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« Prosecutors' duties outside the criminal justice sector »

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I.

1. The principles of the rule of law and respect for basic human rights and freedoms have been the criteria that member States have used as the basis for assessing the social democratic nature of countries and their public services for the last 55 years[i]. It is no different with public prosecution services, where Council of Europe efforts relating to the role of public prosecution within the criminal justice system culminated in Recommendation 19 (2000), the key document for the area in question. Slovenia adopted it unanimously as a starting point for reducing the otherwise numerous differences in the organisation and execution of public prosecution to a common denominator of protection of human rights. Despite not being legally binding, in its four years of existence the Recommendation has become the reference criterion of value for testing the role, objectives and powers of public prosecutors' offices and their responsibilities and approach to individuals and other bodies, particularly the police, courts, defendants and victims, within the criminal justice system. It is never (and never has been) that important what specific model of criminal prosecution or organisational model an individual country has chosen but, always and only, whether and to what extent it deploys its laws in accordance with its written major guiding principles. It is not only in the area of criminal justice that public (state) prosecution is, in the majority of member states, an institution that maintains an important balance between opposing forces that still have the power to obstruct the smooth realisation of these principles in state and society, as well as in an individual citizen's relations within them, through powers that exceed the frameworks of the Recommendation. It is worth emphasising their exceptional variety here in the introduction: not only in terms of their number and the legal areas in which they appear, the roles they play and the influence of their powers within legislation – for today's requirements we have combined them under a title that confirms this variety and complexity within a general definition: "prosecutorial powers (functions) outside the criminal field". The present review, which is my task at this year's conference, is an attempt to examine the basis, characteristics, significance and reach of these functions and the role of public prosecutors' offices in the light of the general orientations of the Council of Europe.

2. The functions of public prosecution in the prosecution of perpetrators of criminal offences for which criminal sanctions are prescribed are defined in points of 1, 2 and 3 of the Recommendation regarding the role of public prosecution within the criminal justice system[ii] (hereinafter: Rec (2000) 19). These are expressed in particular in the right to decide on the commencement and continuation of criminal proceedings and the representation of charges before competent courts, and to use legal remedies against legal decisions in criminal cases. This limitation on the undoubtedly crucial and central role played by prosecution in modern democratic society is hindered by a general standard that exists in numerous legal regulations, where this body or service also has " … other powers determined by law". Let us stay with Rec (2000) 19. The explanatory memorandum to point 1, which explains the exclusiveness of its operations through the role of public prosecution in the criminal justice system, emphasises that public prosecutors can have important roles in individual countries in other legal areas as well, for example commercial or civil law ("… although public prosecutors may also in some countries be assigned other important tasks in fields of commercial law …"). And in the opening paragraphs of the conclusions of the conference, which entirely supported Rec (2000) 19, still then in its draft stage, we see that the participants "… believed that consideration should subsequently be given to the role of public prosecutors in the civil, commercial and social fields.

Furthermore, in order to provide a more effective response to crime, a study should be made of possible action by the public prosecution in administrative, tax, customs, financial and other fields" and "hoped that the Council of Europe would carry out new activities on the role of the public prosecution outside the traditional criminal field, for example with regard to the prevention of delinquency or urban policy …"[iii]. In this I see modern confirmation that the powers and role of public prosecution outside criminal law and procedure are not alien to European justice. The expectation is justified that for any evaluation thereof, the basic orientation of the Council of Europe (that in no area of its operation should uniformity intrude) holds true. Respect for "… the individuality of every State and the need for each State to have institutions which are its own, adapted as they must be to its own realities, its own difficulties and its own personality". As was said in the opening speech given by the Secretary General of the Council at the same conference: "Democracy goes hand in hand with pluralism. Our business is very much one of making differences compatible. Compatible with each other often. Compatible with our principles and values always"[iv]. This basic approach is above all and especially necessary in attempts to define and evaluate the tasks and role of a body as complex as public prosecutors' office. All the historical, socio-cultural and legislative factors that have conditioned and influenced their formation in individual states need to be understood.

3. An overview of the activities of the Council of Europe shows a very clear and great interest in those issues concerning the role of state or public prosecution in member States. It cannot be disputed that the adoption of Rec (2000) 19 and the activities connected with its implementation represent the pinnacle of efforts made up to now. Its key objective deals with the entire spectrum of the most important issues that are always at the heart of everything the Council of Europe does – enforcing the law and respecting human rights in proceedings against those whose unlawful acts have violated the essence of these human values. The document without doubt makes a further contribution to reducing traditional entrenched differences in terms of content, differences which are not insignificant in the field of regulation of the prosecution of criminal offences – I just have to think of the dualism of prosecutorial models throughout the European criminal justice system (adversarial or inquisitorial system, principle of legality or opportunity), along the line of general European principles, especially those from the European Convention on Human Rights (ECHR).

Alongside this general and crucial orientation, one should also mention activities connected with democratic transformation, particularly in the implementation of wide-ranging legislative and judicial reforms in the so-called countries in transition which have joined the Council of Europe in the last 15 years (some of which also became full members of the European Union this month). In this process of transformation, these countries have had to subscribe to the principles outlined here in order to fulfil the conditions for full membership.

There is no doubt that the activities of the Council of Europe have made an important contribution to this, among them the conference on the transformation of the procurator into a body compatible with the democratic principles of law (Vienna, 1993 and Budapest, 1994), the conference on the role of public prosecution in a democratic society (Messina, 1996), and the conference on the "procurator" in a state governed by the rule of law (Moscow, 1997). As part of the Themis programme[v], we lawyers from both value systems were compelled towards a new conceptual evaluation of institutions, where public prosecution did not remain an exception[vi].

Along with all its differences, it was generally or at least predominantly recognised that its primary role and power lay in criminal justice where, defined in its most general terms, it gives the initiative for or launches procedures in the public interest and in other cases determined by law. All other functions and powers, including those dealt with by the institution of the "procurator", are to be tested in light of the principles of the separation of powers and the independent judiciary. In its restriction to the smallest possible extent and through the determination of precise conditions that still allow their implementation in legal fields, the orientation is traditionally aimed at enforcing the rights of individuals[vii].

4. This is how we understand the last Recommendation 1604 (2003) on the role of the public prosecutor's office in a democratic society governed by the Rule of Law[viii] of the Standing Committee of the Parliamentary Assembly of the Council of Europe. For our situation the statement in point 6v is important: that the differing obligations of state prosecutors that do not belong to the area of criminal law are among certain particular features in the national regulations of member States that arouse concern with regard to their compatibility with the basic principles of the Council of Europe. In point 7va, in addition to enforcement of the principle of separation of powers and the implementation of these powers independently of other branches of power, prevention of a conflict of interest and, in particular, prevention of the obstruction of the individual from independently exercising his right to the protection of his rights, it is recommended that member states restrict prosecutorial powers and responsibilities to the prosecution of criminal offences and to a general role as defender of the public interest in the criminal justice system, and that they establish separate and appropriately placed and efficient bodies for the implementation of all other functions. Although the Committee of Ministers[ix] among others also "did not find reasons for the demand that prosecutors abandon the implementation of certain tasks outside the criminal justice system, as is the case in many legal systems", it supported the proposal that detailed and precise studies be conducted on all aspects of the role of public prosecutors not covered by Rec (2000) 19 and that an additional recommendation be drawn up.

II.

1. This survey of the powers that a public prosecutor has outside proceedings dealing with the prosecution of perpetrators of criminal offences is by no means complete and has no comparative-law pretensions. It is based on a variety of sources, all of which have recognised the complexity of the issues but have not treated them in a complex manner. Data from the collection of replies to the questionnaire on the status and role of public prosecution[x] points to this complexity, but does not generally provide a legal basis for an individual institution. The representatives of Armenia, the Czech Republic, Slovakia, Slovenia, Liechtenstein and Portugal, and partly Italy as well, have contributed a more up-to-date and precise survey. I used further data from available material on arrangements in France, Belgium, Germany, Austria, Hungary and Russia. I therefore propose, in the starting points of our future activities in this area, that we invite all member states to draw up more precise surveys of the non-criminal powers of prosecutors. This should in any case include a statement of all the key legal sources of legal arrangements, from possible constitutional to legal bases. Regardless of the current limitations of the sources used, we can use them to sketch an outline of the regulation of these powers in

member states, their substantive and procedural contents, and some of the legal and systemic problems they bring.

2. General characteristics

The first and most general characteristic is the great degree of **specificity** of regulation in member states, which means that comparisons of details are only possible in relatively wide terms rather than in the basic details themselves.

From the point of view of the basic functions of prosecution, powers are generally characterised as those with **secondary importance**. I allow myself to doubt whether such an assessment really can bear analysis in light of the legal position held by a prosecuting body or a body within which the state carries out key prosecutorial functions of criminal prosecution in each specific national arrangement. A number of solutions, in the organisational sense at least and also in terms of content, show that with regard to the position of a body that bears the generally asserted title of public prosecutor's office, it can be questionable as to whether it is really a state body that also has "other non-criminal functions" or whether it is a special state body that, among other things (equal and with the same rights), also performs the function of criminal prosecution. It is therefore important to evaluate individual powers within the framework of the body and its function, especially from the point of view of the generally recognised European standards of their harmonisation with the principle of the separation of powers or the protection of human rights, **and above all from the point of view of the effects that the powers have in relation to those key values and principles**.

In this context I also understand the changes and achievements made by some member states in their efforts to harmonise the institute of the procuracy within the framework of the standards of a state governed by the rule of law. As an example, the numerous powers outside the classic role of the prosecutor that the Russian Procuracy still has as an "independent and centralised system that carries out multidisciplinary supervisory functions"[xi] are certainly not of secondary importance. And it is an objective fact, resulting from historical and national traditions, social and economic conditions and legal experience, that it is not easy to remove them or to replace them with institutes that are perhaps closer to our understanding of the organisation and powers of prosecution. Moreover, it is beyond dispute that the most worrying **extra-judicial power** exercised by the Procuracy has lain in its wide powers of supervision of the judicial system and the possibility of intervening in decision-making as the "supreme guardian of legality" as a political body (of party and state). From the point of view of a State governed by the Rule of Law, this is diametrically opposed to the fundamental principle of the separation of powers and the unacceptability of any violation of the independence of the judiciary as a basic pillar of democratic society[xii]. The essence of the test of every institute thus lies in the fulfilment or otherwise of the criteria of a state governed by the rule of law and its legal safeguards. The wide-ranging practice of the European Court of Human Rights shows us the correct way to proceed here.

The European Court of Human Rights, in protecting the right to adversarial trial (Article 6 of the ECHR), declared that a party has the right to be acquainted with all procedural material that is contained in the court files and that could have an effect on the decision of the court. The

situation in civil proceedings in Belgium and Portugal, where the public prosecutor may, in relation to legal questions and in order to ensure the uniform and correct application of the law, take a position on an extraordinary legal remedy filed by a party, while that party does not have the possibility of taking their own position thereon, was declared impermissible[xiii].

The following are examples of the different and wide-ranging extra-judicial powers and relations based on the above-mentioned report data: powers of general supervision of the legality of a decision taken by state administration (Hungary, Latvia, Slovakia), powers within legislative procedures (Poland), the right to take part in sessions of the government (Slovakia), the public prosecutor general's position as chief legal counsel (Malta), and responsibilities in the area of domestic security (Turkey). Some powers are general and are carried out by the public prosecutor's office as a body, while others are linked to the function of the public prosecutor general.

One illustration of the particularity, which is beyond dispute according to the criteria given above, is the organisational and institutional merger of powers in the Croatian state attorney's office, which combines in one body the functions of public prosecutor as a criminal prosecution body and a representative of the state in property cases. It is interesting that in terms of content it omits some of the "classic non-criminal powers" in countries in transition – the right to file an extraordinary legal remedy of a request for the protection of legality in civil proceedings against a final court decision. The right to file this extraordinary legal remedy was one of the rare functions to have originated in the legal system of the former federal state and to have been retained in the newly independent states (Slovenia, Macedonia, Serbia and Montenegro). The basic functions and powers of the "procurator", which never existed under this name in this territory, were abolished after the break of 1948.

It seems therefore that the Shakespearean dilemma ("a rose by any other name would smell as sweet") does not describe the way public prosecution and other bodies are organised in an individual country.

It would also be difficult to say that the position and role of the public prosecutor within **French legislation** constitutes secondary powers. I am giving it special mention in this part because it is a traditional institution with historical roots stretching back to the 13th century, a model and starting point for other prosecutorial arrangements in continental Europe. It has preserved and developed the system of powers which the public prosecutor exercises pursuant to the law in civil, commercial, labour and social disputes. As the legal representative of society, he has the power to appear before courts and as part of the judiciary on behalf of individuals or in order to enforce a law, always in the public interest. Cases from the area of nationality and civil status, the protection of minors and adults who are incapable of contracting, the mentally ill, bankruptcy cases, and some supervisory disciplinary procedures, including those involving associations of notaries, lawyers, etc., are examples of the legal situations in which he appears as a "legitimate adversary".

3. The **substantial areas** in which the prosecutor may exercise his powers are generally a variation on the French arrangement and, at least regarding key areas, also similar to other comparable countries that have retained non-criminal judicial powers.

In Italian law the public prosecutor has similar powers and a similar position; these compel him to take into account or protect the law and safeguard the public interest in a number of family-law and matrimonial disputes, commercial cases and also in the area of protection of intellectual property, in bankruptcy procedures, and in procedures for supervising the operations of companies, particularly in the interests of protecting small shareholders and when regulations have been violated to the detriment of the public interest. On the basis of a special norm of closure, he may "intervene in all other procedures concerning the public interest".

In Portugal as well the prosecutor has a wide range of non-criminal powers specially laid down in law. In addition to those mentioned, he may, in cases envisaged by the law, assume the task of representing collective and wider interests and represent workers' funds and protect their social rights; he also has powers to protect the legality of normative and administrative acts in administrative, tax and other cases.

An important extension of powers was introduced with the new Czech state prosecutor act in 2002 and the administrative procedure act (in force since 1 January 2003). The first regulation introduced new powers in the area of safeguarding the ownership, administrative and status relationships of companies, the voidness of an action on account of violation of the freedom to contract, in procedures to establish the illegality of industrial action, in procedures to establish paternity, in procedures for deciding on parental rights and obligations, and in procedures relating to the protection and care of children. In administrative procedures the prosecutor gained the power to take active measures by means of an action before the administrative court when the public interest has been affected.

The amended public prosecutor's office of Slovakia act (2001) regulates new powers in the non-criminal area; this act also refers to other regulations, particularly the civil procedure act. In addition to the powers that the public prosecutor exercises before the court (certain status-related cases, procedures for establishing death, the protection and upbringing of minors, bankruptcy cases regarding the status and management of companies), there are also **extra-judicial powers** in relation to the constitutional court, in procedures for reviewing the non-constitutionality or illegality of presidential elections and their annulment, and procedures for reviewing referendum decisions. He also takes measures on the basis of powers he has to supervise the correct use of law in decisions taken by administrative (national and local) bodies when the public interest is involved.

In addition to powers in the criminal prosecution of perpetrators of criminal offences and pursuant to the constitution, the Slovenian state prosecution service has "… other powers determined by law". However, other regulations regulate the active role of the prosecutor only to a limited extent with regard to the right to file actions before courts in civil and other proceedings. A more significant possibility is for the public prosecutor to file an extraordinary legal remedy against a final judicial decision, on the basis of which the Supreme Court tests whether the law was correctly applied in the judgement rendered. He also has several powers in administrative, where he appears as the representative of the public interest, and administrative/judicial proceedings.

In Austrian and German civil procedure as well, the prosecutor may appear in a number of proceedings (establishing of paternity, annulment or invalidity of marriage, announcement of death). The power held by the prosecutor according to the Liechtenstein Civil Code in relation to protection of the rights of children born outside wedlock or the recognition of the paternity of such children is also from the sphere of those powers traditionally in place to protect the "weak and orphaned".

In England, Wales, Scotland and Denmark important or no powers are recognised outside the classic prosecutorial powers in the area of prosecution of criminal offences.

4. There are also various **procedural positions** in which the public prosecutor appears in the exercise of his powers outside the criminal field. The most typical and common is the procedural position of a prosecutor who appears in relation to various claims in the public interest before the court:

4.1. as the **principal party** in proceedings

The power to file an action in civil proceedings or other appropriate motions for the introduction of proceedings is generally regulated by the special regulation described under the previous point. In these cases he must take action when the law obliges him to do so. Here an immediate distinction must be made in the position of the attorney general, who generally represents the state as a party in property cases and other cases determined by law. As a procedural party in civil proceedings, the public prosecutor does not appear in order to protect his own interests nor the interests of the state as a legal subject, but in the public interest or in representation of the public interest. He has all the procedural rights of any other party in proceedings: all rights to put forward applications, objections and motions to advance proceedings, including appeals and other ordinary as well as extraordinary legal remedies. In accordance with his powers in material law, he enforces the voidness of legal transactions and other acts concluded in contravention of compulsory regulations, especially those that protect public order and morals.

In some legal arrangements he has the power to file an action for judicial protection in an administrative dispute where he challenges an unlawful decision issued in administrative proceedings, and also to file extraordinary legal remedies when the law has been violated to the detriment of the public interest. For such challenges he must also have the power in the law for the area to which the challenged decision belongs.

4.2. as a **legal intervening actor** the public prosecutor may, in order to protect the public interest, take part in proceedings already taking place before the court between other parties. The rights from this intervention are exercised in the procedural forms prescribed for the procedural acts of parties. In these proceedings as well he may not have a different position to that enjoyed by parties in proceedings. In comparable legal arrangements, this intervention can be mandatory, meaning that the public prosecutor has to intervene pursuant to the law in such a civil case; his non-attendance also constitutes a formal obstacle to the conduct of proceedings and their invalidity. Generally the decision on whether the public prosecutor will exercise his powers of legal intervention rests with him; this decision must not be arbitrary but defined by the threat posed to the public interest. In French law he has the obligation, as an associated party, to put

forward his own opinion explaining the legal positions with regard to the correct use of the law, possible decisions and the standpoints of legal practice that are the basis for the decision, if asked to do so by the court. The court is not bound by the opinion.

4.3. There is a special position where the public prosecutor is empowered to appear **before the highest courts** with third-instance jurisdiction to decide on the correct use of the law. In several arrangements the prosecutor has the right to file a special extraordinary legal remedy against a final court decision if material or procedural law has been violated. If parties do not establish a reason, do not file an extraordinary legal remedy themselves or if the law does not give them that possibility, the question arises of how to realise the interests of correct use of the law. The public prosecutor therefore has the right under several legislative arrangements to have the final decision tested before the Supreme Court using a special extraordinary legal remedy.

The **effects of such measures** are important in any intervention in a final court decision issued in the field where the disposition of parties prevails. Under some legislative arrangements, the consequence of such intervention is that the judgement of the Supreme Court generally only has a **declaratory effect** (France, Italy). It is arguable whether, on the basis of such intervention, the issued judgement can also be effective against parties that have not challenged this judgement, either because they agree with it or because they do not have any legal possibility of challenging it. In several countries, including Slovenia, the public prosecutor can therefore file a request for the protection of legality against any final judgement if the legally prescribed conditions have been fulfilled and grounds adduced for the challenge. There is a prescribed deadline for the filing of a request that runs from the day the judgement is issued; the prosecutor is bound by this deadline. The Supreme Court reviews the challenged judgement only within the framework of the grounds adduced by the prosecutor, where it also takes into account whether the challenge serves the legitimate public interest. The decision of the court **intervenes in the finality** and also binds the parties (those against whom the decision is issued and those that gave the initiative to the public prosecutor to take action).

5. More on the "public interest"

The basic issue relating to the nature of prosecutorial functions is in whose name and whose interest protection is sought. Recommendation Rec (2000) 19 provided the following answer to this age-old question in point 1: " … public bodies who, on behalf of society and in the public interest, ensure the application of the law". In the explanation of this point, it is more explicitly emphasised that these bodies do not decide in the name of any other body (political or economic) or in their own name, but that the public interest predominates in the performance of obligations.

Generally speaking, all regulations governing prosecutorial powers outside criminal prosecution (see points 3 and 4 above) refer to the duty to protect and enforce the public interest. They are used in a variety of social disciplines: philosophy, sociology, political economy, especially in law and outside it in the field of so-called "ius cogens" regulations, particularly in criminal and administrative law. Despite this, the definition of the public interest (a general formula) involves the expression (not just the sum) of interests of members of a social community, and in legal theory it remains one of the most disputable. No objective criterion for defining general (public) interest has been found. The law almost never defines it precisely but leaves it to the competent body to

establish whether the public interest is involved in a specific case and where it has been violated, and thus also the need to enforce legal protection thereof. In the practice of the Slovenian Supreme Court, a position has been formulated that the public interest is an assumption without which the prosecutor cannot take action. In his request the prosecutor therefore always defines why intervention against a final court decision is required.

This is the position the public prosecutor occupies in the exercise of his powers. With the decisions he uses he establishes conditions in a specific case for protection, which in a State governed by the Rule of Law is generally a matter for the judiciary as an independent branch of power. By using his powers in this direct way he **ensures the operation of the judicial branch** where the principle of the individual protection of rights and of direct access by an individual to the court does not ensure this or does so in an unsatisfactory manner.

Under a number of various legislative arrangements the task of safeguarding the public interest is also entrusted to other bodies, organisationally or conceptually, partly or entirely: different powers and an understanding of the role of the ombudsman, the institute of the state attorney (in Slovenia, in addition to the public prosecutor, the state attorney is also the representative of the public interest), the powers of constitutional courts and especially of ordinary courts (the latter, for example, through powers in modern civil proceedings on the basis of which the court does not allow optional disposition by parties if it contravenes the public interest, morals and legal order). However, the use of the criteria of action in the public interest, precisely because of its use in the exercise of powers in the prosecution of criminal offences, is, of all the possible institutions, the one closest to the public prosecutor. This was clearly recognised by the legislator, who in modern times is increasingly entrusting the public prosecutor with the power to take measures outside the traditional frameworks, particularly for the launching of proceedings before courts or administrative bodies (e.g. Slovakia and the Czech Republic, and in Slovenia in the past). Considering the experience of a young independent state in transition, I doubt that all powers have always been the result of a systematic approach and definition based on principles but, many times, more coincidental and practical, proceeding from the social conditions of the moment.

Conclusion

Any discussion on the role and powers of public prosecution outside criminal prosecution cannot simply be a discussion on prosecution as a body which is perhaps no longer suitable for the implementation of those numerous and various powers entrusted to it in the history of the development of the institution. As a public body that ensures the implementation of laws in the name of society and in the public interest, it enables the direct operation of the **judicial branch of power** through the exercise of these powers where the principle of the individual protection of rights and of direct access by an individual to the court does not ensure this – no different to the protection of society from criminal offences. We are therefore discussing the operation of a State governed by the Rule of Law whose guarantor must also be public prosecution. Given this, it is not a question of which powers he has but, rather, of how he exercises and realises them. Here only those acts count that defend and ensure the Rule of Law and, in a system of the separation of powers, protect human rights to every extent and in each of their particular characteristics.

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[i] Treaty of London, Article 1, 3

[ii] Recommendation Rec (2000) 19, adopted by the Committee of Ministers of the Council of Europe on 6 October 2000

[iii] Conclusions of the Pan-European Conference "What public prosecution in the XXIst Century", ADACS-DAJ.PR (2000) 22, p. 2

[iv] Mr Walter Schwimmer, Secretary General of the Council of Europe, opening speech to the conference, ADACS-DAJ.PR (2000) 9, p. 4

[v] Legal Cooperation: Working Together to Establish the Rule of Law, information note, DIR/DOC(96)4, p. 4

[vi] Mr Roger Perrot, Role of the Public Prosecution Office in Criminal, Civil and Commercial Fields, The Role of the Public Prosecution Office in a Democratic Society, Multilateral Meeting, Messina, 5–7 June 1996, Themis No. 2, CE Publishing, 1997, p. 166

[vii] Mr Roger Perrot, ibidem, p. 175

[viii] Adopted by the Standing Committee, acting on behalf of the Parliamentary Assembly, on 27 May 2003

[ix] Reply adopted by the Committee of Ministers on 4 February 2004 at the 870th meeting of Ministers' Deputies, CM Documents, CM/AS (2004) Rec 1604 final, 6 February 2004, item 3., 8

[x] PC-PR (97) 1 REV 5, answers to question no. 46 – functions of the public prosecutor, p. 86–92

[xi] Mr V. V. Ustinov, Report to the Pan-European Conference "What public prosecution in Europe in the XXI Century", ADACS-DAJ-PR (2000) 03

[xii] Mr Roger Perrot, ibidem, p. 176

[xiii] Van Orshoven v. Belgien, JD 1997/III-p. 1039, Lobo Machado v. Portugal, JD 1996, p. 207