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Regular Selective Information Flow (RSIF) from the Office of the Commissioner for Human Rights to the Contact Persons of the National Human Rights Structures (NHRSs)

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The selection of the information contained on this Issue and deemed relevant to NHRSs is made under the responsibility of the NHRSs Unit and the Legal Advice Unit of the Office of the Commissioner.

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Introduction

This issue is part or the "Regular Selective Information Flow" (RSIF) which Commissioner Hammarberg promised to establish at a round table with the heads of the national human rights structures (NHRSs) in April 2007 in Athens. The purpose of the RSIF is to keep the national structures permanently updated of Council of Europe norms and activities by way of regular transfer of information, which the Commissioner's Office carefully selects and tries to present in a user-friendly manner. The information is sent to the Contact Persons in the NHRSs who are kindly asked to dispatch it within their offices.

Each issue will cover two weeks and will be sent out by the Commissioner's Office a fortnight after the end of each observation period. This means that all information contained in any given issue will be between two and four weeks old.

Unfortunately, the issues will be available in English only for the time being due to the limited means of the Commissioner's Office. However, the majority of the documents referred to exists in English and French and can be consulted on the web sites that are indicated in the issues.

The selection of the information included in the issues is made by the Commissioner's Office under its responsibility. It is based on what the NHRSs and the Legal Advice Units believe could be relevant to the work of the NHRSs. A particular effort is made to render the selection as targeted and short as possible.

Readers are expressly encouraged to give the Commissioner's Office any feed-back that may allow for the improvement of the format and the contents of this tool.

Part I : The activities of the European Court of Human Rights

A. Judgments

1. Judgments deemed of particular interest to NHRSs

The judgments presented under this heading are the ones for which a separate press release is issued by the Registry of the Court as well as other judgments which the Office of the Commissioner considers relevant for the work of the NHRSs. They correspond also to the themes addressed in the Peer-to-Peer Workshops. The judgments are thematically grouped. The information, except for the comments drafted by the Office of the Commissioner, is based on the press releases of the Registry of the Court.

Some judgments are only available in French.

Please note that the Chamber judgments referred to hereunder become final in the circumstances set out in Article 44 § 2 of the Convention : "a) when the parties declare that they will not request that the case be referred to the Grand Chamber; or ; b) three months after the date of the judgment, if reference of the case to the Grand Chamber has not been requested; or c) when the panel of the Grand Chamber rejects the request to refer under Article 43".

Note on the Importance Level :

According to the explanation available on the Court's website, the following importance levels are given by the Court:

1 = High importance, Judgments which the Court considers make a significant contribution to the development, clarification or modification of its case-law, either generally or in relation to a particular **State.**

2 = Medium importance, Judgments which do not make a significant contribution to the case-law but nevertheless do not merely apply existing case-law.

3 = Low importance, Judgments with little legal interest - those applying existing case-law, friendly settlements and striking out judgments (unless these have any particular point of interest).

Each judgment presented in section 1 and 2 is accompanied by the indication of the importance level.

- **Grand Chamber judgment – Detention in high security conditions under a statutory scheme which permitted the indefinite detention of non-nationals certified by the Secretary of State as suspected of involvement in terrorism.**

A. and Others v. the United Kingdom (no. 3455/05) (Importance 1) - No violation of Article 3 taken alone or in conjunction with Article 13 - Violation of Article 5 § 1 - The applicants were not detained with a view to deportation and the derogating measures which permitted their indefinite detention on suspicion of terrorism discriminated unjustifiably between nationals and non-nationals - Violation of Article 5 § 4 - Inability to effectively challenge the allegations - Violation of Article 5 § 5 - Lack of an enforceable right to compensation

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

Following the al'Qaeda attacks of 11 September 2001 on the United States of America, the British Government considered that the United Kingdom was a particular target for terrorist attacks, such as to give rise to a "public emergency threatening the life of the nation" within the meaning of Article 15 of the European Convention on Human Rights (derogation in time of emergency). The Government believed that the threat came principally from a number of foreign nationals present in the United Kingdom, who were providing a support network for extremist Islamist terrorist operations linked to al'Qaeda. These individuals could not be deported because there was a risk that each would be ill-treated in his country of origin in breach of Article 3 of the Convention. The Government considered

that it was necessary to create an extended power permitting the detention of foreign nationals, where the Secretary of State reasonably believed that the person's presence in the United Kingdom was a risk to national security and reasonably suspected that the person was an "international terrorist". Since the Government considered that this detention scheme might not be consistent with Article 5(1) of the Convention (right to liberty), on 11 November 2001 they issued a notice of derogation under Article 15 of the Convention to the Secretary General of the Council of Europe. The notice set out the provisions of Part 4 of the Anti-Terrorism, Crime and Security Act 2001 ("the 2001 Act"), including the power to detain foreign nationals certified as "suspected international terrorists" who could not "for the time being" be removed from the United Kingdom. Part 4 of the 2001 Act came into force on 4 December 2001 and was repealed in March 2005. During the lifetime of the legislation 16 individuals, including the 11 applicants, were certified and detained.

The decision to certify each applicant under the 2001 Act was subject to review every six months before the Special Immigration Appeals Commission (SIAC); each applicant appealed against the Secretary of State's decision to certify him. In determining whether the Secretary of State had had reasonable grounds for suspecting that each applicant was an "international terrorist" whose presence in the United Kingdom gave rise to a risk to national security, SIAC used a procedure which enabled it to consider both evidence which could be made public ("open material") and sensitive evidence which could not be disclosed for reasons of national security ("closed material"). The detainee and his legal representatives were given the open material and could comment on it in writing and at a hearing. The closed material was not disclosed to the detainee or his lawyers but to a "special advocate", appointed on behalf of each detainee by the Solicitor General. In addition to the open hearings, SIAC held closed hearings to examine the secret evidence, where the special advocate could make submissions on behalf of the detainee as regards procedural matters, such as the need for further disclosure, and as to the substance and reliability of the closed material. However, once the special advocate had seen the closed material he could not have any contact with the detainee or his lawyers, except with the leave of the court. On 30 July 2002 SIAC upheld the Secretary of State's decision to certify each of the applicants. However, it also found that, since the detention regime applied only to foreign nationals, it was discriminatory and in breach of the Convention.

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

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

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

Article 3 taken alone or in conjunction with Article 13

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

It could not, however, be said that the applicants had been without any prospect or hope of release. In particular, they had been able to bring proceedings to challenge the legality of the detention scheme under the 2001 Act and had been successful before SIAC, on 30 July 2002, and the House of Lords on 16 December 2004. In addition, each applicant had been able to bring an individual challenge to the decision to certify him and SIAC had been required by statute to review the continuing case for

detention every six months. The Court did not, therefore, consider that the applicants' situation had been comparable to an irreducible life sentence, which would have given rise to an issue under Article 3. In those circumstances, the Court found that the applicants' detention had not reached the high threshold of inhuman and degrading treatment for which a violation of Article 3 could be found.

Articles 5 § 1 and 15

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

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

Subparagraph (f) of Article 5 § 1 permits the State to control the liberty of aliens in an immigration context and the Government contended that the applicants had been lawfully detained as persons "against whom action is being taken with a view to deportation or extradition". The Court did not consider that the United Kingdom Government's policy of keeping the possibility of deporting the applicants "under active review" had been sufficiently certain or determinative to amount to "action ... being taken with a view to deportation". One of the principal assumptions underlying the derogation notice, the 2001 Act and the decision to detain the applicants had been that they could not be removed or deported "for the time being". There was no evidence that there had been any realistic prospect of their being expelled without them being put at real risk of ill-treatment. Their detention had not, therefore, fallen within the exception to the right to liberty set out in paragraph 5 § 1(f). That conclusion had also been, expressly or impliedly, reached by a majority of the members of the House of Lords. It was, instead, clear from the terms of the derogation notice and Part 4 of the 2001 Act that the applicants had been certified and detained because they had been suspected of being "international terrorists". Internment and preventive detention without charge are incompatible with the fundamental right to liberty under Article 5 § 1, in the absence of a valid derogation under Article 15. The Court therefore considered whether the United Kingdom's derogation had been valid.

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

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

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

Before the domestic courts, the Secretary of State had provided evidence to show the existence of a threat of serious terrorist attacks planned against the United Kingdom. Additional closed evidence had been provided before SIAC. All the national judges had accepted that danger to have been credible. Although no al'Qaeda attack had taken place within the territory of the United Kingdom at the time when the derogation had been made, the Court did not consider that the national authorities could be criticised for having feared such an attack to be imminent. A State could not be expected to wait for disaster to strike before taking measures to deal with it. Moreover, the danger of a terrorist attack had, tragically, been shown by the bombings and attempted bombings in London in July 2005 to have been very real. While it was striking that the United Kingdom had been the only Convention State to have lodged a derogation in response to the danger from al'Qaeda, the Court accepted that it had been for each Government, as the guardian of their own people's safety, to make its own assessment on the basis of the facts known to it. Weight had, therefore, to be attached to the judgment of the United Kingdom's Government and Parliament, as well as the views of the national courts, who had been better placed to assess the evidence relating to the existence of an emergency. Accordingly, the Court, like the majority of the House of Lords, held that there had been a public emergency threatening the life of the nation.

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

The Court considered that the House of Lords had been correct in holding that the extended powers of detention were not to be seen as immigration measures, where a distinction between nationals and non-nationals would be legitimate, but instead as concerned with national security. Part 4 of the 2001 Act had been designed to avert a real and imminent threat of terrorist attack which, on the evidence, had been posed by both nationals and non-nationals. The choice by the Government and Parliament of an immigration measure to address what had essentially been a security issue had resulted in a failure adequately to address the problem, while imposing a disproportionate and discriminatory burden of indefinite detention on one group of suspected terrorists. As the House of Lords had found,

there was no significant difference in the potential adverse impact of detention without charge on a national or on a non-national who in practice could not leave the country because of fear of torture abroad.

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

Article 5 § 4

The remaining applicants complained that the procedure before SIAC was unfair because the evidence against them was not fully disclosed. Where a person is detained on the basis of an allegedly reasonable suspicion of unlawful behaviour, the guarantee of procedural fairness under Article 5 § 4 requires him to be given an opportunity effectively to challenge the allegations. This generally requires disclosure of the evidence against him. However, in cases where there is a strong public interest in keeping some of the relevant evidence secret, for example to protect vulnerable witnesses or intelligence sources, it is possible to place restrictions on the right to disclosure, as long as the detainee still has the possibility effectively to challenge the allegations against him.

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

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

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

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

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

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

You may also consult with that respect the opinion of the Commissioner for Human Rights, Mr Alvaro Gil-Robles, on certain aspects of the United Kingdom 2001 derogation from Article 5 of the European Convention on Human Rights (CommDH(2002)7).

- **Grand Chamber – Discrimination in retirement pensions**

Andrejeva v. Latvia (no. 55707/00) (Importance 1) - 18 February 2009 - Violation of Article 14 (prohibition of discrimination) in conjunction with Article 1 of Protocol No. 1 (protection of property) on account of the Latvian courts' refusal to grant the applicant a retirement pension in respect of her years of employment in the former Soviet Union prior to 1991 on the ground that she did not have Latvian citizenship - Violation of Article 6 § 1

Relying on Article 14 taken in conjunction with Article 1 of Protocol No. 1, the applicant alleged, in particular, that by refusing to grant her a State pension in respect of her employment in the former Soviet Union prior to 1991 on the ground that she did not have Latvian citizenship, the Latvian authorities had discriminated against her in the exercise of her pecuniary rights.

Article 14 taken in conjunction with Article 1 of Protocol No. 1

The Court reiterated that once an applicant had established the existence of a difference in treatment, it was for the Government to show that the difference was justified.

In the present case the Court noted, firstly, that in the judgments they had delivered in 1999 the Latvian courts had found that the fact of having worked for an entity established outside Latvia despite having been physically in Latvian territory did not constitute "employment within the territory of Latvia" within the meaning of the State Pensions Act. The parties disagreed as to whether at that time such an interpretation could have appeared reasonable or whether it was manifestly arbitrary. The Court did not consider it necessary to determine that issue separately.

The Court accepted that the difference in treatment complained of pursued at least one legitimate aim that was broadly compatible with the general objectives of the Convention, namely the protection of the country's economic system.

The parties agreed that if the applicant became a naturalised Latvian citizen she would automatically receive the pension in respect of her entire working life. However, the Court had held that very weighty reasons would have to be put forward before it could regard a difference of treatment based exclusively on the ground of nationality as compatible with the Convention; it could not discern any such reasons in the present case. Firstly, it had not been established, or even alleged, that the applicant had not satisfied the other statutory conditions entitling her to a pension in respect of all her years of employment. She was therefore in a similar situation to persons who had had an identical or similar career but who, after 1991, had been recognised as Latvian citizens. Secondly, there was no evidence that during the Soviet era there had been any difference in treatment between nationals of the former USSR as regards pensions. Thirdly, the Court observed that the applicant was not currently a national of any State. She had the status of a "permanently resident non-citizen" of Latvia, the only State with which she had any stable legal ties and thus the only State which, objectively, could assume responsibility for her in terms of social security.

In those circumstances, the arguments submitted by the Latvian Government were not sufficient to satisfy the Court that there was a "reasonable relationship of proportionality" between the legitimate aim pursued and the means employed.

The Government took the view that the reckoning of periods of employment was essentially a matter to be addressed through bilateral inter-State agreements on social security. The Court was fully aware of the importance of such agreements but nevertheless reiterated that by ratifying the Convention, Latvia had undertaken to secure "to everyone within [its] jurisdiction" the rights and freedoms guaranteed therein. Accordingly, the Latvian State could not be absolved of its responsibility under Article 14 on the ground that it was not or had not been bound by inter-State agreements on social security with Ukraine and Russia. Nor could the Court accept the Government's argument that it would be sufficient for the applicant to become a naturalised Latvian citizen in order to receive the full amount of her pension. The prohibition of discrimination in Article 14 was meaningful only if an applicant's personal situation was taken into account exactly as it stood. The Court therefore found, by 16 votes to 1, a violation of Article 14 taken in conjunction with Article 1 of Protocol No. 1.

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

Article 6 § 1

The applicant also complained, under Article 6 § 1 that the hearing of 6 October 1999 had taken place earlier than scheduled, which had prevented her from taking part in the examination of her appeal on points of law.

The Court noted, among other things, that the appeal on points of law had been lodged not by the applicant herself or her lawyer but by the public prosecutor attached to the Riga Regional Court. The Government argued that the favourable position adopted by the public prosecutor had dispensed the Senate from having to afford the applicant the opportunity to attend the hearing herself. The Court was not persuaded by that argument and observed, in particular, that it did not appear that under Latvian law, a public prosecutor could represent one of the parties or replace that party at the hearing. Ms Andrejeva had been a party to administrative proceedings governed at the time by the Civil Procedure Act and instituted at her request. Accordingly, as the main protagonist in those proceedings she should have been afforded the full range of safeguards deriving from the adversarial principle.

The Court concluded unanimously that the fact that the appeal on points of law had been lodged by the prosecution service had in no way curtailed the applicant's right to be present at the hearing of her case, a right she had been unable to exercise despite having wished to do so. There had therefore been a violation of Article 6 § 1.

- **Grand Chamber – Right to respect for property**

Kozacioğlu v. Turkey (no. 2334/03) (Importance 1) - 19 February 2009 - Violation of Article 1 of Protocol No. 1 - Building of historical value - Calculation of expropriation compensation

The Court held by 16 votes to one that there had been a violation of Article 1 of Protocol No. 1 concerning the applicant's complaint that, on expropriating a building he owned, the Turkish courts did not take into account its historical value when calculating compensation:

"*The Court considers that the issue at the heart of the case is the fact that, when calculating the expropriation compensation for a listed property, it is impossible under Turkish law to take into account that part of a property's value that results from its rarity and its architectural and historical features. The Turkish legislature has deliberately set limits on such valuations by excluding the taking into account of such features. Thus, even where the latter seem to imply an increase in the price of the listed property, the domestic courts cannot take them into consideration. In contrast, however, it appears from the Court of Cassation's case-law that where the value of an expropriated property has decreased on account of its registration as a listed building, the courts take such depreciation into account in determining the compensation to be awarded (see paragraph 30 above).*

The Court notes that this valuation system is unfair, in that it places the State at a distinct advantage. It enables the depreciation resulting from a property's listed status to be taken into account during expropriation, while any eventual appreciation is considered irrelevant in determining the compensation for expropriation. Thus, not only is such a system likely to penalise those owners of listed buildings who assume burdensome maintenance costs, it deprives them of any value that might arise from the specific features of their property.

Moreover, the Court, like the Chamber, observes that the practice of a number of Council of Europe member States in the area of expropriation of listed buildings indicates that, despite the absence of a precise rule or common criteria for valuation (see paragraph 34 above), the option of taking into account the specific features of the properties in question when ascertaining appropriate compensation is not categorically ruled out.

In the light of the foregoing, the Court therefore considers that, in order to satisfy the requirements of proportionality between the deprivation of property and the public interest pursued, it is appropriate, in the event of expropriation of a listed building, to take account, to a reasonable degree, of the property's specific features in determining the compensation due to the owner. There has accordingly been a violation of Article 1 of Protocol No. 1" (§§ 69-73).

- **Systemic problem in Georgia concerning medical care for prisoners infected with hepatitis C**

Poghosyan v. Georgia (no. 9870/07) (Importance 2) – 24 October 2009 - Violation of Article 3 on account of the failure to provide the applicant, who suffered from viral hepatitis C, with proper medical care in prison – Systemic problem in Georgia - No violation of Article 3 in respect of the post-operative care administered to the applicant at the prison hospital and at Rustavi prison no. 6- Article 46

Relying on Article 3, the applicant complained that his discharge from the prison hospital had been premature and that he had not received proper medical care while in prison.

The Court noted that after being discharged from the prison hospital the applicant had been taken in charge by the medical staff at the prison and, as his wound had only become slightly infected, it had been possible to treat it successfully. The applicant himself confirmed that the post-operative period had gone smoothly. The Court accordingly found that there had been no violation of Article 3 in respect of the post-operative care administered to the applicant at the prison hospital and at Rustavi prison no. 6.

As to the medical care dispensed in prison, the Court noted first of all that in spite of several series of tests confirming that the applicant had viral hepatitis C, it was not clear from the file that the Georgian authorities had taken the trouble to evaluate the need for further appropriate analyses to be carried out: measurement of the viral load, determination of the viral genotype, or biopsy, for example. These tests had proved all the more necessary as in December 2006 a hepatologist had found that the disease was chronic and the virus was continuing to multiply. The Court further noted that the Georgian Government had supplied no evidence that the applicant had been properly fed and that his state of anorexia and general fatigue had received medical attention. Nor is the Court persuaded by the Government's submission that two echographies had sufficed to determine that the applicant's liver complaint required no medical treatment. It was medically accepted that high gamma-GT levels could indicate fairly severe hepatitis C and that echography was not a reliable means of determining the extent of liver tissue damage. The Court pointed out that, to protect a prisoner's health, it was not enough to have him examined and a diagnosis made. It was essential to provide treatment corresponding to the diagnosis, as well as proper medical supervision. The Court accordingly found it unacceptable that the applicant's repeated requests for treatment had been left unanswered or ignored. That being so, the Court held that the applicant had not received treatment for his viral hepatitis C while in custody, in violation of Article 3.

Furthermore, noting that almost 40 applications concerning the lack of medical care in Georgian prisons were now pending before the Court, the latter found that there was a systemic problem concerning the administration of adequate medical care to prisoners infected, *inter alia*, with viral hepatitis C. It considered this to be an aggravating factor in respect of Georgia's responsibility under the European Convention on Human Rights, but also a threat to the effectiveness of the Convention system. Consequently, under Article 46 (binding force and execution of judgments), it invited Georgia to take legislative and administrative steps, without delay, to prevent the transmission of viral hepatitis C in prisons, to introduce screening arrangements for this disease and to ensure its timely and effective treatment (see in particular §§ 67 to 70).

- **Case of deportation – Failure to comply with the interim measures - Article 3 and Article 34 in conjunction with Rule 39**

Ben Khemais v. Italy (no. 246/07) (Importance 1) - 24 February 2009 - Violation of Article 3 on account of the applicant's deportation to Tunisia- Violation of Article 34 regarding Italy's failure to comply with the measure indicated under Rule 39 of the Rules of Court

The case concerns the applicant's deportation to Tunisia, where he was sentenced to ten years' imprisonment for membership of a terrorist organisation.

In February 2002 the Italian courts sentenced Mr Ben Khemais to five years' imprisonment for membership of a criminal organisation. He served his sentence in full. In March 2006 the Como District Court sentenced him to another prison sentence for assault and ordered him to be deported from Italy after he had served his sentence. The outcome of an appeal lodged by the applicant with the Court of Cassation is unknown. In the meantime, by a judgment of 30 January 2002, the Tunis Military Court had sentenced the applicant to ten years' imprisonment in his absence for membership of a terrorist organisation. That conviction was apparently based exclusively on the statements of a co-accused.

Mr Ben Khemais lodged his application with the European Court of Human Rights in January 2007. In March 2007, pursuant to Rule 39 (interim measures) of the Rules of Court, the Court indicated to the Italian Government that it was desirable, in the interests of the parties and of the smooth progress of the proceedings before the Court, to stay the order for the applicant's deportation pending a decision on the merits.

However, on 2 June 2008 the applicant's representative informed the Registry of the Court that his client had been taken to Milan Airport in order to be deported to Tunisia. The Italian Government informed the Court on 11 June that a deportation order had indeed been issued against the applicant on 31 May 2008 on account of his role in the activities of Islamic extremists. The Milan Criminal Court had observed, *inter alia*, that he represented a threat to national security because he was in a position to renew contacts with a view to resuming terrorist activities, including on an international scale. The

applicant had been deported to Tunisia on 3 June 2008. The Italian Government also submitted documents to the Court containing diplomatic assurances that they had obtained from the Tunisian authorities. According to these documents, the applicant would not be subjected to torture, inhuman or degrading treatment or arbitrary detention. He would be given appropriate medical treatment and would be allowed to receive visits from his lawyer and members of his family

Violation of Article 3

The Court reiterated that in its Grand Chamber judgment in the case of *Saadi v. Italy* (28 February 2008, application no. 37201/06), it had concluded that international reports mentioned numerous and regular cases of torture and ill-treatment meted out in Tunisia to persons suspected or found guilty of terrorism and that visits by the International Committee of the Red Cross to Tunisian prisons could not exclude the risk of subjection to treatment contrary to Article 3. In the present case the Court did not see any reason to review its conclusions, which were, moreover, confirmed by Amnesty International's report of 2008 on Tunisia. That report also said that although a lot of detainees had complained of having been tortured while in police custody, "in virtually all cases the authorities had failed to carry out investigations or bring the alleged perpetrators to justice". The inability of Mr Ben Khemais's representative before the Court to visit his client confirmed the difficulty experienced by Tunisian prisoners in gaining access to independent foreign lawyers even where they were parties to judicial proceedings before international courts. Once an applicant was deported to Tunisia, the lawyers thus risked finding themselves unable to verify their circumstances and ascertain any complaints they may raise regarding the treatment inflicted on them. It also appeared impossible for the Italian Government to undertake any such checks since their ambassador could not see the applicant at his place of custody.

In those circumstances the Court was unable to accept the argument advanced by the Government to the effect that the assurances given by the Tunisian authorities secured effective protection against the serious risk of ill-treatment incurred by the applicant. It reiterated in that connection the principle affirmed by the Parliamentary Assembly of the Council of Europe in its resolution no. 1433(2005), according to which diplomatic assurances could not be relied on unless the absence of a risk of ill-treatment was firmly established. The Court also pointed out that the Tunisian authorities had indicated that the applicant had received many visits from members of his family and his Tunisian lawyer. The latter had stated that his client had not alleged that he had suffered ill-treatment, which appeared to be confirmed by a medical report annexed to the diplomatic assurances. However, whilst that showed that the applicant had not suffered ill-treatment in the weeks following his deportation it did not in any way predict the applicant's future fate. Accordingly, the Court held that the enforcement of the order deporting the applicant to Tunisia had violated Article 3

Violation of Article 34

The Court stressed that the level of protection which the Court was able to afford the applicant in respect of the rights laid down in Articles 2 and 3 had been irreversibly reduced following his deportation. It mattered little that he had been deported after the exchange of observations between the parties; the measure had nonetheless deprived any finding of a violation of all useful effect as the applicant had been deported to a country that was not a party to the Convention, where he risked being subjected to treatment contrary to the Convention.

Moreover, it was implicit in the notion of the effective exercise of the right of application that for the duration of the proceedings in Strasbourg the Court should remain able to examine the application under its normal procedure. The Tunisian authorities had confirmed, however, that Mr Ben Khemais's representative before the Court could not be authorised to visit his client in prison.

Furthermore, the Court noted that the Italian Government, before deporting the applicant, had not requested that the interim measure adopted under Rule 39 of the Rules of Court be lifted and had proceeded to deport him without even obtaining the diplomatic assurances they had referred to in their observations. Consequently, on account of his deportation to Tunisia, the applicant had not been able to advance all the arguments relevant to his defence and the judgment of the Court was liable to be deprived of all useful effect. The fact that the applicant had been removed from Italy's jurisdiction presented a serious obstacle that could prevent the Italian Government from complying with their obligations to protect the applicant's rights and erase the consequences of the violations found by the Court. Accordingly, the Court held that there had been a violation of Article 34.

This case is referred to as well in the Memorandum by Thomas Hammarberg, Council of Europe Commissioner for Human Rights, following his visit to Italy, 19-20 June 2008 (see §86 of the Memorandum). See also the RSIF n°6 and its section dedicated to interim measures (under Part I D).

- **Other cases of ill-treatment**

Gagiu v. Romania (no. 63258/00) (Importance 1) – 24 February 2009 - Violation of Article 2 – Failure of the authorities to protect the applicant's life by administering the necessary medical treatment – Failure to carry out an effective investigation - Conditions of detention at Aiud prison - Violation of Article 8 on account of the Aiud prison administration authorities' refusal to provide the applicant with the requisite items for his correspondence with the Court - Violation of Article 34

In July 1994 Mr Gagiu, a shepherd, was arrested and remanded in custody for murdering another shepherd. On 25 January 1996 he was convicted of aggravated murder and sentenced to twenty years' imprisonment by the Supreme Court of Justice. Amongst other ailments, the medical file drawn up by the authorities mentioned that the applicant had suffered since 1980 from chronic hepatitis and a chronic ulcer. On 31 August 2001 the applicant instituted proceedings to have his prison sentence suspended. On 7 September 2001 he was sent to Dej prison hospital "for medical supervision and treatment" until the outcome of the proceedings. In addition to the ailments already mentioned, the doctors there diagnosed early peritonitis. While under treatment at that hospital, Mr Gagiu died on 8 September 2001 following a hepatic coma and cardiopulmonary arrest.

The Court reiterated that the State's obligation to protect the lives of persons in custody meant providing them in a timely manner with the medical care necessary to prevent death. It emphasised that the serious state of Mr Gagiu's health had made special care and treatment necessary.

However, the Court noted that until 20 August 2001 the applicant had been treated only for bronchopneumonia, whereas his medical file also mentioned chronic hepatitis. Although aware of Mr Gagiu's symptoms, the prison authorities had waited until that date before sending him to the municipal hospital. The Court further observed that instead of receiving the treatment prescribed by the surgeons and specialists following the tests carried out at the municipal hospital, Mr Gagiu had been placed in a cell until the day before he died. The Court found that the prison authorities had not acted with due diligence in providing Mr Gagiu with the necessary medical care, and that there had therefore been a serious failure on their part in their obligation to protect the health of a person in their custody, in violation of Article 2.

As to the authorities' obligation to conduct an effective investigation into the applicant's death, the Court noted that although the public prosecutor's office had immediately opened an investigation, it had been confined to the treatment administered to the applicant at the prison hospital the day before he died, paying no attention to the possible negligence of the authorities responsible for monitoring his state of health at Aiud prison. The investigators had simply found that Mr Gagiu had died of natural, non-violent causes. The Court also noted that the medical committee had not announced its findings until more than two years after the investigation. It therefore held that the authorities had failed in their obligation to conduct an effective, thorough and timely investigation, in violation of their procedural obligation under Article 2.

The Court noted that the Mr Gagiu had had only 1,25 m^2 of living space in Aiud prison, and that he had had to use the toilet in full view of his five fellow prisoners. It also pointed out that the scabies the applicant had contracted was an indication of the sanitary and hygiene conditions in the cell. The Court considered that the hardship the applicant had endured had exceeded the unavoidable level of suffering inherent in detention, and undermined Mr Gagiu's dignity. The applicant had suffered degrading treatment, considering the time he had spent in such conditions of detention and its damaging effects on his health. The Court held that there had been a violation of Article 3.

The Court observed that on numerous occasions in his correspondence with its Registry, Mr Gagiu had mentioned his lack of resources, having no family and being unable to work because of his state of health. It considered credible the applicant's allegations that he had had to sell some of his food to other detainees in order to buy stamps for his letters to the Court. The Court noted that the Government, who submitted that they had provided Mr Gagiu with the stamps he needed, had offered no valid explanation to disprove the applicant's allegations. The Court therefore held that there had been a violation of Article 8.

The Court reiterated that in order for the right of individual application enshrined in Article 34 to be effective, it was essential that applicants should be able to communicate freely with the Court. The examination of applications by the Court could be hampered if an imprisoned applicant was unable to supply copies of the documents needed for his file. The Court noted that the prison authorities had required Mr Gagiu to pay for those copies in the knowledge that he had no resources and knowing also what the consequences of failure to send the documents to the Court would be. The Court took note of several attempts to dissuade the applicant and observed that no explanation had been offered

for Mr Gagiu's transfer from Aiud prison the day after he complained about the incident concerning the alleged disappearance of his first application form. The Court considered that, in the situation of vulnerability and dependence in which the applicant had found himself, the dissuasive remarks of the prison authorities and the unjustified delay in supplying the applicant with the necessary material for his correspondence and the requisite documents for his application to the Court had obstructed the effective exercise of the right of individual application enshrined in Article 34.

Protopapa v. Turkey (no. 16084/90) (Importance 2) - Non violation of Articles 3, 5, 6, 7, 11, 13, and 14 - No evidence showing the excessive use of force - Applicant's refusal to benefit from legal aid - Punishment provided by law

The applicant, Eliade Protopapa, is a Cypriot national who took part in an anti-Turkish demonstration on 19 July 1989 in the Ayios Kassianos area in Nicosia, an area within the United Nations buffer zone. Ms Protopapa alleged in particular that she had been ill-treated by the Turkish police who had beaten her severely with electric batons, causing her painful injuries. She had then been locked in a stiflingly hot room, received no medical assistance, and had been later taken to a garage where she had been interrogated in Greek. Later that day the District Court of Nicosia in the "Turkish Republic of Northern Cyprus" ("TRNC") had authorised Ms Protopapa's detention on remand and two days later had heard her in a hearing. She had refused the legal aid offered by the authorities. Ms Protopapa had been sentenced to 2 days in prison, to a fine and to deposit money as a guarantee that she would not breach public peace for a period of one year. Ms Protopapa alleged that, as a result of the ill-treatment to which she had been subjected, her vertebrae had been seriously damaged.

The Court observed that there had been no evidence showing that the police had used excessive force when arresting Ms Protopapa, nor that the conditions in which she had been detained had been inadequate. The Court therefore concluded that there had been no violation of Article 3.

The Court found that no evidence that Ms Protopapa had been deprived of her liberty unlawfully or arbitrarily. On the day after her arrest, she had been brought before the "TRNC" Nicosia District Court and remanded for trial in relation to the offence of illegal entry into "TRNC" territory. The Court observed that Ms Protopapa had been interrogated by an official who spoke Greek and concluded that the reasons for her arrest had been properly brought to her attention during her interrogation. It therefore held that there had been no violation of Article 5.

The Court observed that Ms Protopapa had understood the charges and the statements made against her by the witnesses during her trial. She had also been offered the opportunity to use legal aid. The Court further rejected the allegation that the "TRNC" courts as a whole were not impartial and/or independent or that Ms Protopapa's trial and conviction had been influenced by political aims. The Court therefore held that the criminal proceedings had not been unfair and that there had been no violation of Article 6.

The Court noted that Ms Protopapa had been convicted for having entered the territory of the "TRNC" without permission, and that it was not disputed that the relevant law had been in force when she had committed the offence. The Court further found that the law had been sufficiently clear and the penalty imposed had been within the law in force at the time the offence was committed. The Court therefore held that there had been no violation of Article 7.

The Court observed that, according to the UN Secretary General's report of 7 December 1989 the demonstrators, including Ms Protopapa, had forced their way into the UN buffer zone. The Court then found that the intervention of the Turkish and/or Turkish-Cypriot forces had not been due to the political nature of the demonstration, but had been provoked by its violent character and by the violation of the "TRNC" borders by some of the demonstrators. Consequently, the Court found no violation of Article 11.

The Court observed that Ms Protopapa had refused the services of a lawyer practising in the "TRNC", had not lodged an appeal against her conviction and had not filed with the local authorities a formal complaint about the ill-treatment she allegedly suffered at the hands of the Turkish-Cypriot police. The Court found no evidence that, had Ms Protopapa made use of all or part of the available remedies, these would have been ineffective and therefore held that there had been no violation of Article 13. The Court concluded also to the non violation of Article 14.

Malenko v. Ukraine (no. 18660/03) (Importance 2) – 19 February 2009 – Violation of Article 3 (treatment) – Conditions of detention – Lack of medical treatment – Regular strip searches offensive to the dignity of the applicant

The applicant is currently serving a prison sentence for murder in Ukraine. Relying on Article 3, Mr Malenko complained of the conditions of his detention, of inadequate medical treatment and of the regular practice of strip searches in the prison in which he is serving his sentence. The Court held unanimously that there had been a violation of Article 3 on account of the excessive overcrowding and lack of ventilation and nutrition in the establishments where Mr Malenko had been detained (namely the Mariupol SIZO, the Sokiryanska prison no. 67 and the Dykanivska prison no. 12), as well as of the clearly insufficient medical care provided to him there. It also found that the regular strip searches which had been carried out on him in front of other detainees upon entry and exit of the prison factory had been offensive to his dignity.

Suptel v. Ukraine (no. 39188/04) (Importance 3) – 19 February 2009 – Violation of Article 3 – Violation of Article 6 § 1 (length) – Ill-treatment by police officers

In 1999 the applicant was arrested on suspicion of incitement to murder; the criminal proceedings against him are still pending. Relying in particular on Article 3, Mr Suptel complained that he had been ill-treated by police officers who had forced him to confess to that crime. Mr Suptel further complained under Article 6 § 1about the excessive length of the criminal proceedings against him. The Court held unanimously that there had been a violation of Article 3 on account of the following elements taken together: the available medical evidence, the applicant's detailed testimony, the failure of the authorities to provide a clear and consistent account of his whereabouts during 11 days in May 1999, his confession in circumstances in which he had apparently had no procedural guarantees, and the lack of any plausible alternative explanation as to the origin of his injuries. The Court further found a violation of Article 6 § 1 on account of the excessive length, over nine years, of the criminal proceedings against Mr Suptel.

Toma v. Romania (no. 42716/02) (Importance 2) – 24 February 2009 - Violations of Article 3 (treatment and investigation) - Violation of Article 5 §§ 3 and 4 - Violation of Article 8

On 9 September 2002 the applicant was arrested for illegal possession of cannabis and placed in pre-trial detention. Relying on Articles 3 (prohibition of inhuman or degrading treatment) and 5 §§ 3 and 4 (right to liberty and security), Mr Toma complained of ill-treatment by the police during questioning, of the lack of an investigation by the authorities into those allegations, of the fact that he had not been brought "promptly" before a judge after his arrest and of the time taken by the courts to rule on his complaint against the order of the prosecutor placing him in pre-trial detention. He also relied on Article 8 (right to respect for private and family life), alleging that the police had contacted journalists. The Court held unanimously that there had been a violation of Article 3 given the co-existence of sufficiently strong, clear and concordant inferences supporting the applicant's allegations of violence – for which the Government had provided no explanation – and of Article 5 § 3 and, by six votes to one, of Article 5 § 4 because the lawfulness of the detention order had not been examined in a "very short time". It held, further, that there had been a violation of Article 8 on account of the interference – without any legitimate aim – constituted by the conduct of the police officers who had contacted journalists to record pictures of the applicant at the police headquarters.

- **Requirements regarding effective investigation**

Pieniak v. Poland (no. 19616/04) (Importance 3) - 24 February 2009 – Violation of Article 3 – Lack of effective investigation

Relying on Article 3 the applicant alleged that he had been ill-treated by the police following his arrest in September 2001 on charges of rape. He further complained that the investigation into his allegations of ill-treatment had been inadequate. The Court held unanimously that there had been a violation of Article 3 as the authorities had failed to provide a plausible explanation of how Mr Pieniak had been injured while in detention. The Court found a further violation of Article 3 on account of the numerous flaws and omissions in the investigation into Mr Pieniak's allegations of ill-treatment:

"*Turning to the circumstances of the instant case, the Court notes that following the applicant's complaint the public prosecutor carried out an investigation. It is not, however, persuaded that this investigation was sufficiently thorough and effective to meet the above requirements of Article 3.*

60. The Court observes that the applicant informed the authorities of the alleged ill-treatment for the first time on 21 September 2001. However, the investigation was instituted only in February 2003 (see paragraph 21 above). In addition, during the first stage the prosecution authorities did not consider all available evidence and, on the applicant's motion, the investigation was reopened (see paragraph 26 above). In this respect the Court notes that doctor P.S., who examined the applicant on his admission to the detention centre, had been heard only in March 2007, that is, five and a half years after the examination.

61. The Court further observes that there was a series of delays in the investigation, the total duration of which cannot be reasonably justified. These delays in the investigation significantly diminished the prospect of its success and completion.

62. Having regard to these numerous flaws and omissions, the Court finds that no effective investigation was carried out into the applicant's allegations of ill-treatment. Accordingly, there has been a violation of Article 3 of the Convention on that account".

- **Detention of migrants / extradition**

Eminbeyli v. Russia (no. 42443/02) (Importance 2) – 26 January 2009 - Violation of Article 5 §§ 1 (f) and 4

The applicant is a stateless person of Azeri ethnic origin who was born in 1956 and currently lives in Sweden. In February 1996 he left Azerbaijan for Russia, where he was granted refugee status and the right to move to Sweden. However in September 2001, at the request of the Azerbaijani authorities, the Russian police arrested him with a view to his extradition. He was ultimately released in October 2001 and moved to Sweden in November 2001. Relying on Article 5 §§ 1 (f) and 4 (right to liberty and security), he complained in particular that his detention had been unlawful and that the judicial review of his detention had been ineffective. The Court held unanimously that Mr Eminbeyli had been detained unlawfully in 2001, in violation of Article 5 § 1 (f), given that he had been granted refugee status and the relevant Russian legislation prohibited the extradition of refugees. The Court further found a violation of Article 5 § 4 as the authorities had held the first court hearing to review the lawfulness of his detention with an eleven-week delay and had delivered their final decision on it four months after Mr Eminbeyli had been released.

- **Access to court and parliamentary immunity**

CGIL and Cofferati v. Italy (no. 46967/07) (Importance 2) - 24 February 2009 - Violation of Article 6 § 1 – Defamation - Inability to sue members of Parliament

The Italian General Confederation of Labour (*Confederazione Generale Italiana del Lavoro* – the "CGIL") is a trade-union federation whose registered office is in Rome. On 25 March 2002, when Mr Cofferati was still General Secretary of the CGIL, the daily newspaper *Il Messaggero* published an interview in which Mr Umberto Bossi, who was then a minister and member of Parliament, drew a connection between the social climate allegedly created by the Left, and in particular the CGIL, and the murder of a Government consultant – Professor Marco Biagi – by the Red Brigades.

The applicants, who considered that the interview damaged their reputation, brought proceedings in the Rome District Court against Mr Bossi, the journalist who ran the interview, the editorial director of *Il Messaggero* and the newspaper's publishing company. On 30 July 2003 the Chamber of Deputies decided that the statements in question had been uttered in the course of a parliamentary debate and that, consequently, Mr Bossi was covered by parliamentary immunity in accordance with Article 68 § 1 of the Constitution. On 10 February 2005 the Rome Court raised a conflict of State powers before the Constitutional Court and stayed the proceedings. On 10 July 2007 the Constitutional Court declared the conflict of powers submission inadmissible on the ground that the allegedly defamatory allegations by Mr Bossi had not been explicitly cited by the Rome District Court in its order. The applicants were therefore unable to pursue the civil proceedings against Mr Bossi and, moreover, considered it pointless to pursue the proceedings against the journalists, the daily and the publishing company because – they said – under Italian law the media were not liable in civil law for defamatory statements made by a politician where those statements were faithfully reproduced.

Relying on Article 6 § 1 of the European Convention on Human Rights, the applicants complained of their inability to sue Mr Bossi for defamation in the national courts on account of his parliamentary immunity.

The Court noted that it is a long-standing practice for States generally to confer varying degrees of immunity to parliamentarians, with the aim of allowing free speech for representatives of the people and preventing partisan complaints from interfering with parliamentary functions. In these circumstances, the Court considers that the interference in question, which was provided for in Article

68 § 1 of the Constitution, pursued legitimate aims, namely to protect free parliamentary debate and to maintain the separation of powers between the legislature and the judiciary (see in particular *Cordova (nos 1 and 2) v. Italy* of 30 January 2003).

It remained to be determined whether the consequences for the applicant were proportionate to the legitimate aims pursued in light of the general principles laid down by the Court. As the it has stated in *Cordova*: "*The Court must assess the contested limitation in the light of the particular circumstances of the case (see Waite and Kennedy, cited above, § 64). It observes in this respect that its task is not to review the relevant law and practice in abstracto, but to determine whether the manner in which they were applied to or affected the applicant gave rise to a violation of the Convention (see, mutatis mutandis, Padovani v. Italy, judgment of 26 February 1993, Series A no. 257-B, p. 20, § 24). In particular, it is not the Court's task to take the place of the domestic courts. It is primarily for the national authorities, notably the courts, to resolve problems of interpretation of domestic legislation (see, among other authorities, Pérez de Rada Cavanilles v. Spain, judgment of 28 October 1998, Reports 1998-VIII, p. 3255, § 43). The Court's role is confined to ascertaining whether the effects of such an interpretation are compatible with the Convention.*

The Court observes that the fact that a State confers immunity on the members of its parliament may affect the protection of fundamental rights. It would be incompatible with the purpose and object of the Convention, however, if the Contracting States, by adopting a particular system of parliamentary immunity, were thereby absolved from their responsibility under the Convention in relation to parliamentary activity. It should be borne in mind that the Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective. This is particularly so of the right of access to a court in view of the prominent place held in a democratic society by the right to a fair trial (see Aït-Mouhoub v. France, judgment of 28 October 1998, Reports 1998-VIII, p. 3227, § 52). It would not be consistent with the rule of law in a democratic society, or with the basic principle underlying Article 6 § 1 – namely that civil claims must be capable of being submitted to a judge for adjudication – if a State could, without restraint or control by the Convention enforcement bodies, remove from the jurisdiction of the courts a whole range of civil claims or confer immunities on categories of persons (see Fayed, loc. cit.)" (§§ 57-58).

In the present case, the Court observed that, following the resolution of the Chamber of Deputies and the decision of the Constitutional Court, the civil proceedings brought against Mr Bossi had been paralysed and the applicants had been deprived of the possibility of obtaining any form of compensation, which had resulted in an interference with their right of access to a court. The Court found that the interference had pursued a legitimate aim because it was designed to protect members of Parliament from partisan complaints, thereby ensuring that they enjoyed full freedom of expression during their term of office. It pointed out, however, that Mr Bossi's statements had been made outside the context of the parliamentary debate on the murder of Marco Biagi and had therefore had no clear connection with a parliamentary activity. It held that the balance between the legitimate aim of the interference and the fundamental rights of the applicants had been upset and that, accordingly, there had been a violation of Article 6 § 1.

Judges Sajó and Karakaş expressed a joint dissenting opinion, which is annexed to the judgment.

- **Fair trial and lustration proceedings**

Jałowiecki v. Poland (no. 34030/07) (Importance 2) – 17 February 2009- Non violation of Article 10 - Violation of Article 6 § 1 in conjunction with Article 6 § 3

On 3 August 1997 the Law of 11 April 1997 on disclosing work for or service in the State's security services or collaboration with them between 1944 and 1990 by persons exercising public functions (the "1997 Lustration Act") entered into force. On 14 April 2004 the applicant, a candidate for the European Parliament, declared that he had not collaborated with the communist-era secret services. He was subsequently elected as a Member of the European Parliament.

On 9 December 2004 the Warsaw Court of Appeal (*Sąd Apelacyjny*) decided to institute lustration proceedings against the applicant following a request made by the Commissioner of the Public Interest (*Rzecznik Interesu Publicznego*) on the grounds that the applicant had lied in his lustration declaration by denying that he had cooperated with the secret services.

On 17 February 2006 the Warsaw Court of Appeal, acting as the first-instance lustration court, found that the applicant had submitted an untrue lustration declaration since he had been an intentional and secret collaborator with the State's secret services. The court established that the applicant had met on probably two occasions in 1973 with agents of the secret services and had agreed to help them as a consultant.

The applicant appealed against the decision. He submitted that he had never collaborated with the secret services and the meeting in question had been in connection with the preparation of an article. The applicant also referred to his subsequent activity in the "*Solidarność*" movement for which he had been persecuted and detained by the communist authorities. Subsequently, he was allowed to leave Poland and between 1985 and 1994 he was a deputy of the Polish Section of Radio Free Europe in Munich. On 6 June 2006 the Warsaw Court of Appeal, acting as the second-instance lustration court, upheld the impugned judgment. On 1 February 2007 the Supreme Court (*Sąd Najwyższy*) dismissed the applicant's cassation appeal.

The Court firstly observed that it has already found that Article 6 of the Convention under its criminal head applied to lustration proceedings (see, *Matyjek v. Poland* (dec.), no. 38184/03, ECHR 2006-... and *Bobek v. Poland* (dec.), no. 68761/01, 24 October 2006). The question of whether the applicant could effectively challenge the set of legal rules governing access to the case file and setting out the features of the lustration proceedings is linked to the Court's assessment of Poland's compliance with the requirements of a "fair trial" under Article 6 § 1 of the Convention (see *Matyjek v. Poland*, cited above, § 42, *Luboch v. Poland*, no. 37469/05, § 46, 15 January 2008).

The Court recalled that it had already dealt with the issue of lustration proceedings in the *Turek v. Slovakia* case (no. 57986/00, § 115, ECHR 2006-... (extracts)) and in *Ādamsons v. Latvia* (no. 3669/03, 24 June 2008). In the *Turek* case the Court held in particular that, unless the contrary is shown on the facts of a specific case, it cannot be assumed that there remains a continuing and actual public interest in imposing limitations on access to materials classified as confidential under former regimes. This is because lustration proceedings are, by their very nature, oriented towards the establishment of facts dating back to the communist era and are not directly linked to the current functions and operations of the security services. Lustration proceedings inevitably depend on the examination of documents relating to the operations of the former communist security agencies. If the party to whom the classified materials relate is denied access to all or most of the materials in question, his or her possibilities of contradicting the security agency's version of the facts will be severely curtailed.

Those considerations remain relevant to the instant case despite some differences with the lustration proceedings in Poland.

The Court concluded that the lustration proceedings against the applicant, taken as a whole, could not be considered as fair within the meaning of Article 6 § 1 of the Convention taken together with Article 6 § 3:

"*The Court has held that lustration measures are by their nature temporary and the necessity to continue such proceedings diminishes with time (see Ādamsons, cited above, § 116). It has been recognised by the Court that at the end of the 1990s the State had an interest in carrying out lustration in respect of persons holding the most important public functions. The Court has also accepted that a similar interest was still legitimate at the beginning of the current decade, at least in respect of parliamentary elections (see Chodynicki v. Poland (dec.), no 17625/05, 2 September 2008). However, it reiterates that if a State adopts lustration measures, it must ensure that the persons affected thereby enjoy all procedural guarantees under the Convention in respect of any proceedings relating to the application of such measures (see Turek, cited above, § 115, Matyjek, cited above, § 62 and Ādamsons, cited above, § 116).*

The Court accepts that there may be a situation in which there is a compelling State interest in maintaining secrecy of some documents, even those produced under the former regime. Nevertheless, such a situation will only arise exceptionally given the considerable time that has elapsed since the documents were created. It is for the Government to prove the existence of such an interest in the particular case because what is accepted as an exception must not become a norm. The Court considers that a system under which the outcome of lustration trials depends to a considerable extent on the reconstruction of the actions of the former secret services, while most of the relevant materials remains classified as secret and the decision to maintain the confidentiality is left within the powers of the current secret services, creates a situation in which the lustrated person's position is put at a clear disadvantage.

38. In the light of the above, the Court considers that due to the confidentiality of the documents and the limitations on access to the case file by the lustrated person, as well as the privileged position of the Commissioner of the Public Interest in the lustration proceedings, the applicant's ability to prove that the contacts he had had with the communist-era secret services did not amount to "intentional and secret collaboration" within the meaning of the Lustration Act were severely curtailed. Regard being had to the particular context of the lustration proceedings, and to the cumulative application of

those rules, the Court considers that they placed an unrealistic burden on the applicant in practice and did not respect the principle of equality of arms.

39. It remains to be ascertained whether the applicant could have successfully challenged the features of the lustration proceedings in his appeal and cassation appeal. Given the Government's assertion that the rules on access to the materials classified as secret were regulated by the successive laws on State secrets and Article 156 of the Code of the Criminal Procedure and that those legal provisions were complied with in this case, the Court is not persuaded that the applicant, in his appeals or cassation appeals, could have successfully challenged the domestic law in force. In so far as the Government rely on the constitutional complaint, the Court points, firstly, to the fact that the Lustration Act had on several occasions been unsuccessfully challenged before the Constitutional Court (see Matyjek v. Poland (dec.), cited above). Moreover, the Court has held that a constitutional complaint was an effective remedy for the purposes of Article 35 § 1 of the Convention only in situations where the alleged violation of the Convention resulted from the direct application of a legal provision considered by the complainant to be unconstitutional (see, Szott-Medyńska v. Poland (dec.), no. 47414/99, 9 October 2003; Pachla v. Poland (dec.), no. 8812/02, 8 November 2005). In this connection, the Court observes that the breach of the Convention complained of in the present case cannot be said to have originated from any single legal provision or even from a well-defined set of provisions. It rather resulted from the way in which the relevant laws were applied to the applicant's case and, in particular, Article 156 § 4 of the Code of Criminal Procedure, allowing the President of the Lustration Court to limit the applicant's access to the case file and his possibilities of taking notes and copying documents (see Bobek, cited above, § 73 and Luboch, cited above, § 71). In that connection the Court points to the established case-law of the Constitutional Court, according to which constitutional complaints based solely on the allegedly wrongful interpretation of a legal provision are excluded from its jurisdiction (see Palusiński v. Poland (dec.), cited above). The Government did not refer to any other domestic remedy which could have offered reasonable prospects of success in this case.

40. It follows that it has not been shown that the applicant had an effective remedy at his disposal under domestic law by which to challenge the legal framework setting out the features of lustration proceedings. Consequently, the Government's objection as to the exhaustion of domestic remedies should be rejected."

You may consult with that respect the viewpoint of the Commissioner for Human Rights : **"Lustration must not turn into revenge against former collaborators"** (19.03.07) as well as the **Memorandum to the Polish Government** : Assessment of the progress made in implementing the 2002 recommendations of the Council of Europe Commissioner for Human Rights (20.06.07).

- **Other cases related to the right to a fair trial**

L'Erablière A.S.B.L. v. Belgium (no. 49230/07) (Importance 3) – 24 February 2009 – Violation of Article 6 § 1 - Rejection of the applicant association's request for planning permission to be withdrawn.

Relying on Article 6 § 1 (right to a fair hearing), the applicant association complained that the inadmissibility decision regarding its application for judicial review of planning permission amounted to a violation of its right of access to a court (On 8 September 2004 the *Conseil d'État* dismissed the application for the decision to be stayed on the ground that it did not include a statement of the facts explaining the background to the dispute. The applicant association submitted, on the contrary, that the facts were known to the other party and that a short statement of the facts did not compromise the proceedings).

The Court noted that the submission of a statement of the facts was one of the formal requirements under domestic law for lodging an application for judicial review before the *Conseil d'État*. It observed, however, that the *Conseil d'État* and the opposing party could have acquainted themselves with the facts even without this statement. The Court noted that the applicant association had annexed the decision granting planning permission to its application, which contained a detailed statement of the facts, and that it could not have provided a more comprehensive statement. It also noted that the composition of the *Conseil d'État* and the judges examining the case were the same as those who had heard a case on the same subject in 2001 and 2005. Lastly, the Court noted that the Belgian Government had access to the decision granting planning permission as they were the author of it.

The Court concluded that the limitation on the right of access to a court imposed on the applicant association was disproportionate to the requirements of legal certainty and the proper administration of justice, contrary to Article 6 § 1.

Vilen v. Finland (no. 22635/04) (Importance 3) – 17 February 2009 - Violation of Article 6 § 1 (fairness) – Communication of the expert's report during proceedings before the Appellate Board for Social Insurance

On the basis of a medical certificate signed by his doctor, the applicant requested sickness benefits for a period of almost seven months in 2002. However, his request was refused by the Social Insurance Institution. Relying on Article 6 § 1 (right to a fair hearing), Mr Vilén complained that he had not had access to the documents prepared by the Social Insurance Institution's medical expert for the examination of his case. The Court found that the expert's reports had not been communicated to the applicant during the proceedings before the Appellate Board for Social Insurance, which, as a result, had deprived him from the possibility to participate properly in the proceedings. The Court therefore held unanimously that there had been a violation of Article 6 § 1 of the Convention.

İbrahim Öztürk v. Turkey (no. 16500/04) (Importance 3) – 17 February 2009 – Violation of Article 6 § 3 (c) in conjunction with Article 6 § 1 (fairness) – Access to a layer during police custody

Relying on Article 6 §§ 1 (right to a fair trial) and 3 (c) (right to legal assistance), the applicant complained that, arrested for an attempted bomb attack, a confession had been obtained from him through torture and that he had not had access to a lawyer during his police custody. The Court observed that the evidence collected by the police while Mr Öztürk was in police custody had served as the basis for his conviction and that neither the subsequent assistance of a lawyer nor the opportunity to dispute the evidence against him at his trial had remedied the breach of Mr Öztürk's defence rights that had been caused by the lack of legal assistance during police custody. The Court therefore held, unanimously, that there had been a violation of Article 6 § 3 (c) taken together with Article 6 § 1.

- **Delay in the enforcement of a judgment**

Abramiuc v. Romania (no. 37411/02) (Importance 1) – 24 February 2009 - Two violations of Article 6 § 1 (length) - Violation of Article 1 of Protocol No. 1 - Violation of Article 13

In 1992 the applicant, who had been a chemical engineer in a State-owned company until 1991, sued his former employer for using his invention between 1984 and 1991 in its industrial production without paying him royalties. In 1994, by a court decision, the State-owned company was ordered to compensate Mr Abramiuc. Relying in particular on Article 6 § 1 (right to a fair hearing within a reasonable time), Article 1 of Protocol No. 1 (protection of property) and Article 13 (right to an effective remedy), the applicant complained of the failure to enforce the final judgment of 1994, of the length of the two sets of proceedings disposed of in 2002 and of his inability to complain of that length under Romanian law. The Court held unanimously that there had been a violation of Article 6 § 1 and Article 1 of Protocol No. 1 on account of the unjustified 11-year delay in enforcing the 1994 judgment, a violation of Article 6 § 1 on account of the length of the proceedings disposed of by judgments of 2002 and a violation of Article 13 as the Government had not proved that the applicant had had an effective remedy by which to raise a complaint relating to the length of the proceedings.

- **Right to respect for private and family life**

Ancel v. Turkey (no. 28514/04) (Importance 2) – 17 February 2009 - No violation of Article 8 regarding enforcement of the judicial decision awarding the applicant custody of her child - No violation of Article 6 § 1 in respect of the length of the civil proceedings brought by the applicant for custody of her child

The case concerns in particular civil proceedings brought by the applicant, a French national, in the Turkish courts for custody of her daughter, who was born in 1994 from her relationship with M.Ş., a Turkish national. Relying on Article 6 § 1 and Article 8, the applicant complained of the excessive length of civil proceedings and the failure to enforce a judicial decision awarding the custody of her daughter.

The Court noted that the civil proceedings had lasted about eight years and four months. It pointed out that part of that time – three years and one month – was attributable to the applicant, such as the delays caused by her failure to attend certain hearings, and the unexplained delay in enforcing the decision given in her favour.

In this case, which required inter-State cooperation, the Court found the period of five years and three months at three levels of jurisdiction reasonable. The case had not appeared particularly complex at the outset, but had become increasingly complex on account of the difficulties encountered at the enforcement phase. Furthermore, whilst it was true that child custody cases had to be dealt with quickly, the Court did not note any significant period of inactivity on the part of the authorities in the present case. It also observed that the applicant had met her former partner in 2004 and had failed to inform the enforcement authorities, which had further delayed the proceedings. Accordingly, the Court held that there had been no violation of Article 6.

The Court reiterated that it was for each Contracting State to set up adequate and effective legal means to ensure compliance with Article 8 of the Convention and the other international agreements it had chosen to ratify. However, as the main source of the problem for the Turkish authorities in the present case had been the disappearance of M.Ş., the Court was not required to examine whether the domestic legal order provided for effective sanctions against him.

The decisive issue was therefore whether the Turkish authorities had taken all steps that could reasonably be expected from them to facilitate the enforcement of the decision awarding the applicant custody and exclusive parental authority over her child. The Court stressed that proceedings relating to the award of parental responsibility, including the enforcement of the final decision, required urgent handling as the passage of time could have irremediable consequences for relations between the child and the parent who did not live with it. The Hague Convention of 25 October 1980 recognised this fact because it provided for a whole series of measures to ensure the immediate return of children removed to or wrongfully retained in any Contracting State.

With regard to the steps taken to locate the applicant's former partner or their child, the Court could not say that the Turkish authorities had not taken all possible measures in this respect. Moreover, the Court again noted that the applicant had failed to cooperate with the authorities regarding her meeting with M.Ş. in 2004. The Court concluded that the Turkish State had made adequate and effective efforts to enforce Ms Ancel's right to the return of her child, and held that there had not been a violation of Article 8.

Errico v. Italy (no. 29768/05) (Importance 2) – 24 February 2009 – Violation of Article 8 – Delay in concluding the preliminary investigation in the framework of a child's placement in care

In 2002 the applicant's daughter was ordered to be placed in care by the Naples Youth Court following criminal proceedings instituted against the applicant for sexual abuse. Relying in particular on Article 8, the applicant complained about being separated from his daughter, of the allegedly excessive length of the investigations against him and of the care proceedings, which he considered to be unfair. The Court held unanimously that there had not been a violation of Article 8 in respect of the child's placement in care or the failure to hear representations from her father beforehand. It found that these measures had been proportionate and necessary for the protection of the health and the rights of the child, given the strong evidence of sexual abuse. The Court did find that there had been a violation of Article 8 on account of the delay in concluding the preliminary investigation in respect of the applicant.

- **Freedom of religion**

Verein der Freunde der Christengemeinschaft and Others v. Austria (no. 76581/01) (Importance 3) – 26 February 2009 - Violation of Article 14 in conjunction with Article 9 – Refusal to grant a religious community legal personality

The applicants are a religious community, Verein der Freunde der Christengemeinschaft, established in Austria in 1998, and four of its members: Martin David, Christoph Leisegang, Erich Cibulka, three Austrian nationals; and, Ute König, a German national. They live in Vienna. The case concerned the applicants' complaint about the Austrian authorities' refusal to grant their community legal personality as a religious society and the excessive length of the related proceedings. They relied on Article 6 § 1 (right to a fair hearing) and Articles 9 (freedom of thought, conscience and religion), 13 (right to an effective remedy) and 14 (prohibition of discrimination). The Court observed that the Austrian Government acknowledged that the applicant religious group had existed in Austria, in the form of an association, since August 1945. Having found that the competent authorities had been long familiar with the applicant religious group, the Court found that the ten-year waiting period applied in respect of the applicants had not been justified, in violation of Article 14 in conjunction with Article 9 of the Convention [see also with that respect the case *Religionsgemeinschaft der Zeugen Jehovas and Others v. Austria* (dec.), no. 40825/98 5 July 2005].

- **Freedom of expression**

Marchenko v. Ukraine (no. 4063/04) (Importance 1) - 19 February 2009- Violation of Article 10- Conviction of a teacher and union representative for defamation of the director of his school- Justified conviction - Lack of proportionality of the sentence (one year imprisonment)- Complaint inadmissible under Article 6

The Court first noted that Mr Marchenko, despite being a union representative acting on a matter of public concern, had a duty to respect the reputation of others, including their presumption of innocence, and owed loyalty and discretion to his employer (see *Constantinescu v. Romania* of 27 June 2000; *Guja v. Moldova* [GC] of 12 February 2008. The Court further observed that Mr Marchenko should have made his allegations first to the director's superior, or other competent authority, before disclosing them to the public. The Court then noted that Mr Marchenko had not attempted to use the legal means available to challenge what he considered ineffective investigation by the public auditing service and the prosecutor into his allegations, but had instead accused the director harshly during a public picket. It therefore found that Mr Marchenko's conviction for defamation was justified by the authorities as far as his picketing activities were concerned, because his accusations had lacked sufficient proof, could reasonably have been considered as defamatory and had undermined the director's right to be presumed innocent until proven otherwise.

Having had regard, however, to the fact that the domestic courts had sentenced Mr Marchenko to a year in prison for these acts, the Court concluded that that had been an excessive measure, which had had a dissuasive effect on public debate, in violation of Article 10:

"In this regard the Court notes that, besides being ordered to pay fine and a sum in compensation to Mrs P., the applicant was sentenced to one year's imprisonment. The Court considers that, while the Contracting States are permitted, or even obliged, by their positive obligations under Article 8 of the Convention to regulate the exercise of freedom of expression so as to ensure adequate protection by law of individuals' reputations, they must not do so in a manner that unduly hinders public debate concerning matters of public concern, such as misappropriation of public funds (see, mutatis mutandis, Cumpănă and Mazăre, cited above, § 113). It further considers that the circumstances of the instant case – a classic case of defamation of an individual in the context of a debate on a matter of public interest – presented no justification for the imposition of a prison sentence. Such a sanction, by its very nature, will inevitably have a chilling effect on public discussion, and the notion that the applicant's sentence was in fact suspended does not alter that conclusion particularly as the conviction itself was not expunged (see, mutatis mutandis, Cumpănă and Mazăre, cited above, § 116 and Salov v. Ukraine, no. 65518/01, § 115, ECHR 2005-VIII (extracts)). Overall, the Court finds that, in convicting the applicant in respect of the letters he sent to KRU and the prosecutor's office, and in imposing a lengthy suspended prison sentence at the end of the proceedings, the domestic courts in the instant case went beyond what would have amounted to a "necessary" interference with the applicant's freedom of expression. There has therefore been a violation of Article 10 of the Convention." (§§ 52-54).

The Court declared inadmissible Mr Marchenko's complaints under Article 6, as it found in particular that he had not made out a valid claim before the Court that he had not been informed properly of the criminal charges against him.

Długołęcki v. Poland (no. 23806/03) (Importance 3)- 24 February 2009- Violation of Article 6- Insult of a local politician- Article of public interest (elections)- Chilling effect- Criminalisation of defamation

The applicant is a journalist and at the relevant time was the editor in chief of a free newsletter, *Kolbudzkie ABC, Periodical, Private, Independent* ("*Periodyk, Prywatny, Niezależny*"). Relying on Article 10 he complained about having been sanctioned by the Polish courts in 2002 to pay a fine to a charity and to reimburse the costs of the proceedings for insulting a local politician.

The Court first found that the article written by Mr Długołęcki had been fairly balanced and of public interest. Further, it noted that the domestic authorities failed to take into consideration the crucial importance of free political debate in a democratic society particularly in the context of free elections (see *Malisiewicz-Gąsior v. Poland*, no. 43797/98, § 67, 6 April 2006).

Lastly, the Court reiterated that the nature and severity of the penalty imposed are factors to be taken into account when assessing the proportionality of the interference (see, for example, *Sürek v. Turkey (no. 1)* [GC], § 64, and *Chauvy and Others v. France*, § 78). In that connection, it noted that while the penalty imposed on the applicant was relatively light (a payment of PLN 50 to a charity and reimbursement of the costs of the proceedings which amounted in total to PLN 518 – approximately 120 Euros (EUR) at the material time), and although the proceedings against him were conditionally

discontinued, nevertheless the domestic courts found that the applicant had committed a criminal offence of proffering insult. In consequence, the applicant had a criminal record. Moreover, it remained open to the courts to resume the proceedings at any time during the period of his probation should any of the circumstances defined by law so justify (see *Dąbrowski v. Poland*, no. 18235/02, § 36, 19 December 2006, and *Weigt v Poland* (dec.), 74232/01, 11 October 2005):

"*Furthermore, while the penalty did not prevent the applicant from expressing himself, it nonetheless amounted to a kind of censorship which was likely to discourage him from making criticisms of that kind again in the future. Such a conviction is likely to deter journalists from contributing to public discussion of issues affecting the life of the community. By the same token, it is liable to hamper the press in the performance of its task of purveyor of information and public watchdog (see, mutatis mutandis, Barthold v. Germany, judgment of 25 March 1985, Series A no. 90, p. 26, § 58, and Lingens v. Austria, cited above, p. 27, § 44). Indeed, the applicant submitted that because of the criminal proceedings instituted against him, he had abandoned his journalistic activity*." (§ 46).

See also the argumentation regarding the criminalization of defamation:

"*47. Finally, the Court notes that the criminal proceedings in the present case had their origin in a bill of indictment lodged by the politician himself and not by a public prosecutor (see, a contrario, Raichinov v. Bulgaria, no. 47579/99, § 50, 20 April 2006) and that they resulted in conditional discontinuation of these proceedings. In view of the margin of appreciation left to Contracting States a criminal measure as a response to defamation cannot, as such, be considered disproportionate to the aim pursued (see Lindon, Otchakovsky-Laurens and July v. France [GC], nos. 21279/02 and 36448/02, § 59, ECHR 2007-..., Radio France and Others v. France, no. 53984/00, § 40, ECHR 2004-II and Rumyana Ivanova v. Bulgaria, no. 36207/03, § 68, 14 February 2008). Nevertheless, the Court notes that when a statement, whether qualified as defamatory or insulting by the domestic authorities, is made in the context of a public debate, the bringing of criminal proceedings against the maker of the statement entails the risk that a prison sentence might be imposed. In this connection, the Court recalls that the imposition of a prison sentence for a press offence will be compatible with journalists' freedom of expression as guaranteed by Article 10 only in exceptional circumstances, notably where other fundamental rights have been impaired, as for example, in the case of hate speech or incitement to violence (see Cumpănă and Mazăre v. Romania [GC], no. 33348/96, § 115, ECHR 2004-XI). For the Court, similar considerations should apply to insults expressed in connection with a public debate. The Court would further observe that the Parliamentary Assembly of the Council of Europe in its Resolution 1577 (2007) urged those member States which still provide for prison sentences for defamation, even if they are not actually imposed, to abolish them without delay (Resolution Towards decriminalisation of defamation adopted on 4 October 2007)*".

Having regard to the above considerations, the Court concluded that the interference in the applicant's case was disproportionate to the legitimate aim pursued, having regard in particular to the interest of a democratic society in ensuring and maintaining the freedom of the press in the context of free elections.

Saygılı and Falakaoğlu v. Turkey (no. 2) (no. 38991/02) (Importance 3) - 17 February 2009- Non violation of Article 10 - Incitement to violence – Non violation of Article 6§1

The applicants are the owner and the editor-in-chief of a daily newspaper, *Yeni Evrensel*. They were sentenced to fines by the domestic court for publishing in October 2000 the declarations of detainees belonging to illegal armed organisations. Relying on Article 10 the applicants complained about their conviction and sentence, and the temporary closure of the newspaper. Relying further on Article 6 § 1, they complained that they were denied a fair hearing.

The Court took into account the background of the cases submitted to it, particularly problems linked to the prevention of public disorder and terrorism (see *Falakaoğlu and Saygılı v. Turkey*, nos. 22147/02 and 24972/03, § 31, 23 January 2007). The Court observed that the applicants were convicted of publishing the declarations of terrorist organisations. These declarations were prepared by the detainees who were being kept in several prisons for their affiliation to various terrorist groups and carried messages concerning their dissatisfaction with the new F-type prison system which led to their "resistance by hunger strikes for an indefinite period". The detainees called on the public, including other prison inmates and "revolutionary groups", to support them by action in their struggle against the "fascist establishment" until their demands were met by the authorities.

By five votes to two, the Court held that there had been no violation of Article 10 in respect of the conviction of the applicants, on account of them not having complied with their duties and responsibilities, as owner and editor-in-chief, to take good care not to disseminate information likely to

provoke violent reactions, especially in situations of conflict and tension. The Court further rejected the applicants' remaining complaint under Article 6:

"*While it is true that the applicants did not personally associate themselves with the views contained in these declarations, they nevertheless provided their writers, who expressed their affiliation to illegal armed groups, with an outlet to stir up violence and hatred. Accordingly, the content of these declarations must be seen as capable of inciting violence in the prisons by instilling an irrational reaction against those who introduced or were in charge of the new incarceration system. In other words, the message which is communicated to the readers is that recourse to violence is a necessary and justified measure of self-defence in the face of the aggressor who wants to turn their lives into prison cells […]… It is to be noted that in a similar case the Court had already expressed its concern about the making of such declarations at a time when serious disturbances had taken place in several prisons between the security forces and detainees, resulting in the deaths and injuries of parties to the conflict (see Falakaoğlu and Saygılı, cited above, § 33). In such a context, the Court considers that there were indeed reasons to fear for violent reactions and thus to be reticent in view of the events that had taken place in the prisons in less than two months after the publication of the impugned declarations. […] As the owner and editor-in-chief of the newspaper, the applicants were vicariously subject to the "duties and responsibilities" which the newspaper's editorial and journalistic staff undertakes in the collection and dissemination of information to the public and which assume an even greater importance in situations of conflict and tension[…] Finally, the Court observes that the nature and severity of the penalty imposed are factors to be taken into account when assessing the proportionality of the interference. In this connection, it concludes that the heavy penalty imposed on the applicants as the owner and editor-in-chief of the newspaper could reasonably be regarded as answering a "pressing social need" and that the reasons adduced by the authorities for the applicants' conviction are "relevant and sufficient*" (§§ 28-30).

- **Right to property**

Grifhorst v. France (no. 28336/02) (Importance 1) – 26 February 2009 - Violation of Article 1 of Protocol 1 - Disproportionate nature of the penalty imposed on the applicant for failure to declare a sum of money to the customs authorities

The case concerned a penalty – the confiscation of a sum of money plus a fine – imposed on the applicant for failing to declare the sum of money to the customs authorities at the border between France and Andorra. On 29 January 1996, on his way into France from Andorra, the applicant was stopped by French customs officers. When asked twice by the customs officers if he had any money to declare, the applicant replied that he did not. The customs officers searched him and his vehicle and found 500,000 Netherlands guilders in his pockets, the equivalent of 233,056 Euros (EUR). They seized the full amount. The applicant declared that he had withdrawn the money from the Credit of Andorra bank to buy a property in Amsterdam.

In October 1998 the Perpignan Criminal Court (France) found the applicant guilty of failure to comply with the obligation under Article 464 of the Customs Code to declare money, securities or valuables. He was sentenced, under Article 465 of the Customs Code, to the confiscation of the full amount plus a fine equal to half the amount he had failed to declare (225,000 Netherlands guilders, the equivalent of EUR 116,828). The judgment was upheld on appeal in March 2001. In January 2002 the Court of Cassation rejected an appeal on points of law.

The Court emphasised the severity of the penalty imposed on the applicant, namely the combined confiscation of the full sum he had been carrying and a fine of half that amount, making a total of EUR 349,584. It observed in particular that in the other member States of the Council of Europe the penalty most frequently applied in such cases was a fine and that only the part of the sum in excess of the permitted amount was subject to confiscation. Furthermore, the Court noted that the French authorities had amended Article 465 of the Customs Code since 2004, so that it no longer provided for automatic confiscation, and the fine had been reduced to a quarter of the sum concerned. It further pointed out that in most of the relevant international or community instruments reference was made to the need for the penalties prescribed by the States to be "proportionate". The Court therefore found that the penalty imposed on the applicant had been disproportionate, in violation of Article 1 of Protocol No. 1.

Dacia S.R.L. v. Moldova (no. 3052/04) (Importance 2) – 24 February 2009 – Violation of Article 6 § 1 and Article 1 of Protocol No. 1 - Annulment of the privatisation of the applicant company's hotel.

The applicant company is a four star hotel, the "Dacia", in Chişinău. In 1997 a privatisation act was adopted by Parliament and the Dacia hotel, then owned by the State, was auctioned. The company

"Selikat-Mix" won the auction and concluded a contract with the Department for the Privatisation of State Property in February 1999. In January 2003 the Prosecutor General's Office brought court proceedings in the interest of the State against Selikat-Mix and the Department, seeking to annul the privatisation of the hotel and to repay the purchase price to the applicant company. The Prosecutor General later requested the court to designate Dacia S.R.L. as defendant in the case, given that Selikat-Mix had ceased to exist. On 6 June 2003 the Economic Court of Moldova ultimately accepted the Prosecutor General's request and delivered a judgment annulling the privatisation on the ground that it had been unlawful. Dacia S.R.L. was ordered to return the hotel to the State Chancellery and the Ministry of Finance was ordered to pay to the company the initial price it had paid for the hotel, namely 20,150,000 Moldovan lei (MDL) (EUR 1,342,590 in October 2004, when the applicant company obtained the last part of that amount). Following the Court's judgment of 18 March 2008, Dacia S.R.L. requested restitution of the hotel and the underlying land. If that were impossible, the applicant company asked to be compensated on the basis of the current market value of the hotel as estimated in the evaluation it had provided to the Court, which amounted to approximately EUR 7,612,000.

The case refers to deprivation of property which lacked a valid reason and was in breach of the principle of legal certainty. In other words, the deprivation of property itself could not be justified in terms of the Convention. The European Court of Human Rights held that the Moldovan Government had to return the Dacia hotel and its equipment, together with the underlying land, to Dacia S.R.L, plus any tax that might be chargeable. In the event that the hotel, land and equipment were returned, the Court held that Dacia S.R.L. had to simultaneously pay EUR 374,299 to the Government, which represented the difference between the money paid by the Government to Dacia S.R.L. for having annulled the privatisation and taken the hotel in 2003, namely EUR 1,264,924, and the amount the Court awarded to Dacia S.R.L. as pecuniary damage in this judgment, namely EUR 890,625. The Court further held that, failing restitution of the hotel, Moldova had to pay to Dacia S.R.L, EUR 7,237,700 in pecuniary damage, which included loss of profits amounting to EUR 763,540, court fees and default interest amounting to EUR 98,565, and reimbursement of the amount taken from the hotel's cashier desk at the time including interest, namely EUR 28,520.

- **Cases concerning disappearances in Chechnya**

Astamirova and Others v. Russia (no. 27256/03) (Importance 3)- 26 February 2009) - Violations of Article 2 (right to life and lack of effective investigation) - Violation of Article 3 (inhuman treatment in respect of Aslanbek Astamirov's sisters, mother, wife and daughters) - Violation of Article 5 (unacknowledged detention) - Violation of Article 13 (lack of an effective remedy) in conjunction with Article 2 - No violation of Article 14 (prohibition of discrimination) - Violation of Article 38 § 1 (a) (refusal to submit documents requested by the Court)

Sagayev and Others v. Russia (no. 4573/04) (Importance 3) - 26 February 2009) - Violations of Article 2 (right to life and lack of effective investigation) - Violation of Article 3 (inhuman treatment in respect of Ilias Sagayev's father, brother and sister-in-law) - Violation of Article 5 (unacknowledged detention) - Violation of Article 13 (lack of an effective remedy) in conjunction with Article 2

Vagapova and Zubirayev v. Russia (no. 21080/05) (Importance 3) - 26 February 2009)- Violations of Article 2 (right to life and lack of effective investigation) - Violation of Article 3 (inhuman treatment in respect of Alis Zubirayev's parents) - Violation of Article 5 (unacknowledged detention) - Violation of Article 13 (lack of an effective remedy) in conjunction with Article 2

In all three cases the Court considered that the applicants, mostly eye-witnesses to the incidents, had presented a coherent and convincing picture of their relatives' abduction. All stated that the abductors had acted in a manner similar to that of a security operation; they had mostly spoken Russian without an accent and had, on the whole, used military vehicles which could not have been available to paramilitary groups. The Court found the fact that large groups of armed men in uniform were able to move freely at the relevant time and apprehend people at their homes strongly supported the applicants' allegation that the men had been Russian servicemen. The Court therefore held in all three cases that the evidence available to it established beyond reasonable doubt that the applicants' relatives had to be presumed dead following their unacknowledged detention by Russian servicemen during a security operation. The Court came to these conclusions by drawing inferences from the Government's failure to submit the documents from the investigation files which were in their exclusive possession or to provide another plausible explanation for the events in question. Noting that the authorities had not justified the use of lethal force by their agents, it concluded that there had been a violation of Article 2 in respect of all of the applicants' relatives.

In all three cases, the Court further held that there had been violations of Article 2 relating to the authorities' failure to carry out effective investigations into the circumstances in which the applicants' relatives had disappeared.

The Court also found that Aslanbek Astamirov's sisters, mother, wife and daughters; Ilias Sagayev's father, brother and sister-in-law; and, Alis Zubirayev's parents had suffered and continued to suffer distress and anguish as a result of the disappearance of their relatives and their inability to find out what had happened to them. The manner in which their complaints had been dealt with by the authorities had to be considered to constitute inhuman treatment, in violation of Article 3. However, in the case of *Sagayev and Others,* the Court observed that only Ilias Sagayev's father, brother and sister-in-law had insistently applied to various official bodies with enquiries about their relatives. While accepting the considerable distress caused by the events of August and September 2002 to the other seven applicants, the Court was nevertheless unable to conclude that their mental suffering had been so serious as to raise an issue under Article 3. It therefore concluded that there had been no violation of Article 3 in respect of those seven applicants.

Lastly, the Court found in particular in all three cases that the applicants' relatives had been held in unacknowledged detention without any of the safeguards contained in Article 5, which constituted a particularly grave violation of the right to liberty and security enshrined in that article.

2. Other judgments issued in the period under observation

You will find in the column "Key Words" of the table below a short description of the topics dealt with in the judgment. For a more complete information, please refer to the following link:

- press release by the Registrar concerning the Chamber judgments issued on 17 February 2009 : here.
- press release by the Registrar concerning the Chamber judgments issued on 19 February 2009 : here.
- press release by the Registrar concerning the Chamber judgments issued on 24 February 2009 : here.
- press release by the Registrar concerning the Chamber judgments issued on 26 February 2009 : here.

We kindly invite you to click on the corresponding link to access to the full judgment of the Court for more details. Some judgments are only available in French.

State	Date	Case Title and Importance of the case	Conclusion	Key Words by the Office of the Commissioner	Link to the case
Bulgaria	26 Feb. 2009	Lisev (no. 30380/03) Imp. 3.	Violation of Art. 6 § 1 (length)	Excessive length of proceedings (more than seven years and five months) for three levels of jurisdiction	link
Finland	24 Feb. 2009	Jaanti (no. 39105/05) Imp. 3	Violation of Art. 6 § 1 (length) Violation of Art. 13	Excessive length (over six years and seven months) of criminal proceedings against the applicant and a further violation of Article 13 in this connection	link
Georgia	24 Feb. 2009	Jgarkava (n° 7932/03) Imp. 2	Violation of Article 6 § 1 (fairness)	Concerning the dismissal of the applicant's claim for compensation for pecuniary, physical and non-pecuniary damage, the Court held by six votes to one that there had been a violation of Article 6 § 1 because the Supreme Court had given its ruling on grounds that were neither clear not sufficient. It had distinguished between "rehabilitation" and "restoration of rights" for the first time without	Link

				giving any explanation.	
Poland	17 Feb. 2009	Gospodarczyk (no. 6134/03) Imp. 3.	No violation of Art. 6 § 1	The court fees the applicant had been required to pay in order to proceed with a claim for compensation could not be considered as disproportionate (mainly because the high amount of the court fees was due to the disproportionate amount of the original claim of the applicant)	link
Romania	17 Feb. 2009	Ileana Lazăr (no. 5647/02) Imp. 3.	No violation of Art. 1 of Prot. No. 1	Concerning the nationalisation of a mill and adjacent land belonging to the applicant, the Court held that the interference was in accordance with the conditions provided for by law and was not disproportionate since the balance payable had been based on an expert report drawn up in adversarial proceedings, and part of the land had been returned	link
Romania	24 Feb. 2009	Tarău (no. 3584/02) Imp. 2	Violation of Art. 5 §§ 3 and 4 Violation of Art. 6 § 3 (d)	Unlawful detention of the applicant on the basis of a "danger to public order"; failure of the authorities to ensure the applicant's adequate participation and effective defence in the proceedings on appeal against detention; inability to examine most of the prosecution witnesses or any defence witnesses during trial.	link
Russia	26 Feb. 2009	Fedorov (no. 63997/00) Imp. 3.	Violation of Article 6 §§ 1 and 3	The quashing of the final domestic court's judgment had not been intended to correct a fundamental judicial error or a miscarriage of justice, but had been used merely for the purpose of obtaining a rehearing. Moreover the applicant had not been given a chance to lodge objections to having the case reopened and, unlike the prosecutor, could not participate in the supervisory review hearing	link
Turkey	17 Feb. 2009	Aslan and Demir (nos. 38940/02 and 5197/03) Imp. 3 Ek and Şıktaş (nos. 6058/02 and 18074/03) Imp. 3.	Violation of Art. 6 § 3 (c) in conjunction with Art. 6 § 1 (fairness)	Deprivation of the applicants' s right to the assistance of a lawyer while in police custody on charges of membership of an illegal organisation.	link link
Turkey	17 Feb. 2009	Baızı (no. 7306/02) Imp 3.	Violation of Art. 5 § 3	Detention in police custody without judicial supervision (following his arrest by the anti-terrorist branch of the İzmir	link

				Security Directorate)	
Turkey	17 Feb. 2009	Balci (n° 31079/02) Imp. 2	No violation of Article 2	The investigation conducted into the applicants 11-years child's death (as a result of his fall from a swing in a park) had been satisfactory and individual criminal responsibility had been established under the domestic law	Link
Turkey	17 Feb. 2009	Mehmet Koç (no. 36686/07) Imp. 3.	Violation of Art. 6 § 1 (length)	Excessive length of criminal proceedings (eight years and seven months for two levels of jurisdiction)	link
Turkey	24 Feb. 2009	Çamçi and Others (no. 25172/02) Imp. 3	No violation of Article 3 (treatment) Violation of Article 3 (investigation)	Lack of effective investigation concerning the circumstances surrounding the police custody following the applicants' arrest during a demonstration	Link
Turkey	24 Feb. 2009	Gülbahar and Tut (no. 24468/03) Imp. 3.	Violation of Art. 6 §§ 1 and 3 (c) Violation of Art. 5 § 3(2nd applicant)	*Inter alia* : length of criminal proceedings against the applicants and length of pre-trial detention (nine years) for terrorist attacks perpetrated in the name of an illegal organisation	link
Turkey	24 Feb. 2009	Nacaryan and Deryan (nos. 19558/02 and 27904/02) Imp. 3	Just satisfaction	Just satisfaction following a violation of Art. 1 of Prot. 1 pursuant to the refusal of the Turkish courts to recognize the applicants' status as heirs to an estate including immovable property	Link
The United Kingdom	17 Feb. 2009	Onur (no. 27319/07) Imp. 2.	No violation of Art. 8	The deportation of the applicant to Turkey could not amount to a violation of the applicant's right to private and family life because, *inter alia*, the applicant, his current partner and their children could have all settled in Turkey without exceptional difficulties.	link
Ukraine	19 Feb. 2009	Doronin (no. 16505/02) Imp. 3.	Violation of Art. 5 § 1 Violation of Art. 5 § 3	The applicant has been detained for indefinite periods of time on the sole grounds that authorities had been studying the case files or that the files had been transmitted to court. The applicant had been detained administratively for 5 days without access to a lawyer, and his pre-trial detention had been validated retroactively and extended for an indefinite period of time. Moreover the detention on remand lasted excessively long (more than two years)	link
Ukraine	19 Feb. 2009	Nikolay Kucherenko (no. 16447/04) Imp. 3.	Violation of Art. 5 § 1	The applicant has been detained for indefinite periods of time on the sole grounds that authorities had been studying the case files or that the files had been transmitted to court	link

Ukraine	19 Feb. 2009	Khristov (no. 24465/04) Imp. 3.	Violation of Art. 6 § 1 (fairness) Violation of Art. 1 of Prot. No. 1	The quashing of the final domestic judgment amounted to a violation of Art. 6. Moreover this quashing in the extraordinary review procedure had deprived the applicant of the possibility to seek reimbursement for the wrongful confiscation of his car	link
Ukraine	19 Feb. 2009	Miroshnichenko (no. 34211/04) Imp. 3.	Violation of Art. 5 § 3	Excessively length (one year and four months) of the pre-trial detention of the applicant, found guilty of theft and robbery	link
Ukraine	19 Feb. 2009	Shabelnik (no. 16404/03) Imp. 2.	Violation of Art. 6 §§ 1 and 3(c) (fairness)	The applicant had made self-incriminating statements in the absence of his lawyer and in circumstances which raised reasonable doubts as to the practices used by the investigator interviewing him	link

3. Repetitive cases

The judgments listed below are based on a classification which figures in the Registry's press release: "*In which the Court has reached the same findings as in similar cases raising the same issues under the Convention*".

The role of the NHRSs may be of particular importance in this respect: they could check whether the circumstances which led to the said repetitive cases have changed or whether the necessary execution measures have been adopted.

State	**Date**	**Case Title**	**Conclusion**	**Key words by the Office of the Commissioner**
Bulgaria	26 Feb. 2009	Vladimirova and Others (no. 42617/02) link	Violation of Article 1 of Protocol No. 1	Order to vacate a property following the application of legislation on restitution
Moldova	24 Feb. 2009	Decev (no. 7365/05) link	Violation of Art. 6 § 1 (fairness) Violation of Art. 1 of Prot. No. 1	Failure of the domestic authorities to enforce a final judgment in the applicant's favour
Portugal	24 Feb. 2009	Melo e Faro Maldonado Passanha and Others (no. 44386/05) link	Violation of Art. 1 of Prot. No. 1	Violation of the protection of property concerning the applicant's land expropriated in 1975 under the land reform
Romania	24 Feb. 2009	Găină (no. 16707/03) link	Violation of Art. 6 § 1 (fairness) Two violations of Art. 1 of Prot. No. 1	Violations of the Convention regarding the revocation of a title to land the applicant had inherited from her brother
Romania	24 Feb. 2009	Petrini (no. 3320/05) link	Violation of Article 6 § 1 (fairness) and of Article 1 of Protocol No. 1	Violations of the Convention concerning apartments that had been nationalised

Romania	17 Feb. 2009	Dumbravă (no. 25234/03) link	Violation of Art. 1 of Prot. No. 1	Violation of the applicant's right to property concerning an action to conclude a sale contract
Ukraine	19 Feb. 2009	Andriychuck (no. 18024/04) link	Violation of Art. 6 § 1 (fairness)	Failure of domestic authorities to enforce final judgments in the applicants' favour
Ukraine	19 Feb. 2009	Bondar and Others (no. 12380/05) link	Violation of Art. 6 § 1 (fairness) Violation of Art. 1 of Prot. No. 1	Idem
Ukraine	19 Feb. 2009	Kooperativ Kakhovskiy-5 (no. 20728/04) link	Violation of Art. 6 § 1 (fairness), of Art. 13, of Art. 1 of Prot. No. 1	Idem
Ukraine	19 Feb. 2009	Kryshchuk (no. 1811/06) link	Idem	Idem

4. Length of proceedings cases

The judgments listed below are based on a classification which figures in the Registry's press release.

The role of the NHRSs may be of particular relevance in that respect as well, as these judgments often reveal systemic defects, which the NHRSs may be able to fix with the competent national authorities.

With respect to the length of non criminal proceedings cases, the reasonableness of the length of proceedings is 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 for instance Cocchiarella v. Italy [GC], no. 64886/01, § 68, published in ECHR 2006, and Frydlender v. France [GC], no. 30979/96, § 43, ECHR 2000-VII).

State	**Date**	**Case Title**	**Link to the judgment**
Hungary	24 Feb. 2009	Eösöly (no. 32069/05)	Link
Romania	24 Feb. 2009	Laurenciu Popovici (no. 30043/04)	Link
Turkey	17 Feb. 2009	Akan (no. 9574/03)	Link
Turkey	17 Feb. 2009	Aras (no. 1895/05)	Link
Ukraine	19 Feb. 2009	Buryak (no. 1866/04)	Link
Ukraine	19 Feb. 2009	Mitakiy (no. 183/06)	Link
Ukraine	19 Feb. 2009	Voishchev (no. 21263/04)	Link
Ukraine	19 Feb. 2009	Voronenkov (no. 41286/04)	Link

B. The decisions on admissibility / inadmissibility / striking out of the list including due to friendly settlements

Those decisions are published with a slight delay of two to three weeks on the Court's Website. Therefore the decisions listed below cover **the period from 2 to 8 February 2009**.

They are aimed at providing the NHRSs with potentially useful information on the reasons of the inadmissibility of certain applications addressed to the Court and/or on the friendly settlements reached.

State	***Date***	***Case Title***	***Alleged violations (Key Words by the Office of the Commissioner)***	***Decision***
Bulgaria	03 Feb. 2009	Petrov (no 20024/04) link	The applicant complains about violations of Art. 6 (fair trial), as well as violations of Art. 2, 3, 5, 7, 9, 13, 14 and 34 (concerning the arrest of the applicant on suspicion of murder and his subsequent detention)	Partly adjourned (concerning the fairness of the criminal proceedings and the hindrance in the exercise of the right of individual petition with the Court) Partly inadmissible as manifestly ill-founded (no appearance of violation)
Bulgaria	03 Feb. 2009	Radkov (no 27795/03) link	The applicant complains *inter alia* under Article 8 and Article 6 § 3 (c) that letters from his lawyers and from the Registry of the Court had been opened and read by the administration of Lovech Prison. He further complains about violations of Art. 5, 6, 13 and 1 of Prot. 1.	Partly adjourned (concerning the applicant's right to respect for his correspondence) Partly inadmissible as manifestly ill-founded (no appearance of violation)
Bulgaria	03 Feb. 2009	Yakimovi (no 26560/05) link	The applicants complain that they had been deprived of their property arbitrarily with no adequate compensation and complain about the length of civil proceedings	Partly adjourned (concerning the length of civil proceedings) Partly inadmissible as manifestly ill-founded (given the importance of the legitimate aims pursued by the Restitution Law and the particular complexity involved in regulating the restitution of nationalised property after decades of totalitarian rule, the Court considers that the interference with the applicants' property rights was not disproportionate)
Bulgaria	03 Feb. 2009	Valchev (no 27238/04) link	The applicant complains about the excessive length of civil proceedings and the lack of an effective remedy in that respect. He further alleges that the courts did not grant him the full amount of his claim.	Partly adjourned (concerning length of civil proceedings and the lack of an effective remedy) Partly inadmissible as manifestly ill-founded
Bulgaria	03 Feb. 2009	Vasil and Rayna Dimitrovi (no 55148/00) link	The applicants complained, relying on Art. 1 of Prot. No. 1 and Articles 13, 14 and 17, that they had been arbitrarily deprived of the property of an apartment they had bought from the State in 1966 (see the judgment in *Velikovi and Others v. Bulgaria*)	Struck out of the list (applicants no longer wishing to pursue their application)
Bulgaria	03 Feb. 2009	Marina (no 16463/02) link	The applicant complains about the length of a set of civil proceedings for damages	Struck out of the list (friendly settlement reached)
Bulgaria	03 Feb. 2009	Danev (no 9411/05) link	Alleged violations of Art. 5, 6 and 13 (concerning the excessive formalism of domestic courts which allegedly deprived the applicant of the possibility to obtain compensation for his unlawful detention, and concerning the breach of the equality of arms due to the participation of the Prosecutor to certain proceedings)	Partly adjourned (concerning the impossibility to obtain compensation for the unlawful detention and concerning the equality of arms) Partly inadmissible as manifestly ill-founded
Croatia	05 Feb. 2009	Ivan and Martin Medic (no 55864/07) link	The applicants complained under Article 6 § 1 and Article 13 about the length of proceedings and the lack of an effective remedy in that respect.	Inadmissible as manifestly ill-founded : the applicants were awarded already a sum of money by the Constitutional Court and can no longer claim the status of victims (the constitutional complaint in the

				present case proved to be an effective remedy)
Croatia	05 Feb. 2009	Kovacevic (nov22271/07) link	Alleged violations of Art. 6 (length of proceedings) and 1 of Prot. 1	Struck out of the list (the applicant died and no relatives were willing to pursue the application)
Cyprus	05 Feb. 2009	Thecypiom ltd. (no 8394/07) link	Alleged violations of Art. 6 (length of proceedings and fairness of appeal proceedings)	Struck out the list (friendly settlement reached)
Georgia	03 Feb. 2009	Kikolashvili (no 37341/04) link	*Inter alia* : alleged violations of Art. 6 (namely concerning the domestic courts' refusal to exempt her from the State fees requested in order to introduce an action for non-pecuniary damage, as well as concerning the fairness and length of proceedings), of Art. 1 of Prot. 1, Art. 14 and Art. 3	Partly inadmissible as incompatible *ratione materiae* (concerning the complaint under Art. 6, the domestic law explicitly excluded, at the material time, the applicant's claim) and partly as manifestly ill-founded (no appearance of violation)
Germany	03 Feb. 2009	Hoischen (no 22683/04) link	Alleged violations of Art. 5 (concerning *inter alia* the length of pre-trial detention) and of Art. 6 and 14	Inadmissible as manifestly ill-founded (the Court considered *inter alia* that the investigations were conducted with the necessary special diligence and that the length of the detention could not be considered as excessive)
Germany	03 Feb. 2009	Senger (no 32524/05) link	The applicant complains under Art. 10 and Art. 3 due to the fact that the Mannheim prison authorities, by refusing him, his mother, aunt and other relatives the opportunity to correspond in Russian, had deprived him of his right to communicate with his relatives who are not capable of writing in German	Partly inadmissible for non-exhaustion of domestic remedies (concerning the general supervision of his correspondence; and concerning the stoppage of letters addressed to the mother) Partly inadmissible as manifestly ill-founded (namely because the stopping of the letters was both "in accordance with the law" and justifiable as "necessary in a democratic society")
Germany	03 Feb. 2009	Niedermeier (no 37972/05) link	The applicant complains about various aspects of the fairness of proceedings (namely concerning the decision of the Nuremberg District Court to stay the proceedings) and about a violation of Art. 7 (infringement of the right to be acquitted for lack of sufficient evidence justifying the charges brought against him)	Inadmissible as manifestly ill-founded because : there is no right under Article 6 to a formal conviction or acquittal following the laying of criminal charges (see the judgment *Deweer v. Belgium* of 27 February 1980); the Nuremberg District Court's decision to provisionally stay the proceedings can be considered to have ended the criminal proceedings against the applicant for the purposes of Article 6, even if there remained a possibility that a court could resume them; and such a decision does not constitute a violation of the presumption of innocence. Inadmissible as incompatible *ratione materiae* under Art. 7
Germany	03 Feb. 2009	Matterne (IV) (no 40899/05) link	The applicant complained under Article 6 of the Convention about the Munich Regional Court's decision to provisionally stay the libel proceedings against him and that he should have been acquitted. He	Inadmissible as manifestly ill-founded because *inter alia*: the decision to provisionally stay the proceedings can be considered to have ended the criminal proceedings against

			complained about further violations of Art. 6 and of Art. 3, 10 and 13	the applicant for the purposes of Article 6, even if there remained a possibility that a court could resume them; there is nothing to establish that the decision to provisionally stay the proceedings itself contains any reasoning suggesting that the applicant was regarded as guilty
Germany	03 Feb. 2009	Schadlich (no 21423/07) link	The applicant complains about the fairness and about the length of proceedings before the administrative courts, in particular before the Dresden Administrative Court and the Saxon Administrative Court of Appeal.	Partly adjourned (concerning the length of proceedings) Partly inadmissible for non exhaustion of domestic remedies concerning the remainder of the application (the applicants had the opportunity to lodge a constitutional complaint against the Federal Administrative Court's decision)
Germany	03 Feb. 2009	Brede (no 35198/05) link	The applicant complained under Article 8 of the Convention about the transfer of parental authority to the Youth Office. She further complained about the separation of her two older children from their younger sibling against their will and under Article 2 of Protocol No. 1 about the deferral of her youngest son's enrolment in school.	Inadmissible as manifestly ill-founded (no appearance of violation of the Convention)
Germany	03 Feb. 2009	Peterke and Lembcke (no 4290/03) link	The applicant complained under Article 6 § 1 of the Convention about the length of the proceedings (amounting to ten years and four months) before the social courts concerning his pension claims	Inadmissible as manifestly ill-founded (neither the length of the proceedings before the Berlin Social Court of Appeal nor the overall length of the proceedings exceeded a reasonable time)
Germany	03 Feb. 2009	Schaedel (no 25223/05) link	Alleged violations of Art. 1 of Prot. 1 (concerning the inability to obtain compensation for use of property from the occupiers and concerning the refusal of legal aid) and of Art. 6 § 1 (length of administrative proceedings)	Inadmissible: partly as incompatible *ratione materiae* (concerning Art. 1 of Prot. 1, the applicant could not claim to have a "*legitimate expectation*"); partly as manifestly ill-founded (the legal aid scheme set up by the German legislature offered the applicant substantial guarantees to protect him from arbitrariness); and partly as incompatible *ratione temporis* (concerning the length of proceedings)
Germany	03 Feb. 2009	Baybasin (no 36892/05) link	Alleged violations of various aspects of Article 6 (namely concerning the right for the applicant to defend himself)	Inadmissible partly as manifestly ill-founded (the Court is satisfied that the rights of the defence were not restricted to an extent that is incompatible with the guarantees provided by Article 6) and partly for non-exhaustion of domestic remedies (concerning the access to the file of the case)

Italy	03 Feb. 2009	Di Cianni (no 14230/03) link	Alleged violation of article 8 (concerning the inability for the applicant to meet his daughter and to exercise his custody rights)	Inadmissible as manifestly ill-founded (the domestic authorities struck a fair balance between the interests of the child and of the applicant)
Lithuania	03 Feb. 2009	Vasiliauskiene (no 36065/06) link	Alleged violation of Art. 8 (the applicant's family complained about the eviction from their home, which had been sold by auction to a third party)	Struck out of the list (the applicants may be regarded as no longer wishing to pursue their application)
Poland	03 Feb. 2009	Gasiorek (no 32058/07) link	The applicant complained about the fairness of the proceedings because she had been unlawfully denied an effective access to court. The legal-aid lawyer failed to inform her within a reasonable time that he had not found legal grounds for bringing cassation proceedings.	Struck out of the list (friendly settlement reached)
Poland	03 Feb. 2009	Szczerbowska (no 49946/06) link	Alleged violation of Art. 6 (length of proceedings)	Struck out of the list (friendly settlement reached)
Romania	03 Feb. 2009	Dobritoiu and Lungu (no 15329/04) link	Alleged violations of Art. 6 (length of civil proceedings), of Art. 1 of Prot. 1 (unlawful deprivation of property) and of Art. 13 (lack of effective remedy)	Struck out of the list (friendly settlement reached)
Romania	03 Feb. 2009	Cristian (no 36646/02) link	Alleged violations of Art. 6 (concerning *inter alia* the equality of arms, the right for the applicant to defend himself, the impartiality of the tribunal)	Inadmissible as manifestly ill-founded (no appearance of violation)
Romania	03 Feb. 2009	Antonescu (no 2528/03) link	Alleged violation of Art. 1 of Prot. 1 taken alone and in conjunction with Art. 14, and of Art. 6 (concerning the taxation of the applicant's retirement allowance)	Struck out of the list (friendly settlement reached)
Russia	05 Feb. 2009	Belkin (nos 14330/07 et al) link	The applicants complained inter alia about the delayed enforcement of domestic judgments in their favour	Inadmissible as manifestly ill-founded (the periods of enforcement were up to one year, which complied with the requirements of the Convention)
Slovakia	03 Feb. 2009	Krivcik (no 22645/04) link	Alleged violation of Art. 6 (length of proceedings)	Struck out of the list (friendly settlement reached)
Switzerland	05 Feb. 2009	Andreas KLINIK AG (no 34928/05) link	Alleged violation of Art. 6 (right of access to a tribunal)	Struck out of the list (applicant no longer wishing to pursue the application)
The United Kingdom	03 Feb. 2009	Hout (no 33170/04) link	The applicant complained under Article 14 of the Convention, taken together with Article 8, that she had suffered discrimination on grounds of her birth status (status of "illegitimate child" under Guernsey law). She further relied on Article 14 taken together with Article 1 of Protocol No. 1.	Struck out of the list (friendly settlement reached)
The United Kingdom	03 Feb. 2009	Sivanathan (no 38108/07) link	The applicant complained that his deportation to Sri Lanka would breach Articles 2 and 3 of the Convention.	Struck out of the list (the applicant may be regarded as no longer wishing to pursue his application as he returned on a voluntary basis to Sri-Lanka : the applicant returned to Sri Lanka on 6 September 2007 at his own request, having been informed that the removal directions had been cancelled as a result of the Rule 39 notification)

Turkey	03 Feb. 2009	Erol (no 15323/03) link	Alleged violations of Art. 3 and 13 (concerning ill-treatment by police during the applicant's arrest and custody)	Inadmissible as manifestly ill-founded (no appearance of violation)
Turkey	03 Feb. 2009	Saglam and others (no 45631/04) Link	Alleged violations of Art. 3, 6, 11 and 13 (following *inter alia* alleged ill-treatment of the applicant during a demonstration)	Inadmissible as incompatible *ratione temporis*

C. The communicated cases

The European Court of Human Rights publishes on a weekly basis a list of the communicated cases on its Website. These are cases concerning individual applications which are pending before the Court. They are communicated by the Court to the respondent State's Government with a statement of facts, the applicant's complaints and the questions put by the Court to the Government concerned. The decision to communicate a case lies with one of the Court's Chamber which is in charge of the case.

There is in general a gap of three weeks between the date of the communication and the date of the publication of the batch on the Website. Below you will find the links to the lists of the weekly communicated cases which were published on the Court's Website :

- on 2 March 2009 : link

The list itself contains links to the statement of facts and the questions to the parties. This is a tool for NHRSs to be aware of issues involving their countries but also of other issues brought before the Court which may reveal structural problems. Below you will find a list of cases of particular interest identified by the Office of the Commissioner.

NB. The statements of facts and complaints have been prepared by the Registry (solely in one of the official languages) on the basis of the applicant's submissions. The Court cannot be held responsible for the veracity of the information contained therein.

Please note that the Irish Human Rights Commission (IHRC) issues a monthly table on priority cases before the European Court of Human Rights with a focus on asylum/ immigration, data protection, anti-terrorism/ rule of law and disability cases for the attention of the European Group of NHRIs with a view to suggesting possible amicus curiae cases to the members of the Group. Des Hogan from the IHRC can provide you with these tables (dhogan@ihrc.ie).

Communicated cases published on 2 March 2009 on the Court's Website and selected by the Office of the Commissioner

State	**Date of communication**	**Case Title**	**Key Words by the Office of the Commissioner**
Cases of extradition to the United States/ death penalty/life sentence without parole			
United Kingdom	10 Feb. 2009	Ahsan N° 11949/08	The applicant was indicted in the United States for: conspiracy for providing material support to terrorists; and conspiracy to kill, kidnap, maim or injure persons or damage property in a foreign country; as well as money laundering. The case concerns the extradition of the applicant from the United Kingdom to the United States. The applicant alleges that the diplomatic assurances provided by the United States are not sufficient to remove numerous risks he faces such as *inter alia* : being designated as an enemy combatant ; being subjected to extraordinary rendition ; being subjected to the death penalty ; being subjected to 'special administrative measures'; being detained in a "supermax" prison; life imprisonment without parole and/or an extremely long sentence of determinate length ; being subjected to life imprisonment without parole and/or an extremely long

			sentence of determinate length. The applicant is currently detained in HM Prison Long Lartin.
United Kingdom	11 Feb. 2009	Wellington N° 60682/08	The applicant complains under Article 3 of the Convention that, if extradited to the United States, he is at real risk of receiving a sentence of life imprisonment without parole. He submits that such a sentence constitutes torture, or inhuman or degrading treatment or punishment. Under Article 1 of Protocol 13, the Government is requested to confirm whether, in the event that the prosecuting authorities of Missouri do not seek the death penalty, the trial court would be unable to impose it *ex proprio motu*. The Court applied Rule 39.
<u>Deportation cases</u>			
France	9 Feb. 2009	De Souza Ribeiro N° 22689/07	The applicant complains under Art. 8 and Art. 13 about the impossibility to challenge the lawfulness of a deportation order. The Court refers in its questions to the parties to the fact that this issue shall be interpreted in light of the judgment *Gebremedhin v. France (no. 25389/05)*
Ireland	11 Feb. 2009	Izevbekhai and others N° 43408/08	The applicants complain under Article 3 of the Convention that there is a real risk that the second and third applicants would be exposed to Female genital mutilation if they are expelled to Nigeria (*N. v. Finland*, no. 38885/02, 26 July 2005) and that the level of review by the Irish domestic courts of the Ministerial Deportation Orders was too limited (*Chahal v. the United Kingdom*, 15 November 1996, *Reports of Judgments and Decisions* 1996-V). They also complain under Articles 6, 13 and 14 of the Convention about the restriction on the right to appeal from the High Court to the Supreme Court imposed by section 5(3)(a) of the Illegal Immigrants (Trafficking) Act 2000.
Sweden	11 Feb. 2009	T.B. N° 62034/08	The applicant complains under Articles 2 and 3 of the Convention that, if deported from Sweden to Eritrea, he would be exposed to a real risk of being killed or detained without trial and tortured because he had escaped from military prison and left Eritrea illegally. Moreover, he alleges that, since he was in the military when he escaped from prison, he will be considered as a deserter and will be punished. He further claims that he is still obliged to do military service and could thus be forced back into the army. Following a request by the applicant under Rule 39 of the Rules of Court, the Court decided to indicate to the Swedish Government that it was desirable in the interest of the parties and the proper conduct of the proceedings before the Court not to deport the applicant to Eritrea until 16 January 2009. This decision was subsequently prolonged by the Court until 18 February 2009.
Sweden	10 Feb. 2009	Al-Zawatia N° 50068/08	The applicant complained under Article 3 of the Convention that, if deported from Sweden to the West Bank or Jordan, this would cause him irreparable harm, due to his very poor mental health, and entail a serious risk to his life and health. He further claimed that it would be inhuman to deport him since he was married to a Swedish woman and dependent on her care and support. The Court rejected the Rule 39 request.
The United kingdom	12 Feb. 2009	Mungai N° 53960/08	The applicant complains that if returned to Kenya, she would face a real risk of ill-treatment contrary to Article 3 of the Convention and/or a violation of Article 2 of the Convention (namely concerning a risk to undergo female genital mutilation). The Court refers especially under domestic law to the case *VM v. Secretary of State for the Home*

			Department before the Asylum and Immigration Tribunal.
The United kingdom	12 Feb. 2009	Almasri 5519/08	The applicant complains under Article 8 of the Convention about his deportation from the United Kingdom to Syria. He also complains that there has been a violation of his rights under Article 6, in that the decision to deport him was taken while he still had a pending application for indefinite leave to remain. He complains under Article 14, in conjunction with Articles 6 and 8, that he has been discriminated against on the grounds of his religion.
The United kingdom	12 Feb. 2009	M.H.I. N° 23135/06	The applicant complains that his removal to Sudan would violate Article 3 of the Convention. In particular, the Government are requested to comment on the applicant's case in light of the determination of the Asylum and Immigration Tribunal in the *AY* case *(Political Parties – SCP – Risk) Sudan.*
<u>Other communicated cases deemed of particular interest</u>			
France	9 Feb. 2009	Ait El Hadj N° 12903/07	The applicant complains under Article 5 about the lawfulness and the length of his pre-trial detention in the framework of criminal proceedings against alleged members of "Salafiya Jihada" involved in the terrorist attacks in Casablanca in May 2003.
France	9 Feb. 2009	Soros N° 50425/06	In the framework of proceedings for financial offences related to the acquisition of shares of the bank *Société Générale*, the applicant, George Soros, was convicted to pay a fine of nearly one million Euros. The applicant complains *inter alia* about a violation of Article 7 (no punishment without law, concerning the offense of *délit d'initié*), of Article 6 and 13 (*inter alia* concerning the fairness and the excessive length of the investigation and the proceedings).
Romania	11 Feb. 2009	Raban N° 25437/08	The applicants allege that the right to respect for their family life, as provided in Article 8 of the Convention, has been violated by the courts that dealt with the Hague Convention proceedings. The first applicant alleges that he is no longer able to communicate with his children in a common language, as he does not speak Romanian, and the children have stopped using Hebrew, encouraged by the mother, who "has deliberately failed to continue the children's Hebrew language skills". Also, the applicant alleges that "the mother is denying him reasonable access" to his children. The applicant further complains under Art. 6§1 about the fairness of the proceedings.
Russia	12 Feb. 2009	Ablyazov N° 22867/05	The applicant complains under Art. 3 and 13 that he was ill-treated by the police officers of the police department of the Oktyabrskiy District of Orsk and that the investigation into his allegations of ill-treatment has been ineffective. He alleges further violations of Art. 6, Art. 34, and Art. 3 of Prot. 7.
Russia	12 Feb. 2009	Kushtova and others N° 21885/07	The applicants complain under Articles 8 and 9 of the Convention that the State authorities unnecessarily interfered with their right to family and private life and freedom of religion by refusing to return the body of their relative for burial according to Islam traditions and customs. They further allege violations of Art. 9 taken in conjunction with Art. 14, of Art. 3, of Art. 13 and of Art. 6
Russia	12 Feb. 2009	Ooo Ivpress and Smetanin N° 35258/05	The applicants allege a violation of Article 10 because the judgments of the domestic courts unduly restricted their right to freedom of expression following the publication of articles criticizing the governor of the Ivanovo Region.

Russia	12 Feb. 2009	Shumkova N° 9296/06	The applicant complains about the failure of the authorities to protect her son's life (who committed suicide in detention). She further complains *inter alia* about the lack of medical treatment for his epilepsy, for the lack of effective investigation into the death, and for ill-treatment imposed on her son while in detention.
Russia	12 Feb. 2009	Taziyeva and others N° 50757/06	The applicants complain that the circumstances of the search of their house in Ingushetia Republic amount to an inhuman or degrading treatment contrary to Article 3. In particular, the search was conducted by a hundred of armed men in black masks; the fifth applicant was tied and threatened with a gun; the women and children of the applicant family remained barely dressed outside for several hours; their property was damaged. They further complain about the lack of effective investigation into the above events. They further allege violations of Art. 8, Art. 13 and Art. 1 of Prot. 1
Ukraine	11 Feb. 2009	Leonov N° 10543/03	The applicant complains under Article 3 of the Convention that he was ill-treated by the police on 24 and 25 August 2001 and that the investigation into his complaint was not effective. He further alleges *inter alia* violations of Art. 5, Art. 6, Art. 13, Art. 14, Art. 1 of Prot. 1 and Art. 1 of Prot. 12

D. Miscellaneous (Referral to grand chamber, hearings and other activities)

European Court of Human Rights grants request for interim measures by Omar Othman (Abu Qatada) (19.02.09)

On 11 February 2009, Omar Othman (Abu Qatada) lodged an application with the European Court of Human Rights (application no. 8139/09). He complains principally that, notwithstanding assurances to the contrary from the Jordanian Government, if deported to that country he is at real risk of being subjected to ill-treatment in breach of Article 3 (prohibition of torture and inhuman and degrading treatment) of the European Convention on Human Rights and flagrant breaches of Articles 5 (right to liberty and security) and 6 (right to a fair trial) of the Convention.

On 18 February 2009 Mr Othman sought interim measures under Rule 39 of the Rules of Court to prevent his deportation to Jordan while the Court considered his application. On 19 February 2009, the Acting President of the Chamber to which the case has been allocated decided, in the interests of the parties and the proper conduct of the proceedings before the Court, to indicate to the Government of the United Kingdom, under Rule 39 of the Rules of Court, that the applicant should not be deported to Jordan until the Court has given due consideration to the matter.

Under Rule 39 of the Rules of Court the Court may indicate to the parties any interim measure which it considers should be adopted in the interests of the parties or of the proper conduct of the proceedings before it. The parties have been told that they will receive further procedural instructions in the very near future.

Hearings in March 2009:

The European Court of Human Rights will be holding the following four hearings in March 2009:
- Wednesday 4 March 2009, Grand Chamber in *Kart v. Turkey* (application no. 8917/05)
- Tuesday 10 March 2009, Chamber hearing on the merits, in *Suljagić v. Bosnia and Herzegovina* (no. 27912/02)
- Wednesday 18 March 2009: Grand Chamber, in *Gäfgen v. Germany* (no. 22978/05)
- Tuesday 24 March 2009, Chamber hearing on the merits in *Olafsson v. Iceland* (no. 20161/06)

New film about the Court (23.02.09)

"The Conscience of Europe", which has just been updated, is a film about the Court and its working practices and activities. The documentary lasts 15 minutes and is intended for the general public. It shows specific examples of cases examined by the Court and considers its prospects over the forthcoming years and the challenges facing it. It is currently available in French, English and German. Watch the video

9th ASEM seminar (18.02.09)

On 18 February 2009 President Costa made the opening speech of the 9th Informal Asia-Europe Meeting (ASEM) seminar on human rights at the Human Rights Building in Strasbourg.

Speech of President Costa (in French only)

Election to the European Court of Human Rights (17.02.09)

The European Court of Human Rights has re-elected Peer **Lorenzen** (Danish) as President of one of its Sections.

European Court of Human Rights tests a new on-line application form (23.02.09)

The European Court of Human Rights has launched a new service on a trial basis to enable applicants to fill out the Court's application form on-line via its internet site. Initially, this service will be available **only** for applicants using **Swedish** or **Dutch** application forms. Depending on the outcome of the trial, it may subsequently be extended to the other official languages of the member States of the Council of Europe.

When filling out the form, applicants can save their changes at any stage and can then return to complete the form at any time. Once the form is fully completed the applicant can submit it. This will trigger a service which will automatically send via email the completed version of the form in PDF format to the applicant who must then print it, sign it and post it on to the Court, with any relevant annexes and within the time-limit indicated.

Part II : The execution of the judgments of the Court

A. New information

The Council of Europe's Committee of Ministers will hold its next "human rights" meeting from 17 to 19 March 2009 (the 1051st meeting of the Ministers' deputies).

You may consult already the **preliminary list of items for consideration**.

B. General and consolidated information

Please note that useful and updated information (including developments occurred between the various Human Rights meetings) on the state of execution of the cases classified by country is provided :
http://www.coe.int/t/e/human%5Frights/execution/03%5FCases/

For more information on the specific question of the execution of judgments including the Committee of Ministers' annual report for 2007 on its supervision of judgments, please refer to the Council of Europe's web site dedicated to the execution of judgments of the European Court of Human Rights:
http://www.coe.int/T/E/Human_Rights/execution/

The simplified global database with all pending cases for execution control (Excel document containing all the basic information on all the cases currently pending before the Committee of Ministers) can be consulted at the following address :
http://www.coe.int/t/e/human_rights/execution/02_Documents/PPIndex.asp#TopOfPage

Part III : The work of other Council of Europe monitoring mechanisms

A. European Social Charter (ESC)

Two collective complaints lodged against France (17.02.09)

The complaint *Confédération Générale du Travail* (CGT) v France, no. 55/2009, relates to Articles 2 (the right to just conditions of work), 4 (the right to a fair remuneration) and 11 (the right to protection of health). In the complaint European Council of Police Trade Unions (CESP) v. France, no. 54/2008, the complainant organisation pleads a violation of Articles 2§1 (working time) and 4§2 (overtime). For further information consult the Collective Complaints webpage.

Collective complaint lodged against France declared admissible (03.03.09)

It is now possible to consult the decision on admissibility for the complaint European Council of Police Trade Unions (CESP) v France, no. 54/2008. The complainant organisation pleads a violation of Articles 2§1 (working time) and 4§2 (overtime). For further information consult the webpage. See the Decision on admissibility. In the decision the claim of the applicant is summarized as follows:

" *The CESP claims that the new regulations introduced by the French Government on 15 April 2008 (General Regulations on Employment in the National Police Service and General Instruction on the organisation of working hours in the National Police Service) are in breach of Article 2§1 on the grounds that it is impossible to ascertain whether daily and weekly police working hours are reasonable because such working hours are not recorded.*

The CESP also contends that the flat, i.e. non-increased, rate of remuneration for overtime work provided for in the new regulations of 17 April 2008 (the General Regulations on the National Police Service and Instruction NOR INTC0800092c) infringes Article 4§2 because the rate of remuneration for overtime work, where the latter is taken into consideration, is based on a rate below the hourly rate for police officers, and where compensation is available in the form of rest periods, such compensation is ineffective".

Election of the Bureau of the European Committee of Social Rights (16.02.09)

The ECSR proceeded to elect the members of its bureau in the course of the current session. The results are as follows:

- Mrs Polonca KONČAR, President
- Mr Andrzej SWIATKOWSKI , Vice President
- Mr Colm O'CINNEIDE , Vice President
- Mr Jean-Michel BELORGEY, General Rapporteur

List of members of the ECSR

Ministerial Conference on Social Cohesion in Moscow attended by a member of the European Committee of Social Rights and the Governmental Committee

Mrs Polonca KONČAR, President of the European Committee of Social Rights (ECSR), Mrs Maria Alexandra PIMENTA, First Vice Chairwoman of the Governmental Committee and Mr Regis Brillat, Executive Secretary of the ECSR attended the First Conference of European Ministers responsible for Social Cohesion in Moscow from 26 to 27 February 2009. Statement by Mrs KONČAR

International Conference: Solidarity of the Society at the time of the Global Financial Crisis, Bratisalva, Slovakia, 19 February 2009
Programme

The European Committee of Social Rights will hold its next session from 16 to 20 February 2009. You may find relevant information on the sessions using the following link :
http://www.coe.int/t/dghl/monitoring/socialcharter/default_en.asp.

You may find relevant information on the implementation of the Charter in States Parties using the following country factsheets:
http://www.coe.int/t/dghl/monitoring/socialcharter/CountryFactsheets/CountryTable_en.asp

B. European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT)

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B. European Commission against Racism and Intolerance (ECRI)

The European Commission against Racism and Intolerance publishes reports on Bulgaria, Hungary and Norway (24.02.09)

The reports on Bulgaria, Hungary and Norway are the first of ECRI's fourth round of country monitoring work, which focuses on the implementation of ECRI's previous recommendations, the evaluation of policies and new developments since its last report.

ECRI underlines that positive developments have occurred in all three of these Council of Europe member states. At the same time, however, the reports detail continuing grounds for concern for ECRI:
In **Bulgaria**, the legal and institutional framework against racism and discrimination has been strengthened and initiatives have been taken to improve the situation of Roma and of refugees. However, some anti-racism or anti-discrimination legal provisions are rarely applied, the situation of Roma and asylum seekers remains worrying, the public's awareness of problems of racism and intolerance still needs to be raised, and the response of the justice system to racist publications and to allegations of racist or discriminatory behaviour on the part of the police should be improved. See **Fourth report on Bulgaria.**

In **Hungary**, the Equal Treatment Authority which has been operating since 2005 can award compensation to victims of discrimination and impose fines on persons or bodies that commit discrimination. A variety of measures have also been taken to improve the integration of disadvantaged individuals, including Roma, and steps have been taken to improve the situation of asylum seekers. However, the recent rise in racist and xenophobic discourse in Hungarian society is worrying, as is the continuing disadvantage experienced by Roma in every field of daily life. Negative stereotypes also remain with respect to migrants and asylum seekers, who experience difficulties in gaining access to housing and employment. See **Fourth report on Hungary.**

In **Norway**, the legal and institutional framework against racism and discrimination has been strengthened and the vast majority of the measures foreseen in the National Plan of Action to Combat Racism and Discrimination (2002-2006) have been implemented. However, the situation of persons of immigrant background remains worrying in sectors such as employment and school education, as well as the situation of Roma and Romani/Taters. Political discourse sometimes takes on racist and xenophobic overtones, and the police still have important challenges to take up, including in the field of addressing racial profiling. See **Fourth report on Norway.**

For each of these country monitoring reports an **interim follow-up** will take place no later than two years after the publication of the reports.

D. Framework Convention for the Protection of National Minorities (FCNM)

The Netherlands: visit of the Advisory Committee on the Framework Convention for the Protection of National Minorities (24.02.09)
A delegation of the Advisory Committee on the Framework Convention for the Protection of National Minorities visited the Netherlands from 25-27 February 2009 in the context of the monitoring of the implementation of this convention by this country. The delegation visited Leeuwarden (Fryslân) as well as Utrecht, Amsterdam and the Hague.

* No work deemed relevant for the NHRSs for the period under observation.

This is the first visit of the Advisory Committee in the Netherlands: the scope of application of the Framework Convention as well as the measures taken to implement this Convention were at the centre of the discussion.

Start of the 3rd monitoring cycle (24.02.09):
Moldova has just submitted its third state report in English, pursuant to Article 25, paragraph 1, of the Framework Convention for the Protection of National Minorities. It is now up to the Advisory Committee to consider it and adopt an opinion intended for the Committee of Ministers.

E. Group of States against Corruption (GRECO)

Group of States against Corruption (GRECO) publishes report on Poland (17.02.09)

The GRECO published its Third Round Evaluation Report on Poland. The report has been made public with the agreement of the country's authorities. It focuses on two distinct themes: criminalisation of corruption and transparency of party funding.

Regarding the criminalisation of corruption [Theme I], GRECO recognises that, on the whole, Polish legislation complies with the Council of Europe's Criminal Law Convention on Corruption (ETS 173) and its Additional Protocol (ETS 191). GRECO acknowledges the legislative measures undertaken, including recent amendments relating to private sector bribery.

Nevertheless, GRECO calls on Poland to address some deficiencies identified in the current legislation, regarding among other issues, the applicability of corruption offences to foreign arbitrators as defined by the Additional Protocol to the Convention, the jurisdiction over corruption offences committed abroad and the potential of misuse involved in the defence of 'effective regret', which occurs when an offender reports a crime after its commission. Moreover, further efforts are needed to significantly reduce the occurrence of corruption in Poland, all the more so as new types of corruption have recently been identified by the authorities in areas such as sport and the private sector, where only a few cases have been investigated so far.

Concerning transparency of party funding [Theme II], the existing legal and institutional framework is well-developed and largely in line with the provisions of Recommendation Rec(2003)4 of the Committee of Ministers of the Council of Europe on Common Rules against Corruption in the Funding of Political Parties and Electoral Campaigns. However, it appears that the system of political financing suffers from a lack of substantial and pro-active monitoring to go beyond the formal examination of submitted information.

The National Electoral Commission clearly requires more powers and resources in order to detect illegal practice and bypassing of transparency rules. Furthermore, current legislation needs to be upgraded in some areas in order to increase the level of disclosure obligations and to align the law on the election of the President of the Republic with the standards set by the other existing election laws.

The report as a whole addresses 13 recommendations to Poland. GRECO will assess the implementation of these recommendations in the second half of 2010, through its specific compliance procedure.

Report: Incriminations / Transparency of Party Funding

Outcome of the 41st Plenary Meeting of GRECO - GRECO 41 (Strasbourg, 16-19 February 2009)

- adoption of evaluation reports : GRECO examined and adopted Third Round Evaluation Reports on France, Norway and Sweden dealing with Incriminations of corruption and Transparency of Party Funding. All reports are still confidential.

- compliance reports : GRECO examined and adopted the joint First and Second Round Compliance Report on Andorra, the Second Round Compliance Report on Bosnia and Herzegovina and the Addenda to the Second Round Compliance Reports on Iceland, Latvia and the United Kingdom. The reports on Latvia and the United Kingdom are already public. See *Addenda* to Compliance Reports for the **United Kingdom** (24 February 2009) and **Latvia** (24 February 2009).

- evaluation teams : GRECO approved the composition of the Teams in charge of the Third Round Evaluation visits to Cyprus, Greece and Romania, to be held in the second half of 2009.

- general activity report for 2008 : GRECO also adopted its Ninth General Activity Report (2008) - including a feature article on Independent Monitoring of Party Funding – and instructed the Secretariat

to forward it to GRECO's Statutory Committee and to the Committee of Ministers of the Council of Europe. The report will be made public at the end of March.

- next plenary meeting : the next plenary meeting is scheduled for 11-15 May 2009.

F. Committee of Experts on the Evaluation of Anti-Money Laundering Measures and the Financing of Terrorism (MONEYVAL)

Mutual evaluation report on Estonia public (16.02.09)
The mutual evaluation report on Estonia, as adopted at MONEYVAL's 28th plenary meeting (8-12 December 2008) is now available for consultation.
Link to report

FATF Statement
The anti-money laundering and countering the financing of terrorism (AML/CFT) systems of Iran, Uzbekistan, Turkmenistan, Pakistan and São Tome and Principe were the subject of a statement issued during the FATF XX Plenary, held in Paris in February 2009.

G. Group of Experts on Action against Trafficking in Human Beings (GRETA)

GRETA meets to prepare the first monitoring round of the Convention

The Group of Experts on Action against Trafficking in Human Beings (GRETA) met for the first time on 24-27 February 2009 at the Council of Europe in Strasbourg.

GRETA adopted its internal rules of procedure and elected Ms Hanne Sophie GREVE as its President, Mr Nicolas LE COZ as its first Vice-President and Ms Gulnara SHAHINIAN as its second Vice-President.

In preparation for the first monitoring cycle of the Convention, GRETA held an exchange of views on the evaluation procedure for monitoring the implementation of the *Council of Europe Convention on Action against Trafficking in Human Beings* by the parties. GRETA decided to meet again on 16-19 June in order to continue the preparations for the first monitoring cycle of the Convention.

Secretary General's Speech
Speech of the Vice-Chair of the Committee of the Parties (French)
GRETA's Internal Rules of Procedure
list of decisions taken at GRETA's first meeting
more on GRETA and its members....

Part IV : The intergovernmental work

A. The new signatures and ratifications of the Treaties of the Council of Europe

Armenia ratified on 17 February 2009 the Convention for the Protection of the Architectural Heritage of Europe (ETS No. 121).

Belgium ratified on 26 February 2009 the Additional Protocol to the Criminal Law Convention on Corruption (ETS No. 191).

Montenegro signed on 24 February 2009 the Additional Protocol to the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, regarding supervisory authorities and transborder data flows (ETS No. 181).

Spain signed on 20 February 2009 the Convention on the Recognition of Qualifications concerning Higher Education in the European Region (ETS No. 165), and the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (CETS No. 198).

B. Recommendations and Resolutions adopted by the Committee of Ministers

Recommendation of the Committee of Ministers to member states on electronic democracy (e-democracy) : CM/Rec(2009)1E / 18 February 2009

C. Steering Committees

Steering Committee for Human Rights - Committee of experts for the development of human rights - Committee of experts on discrimination on grounds of sexual orientation and gender identity (DH-LGBT)

The European Group of National Human Rights Institutions (NHRIs) represented by the French National Human Rights Commission attended the first meeting of the Committee of experts on grounds of sexual orientation and gender identity (DH-LGBT) on 18-20 February 2009. This Committee was set up to draft a Committee of Ministers' recommendation on measures to combat discrimination based on sexual orientation or gender identity, to ensure respect for the human rights of lesbian, gay, bisexual and transgender persons and to promote tolerance towards them.

In preparation of the meeting, the representative of the European Group consulted members of the Group on three points:

1) the mandate of NHRIs and whether they include the fight against discrimination based on sexual orientation and gender identity;

2) the competence of NHRIs in dealing with individual complaints concerning allegations of discrimination based on sexual orientation and gender identity;

3) activities (campaigns, studies, conferences...) for the promotion and protection of rights of LGBT people carried out by NHRIs.

Many institutions replied and their answers have proved to be very helpful for the representative of the European Group who stressed the role of NHRIs in the promotion and protection of the rights of LGBT people based on their mandates and activities, and more especially:

- as monitoring bodies of national legislation and practice compatible with international standards;

- as training providers and awareness-raising bodies (especially through studies) on issues concerning LGBT people such as discrimination in employment;

- as complaint-handling bodies on issues of discrimination in employment, housing, but also prison conditions etc.

A draft list of issues and concrete measures to include in the final recommendation has already been put together by the Committee. NHRIs and ombudspersons are mentioned in the paragraph on

employment related issues as complaint mechanisms. The European Group is requested to give comments on this draft list by 10 April 2009. It is expected that there will be a part in the recommendation on the promotion of tolerance and respect towards LGBT people where the role of national institutions could be emphasised as well.

A draft recommendation will be prepared on the basis of the comments of all participants (including those of the European Group) on the draft list of issues and sent for comments before the next meeting scheduled to take place on 3-5 June 2009.

For any further question you may contact Mrs Noémie Bienvenu at : noemie.bienvenu@cncdh.pm.gouv.fr.

D. Other news of the Committee of Ministers

1049th Meeting of the Ministers' Deputies (18.02.09)

During their meeting on 18 February 2009, the Ministers' Deputies took note of the Secretary General's report on Council of Europe activities following the conflict in Georgia. Furthermore, they were informed by the Council of Europe Commissioner for Human Rights about his recent visit to Georgia. They looked forward to receiving, as soon as possible, the report of the Secretary General on the other aspects of the decision they took on 11 February 2009.

Concerning the Russian Federation, the Ministers' Deputies took note of the co-operation programme between the Council of Europe and the Russian Federation for the Chechen Republic in 2009. They instructed the Secretariat to implement the programme and to report back to their Rapporteur Group on Democracy in due course.

Mr Jaime Lissavetzky, Spain's State Secretary for Sport and the European representative to the Executive Committee of the World Anti Doping Agency (WADA), held an exchange of views with the Ministers' Deputies. The exchange focused on various aspects of the co-operation between the Council of Europe and WADA.

The Ministers' Deputies adopted Recommendation CM/Rec(2009)1 of the Committee of Ministers to member states on e-democracy. They furthermore noted proposals for possible future work in this field as well as of the relevant parts of the conclusions of the General Rapporteurs of the Forum for the Future of Democracy held in Madrid in October 2008, on the same theme. A report of the biennial meeting to review developments in the field of e-voting and on the application of the Committee of Ministers' Recommendation of 2004 on that subject, which was also held in Madrid in October 2008, was also considered.

The General Policy Recommendation No. 12 on combating racism and racial discrimination in the field of sport prepared by the European Commission against Racism and Intolerance (ECRI) was further considered by the Ministers' Deputies, who agreed to bring it to the attention of their respective governments.

Finally, the Deputies approved the terms of reference for a Group of Specialists to produce draft European guidelines on child-friendly justice.

Part V : The parliamentary work

A. Reports, Resolutions and Recommendations of the Parliamentary Assembly of the Council of Europe

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B. News of the Parliamentary Assembly of the Council of Europe

Albania: PACE co-rapporteurs welcome the delay in the implementation of the Lustration Law (17.02.09)

Armenian authorities should fully respect the principle of freedom of Assembly, according to PACE rapporteurs (17.02.09)

Belarus: PACE rapporteur to propose restoring Special Guest status (18.02.09)

Official visit by PACE President to Andorra (18.02.09)

Corien Jonker calls for "a sound and realistic return policy overall in Europe" (19.02.09)

PACE Rapporteur on media freedom expresses his deep frustration at the lack of progress in investigating the murder of Anna Politkovskaya in Russia (20.02.09)

"Fast deterioration of the situation of 'boat people' in Lampedusa must be halted," according to PACE Committee Chair (20.02.09)

Official visit by the PACE President to Morocco (23.02.09)

PACE pre-electoral visit to "the Former Yugoslav Republic of Macedonia" (23.02.09)

Pre-electoral visit by PACE delegation to Montenegro (23.02.09)

Montenegro: Statement by the PACE pre-election delegation (25.02.09)

PACE to discuss possible forms of enhanced co-operation with Maghreb parliaments (26.02.09)

"The former Yugoslav Republic of Macedonia": Statement by the PACE pre-electoral delegation (27.02.09)

C. Miscellaneous

You may find some relevant information on the activities of the Parliamentary Assembly of the Council of Europe in the electronical newsletter "PaceNews". The Issue 48 of the PaceNews covers *inter alia* the activities of the Parliamentary Assembly of the Council of Europe as described in the issue 9 and 10 of the RSIF.

* No work deemed relevant for the NHRSs for the period under observation.

Part VI : The work of the Office of the Commissioner for Human Rights

A. Country work

Greece: "More and strenuous efforts are needed to protect minority rights" says Commissioner Hammarberg (19.02.09)

"Effective protection of minority rights is a fundamental pillar of pluralist societies. Greece still needs to make more and strenuous efforts to ensure that these rights are fully respected and protected". With these words Thomas Hammarberg, the Council of Europe Commissioner for Human Rights, published a report on human rights of minorities in Greece, focusing on issues relating to the right to freedom of association, statelessness and application of the Sharia Law.

While commending certain efforts made by the authorities in particular in the field of minority education in Thrace, the Commissioner remains deeply worried about the persistent denial of recognition of minorities other than the tripartite 'Muslim' one in western Thrace. The Commissioner also expresses his serious concerns by the over-restrictive practice of Greek courts that has led to non-registration of certain minority associations. "The authorities should urgently make possible the effective enjoyment by minority members of their right to freedom of association" said Thomas Hammarberg. "A consultative mechanism should also be created to ensure a continuous dialogue at all levels with minority groups, in accordance with the Council of Europe standards."

The Commissioner also urges the authorities to complete promptly their efforts aimed at restoring the Greek nationality of those minority members who were deprived of it unlawfully by virtue of the former nationality code. "Particular care should be provided to those remained in Greece and who have limited financial resources to cover welfare and medical services" said the Commissioner. "As for the denationalised persons who are abroad, the authorities should consider the possibility of providing them, or their descendants, with satisfaction."

Furthermore, Commissioner Hammarberg expresses serious concerns about the application of the Sharia Law concerning family and inheritance matters to Muslim Greek citizens in Thrace, by Muftis appointed by the Greek state. "Given the issues of incompatibility of this practice with European and international human rights standards, it is necessary to overhaul this practice and strengthen the substantive review and control by domestic courts of the Muftis' judicial decisions."

Finally, the Commissioner calls upon the Greek authorities to proceed promptly to the ratification of or accession to certain major Council of Europe treaties, such as the Framework Convention for the Protection of National Minorities, the European Convention on Nationality and the Fourth Protocol to the European Convention on Human Rights.

The report is based on the Commissioner's visit to Greece on 8-10 December 2008. It is available, together with the Greek authorities' comments, on the Commissioner's website.

Commissioner Hammarberg in Moscow to discuss human rights (24.02.09)

Thomas Hammarberg paid a two-day visit to Moscow to discuss a broad range of human rights issues with different authorities of the Russian Federation, representatives of international organisations and civil society. On Thursday 26 February, the Commissioner took part in the First Conference of European Ministers responsible for social cohesion organised by the Council of Europe, in cooperation with the Ministry of Public Health and Social Development of the Russian Federation.

B. Thematic work

"Systematic work for human rights is a signal of commitment", says Commissioner Hammarberg (18.02.09)

The Council of Europe Commissioner for Human Rights, Thomas Hammarberg, issued a recommendation on systematic work for implementing human rights. The recommendation

demonstrates how States can implement these rights effectively by using baseline studies, relevant action plans and indicators.

The Commissioner stresses that "to develop an action plan openly presenting problems and corresponding activities is a signal of commitment to human rights. Systematic work for human rights means a continuous and inclusive process. It brings national, regional and local authorities, national human rights structures, civil society representatives and other stakeholders together for the implementation of agreed human rights standards. It aims to bridge the gap between the rights proclaimed in human rights instruments and how these rights are respected in individual countries."

The Commissioner's recommendation is published at the same time as the report of the Conference "Rights Work! – International Conference on Systematic Work for Human Rights Implementation" which was organised by the Swedish Chairmanship of the Council of Europe's Committee of Ministers in Stockholm on 6-7 November 2008. The report can be found at the conference web-site: www.sweden.gov.se/rightswork. Read the Recommendation

"From arrest to punishment, human dignity and the rule of law must be fully respected" says Commissioner Hammarberg (18.02.09)

"A sound and independent justice system is at the heart of democracies. No effort should be spared in ensuring that the rule of law is fully ensured" said today Commissioner Hammarberg in a speech given at the 9th informal ASEM seminar on human rights.

Addressing the audience gathered to discuss on human rights in criminal justice systems, the Commissioner made an overview of the main concerns in today's Europe, stressing the importance to further efforts in ensuring that the respect of human dignity and of the rule of law are guaranteed in all the different moments of deprivation of liberty.

"The Council of Europe institutions play an important role also in this field. The fact that the European Convention on Human Rights is ratified by all member states and also made law of the land in all of them is of crucial importance. All inhabitants in the Council of Europe area have the right through individual petition to the Strasbourg Court to seek justice when feeling that the domestic remedies have not protected their rights. The mere existence of that possibility has an impact for the promotion of human rights on our continent."

We can get through the crisis only with a serious and sustainable programme for social rights" (26.02.09)

"Whatever is done to meet the crisis should not be at the cost of those who are already disadvantaged" said Commissioner Hammarberg in his speech at the First Conference of European Ministers responsible for social cohesion organised in Moscow by the Council of Europe, in cooperation with the Ministry of Public Health and Social Development of the Russian Federation. "There are groups in Europe who are already living in poverty - though the average living standard here is high compared to several other parts of the world. We have a child poverty problem in our own societies and many immigrants live in meagre circumstances. These and other vulnerable groups should be protected from further pain. It is necessary and urgent to develop concrete, sustainable programmes which promote social cohesion and prevent any watering down of the already agreed human rights standards."

Read the Speech, Read in Russian

C. Miscellaneous (newsletter, agenda…)

Commissioner Hammarberg meets Javier Solana (23.02.09)

On Friday 20 February, Thomas Hammarberg met with the EU High Representative for the Common Foreign and Security Policy, Javier Solana, to discuss the situation in Armenia, Azerbajian, Belarus, Georgia and Russia. The meeting focused on the crises in Georgia and the need for a continued international presence in the areas affected by the South Ossetia conflict as well as in Abkhazia after June 2009. The Commissioner welcomed the constructive part played by the EU and its Monitoring Mission in Georgia to enhance the security as well as the human rights and humanitarian protection of the war affected population. He stressed the need to strengthen the mission's human rights work. The Commissioner was also informed of the recent visit of the EU High Representative to Belarus.