi Pizzati*: more than 22 months (§99); *Musci*: 23 months (§101); *Giuseppe Mostacciolo* (No. 1): more than 14 months (§98); *Giuseppe Mostacciolo* (No. 2): more than 14 months (§98); *Cocchiarella*: more than 3 years (§100); *Apicella*: 11 months (§98); *Ernestina Zullo*: 23 months (§102); *Giuseppina and Orestina Procaccini*: more than 3 years (§98).

³⁵² *Scordino v. Italy*, 29 Mar. 2006, §198

remedy referred to in Article 35§1 and used by the applicant will be ineffective. It follows that the applicant can still claim to be a victim of the violation concerned and be entitled to complain of the situation to the Strasbourg authorities. As it itself pointed out in the cases cited above, “[t]he Court has already had occasion to indicate that an applicant’s victim status may depend on the level of compensation awarded at domestic level on the basis of the facts about which he or she complains before the Court.”³⁵³

As to the question of the compensation to be paid, the Court has specified the requirements. With regard to pecuniary damage, the domestic courts are clearly in a better position to determine the existence and quantum. Moreover, that point has not been disputed by the parties or interveners. Regarding non-pecuniary damage, the Court – like the Italian Court of Cassation – assumes that there is a strong but rebuttable presumption that excessively long proceedings will occasion non-pecuniary damage. It also accepts that, in some cases, the length of proceedings may result in only minimal non-pecuniary damage or no non-pecuniary damage at all. The domestic courts will then have to justify their decision by giving sufficient reasons. Secondly, on the extent of compensation, the Court has provided the following guidelines. The level of compensation depends on the characteristics and effectiveness of the domestic remedy. The Court can also perfectly well accept that a State which has introduced a number of remedies, one of which is designed to expedite proceedings and one to afford compensation, will award amounts which – while being lower than those awarded by the Court – are not unreasonable, on condition that the relevant decisions, which must be consonant with the legal tradition and the standard of living in the country concerned, are speedy, reasoned and executed very quickly.

However, where the domestic remedy has not met all the foregoing requirements, it is possible that the threshold in respect of which the amount will still allow a litigant to claim to be a “victim” will be higher. It is even conceivable that the court determining the amount of compensation will acknowledge its own delay and that accordingly, and in order not to penalise the applicant later, it will award a particularly high amount of compensation in order to make good the further delay.

As concerns the **Czech Republic**, reforms have been made following the *Hartman* judgment of 10 July 2003, in which the European Court found that appeals to the Constitutional Court, which enabled individuals to challenge any final decision of another body, administrative or judicial, were not effective. According to the pertinent Resolution of the Committee of Ministries the Czech Republic has taken important measures with a view to making the justice system’s work more effective and to expediting court proceedings. The extensive amendment to the Rules of Civil Procedure, enacted by Act No. 7/2009, has, since 1 July 2009, reduced delays in court proceedings by simplifying procedure (for example, the recording of court hearings, reduced scope of the substantiation of some of courts’ decisions), by introducing the concept of ‘the preparatory hearing’, and, primarily, by introducing a brand new effective method of service (‘the mandatory address for service’ of parties to the proceedings); in addition, taken together with Act No. 300/2008, on Electronic [Official] Acts and Authorised Document Conversion, it introduced, as the priority method of the

³⁵³ *Scordino v. Italy*, 29 Mar. 2006, §202.

service of process, electronic delivery to data mailboxes. Act No. 192/2003 has added a provision to Act No. 6/2002 on courts and judges, under which, from 1 July 2004, it is possible to seek a remedy for excessive delays in judicial proceedings by applying for a deadline to be set for completion of a particular procedural stage or formality. Changes in the method of the working of courts, such as court Mini Teams and broader powers for justices' clerks, which relieve judges of unnecessary burden, also help to expedite court proceedings. In this respect, the legal basis is Act No. 121/2008, on Justices' Clerks and Public Prosecutors' Clerks, which, with effect as of 1 July 2008, newly defines the scope of the tasks that hitherto had been carried out by judges and public prosecutors and transfers some of these tasks to justices' clerks and public prosecutors' clerks. On 1 October 2008 there was also a change in the system of proceedings on judges' disciplinary transgressions, which is intended to permit genuinely independent and objective decision making on disciplinary transgressions, which also include unjustifiable delays in the handling of cases assigned to judges. A major leap forward is the extensive digitalisation of the justice system (for example, the ePodatelna [e-MailRoom] project, the ePřetvorný rozkaz [e-CourtOrderToPay] application, and the infoSoud [infoCourt] and infoJednání [infoHearing] projects). An extensive amendment to the Execution Rules (promulgated as Act No. 286/2009), came into force on 1 November 2009. This amendment transfers the administrative agenda from courts to bailiffs/enforcement officers, which is connected with the new powers reposed in bailiffs/enforcement officers. As in the above cases, the objective here was to expedite the entire proceedings. Already the petition itself for the ordering of execution is addressed directly to the bailiff/enforcement officer rather than the execution court. It is precisely the bailiff/enforcement officer who examines whether or not the entitled person's petition contains all the essential details required, and only then will he send the petition to the execution court. The effort to reduce the length of court proceedings and alleviate the burden on ordinary courts continues – states the Government in its report to the Committee of Ministries. The focus is currently on the law on mediation, to help shorten civil proceedings, an amendment to the law on arbitration, which together with the Supreme Court's case law results in a greater transparency and simplification of these proceedings, and an amendment to the Code of Administrative Justice, the purpose of which is to expedite proceedings before administrative courts. The amendment mainly brings changes in the proceedings on cassation appeals, which will be transferred as a whole to the Supreme Administrative Court.³⁵⁴ The work on the digitalisation of the justice system continues; the objective is to introduce the electronic file (known as an eSpis [eFile]) for all types of court proceedings.

In **Croatia**, following the judgment of the European Court in the Horvat case, the constitutional law on the constitutional Court of 1999 was amended. The new article 63 has entered into force since 15 March 2002. The ECHR noted on many occasions that this new provision constituted an effective remedy with regard to the excessive duration of legal procedures (see the *Radoš* case and others against Croatia (07/11/2002) and the decisions on the admissibility in the *Slaviček* case (decision of the 04/07/2002), *Nagolica* case (decision of the 05/09/2002), *Plaftak* and others (decision of the 03/10/2002), *Jeftić* case (decision of the 03/10/2002) and *Sahini* case (decision of the

³⁵⁴ See CM Recommendation on the Execution of Hartman judgment, 29 May 2013, <http://hudoc.echr.coe.int/eng?i=001-122060>

11/10/2002)). The effectiveness of this new remedy was confirmed thereafter by the decisions of the Constitutional Court and in particular through the direct effect granted to the judgments of the European Court in interpretation of the Croatian right. Following the abovementioned legislative reform of 2002, the judgments of the European Court were seen as recognizing a direct effect in the event of excessive duration of the legal procedures, including procedures of execution. The constitutional Court, thus, noted several violations of the right of the plaintiffs under the terms of Article 29, paragraph 1, of the Constitution because of the excessive duration of the legal procedures. Consequently, it ordered to the concerned courts, to return a decision within certain times and granted damages for the delays which had already taken place.

In **Germany** following the case of *Sürmeli v. Germany*, 8 June 2006, and *Rumpf v. Germany*, reforms were made to improve internal legislation. With changes in law of 14 November 2011, on protection of rights of individuals in case of unreasonable length of proceedings, the person who pretends to be a victim of inefficient procedures, may submit a request in the same court where the case is stuck. If the said court does not proceed, then the complainant may submit a request to the court of appeal. The process has two stages: one is of *preventive* nature, where the party claims for the acceleration of the process; and the other one is the *compensation* stage, where the process is out of reasonable limits and the victim claims for compensation. This law includes legal redress for excessive length of court proceedings and as well for criminal investigation, as well as legal address in the federal constitutional court and also in other legislation with a chance for proceedings to be excessive, such as: notary, advocacy, and on financial courts³⁵⁵.

Portuguese law lays down maximum time-limits for each step in criminal proceedings. If these time-limits are not met, the person concerned may make an application for proceedings to be expedited, which, if granted, may lead, for example, to a decision setting a time-limit within and the court or prosecutor must take a particular procedural step, such as closing an investigation or fixing a date for a hearing. The Court recognised the effectiveness of this remedy in its admissibility decision in *Tomé Mota v. Portugal* on 2 December 1999. In the latter case, the applicant, Mr Cesário Manuel Tomé Mota, is a Portuguese national who was born in 1952. At the moment the Court delivered the decision, the applicant was held in Linhó Prison in Portugal. On 31 August 1991 the applicant was arrested. He was suspected of having used several stolen cheques after signing them with signatures corresponding to those of the rightful bearers, thus making himself guilty of handling stolen goods, fraud and forgery. Those facts led to several sets of criminal proceedings being initiated against the applicant and which last several years. The Court considered, in this case that ' In the light of the relevant domestic legislation and information supplied by the government, which the applicant has not disputed, the Court notes that in Portugal a person who alleges that criminal proceedings against him have been excessively lengthy, for example, where the statutory time-limits for any step of the proceedings have been exceeded, may apply to the Attorney-General or the Judicial Service

³⁵⁵ Length of court proceedings in the member states of the Council of Europe based on the case law of the European Court of Human Rights, CEPEJ - 8th plenary meeting, Strasbourg, 6-8 December 2006,

Commission for an order to expedite the proceedings under Articles 108 and 109 of the Code of Criminal Procedure. If such an application is successful, it may, among other effects, lead to a decision to give the prosecutor responsible for the investigation notice to close that investigation, or if need be, to request the judge to take the necessary steps, such as fixing a date for the hearing or closing the judicial investigation. These provisions are, therefore, different from those of Articles 192, 337 and 338 of the former Portuguese Code of Criminal Procedure which were in issue in the *Moreira de Azevedo* case, and which the European Commission of Human Rights considered not to have granted a remedy within the meaning of former Article 26 (currently Article 35 § 1) of the Convention (see application no. 11296/84, *Moreira de Azevedo v. Portugal*, decision of 14 April 1998, DR 56, p. 115). The Court, therefore, notes that Articles 108 and 109 of the New Code of Criminal Procedure put into place, as shown by the decisions put forward by the Government, a true legal remedy enabling a person to complain of the excessive length of criminal proceedings in Portugal (*Gonzalez Marin v. Spain* (dec.), no. 39521/98, ECHR 1999-VII, and application no. 17553/90, *Prieto Rodriguez v. Spain*, decision of 6 July 1993, DR 75, p. 128). The remedy concerned was created, it must be recalled, as a response to the requirement of promptness of proceedings guaranteed by the Convention, as shown by the preamble of the New Code of Criminal Procedure, and it is undoubtedly sufficiently accessible and effective, especially its exercise does not lead to the lengthening of the proceedings in issue, given the very strict time-limits imposed on the institutions responsible for taking a decision. That being so, in the absence of special circumstances, which were not alleged, such as to dispense the applicant from such an obligation, he should have exercised that remedy before complaining to the Commission of the excessive length of the criminal proceedings in issue. Hence the Court declared the application inadmissible.

Similarly, **Austrian law** provides that in administrative proceedings the competent authority, unless provided otherwise, must decide within six months upon any request by a party. If this time-limit is not complied with, the party may lodge an application with the Administrative Court under Article 132 of the Federal Constitution. If deemed admissible, it results in an order to the authority to give the decision within three months, a time-limit which can be extended only once. The Court acknowledged the effectiveness of the Austrian remedy in its *Basic v. Austria* judgment of 30 January 2001, reasoning as follows:

'The Court finds that there are no fundamental differences which would distinguish the application under Article 132 of the Austrian Federal Constitution under review in the present case from the remedy which was at issue in *Tomé Mota*, cited above. Having regard to the fact that under Austrian law administrative authorities are, as a general rule, under a duty to decide on a party's request within six months, and noting that the use of the application under Article 132 of the Federal Constitution does not normally lead to a further delay in the proceedings, the Court concludes that this application constitutes an effective remedy as regards a complaint about the length of proceedings.'

In **France** recognition of state liability for judicial delay has been brought about by case-law developments regarding the interpretation of liability of the ordinary and administrative courts. In its *Bolle-Laroche* judgment of 23 February 2003, which confirmed the trend begun in the courts below, the French Court of Cassation redefined the concept of gross negligence of the ordinary courts for which the state incurs liability as “any deficiency established by an act or series of acts reflecting the unfitness of the public system of justice for its purpose”. In its admissibility decision of 12 June 2001 in *Giummarra and others v. France* the European Court noted this more flexible interpretation of Article L. 781-1 of the Code of Judicial Organisation, which governs actions for damages for the malfunctioning of the justice system, and observed that there was a sufficiently established line of domestic decisions against the state for this to be considered an “effective remedy” within the meaning of Article 13 of the Convention.

Consequently it held that an application under Article L. 781-1 had now acquired “the requisite degree of legal certainty” to constitute an “effective” remedy within the meaning of Article 35§1 of the Convention and that the applicant must use it before applying to the European Court, regardless of the stage reached in the domestic proceedings, whether they had ended or were pending. Similarly, in its *Magiera* judgment of 28 June 2002,⁴⁸³ the French Conseil d’État accepted that, directly pursuant to Article 6§1 of the Convention and the general principles governing the operation of the administrative courts, litigants were entitled to have their applications determined within a reasonable time and that, if the infringement of this right had caused them injury, they could secure redress by holding the state liable for “malfunctioning of the public system of justice” without its being necessary for gross negligence to have been committed in the exercise of judicial power, as had been the case under the previous case-law. In the light of this development the European Court, in its *Broca and Texier-Micault v. France* judgment of 21 October 2003, acknowledged the effectiveness of an action for damages.