THE RIGHT TO A FAIR TRIAL AND RE-OPENING OF CRIMINAL PROCEEDINGS

Training manual on Article 6 ECHR

SUPPORTING EFFECTIVE DOMESTIC REMEDIES AND FACILITATING THE EXECTUTION OF ECTHR JUDGMENTS

Horizontal Facility for Western Balkans and Turkey

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This training manual is developed in the framework of the project "Supporting effective domestic remedies and facilitating the exectution of ECtHR judgments". The manuals were developed following the guidelines of Human Rights Education for Legal Professionals (HELP). This manual is a product of collaboration between a national and international consultant. The opinions expressed in this work are the responsibility of the authors and do not necessearily reflect the official policy or stance of the Council of Europe.

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Table of content

List of acronyms

CC	Constitutional Court
CCJE	Consultative Council of European Judges
CCP	Code of Criminal Procedure
CM	Committee of Ministers
CPC	Code of Criminal Procedure
CoE	Council of Europe
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EU	European Union
GC	Grand Chamber
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
NCA	National School of Advocates
UN	United Nations
USAID	United States Agency for International Development

Foreword

Introduction

This Manual has been developed as part of the European Union (EU) and Council of Europe (CoE) cooperation framework "Horizontal Facility for the Western Balkans and Turkey" (Horizontal Facility). Within its Action "Supporting effective domestic remedies and facilitating the execution of ECtHR judgments" in Albania, the CoE intends to improve the capacity of the judiciary to apply the ECtHR case-law at the national level, as well as to enable legal professionals to effectively apply remedies related to non-enforcement of national judgments. More concretely it aims to closely targeting the undue length of proceedings (outcome 1), property compensation/restitution (outcome 2), and fairness of criminal proceedings, with particular reference to the issue of the re-opening of criminal proceedings following a judgment of the ECtHR' finding a violation of article 6 ECHR (outcome 3). This project was implemented in close partnership with the Ministry of Justice, the Constitutional Court, the High Court, the General Prosecution Office, the Magistrate School, the General Office of State Advocate, the Office for the Treatment of Property, the School of Advocacy and Civil Society Organisations active in this field.

The present Manual has been developed as part of outcome 3 of the Action and aims at strengthening the capacity of the School of Magistrates to train judges and prosecutors on the reopening of criminal proceedings and fair trial, reinforcing the skills of the legal professionals in the application of the requirements of Article 6 ECHR and the relevant case law of the ECtHR with regards to the fairness and reopening of criminal proceedings.

How to use this Manual

This Manual aims to assist current and future trainers in delivering in-service training on article 6 ECHR. Its use requires, as a prerequisite, that trainers are familiar with the principles of adult education and training methodologies and techniques. Its use requires a solid understanding of the Convention system and its principles of interpretation. This, of course, in addition to specific knowledge of the subject matter, that cannot be confined to the information provided in this Manual. The suggested readings indicated, thus, represent the essential minimum in order to run the course.

The overall objective of the proposed curriculum is to ensure that learners improve their knowledge and comprehension on a range of issues related to the implementation of ECHR at domestic level, enabling them to analyse and evaluate the obligations of Albania under the ECHR. The intended audience is represented by lawyers, judges, prosecutors, state agents that deal with the execution of ECtHR (State Advocacy office, Codification Department in the Ministry of Justice, Ministry of Finance, Prime Minister Office etc.). Other law enforcement officers that deal with the implementation of judicial decisions might also very well benefit from this course. As a prerequisite, target audience of this course need to have a general knowledge of ECHR and the Convention system.

As always, it is for the facilitators to use their experience and talents to guide the audience through the course and at all times assess and reassess the needs of the participants. Accordingly, the materials proposed can and should be used with a substantial degree of flexibility: examples, case studies and exercises may need to be tailored and customized to reflect relevant legal systems and address issues of particular interest.

The present Manual is composed of 3 parts. The first 2 parts are more of a general nature and encompass the position of the ECHR within the Albanian legal system and an overview of the right to a fair trial under the Convention. The third section is devoted to the issue of the re-opening of criminal proceedings. The topic is looked both from the angle of the Albanian legislation and practice, before and, to the extent possible, after the amendments that entered into force on 1 August 2017, and also from a comparative perspective. In this respect, it ought to be noted that re-opening of national proceedings following a finding of a violation of article 6 ECHR by the European Court is, to date, something which is very much left to the discretion of Member States, with virtually no case-law that can be used to sustain certain national policies (i.e. for instance on access to free legal aid or to *ex parte* or *ex officio* reopening of proceedings) over others. In this Recommendation No. R (2000) 2 of the Committee of Ministers to member states on the re examination or reopening of certain cases at domestic level following judgements of the European Court of Human Rights offers only limited guidance. However, the review of its application, conducted by in 2015 Committee of Experts on the Reform of the Court (DH-CDR), based on an exchange of information, does provide example of good practices and procedural issues linked to reopening of proceedings, together with the various solutions that States have put in place in order to overcome them.

The Manual offers material to run, as a minimum, a 1-day training on the subject. Depending on the level of understanding of the ECHR by the audience, however, the material can be used also for a longer course. We hope that this manual only represents the beginning of a fruitful training experience where your expertise, creativity and passion can make the difference!

Section I - Implementation of the European Convention of Human Rights

(ECHR) at national level

Overall objective

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

Learning objectives

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

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

1. The Albanian Constitution and the status of the ECHR

1.1 European Convention of Human Rights entry into force in Albania

ECHR is the first convention adopted by Council of Europe that entered into force in 1953. This international instrument was signed by Albanian state on 13 July 1995 and ratified on 02 October 1996.[1]Albania adhered to all the Protocols of the ECHR (1-16)[2]

[1]*Law no 8137, date 3.07.1996, as amended by Law no8431, date 13.07.2000, law no 9264, date 29.07.2004, Law no 9453, date 25.12.2005*

[2]*Protocol of the Convention (signed 2 October. 1996, ratified the same day);Prot. II (signed on 13 July 1995 ratified on2 Oct 1996); Prot III (signed on 13 July 1995 ratified on2 Oct 1996); Prot IV (signed 2 Oct 1996, ratified the same day); Prot V (signed on 13 July 1995, ratified on2 Nov 1996); Prot VI (signed on 4 April 2000,*

apart from the Protocol 9, 10[3] and 14 bis.[4]Article 117.3 of the Constitution of Albania provides that international agreements ratified by law are promulgated and published according to the procedures that are provided for laws. According to provision 1 of this Article, laws acquire juridical force only after they are published in the Official Journal. Therefore the same procedure is applicable for the promulgation of international agreements such as ECHR which was ratified by law no 8137, date 3.07.1996, as amended. However, its *de facto* publication was made only in 2008 (*12 years after its ratification*) in the Official JournalNo.28/ 2008 for the unpublished acts of year 1996.

1.2 The Constitution of Albania and the rank of ECHR in the hierarchy of laws

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

According to the Constitution, Albanian legal system follows the monist approach recognizing to the ECHR a direct effect at domestic level and its supremacy in the hierarchy of national laws. The monist approach implies that an international treaty, signed and ratified, immediately becomes part of internal law as soon as it is published, without any legislative transposition being necessary. In this connection, Article 5 of the Constitution of Albania provides that the Republic of Albania applies international law that is binding upon it. Article 116 of the Constitution provides the order of normative acts that are effective in the entire territory of the Republic of Albania which are: a) the Constitution; b) ratified international agreements; c) the laws; ç) normative acts of the Council of Ministers. Also, Article 122 of the Constitution provides that the international agreements ratified by law that contain self-executing norms are implemented directly (Art.122/1). They enjoy priority over the laws of the country that are incompatible with it (Art. 122/2).The norms issued by an international organization which expressly provide for their direct applicability shall have superiority, in case of conflict, on the laws of the country (Art.122/3). Briefly said, the ECHR enjoys direct applicability in the Albanian domestic legal system, above all due to its self-executing provisions which comply with the requirement of article 123/1 of the Constitution.

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ratified on 1 Oct 2000); Prot VII (signed on 2 Oct 1996, ratified on 1 Jan 1997); Prot VIII (signed on 13 July 1995, ratified on 2 Oct 1996); Prot XI (signed on 13 July 1995, ratified on 1 Nov 1998)Prot XII (signed on 26 May 2003, ratified on 1 May 2005); Prot XIII (signed on 26 May 2003, ratified on 1 June 2007); Prot XIV (signed on 10 Nov 2004, ratified on 3 Feb 2006); Prot XV (signed on 11 Feb 2014, ratified on 12 Nov 2015); Prot XVI (signed on 24 Nov 2014, ratified on 7 May 2015)

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

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

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

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

Example: Earlier, the Constitutional Court by Decision No.65/1999[6] interpreted the Article 17 of the Constitution that refers explicitly to the standards of the ECHR when limitations of individual rights and freedoms have to be imposed by the state authorities, stating that "…***These limitations may not infringe the essence of the rights and freedoms and in no case may exceed the limitations provided for in the ECHR."***

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

The recognition of Convention at domestic level in other countries takes different forms. In some countries[7] the Convention is considered as part of their domestic legislation. In some others[8] the Constitution recognizes the international agreements only limited to the general principles of international law. In the latter case, the Convention and the ECtHR`s case law is recognized as *lex specialis* by a special act, by rulings of the Constitutional Court[9] or by a Supreme Court decision.[10]

Example: **the "*Poitrimol v. France" judgement (1993)*,**[11] proved that French authorities were reluctant to recognise the binding force of ECHR at domestic level considering that the execution process for this judgement lasted for 8 years until the Court of Cassation held the Dentico' decision on 2 March 2001[12] to comply with the Court's

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

[7] *Armenia, Azerbaijani, Romania, Slovakia, Spain, Sweden, Macedonia, Ukraine.*

[8] *Italia, Netherland, United Kingdom, Norway, Russia, Slovenia, Latvia, Denmark.*

[9] *Germany recognized the effect of the Convention on behalf of the principle of openness to the principles of international law only after the German Federal Court came out with its decision Görgülü of 14 October 2004. In Italy, the Constitutional Court ruling in case Candela Soriano landmarked a turning point for the recognition of the supremacy of the provisions of Convention to domestic laws.*

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

11 Application "Poitrimol v. France" no.14032/88, Judgment (Merits and Just Satisfaction), date on 23 November 1993, http://hudoc.echr.coe.int/eng?i=001-57858

12Cassation plenary, 2 March 2001, Vincenzo Dentico: the Cour de cassation, in respect of Article 6.1 and Article 6.3c and Articles 410, 411 and 417 of the Code of Criminal Procedure, quashed a judgment by the Aix-en-Provence Appeal Court and held that "the right to a fair trial and the right of every person accused to be

ruling. In this connection, among the legal reforms undertaken the most important was the adjustment of constitutional review before the Constitutional Council, which has jurisdiction to adjudicate individual complaints based on the rights provided in Convention.

Example: the Supreme Court of the United Kingdom' decision *Horncastle* (2009)[13], can be viewed as a direct response to the European Court of Human Rights ruling in *Al-Khawaja v United Kingdom* (2009)[14] in which the facts were legally very similar. In this case the ECtHR ruled against the state and found that while it was justifiable to allow hearsay evidence in some circumstances, it was likely never permissible for a conviction to be based solely or decisively on such evidence. The Lords in Horncastle do not look favourably upon the decision of the Grand Chamber stating "that although the domestic court was required to take account of the jurisprudence of the European Court of Human Rights in applying principles which were clearly established, where, on rare occasions, the domestic court was concerned that the European court's decision insufficiently appreciated or accommodated particular aspects of the domestic process, it might decline to follow the decision. Later on, in another *decision Ullah,*[15]the Supreme Court adjusted its position expressing that the "duty of national courts is to keep pace with the Strasbourg jurisprudence as it evolves over time: no more, but certainly no less".

Case study "Qufaj v. Albania" (the first judgment for Albania)[16]

The Court communicated the application for this case to Albanian Government in 2003. The applicant, an Albanian company, Qufaj Co. Sh.p.k.[17]claimed before ECtHR that the failure of the Albanian authorities to comply with a final decision had infringed Article 6 § 1 of the Convention.

Facts: The Municipality of Tirana, after having granted to the applicant company a "***planning permission***" to build five hundred flats over 15,788 square meters of land in a residential area in Tirana, then refused to grant the applicant "***the building permit***",[18] since it failed to respect the criteria based on the new provisions of the law. The applicant sought compensation for its loss, in the Tirana District Court. On appeal, the Tirana Court of Appeal quashed the first-instance judgment and ordered the Municipality to pay the applicant an amount as compensation for the damage (decision no. 1197 of 23 February 1996). This decision became final for enforcement. Even

represented by counsel are opposed to a court's judging an accused who fails to be present without excuse, without giving a hearing to the accused person's counsel, if present in the court

13[2010] 2 AC 373, [2010] 2 WLR 47, [2010] 2 All ER 359

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

15Regina v. Special Adjudicator (Do v. Secretary of State for the Home Department), [2004] UKHL 26 on appeal from [2002] EWCA Civ 1856

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

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

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

though the Enforcement Office notified the Municipality that it should execute the Court of Appeal decision, it repeatedly refused to comply, arguing that it had no budget for the execution of judicial decisions. Having the case submitted before the Constitutional Court, the latter rejected the applicant company's complaint, stating that the "complaint [could] not be taken into consideration because the enforcement of court decisions is outside the jurisdiction of the Constitutional Court". The ECtHR delivered the judgment for this case on 18 November 2004 declaring that there was a violation for the non-execution of a final judicial decision by the Municipality.[19]The execution of the judgment was monitored under enhanced supervision procedures by the Committee of Ministers, having qualified the judgment as a leading case. Later on, the Committee of Ministers adopted a resolution for the closure of examination for this case considering that all the measures for the execution were exhausted.

List of questions

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

Recommended reading:

- Judgement on case of Qufaj Co. Sh.P.K. V. Albania no.54268/00, Judgment (Merits and Just Satisfaction)18/11/2004, final on 30/03/ 2005, http://hudoc.echr.coe.int/eng#{%22fulltext%22:[%22qufaj%22],%22documentcollectionid2%22:[%22GRANDCHAMBER%22,%22CHAMBER%22],%22itemid%22:[%22001-67514%22]}
- Resolution CM/ResDH(2011)86[1]Execution of the judgment of the European Court of Human Rights Qufaj Co. Sh.P.K against Albania*http://hudoc.exec.coe.int/eng#{%22EXECIdentifier%22:[%22001-106810%22]}*
- Constitutional Court of Albania Decision No.6/2006
- Constitutional Court by Decision No.65/1999
- Constitutional Court in Decision No.29/2005

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

- Poitrimol v. France judgement
- Supreme Court in United Kingdom asserted in its decision Horncastle (2009)

2. Obligation to execute Judgements of the ECtHR

Respect for the ECHR, including the compulsory jurisdiction of the ECtHR and its binding judgments, is the main pillar of European public order. Article 1 of the Convention entails the High Contracting Parties with the obligation to secure to everyone within their jurisdiction the rights and freedoms enshrined in the Convention. In line with this provision, the Albanian Constitution provides in Article 15: "*The Albanian state has the obligation to respect fundamental human rights and freedoms by considering them indivisible, inalienable, and inviolable and which stand at the basis of the entire juridical order.*" The nature and limits of member state' obligation under Article 1 of Convention are dictated by the states jurisdiction' boundaries.

Example: ***in "Mamatkulov v. Turkey,"***[20] the Court held that "Indications of interim measures given by the Court, as in the present case, permit it not only to carry out an effective examination of the application but also to ensure that the protection afforded to the applicant by the Convention is effective; such indications also subsequently allow the Committee of Ministers to supervise execution of the final judgment. Such measures thus enable the State concerned to discharge its obligation to comply with the final judgment of the Court, which is legally binding by virtue of Article 46 of the Convention. Consequently, the effects of the indication of an interim measure to a Contracting State – in this instance the respondent State – must be examined in the light of the obligations which are imposed on the Contracting States by Articles 1, 34 and 46 of the Convention"

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

Example: ***in "Rrapo v. Albania,"***[21] the Court considered that the failure of Albanian authorities to execute an ECtHR' interim measure caused the violation of Article 34 and subsequently had inflicted the violation of obligation under Article 1 of the Convention, stating: " ...a failure by a respondent State to comply with interim measures will undermine the effectiveness of the right of individual application guaranteed by Article 34 and the State's formal undertaking in Article 1 to protect the rights and freedoms set forth in the Convention."

[20] Application no.6827/99 46951/99,Judgment (Merits and Just Satisfaction), Grand Chamber, date on04 February 2005,http://hudoc.echr.coe.int/eng?i=001-68183
21 Application no.58555/10, Judgment (Merits and Just Satisfaction), date on 25 September 2012, http://hudoc.echr.coe.int/eng?i=001-113328

2.1 Determination of the content of the obligation to execute judgments of the ECtHR

Whenever, High Contracting Parties fail to fulfil their primary obligation under Article 1 of the Convention, there is a potential for violation of Convention. Anytime the ECtHR finds a violation of human rights enshrined in the Convention, the respondent state party bears the responsibility under Article 1 and Article 46 of the Convention to offer proper redress. In this context, Article 46 of the European Convention[22] provides the obligation of state parties to abide to a final ECtHR' judgement. This obligation is three fold: first, the obligation to put an end to the violation; second the obligation to make reparation (to eliminate the past consequences of the act contravening international law) and, finally, the obligation to avoid similar violations (the obligation not to repeat the violation).These three obligations are equally apparent from the resolutions of the Committee of Ministers adopted with regard to Article 46§2 under Rule 6(2).[23]In addition, Article 46[24]of the ECHR provides that it is the Committee of Ministers that supervises the execution of judgments. This process involves all the High Contracting Parties in the Convention, which have to cooperate via their public institutions, including their parliaments.

Example: ***in the "Scozzari and Giunta v. Italy" case,***[25] the Court reiterated that "a judgment finding a breach "imposes on the respondent state a legal obligation not just to pay those concerned the sum awarded by way of just satisfaction, but also to choose, subject to supervision by the Committee of Ministers, the general and/or, if appropriate, individual measures to be adopted in their domestic legal order to put an end to the violation found by the Court and to redress so far as possible the effects."

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

22Article 46 of European Conventon: "Binding force and execution of judgments 1. The High Contracting Parties under-take to abide by the final judgment of the Court in any case to which they are parties. 2. The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution."

23Rules adopted by the Committee of Ministers for the application of Article 46, paragraph 2,of the European Convention on Human Rights (Adopted by the Committee of Ministers on 10 May 2006at the 964th meeting of the Ministers' Deputies.

24A referral decision shall require a majority vote of two thirds of the representatives entitled to sit on the Committee

25Application Scozzari and Giunta v. Italy, no. 39221/98 41963/98,Judgment (Merits and Just Satisfaction), date on 13 July 2000

temporis[26] criteria, applicable to set the boundaries for Convention' jurisdiction over states.

Example: ***in "Loizidou v. Turkey"***[27]judgment ECtHR sets out the nature of limitations over the obligation under Article 1 and Article 46 of the Convention:

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

For the applicant and the Government of Cyprus, when States make declarations under Articles 25 and 46 (art. 25, art. 46) recognizing the competence of the Commission and Court, the only conditions permitted are those *ratione temporis*.
As was observed in the Court's Ireland v. the United Kingdom judgment of 18 January 1978 (Series A no. 25, p. 90, para. 239), "Unlike international treaties of the classic kind, the Convention comprises more than mere reciprocal engagements between Contracting States. It creates, over and above a network of mutual, bilateral undertakings, objective obligations which, in the words of the Preamble benefit from a 'collective enforcement'."
That the Convention is a living instrument which must be interpreted in the light of present-day conditions is firmly rooted in the Court's case-law (see, inter alia, the Tyrer v. the United Kingdom judgment of 25 April 1978, Series A no. 26, pp. 15-16, para. 31). Such an approach, in the Court's view, is not confined to the substantive provisions of the Convention, but also applies to those provisions, such as Articles 25 and 46 (art. 25, art. 46), which govern the operation of the Convention's enforcement machinery. It follows that these provisions cannot be interpreted solely in accordance with the intentions of their authors as expressed more than forty years ago.
Taking into consideration the character of the Convention, the ordinary meaning of Articles 25 and 46 (art. 25, art. 46) in their context and in the light of their object and purpose and the practice of Contracting Parties, the Court concludes that the restrictions *ratione loci* attached to Turkey's Article 25 and Article 46 (art. 25, art. 46) declarations are invalid."

[26] *Jurisdiction Ratione Temporis or temporal jurisdiction refers to the jurisdiction of a court of law over a proposed action in relation to the passage of time.*
[27] *Application no.15318/89, Judgment (Preliminary Objection), date on 23/03/1995, http://hudoc.echr.coe.int/eng?i=001-57920*

List of questions

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

Recommended readings:

Resolutions

Case Of Loizidou Against Turkey [Dh(2003)174 (Interim Resolution)]

Case Of Loizidou Against Turkey [Dh(2003)191]

Case Of Loizidou Against Turkey [Dh(2003)190]

Case Of Loizidou Against Turkey [Dh (2001) 80 (Interim Resolution)]

Case Of Loizidou Against Turkey [Dh (2000) 105]

2.2 Just satisfaction

The obligations arising out of the Court's judgments fall into three broad categories: just satisfaction, individual measures and general measures. Just satisfaction is ruled based on Article 41 of the Convention which provides as follows: "If the Court finds that there has been a violation of the Convention or the protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party." The criteria for the determination of amount of just satisfaction much depend on the nature of the case.[28]

Following the entry into force of Protocol 14, on 1st June 2010,[29] the Committee of Ministers supervises also the execution of the terms of friendly settlements endorsed by the Court (Article 39 of Convention), including any sum that the State has agreed to pay the applicant under the terms of such a settlement.

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

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

[29] *http://www.coe.int/en/web/conventions/search-on-treaties/-/conventions/treaty/194*

domestic legislation does not offer the legal means to require for the reparation of the violation. Therefore, the calculation of just satisfaction differs from case to case, depending to the relevant circumstances.

Example: ***in "Bajrami v. Albania,"***[30] the Court does not discern any causal link between the violation found and the pecuniary damage alleged; it therefore dismisses this claim. As to non-pecuniary damage, the Court sees no reason to doubt that the applicant suffered some distress as a result of the non-enforcement of the final judgment at issue and that sufficient just satisfaction would not be provided solely by the finding of a violation.

Example: ***in "Tomasic v. Croatia,"***[31] the Court reiterated as to the non-pecuniary damage sought, that where an applicant had resorted to an available domestic remedy and thereby obtained a finding of a violation and was awarded compensation, but can nevertheless still claim to be a "victim", the amount to be awarded under Article 41 may be less than the amounts the Court was awarding in similar cases. In that case an applicant must be awarded the difference between the amount obtained from the Constitutional Court and an amount that would not have been regarded as manifestly unreasonable compared with the amounts awarded by the Court. The Court considers that, in the absence of domestic remedies, in the present case it would have awarded the sum of EUR 4,000. It has already found that the applicant was awarded EUR 600 by the Constitutional Court, which is approximately 15 % of what the Court would have awarded him.

Example: ***in "Paudicio v. Italy,"***[32] the Court noted that the criminal courts had definitively determined that the applicant had suffered pecuniary damage as a result of the illegal construction carried out by his neighbours. However, in view of the fact that, in accordance with the decision of those courts, the applicant may bring an action before the civil courts in order to obtain compensation, the Court considers that it is not appropriate to award an amount of pecuniary damage.

Example: ***in "Cochiarella v. Italy,"***[33] the Court indicates that "the amount it will award in respect of non-pecuniary damage may be less than that indicated in its case-law where the applicant has already obtained a finding of a violation at domestic level and compensation by using a domestic remedy. Apart from the fact that the existence of a domestic remedy is fully in keeping with the subsidiarity principle embodied in the Convention, such a remedy is closer and more accessible than an application to the Court, is faster and is processed in the applicant's own language; it thus offers advantages that need to be taken into consideration.

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

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

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

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

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

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

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

List of questions

1. Identify the types of obligation of respondent party under Article46.2 of the Convention for the execution of judgments brought as example
2. Define the obligation of the High Contracting Party to the Convention based on Article 41 of the Convention
3. Discuss the criteria for the determination of award of just satisfaction in the examples brought above

Recommended reading:

- Judgement "Bajrami v. Albania"
- Judgement "Tomasic v. Croatia"
- Judgement Paudicio v. Italy
- Judgement "Cochiarella v. Italy"
- Resolutions DH(1992)26, (1995)82 and (1994)26;Interim Resolutions ResDH(2000)135, ResDH(2005)114ResDH(2007)2 and CM/ResDH(2009)42
- Interim Resolution CM/ResDH(2010)83 on the execution of the judgments of the European Court of Human Rights, Ben Khemais v. Italy
- Resolution 1226 (2000) on the execution of judgments of the European Court of Human Rights, adopted by the Assembly on 28 September 2000
- High Level Conference on the Future of the European Court of Human Rights, Interlaken Declaration, 19February 2010.www.eda.admin.ch/etc/medialib/downloads/edazen/topics/europa/euroc.Par.0133.File.tmp/final_en.pdfDoc. 12455 20 December 2010
- Implementation of judgments of the European Court of Human Rights Report1Committee on Legal Affairs and Human Rights Rapporteur: Mr Christos POURGOURIDES, Cyprus, Group of the European People's Party

2.3 Individual non-pecuniary measures

If an ECtHR' judgment imposes on the respondent state a legal obligation under Article 46 of the Convention, to put an end to the violation it intends to offer reparation for the applicant in such a way as to restore the situation before the breach as far as possible. In this connection Article 41 of the Convention covers only the award of just satisfaction, when the national law allows partial or no reparation for the violation found. It follows, *inter alia*, that a judgment in which the Court finds a violation of the Convention or its Protocols imposes on the respondent State a legal obligation not just to pay those concerned the sums awarded by way of just satisfaction, but also to choose, subject to supervision by the Committee of Ministers, the general and/or, if appropriate, individual measures to be adopted in its domestic legal order. These measures shall aim to put an end to the violation found by the Court and make all feasible reparation for its consequences in such a way as to restore as far as possible the situation existing before the breach.[34]

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

Example*: (Article 41 of Convention) "Gjonboçari v. Albania" case,*[35]concerns the structural problem of failure to enforce final domestic court and administrative decisions relating to the right of the applicants to restitution or compensation (whether pecuniary or in kind) for property nationalized under the communist regime (violations of Article 6§1 and Article 1 of Protocol No. 1). Lack of an effective remedy was found in this respect (violation of Article 13 in conjunction with Article 6§1).The Court notes that the State's outstanding obligation to enforce the judgment of 6 March 2003 is not in dispute. Accordingly, the applicants are still entitled to have their property rights over the relevant plot of land determined. The Court recalls that the most appropriate form of redress in respect of a violation of Article 6 is to ensure that the applicant as far as possible is put in the position he would have been had the requirements of Article 6 not been disregarded. The same applies in the present case, especially in view of the violations found and the Court's findings in previous judgments concerning Albania. It therefore considers that the Government must secure, by appropriate means and speedily, the enforcement of the domestic court's final judgment. Information was required regarding the performance of the procedures for the execution of the Supreme Court's decision.[36]

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

[35]*Application no.10508/02, ECtHR Judgment (Merits and Just Satisfaction),date23 October 2007,http://hudoc.echr.coe.int/eng?i=001-82863*

[36]*http://hudoc.exec.coe.int/ENG#{%22EXECIdentifier%22:[%22DH-DD(2012)1031E%22]}*

Example*: (Article 41 of Convention) "Çaush Driza v. Albania" case,*[37]concerns the failure of the domestic authorities to enforce a final national decision that entitled the applicant with the right to get awarded with in kind compensation. This was found in violation of Article 6§1 and Article 1 of Protocol No. 1, as well violation of Article 13 in conjunction with Article 6§1 due to lack of an effective remedy in this respect. Under Article 41the European Court ordered no pecuniary or non-pecuniary award due to the fact that the applicant failed to comply with the time limits set out in Article 60/2 of the Rules of Court. However, the Court ordered based on Article 41 that the applicant remains entitled to the award of in-kind compensation pursuant to the Court of Appeal's decision in his favour, and that the authorities are required to take the necessary steps to secure the enforcement of that decision. In this case information was expected from the authorities to specify the date when the applicant received full ownership of 1650 m2.[38]

In the criminal cases Xheraj, Caka, Berhani, Cani, Shkalla, Kaçiu & Kotorri, Haxhia against Albania[39]the Court called for individual non-pecuniary measures for reopening of proceedings. In these cases the Court revealed a range of procedural irregularities that could render the proceedings unfair. Following the Xheraj case, in February and March 2012, the Supreme Court decided to reopen the proceedings in all the other cited cases based on the findings of ECtHR' judgements, where decisions taken in the domestic judicial proceedings had been found in breach of the Convention.[40]

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

[37]*Application no.0810/05,Judgment (Merits and Just Satisfaction), date on 15 March2011, http://hudoc.echr.coe.int/eng?i=001-103927*

[38]*http://hudoc.exec.coe.int/ENG#{%22EXECDocumentTypeCollection%22:[%22CEC%22],%22EXECIdentifier%22:[%22004-1%22]}*

[39] *Application no.34783/06, ECtHR judgement 5.11.2013, final on 5.02.2014*

[40]*"1265 meeting (20-22 September 2016) (DH) - Updated action plan (06/07/2016) - Communication from Albania in the Caka group of cases against Albania (Application No. 44023/02) [Anglais uniquement] "*

[41]*Application no.37959/02, Judgment (Merits and Just Satisfaction), date on 29/07/2008, http://hudoc.echr.coe.int/eng?i=001-87964*

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

List of questions:

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

Recommended readings:

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

2.4 General Measures

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

Examples of good practice for the execution of general measures:

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

c. Verification of existing laws and administrative practice as a result of national experience in applying a law or regulation or following a new judgment by the Court[42](usually carried by the ministry that initiates legislation, governmental agencies, training institutions, competent organs of the state etc., within the framework of the parliamentary debates, ombudspersons). Verification may also take place within the framework of court proceedings brought by individuals with legal standing to act or even by state organs, persons or bodies not directly affected (for example before the Constitutional Court).

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

Example: ***in "Luli & others v. Albania,"***[43]the Court criticised, in particular, the failure of the judicial system to manage properly a multiplication of proceedings before various courts on the same issue and repeated referrals of a case to a lower level of jurisdiction (violations of Article 6 § 1). In this case, the Court noted that this kind of violation was

[42] *In the case of a judgment that concerns it directly, by virtue of Article 46, the state is under obligation to take the measures necessary to abide by it.*
43Application no. 64480/09 64482/09 12874/10, ECtHR Judgment (Merits and Just Satisfaction) date01 April 2014, http://hudoc.echr.coe.int/eng?i=001-142305

becoming a serious deficiency in domestic legal system in Albania requiring the introduction of new effective remedies.[44]In response, the Albanian authorities undertook the justice reform (a committee of senior experts was in charge, as monitored by the parliamentary commission for the justice reform), which among others consisted on the amendment[45]of the Civil and Criminal Codes of Procedure and the organic law of Constitutional Court.[46]As result the amendment of these laws fixed: (1) the legal deadlines and the effective remedies to claim for excessive length of judicial proceedings including the right to "inquire damages" in case of an infringement, and (2) punishing measures for those officials/judges who directly or indirectly infringe this principle.

List of questions:

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

Recommended reading:

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

2.5 The supervision procedure and relevant statistics

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

44"1273 meeting (December 2016) (DH) - H46-1 Luli and others v. Albania (Application No. 64480/09) / 1273e réunion (décembre 2016) - Luli et autres c. Albanie (Requête n° 64480/09) ";"1273 meeting (6-8 December 2016) (DH) - Updated action plan (20/10/2016) - Communication from Albania concerning the Luli and others group of cases against Albania (Application No. 64480/09) [Anglais uniquement] "
45Law no.10052, date 29.12.2008
46Amendment of the organic law of the Constitutional Court in its Article 74 with the aim of making more flexible procedures for reaching the requested majority of a 9-member panel for taking the decision in defense of the right for access to court under Article 6 of the Convention.

standard supervision. Conversely, cases under standard supervision may be transferred to enhanced supervision if deemed appropriate in the light of developments.[47]

According to the statistics,[48]it shows that Albania as High Contracting Party is under supervision procedure for the execution of 52 judgements, whereas 28[49] of them are being monitored under the enhanced procedure and 22 under the standard procedure. Additionally there are 2 newly cases which will undergo the monitoring procedure. The total number of judgments on Albania including those closed and those under pending supervision procedures are 65. From these, 11 judgements are leading cases and 38 judgements are repetitive cases. Also, there have been 9 cases that were closed by means of friendly settlement negotiation. Additionally, there have been adopted 13 Resolutions from the Committee of Ministers for the closure of supervision' judgements for Albania.

Mainly, judgments under supervision for Albania are divided in 5 categories: (1) the Caka group deals with the unfairness of judicial proceedings (2) the Driza group and Manushaqe Puto pilot judgment deal with the non enforcement of final decisions recognizing the restitution of properties to the former owners, which were confiscated during the communist regime (3) the Dybeku and Grori group deal with the poor and unlawful detention (4) Luli & others group deal with the excessive length of proceedings and lack of effective remedies (5) Puto group deals with the non enforcement of judicial decisions in general.[50]

Case study "Kudla v. Poland"[51]

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

Facts: The applicant was detained on remand in August 1991. After numerous requests for release had been refused, the detention order was finally quashed in June 1992, on the basis of a psychiatric report that stated that the applicant showed persistent suicidal tendencies. The applicant subsequently failed to attend a hearing in his case in February 1993 and, as he did not submit the medical certificate requested by the court within the specified time limit, an arrest warrant was issued. The applicant was arrested in connection with a traffic offence in October 1993 and placed in detention on remand. However, an application for release was refused by the Regional Court on the basis of a

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

4810th annual report of the committee of ministers supervision of the execution of judgments and decisions of the European court of human rights, 2016.

49Gjonbocari And Others V. Albania; Driza V. Albania ; Caka V. Albania; Beshiri And Others V. Albania; Topallaj V. Albania; Bushati And Others V. Albania; Nuri V. Albania; Hamzaraj V. Albania (No. 1); Caush Driza V. Albania; Siliqi And Others V. Albania; Cani V. Albania; Eltari V. Albania; Karagjozi And Others V. Albania; Izet Haxhia V. Albania; Delvina V. Albania; Manushaqe Puto V. Albania; Bici V. Albania; Sharra V. Albania; Luli V. Albania; Metalla V. Albania; Luli And Others V. Albania; Rista V. Albania; Qerimi V. Albania; Karagjozi And Others V. Albania; Alicka And Vasha V. Albania; Halimi And Others V. Albania; Ramadhi And Others V. Albania; Vrioni V. Albania

[50]Cases invoke Article 6(49), Article 6/1(43), Article 13 (27), P1/1 (22)

[51]Ibid.

report by prison officers. Several further requests were rejected before the applicant was convicted in June 1995. The conviction was quashed in February 1996 and a retrial ordered. In May 1996 the detention order was quashed, subject to payment of bail of 10,000 zlotys. The applicant's appeals against the amount, in which he invoked the risk of suicide, were unsuccessful. He was finally released in October 1996 after bail had been lodged. He was again convicted in December 1998, the sentence imposed was reduced on appeal in October 1999 and a cassation appeal is pending before the Supreme Court.

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

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

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

List of questions

1. Discuss the nature of recommendations made by the Court in *Kudla v. Poland judgement,* what is the obligation for the polish government based on article 46 of the Convention?
2. What decision would you make as a judge in similar legal grounds?
3. Identify the criteria applied by the court for determination of amount of just satisfaction (pecuniary and non pecuniary) in judgements Bajrami v. Albania, Tomasic v. Croatia, Paudicio v. Italy
4. Discuss the differences in the applied criteria for each case
5. How do you read the statistics produced for Albania during 2001-2017?

6. What does the number of Committee of Ministers' Resolution for closure of supervision in 13 cases demonstrates in terms of Convention' implementation by Albania?(does it indicate a good level of implementation of ECHR at domestic level?

Recommended reading

- Judgment on case of Qufaj Co. Sh.P.K. V. Albania no.54268/00, Judgment (Merits and Just Satisfaction)18/11/2004, final on 30/03/ 2005, http://hudoc.echr.coe.int/eng#{%22fulltext%22:[%22qufaj%22],%22documentcollectionid2%22:[%22GRANDCHAMBER%22,%22CHAMBER%22],%22itemid%22:[%22001-67514%22]}
- Resolution CM/ResDH(2011)86[1]Execution of the judgment of the European Court of Human Rights Qufaj Co. Sh.P.K against Albania *http://hudoc.exec.coe.int/eng#{%22EXECIdentifier%22:[%22001-106810%22]}*
- CM/Rec(2008)2, Recommendation of the Committee of Ministers to member states on **efficient domestic capacity for rapid execution of judgments** of the European Court of Human Rights (adopted by the Committee of Ministers on 6 February 2008 at 1017th Session)
- CM/Rec(2004)6Recommendation of the Committee of Ministers to member States on the **improvement of domestic remedies** (adopted by the Committee of Ministers on 12 May 2004 at its 114th Session)
- GT-Ref. ECHR(2013)2 rev2, Measures to improve the execution of the judgments and decisions of the Court, under discussion within the Ad hoc Working Party on Reform of the Human Rights Convention system, of 2 May 2013
- CM/Res(2002)59,Resolution of the Committee of Ministers concerning the practice in respect of friendly settlements (Adopted by the Committee of Ministers on 18 December 2002 at the 822nd meeting of the Ministers' Deputies)
- CM/Res(2002)58, Resolution of the Committee of Ministers on the publication and dissemination of the case-law of the European Court of Human Rights (Adopted by the Committee of Ministers on 18 December 2002 at the 822nd meeting of the Ministers' Deputies)
- CM/Rec(2010)12, Recommendation of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities (adopted by the Committee of Ministers on 17 November 2010 at the 1098th meeting of the Ministers' Deputies)
- CM/Rec(2003)16, Recommendation of the Committee of Ministers to member states on the execution of administrative and judicial decisions in the field of administrative law (adopted by the Committee of Ministers on 9 September 2003 at the 851st meeting of the Ministers' Deputies)
- CM/Rec(2003)17, Recommendation of the Committee of Ministers to member states on enforcement (adopted by the Committee of Ministers on 9 September 2003 at the 851st meeting of the Ministers' Deputies)
- European Commission for the Efficiency of Justice (website), A good practice guide on Structural measures to improve the functioning of civil and administrative justice

3. Other actors involved in the implementation of the Convention

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

Example: in "*Von Hannover v. Germany"(2),* [52] the Court observes at the outset that it is not its task in the present case to examine whether Germany has satisfied its obligations under Article 46 of the Convention regarding execution of the Von Hannover judgment (1), it delivered in 2004, as that task is the responsibility of the Committee of Ministers.

3.1 The role of the ECtHR in the execution of its judgements

Committee of Ministers on the other side has endorsed the role of the ECtHR on the execution process by considering the Court's case-law as a guiding tool for the states. More concretely, Committee of Ministers in its Resolution Res (2004)3, [53]invited the ECtHR "to identify, in its judgments finding a violation of the Convention, what it consider[ed] to be an underlying systemic problem and the source of this problem, in particular when it [was] likely to give rise to numerous applications, so as to assist states in finding the appropriate solution and the Committee of Ministers in supervising the execution of judgments". Additionally, later the Committee of Ministers accentuated that "the case law of the European Court of Human Rights …, notably its pilot judgments, provide[d] important guidance and instruction to member states in this respect".[54]For many more, Article 46, as amended by Protocol No.14, [55] expressly recognises the fact that the Court has a certain role in the execution process.

As to cite Antônio Augusto Cançado Trindade:[56]

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

The Court itself has affirmed its jurisdiction to draw recommendations for the respondent states in its own judgement relying to the Article 46 and Article 32 of the Convention.[57]Thus, there is a sound legal basis, (*a Convention basis and a customary*

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

[53] *Resolution Res(2004)3of the Committeeof Ministerson judgments revealing an underlying systemic problem(adopted by the Committee of Ministers on 12 May 2004,at its 114th Session)*

[54] *Recommendation Rec(2010)3 on "effective remedies for excessive length of proceedings"*

[55] *http://www.echr.coe.int/Documents/Library_Collection_P14_ETS194E_ENG.pdf*

[56] *"Dialogue between judges, European Court of Human Rights, Council of Europe, 2014"*

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

basis), for the Court's jurisdiction to indicate to respondent States the measures to be taken to ensure the execution of its judgments.

Example: ***in the "Manushaqe Puto v. Albania",***[58]the ECtHR had the occasion to point out that, "Under Article 19[59] of the Convention, it had jurisdiction to "ensure" the observance of the engagements undertaken by States in the Convention. In accordance with the "implied powers" doctrine, this means that the Court has the power to indicate individual or general measures to discharge this task if it finds it necessary."

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

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

Example: ***in Caka group of cases,*** [60]against Albania, adoption of an individual measure for the reopening of criminal proceedings at domestic level acquired first the adoption of a legislative measure in order to provide the legal bases on the domestic law for such an action. In this respect, the Court made "soft" recommendations that leave considerable latitude to the respondent State for choosing the content of the measures to be taken. In such cases states enjoy a wide margin of appreciation as to the practical solution. Here subsidiarity comes into play in two respects. On the one hand, subsidiarity discourages the Court from indicating to the national courts a way out of this quandary. Conversely, subsidiarity requires the Court to analyse and understand how the human rights violations arise before the domestic legal framework.

Example: ***the pilot judgment in "Manushaqe Puto v. Albania"***,[61]would be the case to explain the compelling nature of the ECtHR' recommendations which are "targeted" to concrete measures and are relatively precise. In this case, the Court indicated the general and/or individual measures to be taken by the Albanian authorities, which appear in the operative part as particularly mandatory.[62]On such occasion, the respondent Albanian authorities had little or no freedom of choice to practical solutions.

[58] Application no.604/07 34770/09 43628/07, Judgment (Merits and Just Satisfaction), date on 31/07/2012, http://hudoc.echr.coe.int/eng?i=001-112529
[59] Article 19 – "to ensure the observance of the engagements undertaken by the High Contracting Parties in the Convention and the Protocols thereto, there shall be set up a European Court of Human Rights, hereinafter referred to as "the Court". It shall function on a permanent basis."
60 Application no.44023/02,Judgment (Merits and Just Satisfaction), date on 08 December 2009, http://hudoc.echr.coe.int/eng?i=001-96033
61See footnote 63
62See footnote 63

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

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

List of questions

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

Recommended reading

- Resolution *Res(2004)3*of the Committee of Ministers on judgments revealing an underlying systemic problem*(adopted by the Committee of Ministers on 12 May 2004,at its 114th Session)*
- CM/Rec(2010)3, Recommendation of the Committee of Ministers to member states on **effective remedies for excessive length of proceedings**(adopted by the Committee of Ministers on 24 February 2010 at its 1077th Session)
- *Dialogue between judges, European Court of Human Rights, Council of Europe, 2014"*
- *Manushae Puto pilot judgement of European Court of Human Rights*

3.2 The role of national authorities in the execution of judgements

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

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

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

Example: in Albania the execution process of ECtHR judgements has involved among others the Parliament of Republic of Albania,[63] the Prosecution Office, Ombudsman and other executive bodies that play a role for the implementation of Convention at national level.

List of questions:

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

Recommended reading:

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

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

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

[63] *See 82*

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

refuse to enforce laws found to be incompatible with the ECHR. Consequently, national courts are responsible to respond to demands for effective protection of human rights and avoid penalization of the High Contracting Party.

Example: Albanian Constitutional Court (CC) and the Supreme Court played a role for the direct implementation of Convention and the case law of the Court. CC based on the Court' findings in *Qufaj v. Albania* modified its practice when dealing with claims of non-execution of final judicial decisions. In Qufaj'case,[64] the Court found that: "*….The Constitutional Court rejected the applicant company's complaint, stating that the "complaint [could] not be taken into consideration because the enforcement of court decisions is outside the jurisdiction of the Constitutional Court". The Court notes that the Albanian legal system affords a remedy - in the form of an application complaining of a breach of the right to a fair trial-which was available to the applicant company in theory. The Court holds that the fair trial rules in Albania should have been interpreted in a way that guaranteed an effective remedy for an alleged breach of the requirement under Article 6§1 of the Convention. In the Court's opinion, therefore, the Constitutional Court was competent to deal with the applicant company's complaint relating to non-compliance with a final decision as part of its jurisdiction to secure the right to a fair trial."*

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

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

CM/Rec(2002)13 ***Recommendation of the Committee of Ministers*** invites member states for the **publication and dissemination** of the case-law of the European Court of Human Rights aiming at ensuring that judgments and decisions which constitute relevant case-law developments, or which require special implementation measures on their part as respondent states, are rapidly and widely published, through state or private initiatives, in their entirety or at least in the form of substantial summaries or excerpts (together with appropriate references to the original texts) in the language(s)

[64] *See footnote 53*

of the country, in particular in official gazettes, information bulletins from competent ministries, law journals and other media generally used by the legal community, including, where appropriate, the Internet sites.

The Interlaken Conference' Declaration expressly invited States to "tak[e] into account the Court's developing case-law, also with a view to considering the conclusions to be drawn from a judgment finding a violation of the Convention by another State, where the same problem of principle exists within their own legal system".[65]

Based on the need for mutual recognition of effects of court' decisions given by member states at national level, it is therefore essential for the states to increase exchanges between legal professionals from different networks. National judiciaries are welcomed, in their role to (a) ensure that national law and case-law conforms to Convention as applicable in the relevant states;(b) reduce, different applications of Convention in the member state' systems bound by it; (c) assure, that national law and case-law, respects the case-law of the ECtHR (d) take duly into account recommendations of the Council of Europe.[66]

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

(a) Constitutional Court
- Decision No. 38/2010 (equality of arms in criminal proceedings)
- Decision No. 16/2006 (violation of equality of arms in trial related to the review of the recourse in the presence of the prosecutor only)
- Decision No. 30/2010 (the right to be heard by the court related to the trial in absentia of the defendant)
- Decision No.11/2009 (right to be tried by a court established by law related to the lack of jurisdiction of the court of serious crimes)
- Decision No1/2017 (review of property act)
- Decision 43/2011 (review of property act)
- Decision No.33/2005 (reasoning of judgments related to the grounds for the judgment)

(b) Supreme Court: Decision No.4, date 6.12.2013
(d) District Court: Decision No.17, date 23.01.2007 Mirdite (referred in *the Ceka v. Albania* judgement)

As could be concluded, the enforcement of the ECHR and the Court' case law at domestic level suggests that domestic courts are expected to take a proactive approach. This approach implies an assessment of the need to refer to other countries' case-law based on: (a) interpretation value *res interpretata*, (b) similarity of a problem, (c) finality and level of authority of a judgment (chamber judgments, sections of the

[65] *See, principle of subsidiarity – Interlaken Follow-up – Note by the Jurisconsult, p. 8 :http://www.echr.coe.int/Documents/2010_Interlaken_Follow-up_ENG.pdf*
[66] *Opinion no 9 (2006) of the Consultative Council of European Judges (CCJE) for the attention of the Committee of Ministers of the Council of Europe on the role of national judges in ensuring an effective application of international and European law*

court, Grand Chamber), (d) prevention of similar violations (e) general obligation to comply with Convention (as interpreted by the ECtHR' case-law).

Example: ***Supreme Court' Decision No.21/2013[67] of the Russian Federation***, reminds to all Russian courts of their obligation to follow the ECtHR' case-law including those against other States parties to the Convention, which thus enshrines the principle of the *erga omnes* value of the Court' case-law. In its paragraph 25, the decision provides that: "*In order to read the texts of the judgments in the Russian language delivered by the European Court both in respect of the Russian Federation and other states which are parties to the Convention, the courts are recommended to use, among other sources, the Reference information system Mezhdunarodnoye Pravo (International Law) developed by the Supreme Court of the Russian Federation and installed in the departmental profile of the State automated system Pravosudiye (Justice) as well as HUDOC database of the European Court: http://hudoc.echr.coe.int/sites/eng."*

List of questions

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

Recommended readings:

- Judgement "Qufaj v. Albania"
- Judgement "Marini v. Albania"
- Judgement "Xheraj v. Albania"
- CC decision no.6/2006 on "Memishaj v. Municipality"
- CC decision 12/2012 on Koliqi case
- CC decision no.20/2011
- Supreme Court Decision no.21/2013[68] of the Russian Federation
- The Interlaken Conference' declaration
- CM/Rec(2002)13 Recommendation of the Committee of Ministers to member states on the **publication and dissemination** in the member states of the text of the European Convention on Human Rights and the case-law of the European Court of Human Rights (adopted by the Committee of Ministers on 18 December 2002 at its 822nd Session)

[67] *It is the non-judicial decision delivered on 27 June 2013 by the plenary bench*
[68] *It is the non-judicial decision delivered on 27 June 2013 by the plenary bench*

3.4 Role of prosecutor Office

The Office of the Public Prosecutor plays a central and vital role in ensuring security and liberty throughout Council of Europe Member States.[69] This was also reiterated by the National systems vary in many ways, however, including the location and relationship of the office with respect to other branches of government, its responsibilities and powers within the criminal justice system (including the gate-keeping function, encompassing a filtering component, i.e. determining which cases go forward into the justice system to be prosecuted at public expense), and its role as regards the courts and other spheres of public administration. Prosecutors play a pivotal role in asserting and vindicating human rights, both of suspects, accused persons and victims.

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

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

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

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

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

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

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

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

Respect for the *adversarial principle* in criminal matters requires distinguishing between the investigation phase and the phase of trial. Concerning the first phase of investigation, the adversarial principle is not absolute. Rather, it is an anticipation of it: it consists of a search for evidence to establish whether there are sufficient grounds to proceed with an indictment and, during this phase, the procedure can be confidential[7].

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

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

Example: *in "Laska & Lika v. Albania",*[70] the Court observes that "the applicants were found guilty essentially on the strength of eyewitnesses' submissions obtained during the identification parade. It notes that the eyewitnesses' evidence resulting from the identification was the key evidence supporting the prosecution's case against the applicants.

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

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

3.5 Role of training institutions

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

Recommendation Rec (2004)4,[71]on ECHR in university education and professional training calls to member states "to ascertain that adequate professional training concerning the Convention and the case-law of the Court exist at national level, in particular (1) as a component of the preparation programs of national or local examinations for access to the various legal professions (2) the initial and continuous training provided to judges, prosecutors and lawyers (3) to personnel in other sectors responsible for law enforcement (4) and/or to personnel dealing with persons deprived of their liberty (for example, members of the police and the security forces, the personnel of penitentiary institutions and that of hospitals…"

Specific training on the Convention and its standards could entail the organization of workshops as part of the professional training for judges. More concretely, judges' training intends incorporation of Convention standards and the Court's case-law in the reasoning of their judgments. CCJE[72] recommends that states have to enable the access of judges to relevant information, foreign language courses and translation facilities, especially:

[71] *https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=090000168052dd13a*

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

- Prior knowledge of international and European law and case-law[73]
- Appropriate knowledge of international and European law[74]
- Play a relevant role in the initial and in-service training of judges[75]
- Information on international and European law, including the decisions of the international and European Courts should be made available[76]
- Judges gain full proficiency in foreign languages[77]

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

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

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

[73] *Should be ensured by the inclusion of these topics in the curricula of the law faculties*

[74] *should be one of the conditions that appointees to judicial posts should meet, before they take up their duties*

[75] *judicial training in this area would benefit from international cooperation between national judicial training institutions*

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

[77] *additionally, courts should have translation and interpretation services of quality available apart from the ordinary cost of the functioning of courts*

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

Example: in Albania, the execution of "***Dybeku v. Albania' judgement"***[78] required the professional training of medical staff in penitentiary hospitals with a view to improve the treatment of prisoners suffering from mental disorders.

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

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

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

List of questions

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

Recommended readings

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

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

4. Effect of the Convention on the domestic legal system

The first and most basic point is that "the Convention is no longer mainly a species of international law: it is "*national* law" that is directly enforceable by national judges."[79]Today, every Contracting Party has domesticated the Convention in their domestic legal system. With incorporation, the Convention becomes binding on every state official who exercises public authority, as a matter of domestic law. One of the reasons that there are different standards of Convention' implementation in member states is attributable to the fact that countries have approached different roots for incorporation of Convention in their domestic legal system.

Example: *in "Von Hannover v. Germany"* (2),[80] a second application before the Court from the same applicant in Von *Hannover v. Germany* (1),[81] the Court observed that: *"In accordance with their case-law, the national courts carefully balanced the right of the publishing companies to freedom of expression against the right of the applicants to respect for their private life. In doing so, they attached fundamental importance to the question whether the photos, considered in the light of the accompanying Articles, had contributed to a debate of general interest. They also examined the circumstances in which the photos had been taken. The Court also observes that the national courts explicitly took account of the Court's relevant case-law. Whilst the Federal Court of Justice had changed its approach following the Von Hannover judgment, the Federal Constitutional Court, for its part, had not only confirmed that approach, but also undertaken a detailed analysis of the Court's case-law in response to the applicants' complaints that the Federal Court of Justice had disregarded the Convention and the Court's case-law*."

Example: *following the "Doronin v. Ukraine"*[82]in Ukraine 192 group of cases represent violations of Article 5 of the Convention for unlawful and lengthy detention on remand arising from: detention without judicial decision to that effect and/or the retro-active application of decisions on detention; failure to give reasons and set time limits for detention; the failure to consider alternative preventative measures to detention on remand; and the lack of judicial review of the lawfulness of detention. Measures have been taken to amend the existing Code of Criminal Procedure, in particular to ensure that the time taken for the detainee to familiarize him or herself with the case-file is taken into account when calculating the detention period. The new Code of Criminal Procedure to be drafted would address all outstanding problems listed above.

Example: *following "Dauti v. Albania,"*[83]in Albania the Medical Examination Appeals Commission on Capacity for Work (K.M.C.A.P. Epror - an appeal' administrative body)[84] was made compatible with the standards of an effective remedy based on Article 13 of European Convention through the necessary amendments in the legislation; following

[79]*See footnote 82*
80 See footnote 57
81 See footnote 87
82Report1 Committee on Legal Affairs and Human Rights Rapporteur: Mr Christos POURGOURIDES, Cyprus, Group of the European People's Party
83Application no. 19206/05, ECtHR judgement 3 February 2009, final on 3 May 2009, http://hudoc.echr.coe.int/eng?i=001-91103
84The amendment of the Law No.7703, Date 11.05.1993 "On social security", by Law no/2013 which aimed at the modification of recruitment procedures and the adjudication methods of KMCAP members.

"***Marini v. Albania"*** the legal reforms have adjusted the constitutional complaint to an effective remedy in compliance with Article 13 of the Convention;[85]following "***Luli & others v. Albania"***[86]the Code of Civil Procedures has been amended by Law no.38/2017 (art. 399/6) with the view to create remedies for the parties in the civil, administrative and criminal proceedings for claims of damage' compensation due to the excessive lengths of judicial proceeding and to create remedies for the non-execution of court' decisions.

4.1 Concept of shared responsibility for the enforcement of the Convention

Protocol No.11[87] of the Convention and the domestication of the Convention at national level, as combined gave birth to a new legal system. This system is based on the collective protection of human rights from all the member states, where the European Court holds the status of "the first among equals." The system works based on the principle of shared responsibility among the member states and the principle of opened dialogue among domestic courts with the ECtHR. This dual dimension makes the system pluralistic.

Protocol No.15[88]of the Convention even though not in force yet,[89] emphasized the importance of the principle of subsidiarity that rests on the roots of the relationship between the Court and national states. This principle imposes on States and on their courts the necessary obligations at the same time a broad discretion as regards the execution of the Court's judgments.

As to illustrate, there might be cases when ECtHR has to weight two substantive rights that are in tension with each other, by applying higher standards of protection for one right, as compared to the other. In such cases, even though the national courts have followed different approaches from the one maintained by the ECtHR, it is important that each of the courts have resolved these hard cases in *good faith*. It is for these situations that the ECtHR and the domestic courts should continue to engage in regular dialogue with each other in order to understand their respective positions, difficulties and sensitivities as regards the interpretation and application of the Convention and the implementation of the Court's judgments in the national legal orders. Following up with the Brighton' Declaration[90] the Protocol No.16 of the Convention has been adopted (not yet entered into force).[91] This Protocol aims at enhancing the tools of dialogue and interaction between the Court and national authorities, such as the extension of the Court' competencies to give advisory opinions based on the requests of domestic highest courts.

85Amendment of Constitution of Albania (2016) and the enactment of the new law no.99/2016 "On the organisation and functioning of the Constitutional Court provide that the CC' decisions shall be legally binding and the CC shall invest itself for the adjudication of claims for a fair trial on both the procedural and substantive grounds

[86] The amendment of the Civil Procedural Code by law 34/2017,[86]in Article 399

[87] https://rm.coe.int/168007cd49

[88] http://www.echr.coe.int/Documents/Protocol_15_ENG.pdf

[89] http://www.coe.int/en/web/conventions/full-list

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

[91] http://www.coe.int/en/web/conventions/full-list

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

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

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

Case Study "Von Hannover v. Germany" (1)[92]

"Von Hannover v. Germany" judgement, *concerns the different position maintained by the Constitutional Court of Germany based on the national law as compared to the ruling of the ECtHR on the case*,The applicant, the eldest daughter of Prince Rainier III of Monaco (Princess Caroline of Monaco), lodged an application with ECtHR alleging violation of the right for respect of private life and family (Article 8 of the Convention). More concretely, she claimed that domestic courts did not rule for the protection of her right to prevent the publication of photos about her private life in the tabloid press.

German' Constitutional Court (in a landmark judgment of 15 December 1999), maintained that it agrees with the criterion of the *community interest* applied by the lower courts, emphasizing the importance of the freedom of press. The free formation of opinions requires the press to have, within legal limits, sufficient margin of manoeuvre to decide, what the public interest demands, and what amounts to a matter

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

of public interest. Also the concept of a 'figure of contemporary society "*par excellence*" designates people whose image is deemed by the public to be worthy of respect out of consideration for the public's interest. Moreover, Constitutional Court maintained also that the criteria from the theory prospect are irreproachable with the constitutional law, to determine the concept of 'legitimate interest' upholding the position that:

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

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

The ECtHR' judgement on Von Hannover v Germany (1) final on 2004, examining this application, makes an assessment of the protection that should be afforded for both: (1) the right of individual for private life (Article 8) (2) the freedom of press (Article 10). It emphasized the fair balance that has to be struck between the competing interests of the individual and of the community as a whole, where in both contexts the State enjoys a certain margin of appreciation. Within the scope of Article 8 these obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves. Where, in relation to the scope of Article 10 of the right to expression of press, it emphasized the duty of the press to not overstep certain bounds in respect of the reputation and rights of others. Its duty is only to impart, information and ideas on all matters of public interest. Thus, the Court argued that merely classifying the applicant as a figure of contemporary society "*par excellence*" does not suffice to justify such an intrusion into her private life.[93]Furthermore, the Court considers that the public does not have a legitimate interest in knowing where the applicant is and how she behaves generally in her private life. Thus it found there has been a violation of Article 8 of the Convention.

List of questions

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

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

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

Recommended reading:

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

Section II– Introduction to article 6.1 ECHR – Right to a fair trial

Overall Objective

Overall objective of this session is to ensure learners improve their knowledge and comprehension on a range of issues related to methods of interpretation applied by the ECtHR for the examination of claims related to the right to a fair trial according to Article6.1 of the Convention. More concretely, this session will enable learners to analyse and evaluate the application of general principles, referring to the relevant case-law and making use of different tests of hypothetical situations. The targeted learners for this session need to have a general knowledge of European Convention of Human Rights and the case law of ECtHR. The professional and organisational background acquired corresponds to the profession of judges, lawyers, and prosecutors.

Learning Objectives:

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

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

1. Introduction of interpretation methods applied by the ECtHR

1.1 Teleological method of interpretation

The interpretive method developed by the Strasbourg Court encapsulates both a textual and teleological approach. The teleological approach will be elaborated by focusing on three fundamental interpretive principles developed by the Court. These are the principles of effective protection, dynamic interpretation, and fair balance. The preamble's focus on the overarching object and purpose of the ECHR is in general of greater importance than various specific intentions voiced in the *Travaux Preparatoires*. The first principle is that a provision of the ECHR must be interpreted so that the rights enumerated become practical and effective, that is, we have a principle of effective protection. The second principle is that a provision of the ECHR must be interpreted in a dynamic and evolutive way in light of present-day conditions, that is, we have a

principle of dynamic interpretation. The third principle is that a provision of the ECHR must be interpreted in light of the need to strike a 'fair balance' between, on the one hand, the individual right at issue and, on the other hand, other ECHR rights and legitimate public interests, that is, we have a principle of fair balance. This latter principle connects with the principle of subsidiarity.[94]

1.2 Principle of effective protection

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

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

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

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

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

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

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

2.1 The notion of autonomous concepts

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

Example: ***in "König v. Germany,"***[95] a case involving proceedings to withdraw the authorisation for a doctor to practice on grounds of alleged misconduct, where the plenary Court held "both the Commission and the Government agree that the concept of "civil rights and obligations" cannot be interpreted solely by reference to the domestic law of the respondent State…Hence, it considers that the same principle of autonomy applies to the concept in question; any other solution might lead to results incompatible with the object and purpose of the Convention…'(§88).However, national legislation plays a subsidiary role in the determination of the concepts in Article 6. Whilst the Court thus concludes that the concept of "civil rights and obligations" is autonomous, it nevertheless does not consider that, in this context, the legislation of the State concerned is without importance(§89)."

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

Example: ***in Ringeisen v. Austria,***[96] the European Court held that "all proceedings the result of which is decisive for private rights and obligations'(*§94)* constitute the determination of civil rights and obligations. In the same case, the Court held: 'The character of the legislation which governs how the matter is to be determined (civil, commercial, administrative law, etc.) and that of the authority which is invested with jurisdiction in the matter (ordinary court, administrative body, etc.) are therefore of little consequence."

[95] *Application No. 6232/73, Judgment of 28 June 1978, http://hudoc.echr.coe.int/eng?i=001-57512*
[96] *Application no 2614/65, Judgment of 16 July 1971,http://hudoc.echr.coe.int/eng?i=001-57565*

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

Example: ***in "Vilho Eskelinen and others v. Finland,"***[97] where the Grand Chamber redefined the previous functional criteria developed in *Pellegrin v France* [GC][98] and held that a State may only exclude the application of Article 6 to public servants if two conditions are satisfied: Firstly, the State in its national law must have expressly excluded access to a court for the post or category of staff in question; and secondly, the exclusion must be justified on objective grounds in the State's interest' (§62). In *Ferrazzini v. Italy*[99], the Grand Chamber confirmed tax obligations fall outside the scope of civil rights and obligations (/§29). In *Micallef v Malta*[100] the Grand Chamber revised its prior case-law and held that interim measures issued by civil courts may determine civil rights and obligations due to delays in the full hearing of a case.

Example*: in "Dauti v. Albania",* [101] the Court found the applicability of Article 6§1 of the Convention in the instant case maintaining that "it has not been argued, nor is there anything to suggest, that this case relating to the applicant's claim for disability benefits did not concern a dispute (contestation) over a "right" which could be said, on arguable grounds, to be recognised under domestic law. In particular, it cannot be said that the applicant's claim was frivolous or vexatious or otherwise lacking in foundation. Nor is it disputed, and the Court is satisfied, that the right in question was "civil" in character in the autonomous sense of Article 6§1 of the Convention. The Court reiterates that it has previously determined that welfare benefits and rights to social insurance are "civil rights" within the meaning of Article 6§1 of the Convention, which applies to proceedings in relation thereto. The present case concerned the applicant's right to welfare benefits, namely a disability allowance arising in connection with his incapacity for work."

[97] *Application no. 63235/00, Judgment of 19 April 2007, http://hudoc.echr.coe.int/eng?i=001-80249*
[98] *Application no. 28541/95, Judgment of 8 December 1999, http://hudoc.echr.coe.int/eng?i=001-58402*
[99] *Application no. 44759/98), Judgment of 12 July 2001,http://hudoc.echr.coe.int/eng?i=001-59589*
[100] *Application no. 17056/06, Judgment of 15 October 2009,http://hudoc.echr.coe.int/eng?i=001-95031*
[101] *See footnote 93*

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

The European Court has consistently emphasised the autonomous construction of the notion of a 'charge' for the purposes of Article 6§1 (*Neumeister v Austria,*§18[102]).In the construction of the word 'criminal', the European Court has held that a State is free to designate as a criminal offence an act or omission not constituting the normal exercise of one of the rights that is protected by the Convention. However, the plenary Court has ruled that, in the converse situation, it retains jurisdiction to adjudicate on the classification by the State of an act or omission as disciplinary rather than criminal (*Engel v The Netherlands*, §81[103]).

Example: ***in "Engel v. the Netherlands,"***[104]the plenary Court developed three criteria to determine if proceedings fall within scope of category of 'criminal' charge:
-The domestic classification of the offences;
-The nature of the charge; and
-The nature and severity of the penalty.

Example: ***in "Ezeh and Connors v. UK,"***[105] the Grand Chamber had to determine if the award of additional days custody to prisoners for breaches of prison discipline amounted to the determination of 'criminal proceedings' under the *Engel* criteria. It held "in addition, it is the Court's established jurisprudence that the second and third criteria laid down in Engel are alternative and not necessarily cumulative: for Article 6 to be held applicable, it suffices that the offence in question is by its nature to be regarded as "criminal" from the point of view of the Convention, or that the offence made the person liable to a sanction which, by its nature and degree of severity, belongs in general to the "criminal" sphere .....This does not exclude that a cumulative approach may be adopted where separate analysis of each criterion does not make it possible to reach a clear conclusion as to the existence of a criminal charge ...(§86)."

Example: ***in "Mulosmani v. Albania",***[106]the Court argued that "Charge", for the purposes of Article 6, may be defined as "the official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence", a definition that also corresponds to the test whether "the situation of the [suspect] has been substantially affected."

[102] *Application no.1936/63, Judgment of 27 June 1968,http://hudoc.echr.coe.int/eng?i=001-57543*
[103] *Application no. 5370/72), Judgment of 8 June 1976, http://hudoc.echr.coe.int/eng?i=001-57479*
[104] *Ibid.*
[105] *Applications no. 39665/98 and 40086/98, Judgment of 9 October 2003, http://hudoc.echr.coe.int/eng?i=001-61333*
[106] *Application no. 29864/03, Judgment date 08 October 2013, http://hudoc.echr.coe.int/eng?i=001-126793*

List of questions

1. Explain the concept of autonomous meaning?
2. Discuss the notion of autonomous meaning in the determination of civil rights.
3. Discuss the notion of autonomous meaning in the determination of criminal rights.

Recommended reading:

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

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

3.1. The concept of positive obligations

In certain situations, a State is obliged to take positive steps to vindicate Convention rights and ensure they are effectively enjoyed by those in their jurisdiction. The European Court has relied on Article 1 of the Convention, which requires a state to 'secure to everyone within their jurisdiction the rights and freedoms defined in Section 1 of this Convention', as the jurisprudential basis for imposing a number of implied positive obligations on the States party to the Convention.[107]In the view of the ECtHR' case-law, the prime characteristic of positive obligations is that they in practice require national authorities to take the necessary measures to safeguard a right or, more specifically, to adopt reasonable and suitable measures to protect the rights of the individual.[108]

3.2 Positive and negative obligations

Positive obligations are to be distinguished from negative obligations.[109]A negative obligation requires a State to refrain from any action that would amount to an unjustified interference with rights protected under the Convention. For many Convention rights, this negative obligation is absolute as, for example, the prohibition of torture under Article 3of the Convention. Other rights are qualified, whose interference is permitted so long as certain conditions are met as for example in the case of freedom of expression under Article 10and privacy and family rights under

107A. Mowbray, Cases, Materials and Commentary on the European Convention on Human Rights, 3rd edn., (OUP, 2012) p.82.
108Steven Greer, The Margin of Appreciation: Interpretation and Discretion under The European Convention on Human Rights, Human Rights Handbooks No. 7, Council of Europe (2000), p.7. http://www.echr.coe.int/LibraryDocs/DG2/HRFILES/DG2-EN-HRFILES-17(2000).pdf
109See for a detailed discussion of the difference between positive and negative obligations, Laurens Lavrysen, Human Rights in the Positive State (Intersentia:2016) http://intersentia.com/en/human-rights-in-a-positive-state.html

Article 8 of the Convention. It is not always simple to draw a distinction between positive and negative obligations.

Example: ***in "Keegan v. Ireland",***[110] the European Court stated "the essential object of Article 8 is to protect the individual against arbitrary action by the public authorities. There may in addition be positive obligations inherent in an effective "respect" for family life. However, the boundaries between the State's positive and negative obligations under this provision do not lend themselves to precise definition. The applicable principles are, nonetheless, similar. In both contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole; and in both contexts the State enjoys a certain margin of appreciation."

3.3 Types of positive obligations

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

- Article 2 (see McCann and Others v. the United Kingdom)
- Article 3 (see Assenov and Others v. Bulgaria)
- Article 8 (see Gaskin v. the United Kingdom)
- Article 11 (see Plattform "Ärzte für das Leben" v. Austria)

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

Example: ***in "Marckx v. Belgium",***[111]the plenary Court held that Article 8 imposes positive obligation on State to provide domestic laws which would allow an unmarried mother and her child to lead a normal family life and allow the child to be integrated in the family from the moment of birth.

Example: ***in "X and Y v. The Netherlands",***[112]the Court held that the Article 8 imposed a positive obligation on a State to make provision for punishment through appropriate criminal law provisions for wrongdoing that violates the essential aspects of a person's integrity.

Example: ***in "Airey v. Ireland",***[113]the applicant challenged the lack of availability of legal aid for judicial separation proceedings. The ECtHR found a violation of Article 6§1 maintaining that "To hold that so far-reaching an obligation exists would, the Court agrees, sit ill with the fact that the Convention contains no provision on legal aid for those disputes, Article 6 para. 3 (c) (art. 6-3-c) dealing only with criminal proceedings. However, despite the absence of a similar clause for civil litigation, Article 6 para. 1 (art. 6-1) may sometimes compel the State to provide for the assistance of a lawyer when such assistance proves indispensable for an effective access to court either because

[110] *Application No.16969/90, Judgment of 26 May 1994,http://hudoc.echr.coe.int/eng?i=001-57881*
[111] *Application no. 6833/74, Judgment of 13 June 1979,http://hudoc.echr.coe.int/eng?i=001-57534*
[112] *Application no. 8978/80, Judgment of 26 March 1985,http://hudoc.echr.coe.int/eng?i=001-57603*
[113] *Application no. 6289/73, Judgment of 9 October 1979, http://hudoc.echr.coe.int/eng?i=001-57420*

legal representation is rendered compulsory, as is done by the domestic law of certain Contracting States for various types of litigation, or by reason of the complexity of the procedure or of the case."

Example: ***in "Bushati v. Albania",*** [114]the Court reiterates that "execution of a final judgment given by any court must be regarded as an integral part of the "trial" for the purposes of Article 6 of the Convention (see Hornsby v. Greece). The State has a positive obligation to organise a system for enforcement of judgments that is effective both in law and in practice and ensures their enforcement without any undue delays (see Ruianu v. Romania). When the authorities are obliged to act in order to enforce a judgment and they fail to do so, their inactivity can engage the State's responsibility on the ground of Article 6§1 of the Convention."

Example: ***in "Bajrami v. Albania,"***[115]the Court reiterates that "the essential object of Article 8 is to protect the individual against arbitrary action by public authorities. There are in addition positive obligations inherent in effective "respect" for family life. In both contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole; and in both contexts the State enjoys a certain margin of appreciation (see Keegan v. Ireland). In relation to the State's obligation to take positive measures, the Court has repeatedly held that Article 8 includes a parent's right to the taking of measures with a view to his being reunited with his child and an obligation on the national authorities to facilitate such reunion."

3.3.1 Positive obligations in respect of procedural safeguards

The European Court has held that a State may have a positive procedural obligation to provide effective protection of a Convention right. Whereas, earlier case-law distinguished procedural from substantive positive obligations, 'more recent case-law reflects a new tendency whereby the Court appears systematically to base the positive obligations which it lays down, whether substantive or procedural, on a combination of the standard-setting provisions of the European [Convention] text and Article 1 of that text'[116].

Example: ***in "Bijelić v. Montenegro and Serbia",***[117]the Court found that by virtue of Article 1 of the Convention, each Contracting Party "shall secure to everyone within [its] jurisdiction the rights and freedoms defined in [the] Convention". The discharge of this general duty may entail positive obligations inherent in ensuring the effective exercise of the rights guaranteed by the Convention. Inthe context of Article 1 of Protocol No. 1, those positive obligations may require the State to take the measures necessary to protect the right of property … particularly where there is a direct link between the measures which an applicant may legitimately expect the authorities to undertake and the effective enjoyment of his or her possessions …It is thus the State's responsibility to make use of all available legal means at its disposal in order to enforce a final court decision, notwithstanding the fact that it has been issued against a private party, as well as to make sure that all relevant domestic procedures are duly complied with …(§81-83)."

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114 Application no.6397/04,Judgment date14 February 2012, http://hudoc.echr.coe.int/eng?i=001-96025

115See footnote 32

116Steven Greer, The Margin of Appreciation: Interpretation and Discretion under The European Convention on Human Rights, Human Rights Handbooks No. 7, Council of Europe (2000), pp8-9.http://www.echr.coe.int/LibraryDocs/DG2/HRFILES/DG2-EN-HRFILES-17(2000).pdf

117Application No.11890/05), Judgment of 28 April 2009, http://hudoc.echr.coe.int/eng?i=001-92484

List of questions

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

Recommended reading:

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

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

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

Example: ***in "Burden v. United Kingdom"***,[118] the European Court has based the principle of subsidiarity on Article 13 (right to an effective remedy)and Article 35 of the Convention (admissibility criteria) which provides that the European Court may only deal with the matter after all domestic remedies have been exhausted.'[119]

Example: ***in "Bajrami v. Albania"***,[120] the Court notes that "the purpose of Article 35 is to afford the Contracting States the possibility of preventing or putting in place the alleged violation against them before these claims were presented to it.[121] As a result, the appeal to be submitted to the Court must first be submitted to the relevant national courts, at least in

[118] *Application No. 13378/05, Judgment of 29 April 2008,http://hudoc.echr.coe.int/eng?i=001-86146*

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

[120] *See footnote 32*

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

substance, in accordance with the formal requirements of the domestic law and within the time limits laid down by law. However, the only internal means that need to be evacuated are those that relate to the alleged violations and are at the same time possible and sufficient. The existence of such internal tools should be quite secure, not only in theory, but also in practice, and if they are not, they do not provide the necessary access and efficiency. In this context, it is up to the relevant State to prove the fulfilment of these various conditions."

Example: ***in "Grori v. Albania,"***[122] the Court reiterates that "the rule of exhaustion of domestic remedies obliges those seeking to raise their case against a State in an international judicial or arbitral body to use the means provided for by the national legal system first. The rule is based on the assumption that there are effective remedies available in respect of an alleged domestic infringement, irrespective of whether the provisions of the Convention are or are not incorporated in domestic law. In this way, this is an important aspect of the principle that the protection machinery envisaged in the Convention is complementary to national systems that preserve human rights. At the same time, it is the obligation of the government to provide an effective remedy available in theory and practice for the Court at the material time, a vehicle that was indisputable, capable of addressing the applicant's allegations and providing reasonable opportunities."

4.1. Fourth instance principle.

In accordance with the principle of subsidiarity, the ECtHR has held that Article 6§1 of the Convention does not permit the Court to act as a fourth instance of appeal. It is admittedly not the Court's task to substitute its own assessment of the facts and the evidence for that of the domestic courts and, as a general rule, it is for these courts to assess the evidence before them. The Court's task is to ascertain whether the proceedings considered as a whole, including the way in which the evidence was taken, were fair (*Bernard v. France,*§37).[123]

Example: ***in "Balliu v. Albania",***[124] where the Court reiterates that "the admissibility of evidence is primarily governed by the rules of domestic law and that, as a rule, it is for the national courts to assess the evidence before them. The task of the Convention institutions is to ascertain whether the proceedings in their entirety, including the way in which evidence was taken, were fair. As a rule, these rights require that the defendant should be given an adequate and proper opportunity to challenge and question a witness against him either when he was making his statements or at a later stage of the proceedings."

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

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

[122] *Application no.25336/04,Judgment date 07 July 2009, http://hudoc.echr.coe.int/eng?i=001-93410*
[123] *Application No.22885/93, Judgment of 23 April 1998,http://hudoc.echr.coe.int/eng?i=001-58161*
[124] *Application no.74727/01, Judgment date 16 June 2005, http://hudoc.echr.coe.int/eng?i=001-69401*

4.2.1 Inconsistent national judgments and principle of legal certainty

Example: ***in "Tomić and others v. Montenegro,"***[125] the Court reiterates that it is not its role to question the interpretation of the domestic law by the national courts. Similarly, it is not in principle its function to compare different decisions of national courts, even if given in apparently similar proceedings; it must respect the independence of those courts ... It has also been considered that certain divergences in interpretation could be accepted as an inherent trait of any judicial system which, like the Montenegrin one, is based on a network of trial and appeal courts with authority over a certain territory ... However, profound and long-standing differences in the practice of the highest domestic court may in itself be contrary to the principle of legal certainty, a principle which is implied in the Convention and which constitutes one of the basic elements of the rule of law ... The criteria in assessing whether conflicting decisions of domestic supreme courts are in breach of the fair trial requirement enshrined in Article 6 / 1 of the Convention consist in establishing whether "profound and long-standing differences" exist in the case-law of a supreme court, whether the domestic law provides for machinery for overcoming these inconsistencies, whether that machinery has been applied and, if appropriate, to what effect ... Lastly, it has been accepted that giving two disputes different treatment cannot be considered to give rise to conflicting case-law when this is justified by a difference in the factual situations at issue ..."

Example: ***in "Stanković and Trajkovič v. Serbia,"***[126] the Court maintained that "the principle of legal certainty guarantees, *inter alia*, certain stability in legal situations and contributes to public confidence in the courts. The persistence of conflicting court decisions, on the other hand, can create a state of legal uncertainty likely to reduce public confidence in the judicial system, whereas such confidence is clearly one of the essential components of a State based on the rule of ... (vi) However, the requirements of legal certainty and the protection of the legitimate confidence of the public do not confer an acquired right to consistency since failure to maintain a dynamic and evolutive approach would risk hindering reform or improvement."

4.2.2 Errors of fact or law

Example: ***in "Tomić and others v. Montenegro,"***[127] the Court reiterates that, "in accordance with Article 19 of the Convention, its duty is to ensure the observance of the engagements undertaken by the Contracting Parties to the Convention. In particular, it is not its function to deal with errors of fact or law allegedly committed by a national court unless and in so far as they may have infringed rights and freedoms protected by the Convention."

[125] *Applications no.18650/09, 18676/09, 18679/09, 38855/09, 38859/09, 38883/09, 39589/09, 39592/09, 65365/09 and 7316/10, Judgment of 22 October 2012, http://hudoc.echr.coe.int/eng?i=001-110384*
[126] *Applications No. 37194/08 and 37260/08, Judgment of 22 December 2015, http://hudoc.echr.coe.int/eng?i=001-159376*
[127] *See footnote 128*

4.2.3 Lack of reasoning or legal basis

Example: ***in "Barać and others v. Montenegro,"***[128] the Court held that "no fair trial could be considered to have been held where the reason given in the relevant domestic decision was not envisaged by the domestic legislation and, therefore, was not a legally valid one ... where the competent domestic body refused to enrol the applicant on the list of "pupil advocates", relying on a ground which was not provided in the relevant legislation at all ...Turning to the present case, the Court observes that the final decision rendered by the Supreme Court against the applicants relied solely on an Act which had previously been declared unconstitutional and a relevant decision to that effect already published in the Official Gazette. Thus, the Labour Amendments Act 2004 had ceased to be in force and, as such, was not applicable in the applicants' case, as provided by Article 69§1 of the Constitution in force at the time (see paragraph 13 above). Therefore, the only legal basis for the Supreme Court's decision was not valid at the relevant time. It is irrelevant in this connection whether the impugned piece of legislation was declared unconstitutional for formal or substantial reasons (see paragraphs 15 and 31 above)".

Example: ***in "Milojević and others v. Serbia,"***[129] the Court reiterates that "according to its established case-law, reflecting a principle linked to the proper administration of justice, judgments of courts and tribunals should adequately state the reasons on which they are based. The extent to which this duty to give reasons applies may vary according to the nature of the decision and must be determined in the light of the circumstances of the case ... Although Article 6/1 obliges courts to give reasons for their decisions, it cannot be understood as requiring a detailed answer to every argument of the parties involved ... When applying legal rules lacking in precision, however, the domestic courts must show particular diligence in giving sufficient reasons as to why such a rule was applied in a particular manner, given the circumstances of each specific case. Merely citing the language of the imprecise provision cannot be regarded as sufficient reasoning."

Case study "Mullai v. Albania"[130]

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

(1) Violation of the principle of legal certainty regarding the District Court's decision of 14 December 2005guaranteed by Article 6.1 of the Convention,

[128] *Application No. 47974/06, Judgment of 13 December 2011, http://hudoc.echr.coe.int/eng?i=001-107943*
[129] *Applications No. 43519/07, 43524/07 and 45247/07, Judgment of 12 January 2016, http://hudoc.echr.coe.int/eng?i=001-159880*
[130] *Application no.9074/07,Judgment (Merits), date on 23 March 2010, http://hudoc.echr.coe.int/eng?i=001-97882*

(2) Non-execution of Decision No. 66, dated 22.12.1998, on the approval of the construction license, during the period when the works were suspended by the act of the Tirana Construction Police Directorate (TCPD).

(3) Violation of the right for the peaceful enjoyment of property within the meaning of Article 1 Protocol 1 concerning the suspension of works

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

ECtHR' judgement in Mullai v. Albania: the Court found that the Supreme Court's reasoning in the decision of 29 March 2001 is unfair since it states that the Prefect's decision of 12 January 2000 was *ultra vires* due to the non-exhaustion of local administrative remedies regarding the validity of the permit of the construction of the building. In the same decision, the Supreme Court has challenged this conclusion by declaring the construction permit valid. The European Court has ruled that such oppositions within the same decision are incompatible with the judicial function and the role that the Supreme Court should have in resolving conflicts and avoiding divergences being uniform in its decision. The Supreme Court's decision has become a source of legal insecurity, affecting the public confidence of individuals in the justice system and in the rule of law. As a result, judicial proceedings have significantly influenced the overall climate of legal insecurity. The way in which domestic authorities have proceeded violated the right of the applicants to deal with their claim clearly, coherently and with the due sustainability. It further observed that the domestic proceedings, particularly the manner in which the litigation was conducted, breached the principle of legal certainty under Article 6§1 of the Convention on account of the Supreme Court's inconsistent interpretation. Therefore, the Court considered that extending of the building permit's validity by two years and having the construction work resumed would be the most appropriate form of redress for the applicants.[131] *Therefore,* the parties were invited to negotiate and reach an agreement for the determination of the amount of compensation for the applicant' company as well as for the applicant Mullai' family.[132]

[131] *1250 meeting (8-10 March 2016) (DH) - Action report (25/09/2015) - Communication from Albania concerning the case of Mullai and others against Albania (Application No. 9074/07) [Anglais uniquement]*
[132] *As the former owner of the 3-storey villa, object of appeal*

List of questions

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

Recommended reading

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

5. Principle of dynamic interpretation

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

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

[133] *Application no.2122/64, Judgment of 27 June 1968, http://hudoc.echr.coe.int/eng?i=001-57595*

guided in its interpretation of the Convention by the Vienna Convention on the Law of Treaties (Article 31[134]and 32).[135]

Example: ***in "Goodwin v. United Kingdom,"***[136]the Grand Chamber explained its teleological approach in the context of a case involving the legal status of transsexuals in order to justify its departure from its previous case-law. However, since the Convention is first and foremost a system for the protection of human rights, the Court must have regard to the changing conditions within the respondent State and within Contracting States generally and respond, for example, to any evolving convergence as to the standards to be achieved .. It is of crucial importance that the Convention is interpreted and applied in a manner that renders its rights practical and effective, not theoretical and illusory. A failure by the Court to maintain a dynamic and evolutive approach would indeed risk rendering it a bar to reform or improvement.

Example: ***in "Radunović and others v. Montenegro,"***[137]the Court held "Moreover, the Convention has to be interpreted in the light of the rules set out in the Vienna Convention of 23 May 1969 on the Law of Treaties, Article 31§3 (c) of which indicates that account is to be taken of "any relevant rules of international law applicable in the relations between the parties". The Convention, including Article 6, cannot be interpreted in a vacuum. The Court must therefore be mindful of the Convention's special character as a human rights treaty, and it must also take the relevant rules of international law into account, including those relating to the grant of State immunity."

5.1 Article 6§1 and the teleological approach

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

5.1.1 Right of access to a court

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

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[134] VCLT Article 31, which sets out the general principles for the interpretation of a treaty, in its relevant parts reads:
1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and ann

- *[135]Article 32 of the VCLT furthermore provides as follows:*
- *Recourse may be had to supplementary means of interpretation, including the preparatory*
- *work of the treaty and the circumstances of its conclusion, in order to confirm the meaning*
- *resulting from the application of Article 31, or to determine the meaning when the interpretation*
- *according to Article 31:*
- *(a) leaves the meaning ambiguous or obscure; or*
- *(b) leads to a result which is manifestly absurd or unreasonable*

[136]Application No.28957/95, Judgment of 11 July 2002, http://hudoc.echr.coe.int/eng?i=001-57974
[137]Applications No.45197/13, 53000/13 and 73404/13, Judgment of 25 January 2017, http://hudoc.echr.coe.int/eng?i=001-167803

Example: ***in "Golder v. United Kingdom,"***[138] which deals witha prisoner seeking to contact a lawyer with a view to instituting civil libel proceedings against a prison officer claimed he had been denied access to a court. The Plenary court held "It would be inconceivable, in the opinion of the Court, that Article 6 para. 1 (art. 6-1) should describe in detail the procedural guarantees afforded to parties in a pending lawsuit and should not first protect that which alone makes it in fact possible to benefit from such guarantees, that is, access to a court. The fair, public and expeditious characteristics of judicial proceedings are of no value at all if there are no judicial proceedings."

Example***: in "Lawyer Partners A.S. v. Slovakia,"***[139] the Court reiterates that "the Convention is intended to guarantee rights that are not theoretical or illusory, but practical and effective. This is particularly relevant with regard to Article 6§1 of the Convention, in view of the prominent place held in a democratic society by the right to a fair trial. It must also be borne in mind that hindrance can contravene the Convention just like a legal impediment (see Andrejeva v. Latvia [GC], no. 55707/00, / 98, ECHR 2009, with further references§51)."

Example***: in "Marini v. Albania,"***[140] the Court found that "the inability of the Constitutional Court to come up with a reasoned decision only because the procedures provided for in Article 74 of the Law on the Organization of the MCRs required the absolute majority of a 9-member panel to allow the applicant to remain in an undetermined situation for a long time, leading to a violation of the essence of his right to access to the court under Article 6 of the Convention. The approach made by the Albanian legal system to regulating the CC procedures varies considerably from the regulation made to these procedures, the systems of other member states. In this respect, it is necessary to modify the Albanian legal system, with the aim of providing alternative procedures for achieving the absolute majority in any case."

Example: ***in "Dauti v. Albania,"***[141] the Court found "The European Court in its decision found that the Appeals Commission for medical examinations related to the capacity of work ability did not constitute an independent and unbiased body of assessment, consequently its decisions could not be entitled Executive, and as such they should be subject to judicial jurisdiction in respect of their right to complain. The refusal of the domestic courts to review the applicant's claim against a decision of this Commission has violated his right of access to the court."

Example: ***in "Shkalla v. Albania,"***[142] the Court notes that "the applicant's proceedings and conviction were conducted *in absentia*. It results from the information in the case file that the applicant took cognizance of his conviction *in absentia* only on 14 June 2003, on which date he surrendered to the authorities. The Court therefore considers that the starting date for the running of the statutory time-limit for the applicant to lodge a constitutional appeal should have been, at the latest, 14 June 2005.The Court considers that the impugned decision amounted to an unjustified denial of the applicant's right of access to the Constitutional Court."

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[138] *Application No.4451/70, Judgment of 21 February 1975, http://hudoc.echr.coe.int/eng?i=001-57496*

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

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

[141] *See footnote 93*

[142] *Application no.26866/05, Judgment date 10 May 2011, http://hudoc.echr.coe.int/eng?i=001-104710*

5.1.2 Right to implementation of judgments

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

Example: ***in "Vukelić v. Montengro,"***[143] the Court recalls that "Article 6§1 of the Convention, inter alia, protects the implementation of final, binding judicial decisions, which, in States that accept the rule of law, cannot remain inoperative to the detriment of one party. Accordingly, the execution of a judicial decision cannot be prevented, invalidated or unduly delayed (see, among other authorities, Hornsby v. Greece, 19 March 1997§40, Reports of Judgments and Decisions 1997-II). The State has an obligation to organize a system of enforcement of judgments that is effective both in law and in practice … Further, the Court notes that, irrespective of whether enforcement is to be carried out against a private or State actor, it is up to the State to take all necessary steps, within its competence, to execute a final court judgment and, in so doing, to ensure the effective participation of its entire apparatus, failing which it will fall short of the requirements contained in Article 6§1 … However, a failure to enforce a judgment because of the debtor's indigence cannot be held against the State unless and to the extent that it is imputable to the domestic authorities, for example, to their errors or delay in proceeding with the enforcement … Lastly, the Court reiterates that enforcement proceedings by their very nature need to be dealt with expeditiously."

Example: ***in "Qufaj v. Albania,"***[144] the Court argued "State authorities cannot be justified by the lack of funds for not complying with a financial obligation arising from a court decision. Undoubtedly in special circumstances, the delay in executing a decision can be justified. However, this delay cannot be to the extent that it affects the essence of the right protected under Article 6§1 of the Convention. The right to a due legal process remains illusory and loses its purpose if the domestic legal system allows local authorities to refuse, neglect or delay the execution of a final court decision to the detriment of one party."

Example: ***in "Zyflli v. Albania,"***[145] the Court has reiterated that "the exhaustion rule of domestic remedies referred to in Article 35§1 of the Convention obliges the applicant to use remedies that are normally available and sufficient in the domestic legal system. The existence of remedies should be guaranteed both in theory and in practice. The right to compensation, within the meaning of paragraph 5, arises if the domestic authorities or courts infringe at least one of the preceding paragraphs of Article 5 of the Convention."

[143] *Application no. 58258/09, Judgment of 4 June 2013, http://hudoc.echr.coe.int/eng?i=001-120064*
[144] *See footnote 53*
[145] *Application no.12310/04, Decision date27 September 2005, http://hudoc.echr.coe.int/eng?i=001-70629*

5.1.3 Right to finality of court decisions

Example: ***in "Brumărescu v. Romania,"***[146] the Court maintained that "The right to a fair hearing before a tribunal as guaranteed by Article 6 / 1 of the Convention must be interpreted in the light of the Preamble to the Convention, which declares, among other things, the rule of law to be part of the common heritage of the Contracting States. One of the fundamental aspects of the rule of law is the principle of legal certainty, which requires, inter alia, that where the courts have finally determined an issue, their ruling should not be called into question."

Example: ***in "Driza v. Albania,"***[147] the Court found "the Supreme Court dropped the case two times by, after 2 years and 7 months, of a final decision in favor of the applicant, once by the decision given in parallel proceedings and the next time by recourse in the interest of the law, which has led to the violation of legal certainty under Article 6§1 of the Convention. In the light of Article 6 of the Convention, guaranteeing the principle of legal certainty implying respect for the principle of *res judicata* requires that the lower court decisions on a particular case should not be questioned subsequently by the courts of higher jurisdictions. Higher courts have the right only to correct mistakes or inaccuracies of the lower courts' final decisions, but never retry the case on the merits."

Example: ***in "Vrioni and others v. Albania,"***[148] the Court found "Legal security presupposes respect for the principle of *res judicata*, that is, the principle of the offense. This principle insists that no party has the right to request a review of a binding final decision only to obtain a re-trial hearing and a retrial of the case. The powers to review the higher courts should be exercised to correct judicial errors and failures in rendering justice, but not to conduct a new trial of the case."

Case study "Handyside v. United Kingdom"[149]

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

Facts: Richard Handyside, proprietor of "Stage 1" publishers, purchased British rights of "the little red schoolbook" written by Søren Hansen and Jesper Jensen and published, as of 1976, in several countries, with content that was considered as not reasonable and necessary.[150] Handyside sent out several hundred review copies of the book, together with a press release, to a selection of publications from national and local newspapers to educational and medical journals. He also placed advertisements for the book. The book became subject of extensive press comment, both favourable and not. On 31 March 1971, 1,069 copies of the book were provisionally seized together with leaflets, posters, showcards, and correspondence relating to its publication and

146 Application no. 28342/95, Judgment of 28 October 1999, http://hudoc.echr.coe.int/eng?i=001-58337
147Application no. 33771/02, ECtHR Judgment (Merits and Just Satisfaction), date 13 November 2007, http://hudoc.echr.coe.int/eng?i=001-83245
148 Application no. 2141/03, Judgment date 24 March 2009, http://hudoc.echr.coe.int/eng?i=001-102131
149 Application no.5493/72, Judgement 07 December 1976,http://hudoc.echr.coe.int/eng?i=001-57499
150in Denmark, Belgium, Finland, France, West Germany, Greece, Iceland, Italy, the Netherlands, Norway, Sweden, and Switzerland as well as several non-European countries

sale. On 1 April 1971, 139 more copies were seized. About 18,800 copies of a total print of 20,000 copies were missed and subsequently sold. On 8 April, a Magistrates' Court issued two summonses against Handyside for having in his possession obscene books for publication for gain. Handyside ceased distribution of the book and advised bookshops accordingly but, by that time, some 17,000 copies were already in circulation. On 1 July 1971, Handyside was found guilty of both offences and fined £25 on each summons and ordered to pay £110 costs. His appeal was rejected.

ECtHR' judgement: the Commission held that the interference in Handyside's freedom of expression was both prescribed by law, having a legitimate aim and necessary in a democratic society, thus there was no violation of Article 10 ECHR. It had also held unanimously that Handyside's property rights (Article 1 of Protocol No. 1) were not violated.
The Commission's report and the subsequent hearings before the Court in June 1976 brought to light clear-cut differences of opinion on how to determine whether the actual "restrictions" and "penalties" complained of by the applicant were "necessary in a democratic society", "for the protection of morals". According to the Government and the majority of the Commission, the Court has only to ensure that the English courts acted reasonably, in good faith and within the limits of the margin of appreciation left to the Contracting States by Article 10 para. 2.

The Court points out that the machinery of protection established by the Convention is subsidiary to the national systems safeguarding human rights. The Convention leaves to each Contracting State, in the first place, the task of securing the rights and liberties it enshrines. The institutions created by it make their own contribution to this task but they become involved only through contentious proceedings and once all domestic remedies have been exhausted (Article 26) (art. 26).
These observations apply, notably, to Article 10 para. 2. In particular, it is not possible to find in the domestic law of the various Contracting States a uniform European conception of morals. The view taken by their respective laws of the requirements of morals varies from time to time and from place to place, especially in our era which is characterised by a rapid and far-reaching evolution of opinions on the subject. By reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements as well as on the "necessity" of a "restriction" or "penalty" intended to meet them.[151] Nevertheless, it is for the national authorities to make the initial assessment of the reality of the pressing social need implied by the notion of "necessity" in this context.
Consequently, Article 10 para. 2 leaves to the Contracting States a margin of appreciation. This margin is given both to the domestic legislator and to the bodies, judicial amongst others that are called upon to interpret and apply the laws in force.

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

List of questions:

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

Recommended reading

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

5. Principle of fair balance

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

The Substantive Aspect: the rights enshrined in the ECHR are understood broadly, thus they often may come into tension with each other, necessitating that a 'balance' of some sort is struck between them. This implies that in some situations, the protection of the rights of one person will entail an interference with the rights of another person or many of the rights enshrined in the ECHR can come into tension with legitimate public interests. In such cases limitation of rights may be justifiable in the domestic legal system for the promotion of important public interests, such as national security, prevention of crime, the economic well-being of the nation, and so on. For example, ECHR provides legitimate restriction of some of the rights in Articles 8(2), 9(2), 10(2) and 11(2).

The institutional aspect: the Convention' rights must be interpreted and applied in a way which does not obliterate the prerogative of the "democratically accountable" state bodies of the High Contracting States to take important decisions on behalf of their respective communities.[152] According to this principle the contracting states enjoy

[152] *It is part of the 'object and purpose' of the ECHR, as defined in the preamble, to promote democratic ideals*

a certain 'margin of appreciation', when it takes legislative, administrative, or judicial action in the area of a Convention rights.

The procedural aspect: an interference with an ECHR right, through any general act by a contracting state' public body, must be carried out in accordance with the principle of the Rule of Law. This tenet gives rise to a requirement of legality as well as a requirement of procedural fairness referring in particular to the decision-making procedure which needs to guarantee adequate safeguards against arbitrariness.

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

6.1.1 Restrictions on right to a court - the essence test

The general principle applied for the limitation of Convention rights is that when interfering with a right in some way, the contracting state must pursue a legitimate aim, and the measure must be proportional to the aim pursued. ECtHR has consistently held that any restrictions on the right of access to a court under Article 6§1 of the Convention must not be such "as to impair the very essence of the right."However, the European Court has emphasised that the right of access is not absolute. 'The Court considers, accepting the views of the Commission and the alternative submission of the Government, that the right of access to the courts is not absolute. As this is a right which the Convention sets forth (see Articles 13, 14, 17 and 25) (art. 13, art. 14, art. 17, art. 25) without, in the narrower sense of the term, defining, there is room, apart from the bounds delimiting the very content of any right, for limitations permitted by implication (*Golder v. United Kingdom*,§38).[153]

Example: ***in "Marini v. Albania,"***[154]the Court found "…furthermore, the "right to a court" is not absolute. It is subject to limitations permitted by implication, in particular where the conditions of admissibility of an appeal are concerned, since by its very nature it calls for regulation by the State, which enjoys a certain margin of appreciation in this regard (*see, Ashingdane v. the United Kingdom*). However, these limitations must not restrict or reduce a person's access in such a way or to such an extent that the very essence of the right is impaired; lastly, such limitations will not be compatible with Article 6.1 if they do not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved (see *Levages Prestations Services v. France*)"

6.1.2 Categories of restrictions

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

[153] *See footnote 138*

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

6.1.3 Limitation periods as restriction

The European Court has recognised that limitation periods are a common feature of national legal systems and fulfil important and legitimate objectives namely 'to ensure legal certainty and finality, protect potential defendants from stale claims which might be difficult to counter and prevent the injustice which might arise if courts were required to decide upon events which took place in the distant past on the basis of evidence which might have become unreliable and incomplete because of the passage of time.[155]

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

Example: ***in "Stubbings v. United Kingdom,"***[156] the Court found that "It must be satisfied that the limitations applied do not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired. Furthermore, a limitation will not be compatible with Article 6 para.1 (art. 6-1) if it does not pursue a legitimate aim and if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved."

6.1.4 Immunity claims as restrictions

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

Example: ***in "Osman v. United Kingdom,"***[157] the Grand Chamber reviewed the national court's decision to dismiss an action for negligence against police on public policy grounds and it would observe that the application of the rule in this manner without further enquiry into the existence of competing public-interest considerations only serves to confer a blanket immunity on the police for their acts and omissions during the investigation and suppression of crime and amounts to an unjustifiable restriction on an applicant's right to have a determination on the merits of his or her claim against the police in deserving cases.

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

[155] *Application no. 22083/93; 22095/93, Judgment of 22 October 1996.*
[156] *Application no.2083/93 22095/93, Judgment (Merits), date on 22 October 1996, http://hudoc.echr.coe.int/eng?i=001-58079*
[157] *Application no. 23452/94, Judgment of 28 October*

Example: ***in "Radunović and others v. Montenegro"***[158] the state immunity was pleaded in unfair dismissal proceedings brought by employees of the US embassy in Montenegro: 'In view of the above, the Court considers that by rejecting the applicants' claim for compensation relying on State immunity without giving relevant and sufficient reasons, and notwithstanding the applicable provisions of international law, as well as sections 28 of the Civil Procedure Act and sections 47 and 55 of Resolution of Conflict of Laws and Regulations of other States Act, the Montenegrin courts failed to preserve a reasonable relationship of proportionality. They thus impaired the very essence of the applicants' right of access to a court.

Example: ***in "Vrioni v. Albania & Italy"***[159] the Court noted that "applicants complained of a denial of access to a court on account of their inability to take proceedings against a diplomatic mission, namely the Embassy of the Republic of Italy in Albania. Article 6 § 1 secures to everyone the right to have any claim relating to his civil rights and obligations brought before a court. The right of access to a court is not, however, absolute, but may be subject to limitations; these are permitted by implication since the right of access by its very nature calls for regulation by the State. The Court reiterates that generally recognized rules of international law on State immunity cannot be regarded as imposing a disproportionate restriction on the right of access to a court as embodied in Article 6 §1 of the Convention. As the right of access to a court is an inherent part of the fair-trial guarantee in that Article, so some restrictions on access must likewise be regarded as inherent, an example being those limitations generally accepted by the community of nations as part of the doctrine of State immunity. There is nothing in the present case to warrant departing from those conclusions. In these circumstances, the facts complained of do not disclose an unjustified restriction on the applicants' right of access to a court."

Example: ***in "Treska v. Albania & Italy,"***[160] the Court considers that "the grant of sovereign immunity to a State in civil proceedings pursues the legitimate aim of complying with international law to promote comity and good relations between States through the respect of another State's sovereignty... It recalls that the Convention has to be interpreted in the light of the rules set out in the Vienna Convention of 23 May 1969 on the Law of Treaties, and that Article 31 § 3 (c) of that Convention indicates that account is to be taken of "any relevant rules of international law applicable in the relations between the parties"...The Convention should so far as possible be interpreted in harmony with other rules of international law of which it forms part, including those relating to the grant of State immunity...In this connection, the Court has held that measures taken by a High Contracting Party which reflect recognised rules of international law on State immunity cannot generally be regarded as imposing a disproportionate restriction on the right of access to a court as embodied in Article 6§1. It has also taken the view that, just as the right of access to a court is an inherent part of the fair-trial guarantee in that Article, so some restrictions on access must likewise be regarded as inherent, an example being those limitations generally accepted by the community of nations as part of the doctrine of State immunity."

[158] *Applications no. 45197/13, 53000/13 and 73404/13, Judgment of 25 October 2016, http://hudoc.echr.coe.int/eng?i=001-167803*
[159] *Application no.35720/04 42832/06, Judgment date 29 September 2009,http://hudoc.echr.coe.int/eng?i=001-94452*
[160] *Application no.26937/04, Decision date 29 June 2006, http://hudoc.echr.coe.int/eng?i=001-76581*

List of questions

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

Recommended reading

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

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

The margin of appreciation doctrine was developed by the European Court originally in the context of limitations on rights but the Court has since extended the doctrine to all the substantive Articles of the Convention. The doctrine reflects the subsidiary nature of the protection afforded under the Convention to the national mechanisms for the protection of human rights (the doctrine of subsidiarity). The margin of appreciation and subsidiarity doctrines were explicitly endorsed in the 2012 Brighton Declaration on the Future of the European Court of Human Rights.[161] Protocol No.15 of the Convention (not yet in force) adds a new preamble to the Convention making specific reference to the margin of appreciation enjoyed by the Member States 'subject to the supervisory jurisdiction' of the European Court.[162]

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

[161] http://www.echr.coe.int/Documents/2012_Brighton_FinalDeclaration_ENG.pdf
[162] http://www.echr. coe.int/Documents/Protocol_15_ENG.pdf

Example: ***in "Handyside v. United Kingdom,"***[163]the plenary Court stated, "This margin [of appreciation] is given both to the domestic legislator ("prescribed by law") and to the bodies, judicial amongst others, that are called upon to interpret and apply the laws in force(§48). In*Handyside*the plenary Court approved the restriction on free speech under Article 10§2 of the Convention based on the margin of appreciation doctrine. The amount of deference accorded to the State depends on the subject matter of the case (*Rasmussen v. Denmark,*[164]*Sunday Times v. United Kingdom (No.1).*[165]

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

The autonomous interpretation by the European Court of key Article 6§1 concepts substantially limits the margin of appreciation for states under Article 6§1.However, the ECtHR recognizes that the positive obligation on a State to provide an effective right of access to the courts calls for regulations by the state which may vary according to national priorities and resources. In this context, the states enjoy a margin of appreciation as limitations of the right of access are permitted by implication and in accordance with the very essence requirement. The Grand Chamber has held that the right to access to courts "may be subject to legitimate restrictions such as statutory limitations period, security for costs orders, regulations concerning minors and persons of unsound mind (*Z and others v. The United Kingdom*)."[166]

In this connection, the European Court has stated that "the contracting States have a greater latitude when dealing with civil cases concerning civil rights and obligations than they have when dealing with criminal cases" (*Dombo Beheer B.V v. The Netherlands*).[167]That is due to the fact that the second and third paragraphs of Article 6§1of the Convention contain detailed provisions for criminal cases which have no equivalent with civil cases.

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

Example: ***in "Van Mechelen and Others v. the Netherlands,"***[168]the Court reiterates that the admissibility of evidence is primarily a matter for regulation by national law and as a general rule it is for the national courts to assess the evidence before them. The Court's task under the Convention is not to give a ruling as to whether statements of witnesses were properly admitted as evidence, but rather to ascertain whether the proceedings as a whole, including the way in which evidence was taken, were fair(§50).

[163]*Application no.5493/72, Judgment of 7 December 1976, http://hudoc.echr.coe.int/eng?i=001-57499*
[164] *Application No. 8777/79, Judgment of 28 November 1984,http://hudoc.echr.coe.int/eng?i=001-72015*
[165] *Application No. 6538/74, Judgment of 26 April 1979, http://hudoc.echr.coe.int/eng?i=001-57584*
[166] *Application no. 29392/95, Judgment of 10 May 2001, http://hudoc.echr.coe.int/eng?i=001-59455*
[167] *Application no. 14448/88, Judgment of 27 October 1993, http://hudoc.echr.coe.int/eng?i=001-57850*
[168]*Application no.21363/93 21364/93 21427/93, Judgment (Merits), date on 23April 1997, http://hudoc.echr.coe.int/eng?i=001-58030*

Example: *in "Radunović v. Montenegro,"*[169] the Court maintained that 'However, the right of access to a court secured by Article 6 / 1 is not absolute, but may be subject to limitations; these are permitted by implication since the right of access by its very nature calls for regulation by the State. In this respect, the Contracting States enjoy a certain margin of appreciation, although the final decision as to the observance of the Convention's requirements rests with the Court. It must be satisfied that the limitations applied do not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired. Furthermore, a limitation will not be compatible with Article 6 / 1 if it does not pursue a legitimate aim and if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved(§62).

Example: *in "Garzičić v. Montenegro,"*[170] the Court held "the right to a court, however, is not absolute; it is subject to limitations permitted by implication, in particular where the "conditions of admissibility of an appeal are concerned" since by its very nature it calls for regulation by a State, which enjoys a certain margin of appreciation in this regard. Nonetheless, these limitations must not restrict or reduce the individual's access in such a way or to such an extent as to impair the very essence of the right. Moreover, they will only be compatible with Article 6§1 if they are in accordance with the relevant domestic legislation, pursue a legitimate aim and there is a reasonable relationship of proportionality between the means employed and the aim pursued…"

Example: *in "Rramadhi v. Albania,"*[171] the Court reiterates that States have a wide margin of appreciation to determine what is in the public interest, especially where compensation for nationalisation or expropriation is concerned, as the national legislature has a wide discretion in implementing social and economic policies. However, that margin of appreciation is not unlimited and its exercise is subject to review by the Convention institutions (see Lithgow and Others v. the United Kingdom, judgment)."

Example: *in "Beshiri v. Albania,"*[172] the Court held that "Article 1 of Protocol No.1 cannot be interpreted as imposing any general obligation on the Contracting States to return property which was transferred to them before they ratified the Convention. Nor does Article 1 of Protocol No. 1 impose any restrictions on the Contracting States' freedom to determine the scope of property restitution and to choose the conditions under which they agree to restore property rights of former owners (see Jantner v. Slovakia).In particular, the Contracting States enjoy a wide margin of appreciation with regard to the exclusion of certain categories of former owners from such entitlement. Where categories of owners are excluded in this way, their claims for restitution cannot provide the basis for a "legitimate expectation" attracting the protection of Article 1 of Protocol No.1.On the other hand, once a Contracting State, having ratified the Convention including Protocol No.1, enacts legislation providing for the full or partial restoration of property confiscated under a previous regime, such legislation may be regarded as generating a new property right protected by Article 1 of Protocol No. 1 for persons satisfying the requirements for entitlement. The same may apply in respect of arrangements for restitution or compensation established under pre-ratification legislation if such legislation remained in force after the Contracting State's ratification of Protocol No.1 (see Broniowski v. Poland)."

[169] *Applications nos. 45197/13, 53000/13 and 73404/13 , Judgment of 25 October 2016, http://hudoc.echr.coe.int/eng?i=001-167803*
[170] *Application no. 17931/07, Judgment of 21 September 2010,http://hudoc.echr.coe.int/eng?i=001-100500*
[171] *Application no.38222/02,ECtHR Judgment (Merits and Just Satisfaction), date 13 November 2007, http://hudoc.echr.coe.int/eng?i=001-83249*
[172] *Application no.7352/03, Judgment date 22 August 2006*

Example: ***in "Bajrami v. Albania,"***[173] the Court reiterates that the essential object of Article 8 is to protect the individual against arbitrary action by public authorities. There are in addition positive obligations inherent in effective "respect" for family life. In both contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole; and in both contexts the State enjoys a certain margin of appreciation."

Example: ***in "Maria Athanasius case cited in Manushaqe Puto v. Albania,"***[174] the Court argued that: "Furthermore, any interference with the enjoyment of a right or freedom recognized by the Convention must pursue a legitimate aim. By the same token, in cases involving a positive duty, there must be a legitimate justification for the State's inaction. The principle of a "fair balance" inherent in Article 1 of Protocol No. 1 itself presupposes the existence of a general interest of the community. Because of their direct knowledge of their society and its needs, the national authorities are in principle better placed than the international judge to appreciate what is "in the public interest". Under the system of protection established by the Convention, it is thus for the national authorities to make the initial assessment as to the existence of a problem of public concern warranting measures to be applied in the sphere of the exercise of the right of property, including deprivation and restitution of property. Here, as in other fields to which the safeguards of the Convention extend, the national authorities accordingly enjoy a certain margin of appreciation. Furthermore, the notion of "public interest" is necessarily extensive. In particular, the decision to enact laws expropriating property or affording publicly funded compensation for expropriated property will commonly involve consideration of political, economic and social issues. Finding it natural that the margin of appreciation available to the legislature in implementing social and economic policies should be a wide one, the Court has declared that it will respect the legislature's judgment as to what is "in the public interest" unless that judgment is manifestly without reasonable foundation (…)."

List of questions

1. Discuss the "margin of appreciation" doctrine
2. How was applied the margin of appreciation doctrine in different cases?

Recommended reading

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

[173] *See footnote 32*
[174] *See footnote 63*

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

8.1 The right to appeal

Example: ***in "Garzičić v. Montenegro,"***[175] the European Court, in the context of the national regulation of rights of appeal, set out clearly the criteria it will apply in adjudicating on the compatibility of procedural restrictions with the right of access to a court guaranteed under Article 6§1: "Article 6 of the Convention does not compel the Contracting States to set up courts of appeal or of cassation. Where such courts do exist, the guarantees of Article 6 must be complied with, for instance in that it guarantees to litigants an effective right of access to the courts for the determination of their "civil rights and obligations." The "right to a court", however, is not absolute; it is subject to limitations permitted by implication, in particular where the "conditions of admissibility of an appeal are concerned" since by its very nature it calls for regulation by a State, which enjoys a certain margin of appreciation in this regard ... Nonetheless, these limitations must not restrict or reduce the individual's access in such a way or to such an extent as to impair the very essence of the right. Moreover, they will only be compatible with Article 6§1 if they are in accordance with the relevant domestic legislation, pursue a legitimate aim and there is a reasonable relationship of proportionality between the means employed and the aim pursued.

8.2 Equality of arms

The principle of equality of arms requires that each party is provided with an equal opportunity to prepare and present their case in court. The principle forms part of the general obligation on a State under Article 6 to ensure a person has a fair trial. The principle overlaps with other of the obligations of fairness such as the right to adversarial proceedings that guarantees a party the right to access and comment on relevant evidence and material. There must be sufficient procedural safeguards appropriate to the nature of the case and corresponding to what is at stake between the parties.[176] The principle applies not only to the rules of court procedure but also to institutional arrangements, such as the role of the advocate general and the public prosecutor. The principle of equality of arms applies both to criminal and civil proceedings. In examining if the principle has been respected the European Court will examine the fairness of the proceedings as a whole.

Example: ***in "Dombo Beheer BV v. Netherlands,"***[177] the Court held that"The requirements inherent in the concept of "fair hearing" are not necessarily the same in cases concerning the determination of civil rights and obligations as they are in cases concerning the determination of a criminal charge. This is borne out by the absence of detailed provisions such as paragraphs 2 and 3 of Article 6 (art. 6-2, art. 6-3) applying to cases of the former category. Thus, although these provisions have certain relevance outside the strict confines of criminal law ... the Contracting States have greater latitude when dealing with civil cases concerning civil rights and obligations than they have when dealing with criminal cases.Nevertheless, certain principles concerning the notion of a "fair hearing" in cases concerning civil rights and obligations emerge from

[175] *Application no. 17931/07, Judgment of 21 September 2010, http://hudoc.echr.coe.int/eng?i=001-100500*
[176] *Article 6: Self-learning course, Human Rights Education for Legal Professionals, Council of Europe (2014).*
[177] *Application no. 14448/88, Judgment of 27 October 1993,http://hudoc.echr.coe.int/eng?i=001-57850*

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

Example: ***in "Perić v. Croatia,"***[178] the Court maintained that "Nevertheless, certain principles concerning the notion of a fair hearing in cases concerning civil rights and obligations emerge from the Court's case-law. Most significantly for the present case, it is clear that the requirement of equality of arms, in the sense of a fair balance between the parties, applies in principle to such cases as well as to criminal cases ... In that connection the Court considers that as regards litigation involving opposing private interests, equality of arms implies that each party must be afforded a reasonable opportunity to present his case - including his evidence - under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent. It is left to the national authorities to ensure in each individual case that the requirements of a fair hearing are met."

Example: ***in "V v. UK"*** **(Grand Chamber),**[179] the Court recalls that Article 6§1 guarantees certain rights in respect of the "determination of ... any criminal charge ...". In criminal matters, it is clear that Article 6§1 covers the whole of the proceedings in issue, including appeal proceedings and the determination of sentence.

Example: ***in "Caka v. Albania"*** the Court argued that "the evidence must normally be produced at a public hearing, in the presence of the accused, with a view to adversarial argument. There are exceptions to this principle, but they must not infringe the rights of the defence. As a general rule, paragraphs 1 and 3(d) of Article 6 require that the defendant be given an adequate and proper opportunity to challenge and question a witness against him, either when he makes his statements or at a later stage of the proceedings. It is normally for the national courts to decide whether it is necessary or advisable to hear a particular witness. Article 6§3(d) does not require the attendance and examination of every witness on the accused's behalf: its essential aim, as indicated by the words "under the same conditions", is a full "equality of arms" in the matter. Under certain circumstances it may be necessary for the courts to have recourse to statements made during the criminal investigation stage. If the accused had sufficient and adequate opportunity to challenge such statements, at the time they were taken or at a later stage of the proceedings, their use does not run counter to the guarantees of Article 6§1 and 3 (d). The rights of the defence are restricted to an extent that is incompatible with the requirements of Article 6 if the conviction is based solely, or in a decisive manner, on the depositions of a witness whom the accused has had no opportunity to examine or to have examined either during the investigation or at trial."[180]

[178] *Application no. 34499/06, Judgment of 27 June 2008, http://hudoc.echr.coe.int/eng?i=001-85583*
[179] *Application no. 24888/94, Judgment of 16 December 1999.*
[180] *Application no.44023/02, Judgment date08 December 2009*

Case study "Cani v. Albania"[181]

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

1st instance proceedings: following a number of remittals of the case against the applicant and two other co-defendants, on 4 March 2004 Berat District Court ("the District Court") convicted the applicant of several criminal charges committed in collusion with the co-defendants.[182] The District Court sentenced the applicant to a cumulative sentence of life imprisonment. During the District Court proceedings the applicant was mainly represented by court-appointed lawyers. In the final stage of those proceedings, the applicant appointed counsel of his own choosing on the strength of a power of attorney signed on 18 February 2004.

Appeal proceedings: On 12 March 2004 the applicant lodged an appeal with the Vlora Court of Appeal ("the Court of Appeal"). Although he admitted having committed the criminal offences, he challenged the penalty imposed. He argued that the trial court had failed to take account of some mitigating factors in his favor such as the remorse he had shown after committing the crime and his surrender to the authorities, his family's difficult financial situation and the fact that he had a minor child, the lack of any previous criminal records and his low educational level. During 4 may 2004 until 18 June 2004, the court postponed the hearings several times in order to ensure the applicant attendance.[183]The applicant was not present at the hearings, but his lawyer did attend. In the end, the Court of Appeal decided to proceed with the hearing in the applicant's absence as he was represented by his lawyer, sentencing the applicant to a cumulative term of twenty-five years' imprisonment, reduced by one-third as a result of the use of the summary procedure.

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

[181] *Application no.11006/06,Judgment dateo6 March 2012,http://hudoc.echr.coe.int/eng?i=001-109359*

182The District Court found that the applicant had acted in aggravating circumstances in that he had been the perpetrator of one of the criminal offences, which had led to the death of a person, whereas the co-defendants had assisted in the commission of that offence. As regards the other criminal offences, the District Court found each co-defendant guilty as charged.

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

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

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

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

List of questions

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

Recommended reading

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

Section III- Re-opening of criminal proceedings

Learning Objectives:

By the end of this session participants will be able to:

- Analyse the re-opening of proceedings as a form of *restitutio in integrum*
- Record the practical application of the principle of re-opening by the ECtHR
- Differentiate the re-opening of proceedings from other forms of *restitutio in integrum*
- Compare the Albanian legislation concerning re-opening of proceedings before and after August 1, 2017
- Recall the main judgments rendered against Albania where violation of article 6 ECHR
- Assess the response of the national authorities in such cases
- Review the situation of CoE Member States in relation to re-opening
- Identify the critical issues arising from the re-opening of proceedings
- Solve conflicts arising in cases re-tried at national level following re-opening

Resources

- Jeremy McBride, Human Rights and criminal procedure, Council of Europe publishing available at http://www.coe.int/en/web/national-implementation) (English only)
- Elisabeth Lambert Abdelgawad, The execution of judgments of the European Court
- of Human Rights, 2nd edition, Council of Europe Publishing, available at http://www.echr.coe.int/LibraryDocs/DG2/HRFILES/DG2-EN-HRFILES-19(2008).pdf(Englis only)
- Guide to article 6 ECHR (Criminal limb) available at http://www.echr.coe.int/Documents/Guide_Art_6_criminal_ENG.pdf (English only)
- The following websites contain databases of ECtHR jurisprudence translated into Albanian http://www.magjistratura.edu.al/?fq=info&metod=shfaqkat&katID=id_vendime
- https://www.gov.uk/government/world-location-news/the-european-human-rights-database-for-south-east-europe
- http://www.avokaturashtetit.gov.al/projekte-2/perkthime-dhe-botime-te-vendimeve-te-perzgjedhura-te-gjykates-evropiane-te-te-drejtave-te-njeriut-te-vitit-2015

1. Reopening of proceedings as a form of *restitutio in integrum*

As already mentioned, according to Article 46 § 1 ECHR *"the High Contracting Parties undertake to abide by the final judgments of the Court in any case to which they are parties "*. This provision has been interpreted meaning that any judgment by the ECtHR condemning a State entails for that State three types of obligations:

a) to pay the just satisfaction awarded by the Court under Article 41 ECHR;
b) to ensure that the violation has ceased and that the consequences have been erased to the extent possible; and
c) to avoid future violations similar to those established in the judgment.

As mentioned previously, the obligations arising from the Court's judgments fall under three main categories: just satisfaction, individual measures and general measures. The ECHR does not contain any details as to how to comply with a judgment delivered by the Court. Indeed, the latter recalls in its jurisprudence that the findings of violations are in principle declaratory; it also recognizes the freedom of States to choose the means to be used in their domestic legal order to fulfil their obligations under Article 46. In other words, States are subject only to an obligation of result and not of conduct. Obviously this freedom in the choice of means is not unlimited, first of all since it is exercised under the supervision of the Committee of Ministers, to which Article 46 § 2 of the Convention gives the power to supervise the execution of judgments of the Court and to assess the measures taken by the respondent party. Secondly, the Court is not entirely absent from the supervision of the execution of its judgments. For example, in recent years, the Court has insisted that the means used should be compatible with the conclusions contained in its judgments and takes a more and more frequent position on the most effective means to achieve implementation. It thus indicates the general and individual measures of execution that States could adopt. Amongst others, the reopening of the internal proceedings occupies a prominent place among the measures designated for the respondent state.

The reopening of proceedings represents a manifestation of the classical principle of *restitution in integrum,* which aims at re-establishing the situation as it was before the violation.

Example: in *Papamichalopoulos and others v. Greece*[184] the Court, for the first time, encouraged the State to return a property, observing that "the return of the land in issue, an area of 104,018 sq. m - as defined in 1983 by the Athens second Expropriation Board - would put the applicants as far as possible in a situation equivalent to the one in which they would have been if there had not been a breach of Article 1 of Protocol No. 1 (P1-1)". Only in the absence of such restitution the State would need to pay pecuniary compensation. By offering this option to the State, the Court credited the idea that restitution in kind is an obligation which exceeds and complements the just satisfaction.

[184] *Papamichalopoulos and others v. Greece, application no. 14556/89, 31 October 1995, para. 38, summary in Albanian available at http://hudoc.echr.coe.int/eng#{"fulltext":["Papamichalopoulos%20and%20others%20v.%20Greece"],"documentcollectionid2":["GRANDCHAMBER","CHAMBER"]}*

The pre-eminence of restitution in kind on compensation is indeed evident in the protection of property. However, restitution in kind may be equally or even more preferable in cases relating to article 6 ECHR, when a violation of fairness of proceedings was established. Thus, for example, in cases of non-execution of internal decisions, the Court very often uses its power to indicate individual measures to request the respondent State to enforce the decision at stake. In the even more sensitive area of national decisions which were found to breach the ECRH, the re-examination of the case or the reopening of the internal judicial procedure often proves to be the most effective, or even the only way, to achieve *restitutio in integrum*.

Example: in *Gençel v. Turkey*[185] the Court stated "when the Court finds that the conviction of an applicant was imposed by a court which was not independent and impartial tribunal within the meaning of Article 6 § 1, it considers that in principle the most appropriate redress would be to have the applicant retried in due time by an independent and impartial tribunal. The re-opening clause was repeated in many cases before being slightly modified by the Grand Chamber judgments in the cases of Öcalan v. Turkey[186] and Sejdovic v. Italy[187] (issued in 2005 and 2006, respectively, concerning the independence and the impartiality of state security courts in Turkey and convictions in absentia in Italy).

Since those judgments, the reopening clause has been used systematically by the Court in similar cases, but also in other criminal cases. Indeed, there are several types of violation of article 6 for which the clause may be applied. A few examples would be:

a) infringement of the right of access to a Court;
b) the right to participate in the trial or to be heard by the court;
c) violation of the principles of adversarial and equality of arms;
d) infringement of the right to examine witnesses for the prosecution or for the defence;
e) infringement of the right of the accused to be informed of the nature of the charge against him, and the right to dispose of the time and facilities necessary for the preparation of his defence;
f) the right to have the assistance of a lawyer;
g) interference with the right not to have information collected as a result of entrapment used in criminal proceedings;
h) interference with the right that statements obtained under torture be used.

If cases of violation of Article 6 are *par excellence* the area in which the reopening of proceedings may be the most appropriate remedy, the Court extends the scope of this clause in other categories of violation of the Convention. For example, the reopening clause has also been inserted in cases of violation of articles 2 (Abuyeva and Others v.

[185] *Gençel v. Turkey , application no. 53431/99, 23 October 2003, para. 27, Albanian version available at http://hudoc.echr.coe.int/eng?i=001-115757*
[186] *Öcalan v. Turkey, application no. 46221/99 [GC], 12 May 2005, Albanian summary available at http://hudoc.echr.coe.int/eng#{"fulltext":["ocalan%20v.%20Turkey"],"languageisocode":["ALB"],"documentcollectionid2":["GRANDCHAMBER","CHAMBER"]}*
[187] *Sejdovic v. Italy, application no. 56581/00 [GC], 1 March 2006, available at http://hudoc.echr.coe.int/eng?i=003-1598935-1674030*

Russia)[188], 7 (Dragotoniu and Militaru-Pidhorni v. Romania[189]) or 8 ECHR (Paulik v. Slovakia[190], Ageyevy v. Russia[191]).

1.1 Use of the reopening clause in the practice of the ECtHR

In most cases, the reopening clause for violations of article 6 ECHR is inserted in the part relating to article 41 ECHR on just satisfaction. This provision indicates "*If the Court find that there has been a violation of the Convention or the Protocols thereto, and it the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.*" In concrete terms, Article 41 states that the payment of just satisfaction arises only in cases where the *restitution in integrum* is not possible. It therefore seems logical that, when possible, the Court favours the reopening of proceedings as a measure which replaces or supplements the just satisfaction. In this logic, the Court uses the reopening clause by granting at the same time just a sum for moral damage or uses the reopening clause but refuses to grant just satisfaction on the ground that the finding of a violation of article 6 § 1 constitutes in itself (Sejdovic v. Italy[192]). The Court may also propose an alternative to the State: either uphold the applicant's request to be retried or to pay compensation for non-pecuniary damage (Claes and Others v. Belgium[193]). The Court may also reserve the application of article 41 in order to verify, within the scope of its competence under that article, whether or not the measures adopted by the respondent State to enforce the conviction main.

Example: *Barberà, Messegué and Jabardo v. Spain*[194] of 1994 offers a good example of supervision by the Court. In this case, concerning fairness of criminal proceedings, the Court had found a violation of article 6 § 1 and reserved the question of the granting of just satisfaction. When it resumed its consideration of the item, it considered that the measures taken in the meantime by the authorities (reopening of internal judicial proceedings, release and acquittal of the applicants), even though considerable, could not constitute in themselves *restitutio in integrum* or full compensation for damage arising from the detention suffered by the applicants as a direct consequence of criminal proceedings conducted in violation of the ECHR. It therefore also awarded the applicants financial compensation.

In addition, the reopening clause is often inserted with a reference to the existence under national legislation of review mechanisms, for example in cases against Romania

[188] *Abuyeva and Others v. Russia, application no. 27065/05, 2 December 2010, available at http://hudoc.echr.coe.int/eng?i=002-700*
[189] *Dragotoniu and Militaru-Pidhorni v. Romania, applications no. 77193/01 and 77196/01, 24 May 2007, available at http://hudoc.echr.coe.int/eng?i=002-2719*
[190] *Paulik v. Slovakia, application no. 10699/05, 10 October 2006, available at http://hudoc.echr.coe.int/eng?i=002-3115*
[191] *Ageyevy v. Russia, application no. 7075/10, 18 April 2013, available at http://hudoc.echr.coe.int/eng?i=002-7435*
[192] *Cit.*
[193] *Claes and Others v. Belgium, applications nos. 46825/99, 49716/99 49104/99 47132/99, 47502/99, 49010/99 and 49195/99, 02 June 2005, available at http://hudoc.echr.coe.int/eng?i=001-69230 (French only).*
[194] *Barberà, Messegué and Jabardo v. Spain, applications no. 0588/83, 10589/83 and 10590/83, 13/06/1994, available at http://hudoc.echr.coe.int/eng?i=002-10457*

(Flueraş[195], Nițulescu[196]), or Russia (Vladimir Romanov[197], Pishchalnikov[198]). There are also Cases where the Court does not insert a reopening clause but merely notes the existence of an internal mechanism of reopening (Nikolitsas v. Greece[199]). Finally, the Court sometimes takes the position under Article 46 of the Convention to insert the reopening clause. This approach is in line with the approach adopted by the Grand Chamber in Öcalan v. Turkeyand Sejdovic v. Italy[200].

Another question that arises is whether this clause should be inserted in the judgments or only in the statement of reasons relating to articles 41 or 46 ECHR. First, some judgments had included this clause also in their operative provisions (Claes and Others v. Belgium[201], Lungoci c. Romania[202]). However, this practice was not widely followed. Then, in its judgment in 2008 in the case of Salduz v. Turkey[203], the Grand Chamber opted for the traditional approach and merely inserted the reopening clause into the statement of reasons relating to article 41 ECHR. It is however interesting to note that in their concurring opinion annexed to the judgment, four Judges considered that this clause should have been resumed also in the operative part of the judgment on the ground that the Court should urge the internal resort to a reopening procedure, provided, of course, that the applicant so wishes.

Since the Salduz judgment, the usual practice of the Grand Chamber and of the various sections is that of including the reopening clause only in the statement of reasons for the judgment (Cudak v. Lithuania [GC][204], Taxquet v. Belgium [GC][205], Laska and Lika v. Albania[206] etc.). However, separate opinions continue to be expressed on this point, arguing for the insertion of the reopening clause in the operative part of the judgments. Some of the Judges continue to believe that is the operative part of the judgment which is binding on the parties for the purposes of article 46 § 1 and it is therefore not immaterial from a legal point of view that certain considerations of Court also appear in the operative part. In any event, the Court reserves the right to adapt its practice when justified by the circumstances of each case and the nature of the violation established.

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[195] *Flueraş v. Romania, application no. 17520/04, 09/04/2013 (in French only), available at http://hudoc.echr.coe.int/eng?i=001-118649*

[196] *Nițulescu v. Romania, application no. 16184/06, 22/09/2015, http://hudoc.echr.coe.int/eng?i=001-157368.*

[197] *Vladimir Romanov v. Russia, application no. 41461/02, 24/07/2008, available at http://hudoc.echr.coe.int/eng?i=003-2426171-2629838*

[198] *Pishchalnikov v. Russia, application no. 7025/04, 24/09/2009, available at http://hudoc.echr.coe.int/eng?i=003-2870722-3150661*

[199] *Nikolitsas v. Greece, application no. 63117/09, 03/07/2014, available at http://hudoc.echr.coe.int/eng?i=001-145232 (French only).*

[200] *Cit.*

[201] *Cit.*

[202] *Lungoci c. Romania, application no. 62710/00, 26/01/2006, available at http://hudoc.echr.coe.int/eng?i=001-72162 (French only).*

[203] *Salduz v. Turkey, application no. 36391/02, [GC], 27/11/2008, available at http://hudoc.echr.coe.int/eng?i=002-1843*

[204] *Cudak v. Lithuania, application no. 15869/02, [GC], 23/03/2010, available at http://hudoc.echr.coe.int/eng?i=002-1027*

[205] *Taxquet v. Belgium, application no. 926/05, [GC], 16/11/2010, available at http://hudoc.echr.coe.int/eng?i=001-115758 (Albanian version)*

[206] *Laska and Lika v. Albania, applications no. 12315/04 and 17605/04, 20/04/2010, available at http://hudoc.echr.coe.int/eng?i=002-980*

Example: in *Scoppola v. Italy(no. 2)*[207] the Grand Chamber was not satisfied with asking the Respondent State to resume trial and both in the body of its judgment. It thus considered that "the retrospective application to the applicant's detriment of the provisions of Legislative Decree no. 341 of 2000 infringed the rights guaranteed by Articles 6 and 7 of the Convention. In particular, after a trial that the Court has found to have been unfair (see paragraph 145 above), the applicant received a sentence (life imprisonment) heavier than the maximum sentence to which he was liable at the time when he requested and was granted the right to be tried under the summary procedure (thirty years' imprisonment). Having regard to the particular circumstances of the case and the urgent need to put an end to the breach of Articles 6 and 7 of the Convention, the Court therefore considers that the respondent State is responsible for ensuring that the applicant's sentence of life imprisonment is replaced by a penalty consistent with the principles set out in the present judgment, which is a sentence not exceeding thirty years' imprisonment."

1.2 Oversight of the application of the reopening clause

Once a reopening clause has been inserted in a judgment, does the Court have a say concerning the proper execution of that judgment? Apart from the possibility mentioned earlier to decide separately under article 41 ECHR in order to verify that the violation found was fully redressed, the Court exercises a policy of self-restraint and voluntarily does not participate to the dialogue between the respondent State and the CM. The Court has always pointed out that it has not jurisdiction to verify whether a Contracting Party has complied with the obligations arising by its judgments. It has thus declared inadmissible *ratione materiae* of the complaints relating to non-performance by the State of its judgments (Lyons v. United Kingdom[208] (dec.)). However, the role played by the Committee of Ministers in the execution of judgments does not mean that the measures taken by a respondent State to remedy the breach is not able to raise a new problem, which is not settled by the judgment and be the subject of a new application which the Court might be asked to examine (Verein gegen Tierfabriken Schweiz v. Switzerland no. 2[209], Hakkar v. France (dec.)[210]).

2. Alternatives to reopening

If proceedings are not reopened, a range of individual measures may offer redress in criminal cases. These may include an agreement not to enforce the domestic measure at issue, including a judgment such as in the case of Muyldermans v. Belgium[211], Resolution DH (96) 18 of 9.02.1996, where the enforcement of the Audit Court

[207] *Scoppola v. Italy, application no. 10249/03, [GC] 17/09/2009, paras. 153 and 154, available at http://hudoc.echr.coe.int/eng?i=003-2852538-3141908*
[208] *Lyons v. United Kingdom, application no. 15227/03, 08/07/2003 (dec.), available at http://hudoc.echr.coe.int/eng?i=001-23303*
[209] *Verein gegen Tierfabriken Schweiz v. Switzerland (no. 2), application no. 32772/02, [GC], 30/06/2009, available at http://hudoc.echr.coe.int/eng?i=001-93265*
[210] *Hakkar v. France, application no. 43580/04, dec. 07/04/2009 (French only), available at http://hudoc.echr.coe.int/eng?i=001-92442*
[211] *Muyldermans v. Belgium, application no. 12217/86, 23.10.1991, available at http://hudoc.exec.coe.int/eng?i=001-55816*

judgment at issue was waived under a subsequent law. In some states, rectification of criminal records does not require a retrial: for instance, Resolution ResDH (2006) 79[212] of 20 December 2006, on 32 judgments against Turkey in 1999, 2000, 2002, 2004 and 2005 concerning freedom of expression following convictions under former Article 8 of the Law against Terrorism No. 3713, refers to the following individual measures: ex officio removal of the convictions from the judicial records and statistics of the Ministry of Justice and automatic lifting of restrictions on applicants' civil and political rights.

In some countries the legislation also has special provisions, such as the possibility of suspending enforcement of a sentence. Mention should also be made of acts of clemency and reduction of sentences, with procedures varying considerably from one State to another. In the past, pardons have in fact constituted an adequate measure of relief for a number of applicants and in cases where reopening of proceedings is not possible, as in the Belgian cases concerning infringements of the applicants' right to defend themselves through legal assistance of their own choosing at different stages of criminal proceedings.[213] Another possibility is the unconditional release of the applicant[214] or, failing that, release on parole.[215] "Positive" action, which is more noteworthy than that described above since it entails the adoption of new provisions rather than the annulment or repeal of the contested measure, is also less widespread in practice.

2.1 Are acts of clemency sufficient to provide for *restitution in integrum?*

Following the Stefanov v. Bulgaria case[216], the Government promised to adopt a general amnesty; Jehovah's witnesses with criminal convictions for having refused to do their military service on the grounds of conscientious objection would thus be exempted from criminal responsibility and discharged, since they would no longer have committed illegal acts. These acts of clemency, however, may entail some awkward consequences. As a measure wholly or partly exempting convicted persons from serving their sentences, a pardon, in most European systems, does not abolish the other effects of a criminal conviction, such as ancillary penalties and entry of the conviction in the criminal record. It does not call into question the individual's criminal guilt. Furthermore, a pardon is often regarded as a sovereign favour; yet, in the case

[212] *Available at http://hudoc.exec.coe.int/eng?i=004-5538*

[213] *Cases of Van Geyseghem (judgment of 21 January 1999), Goedhart (judgment of 20 March 2001), Stroek L. and C. (judgment of 20 March 2001) and Pronk (judgment of 8 July 2004) available at http://hudoc.exec.coe.int/eng?i=001-97983. The Belgian authorities partially pardoned Mr Stroek and Mr Goedhart, partly erasing the consequences of their convictions, declaring void the international arrest warrants taken out against them; the sentence imposed on Ms Van Geyseghem was time-barred (see CM/ Del/OJ/DH (2005) 940vol1 Public, 28 October 2005).*

[214] *ResDH (2006) 53 of 2 November 2006, available at http://hudoc.echr.coe.int/eng?i=001-78117 concerning a judgment against Georgia in 2004 (Grand Chamber): in this case, release occurred the day after the Court's judgment (pursuant to a domestic decision at the same time).*

[215] *ResDH (2006) 56 of 2 November 2006, available at https://rm.coe.int/168059ddae concerning two Committee of Ministers decisions of 1999 and a judgment against the United Kingdom in 2002 relating to aliens' unlawful detention, lack of compensation, and violation of the right to a fair trial. One of the applicants was released unconditionally, while the other was released on parole.*

216Stefanov v. Bulgaria case of 3 May 2001, Resolution ResDH (2004) 32 of 15 June 2004, available at http:// hudoc.exec.coe.int/eng?i=001-56371

with which we are concerned, the victim is entitled to *restitutio in integrum*. A pardon and reopening of proceedings do not seem to have the qualities for being deemed equivalent in terms of reparation.[217]

1.2. Practical exercise

Instructions for trainers

Distribute 1 copy of the case-study to participants. Divide participants into 4 groups and ask them to go through the case-study and answer the questions. Provide flipchart papers and markers so as to allow groups to summarize findings for each answer. After 10-15 minutes, reconvene groups in plenary and ask representatives of the first 2 groups to present their findings related to question 1. After plenary discussion proceed with remaining groups and question 2. Use the key solution to lead the discussion and/or debrief.

Alternatively, you can use the scenario to organize a mini-moot court or debate exercise, dividing participants into groups and asking them to sustain the position of the Government and of the applicant respectively.

Case study no. 1

Darko was accused of rape. The District Court examined the parties' statements, witnesses' declarations and medical reports. It found, in particular, that the applicant had not had sexual intercourse with the victim without the latter's consent, since on numerous occasions the victim could have refused intercourse with the applicant and could have alerted a police patrol which had stopped them on the way to the applicant's apartment. The victim could also have alerted the applicant's flatmates, who had been in the apartment during the alleged rape, as well as other persons. The District Court also found that the medical reports did not provide a clear answer to the question as to whether the applicant had had intercourse with the victim. The prosecutor and the victim appealed. Their appeals merely stated that the verdict of the District Court was unlawful and unreasoned.

The Regional Court upheld their appeal, quashed the judgment of the District Court and found the applicant guilty of rape. The Regional Court found that the victim's statements, the witnesses' declarations and the medical reports indicated that there had been forced intercourse with the victim. It found that the victim had been depressed and forcibly taken to the applicant's apartment. The court sentenced him to five years' imprisonment. However, the Regional Court applied an amnesty law and relieved the applicant from the obligation to serve his sentence. The applicant lodged an appeal in cassation.

[217] *This was clearly accepted by the ICJ. in the case concerning Avena and other Mexican Nationals (Mexico v. United States of America). Admittedly, in the law of English-speaking countries, the concept of a pardon is broader, encompassing an amnesty, and a pardon may be granted before a conviction has taken place. Moreover, in Italy and Germany in particular, pardon is granted ex officio; only certain states such as Belgium, Spain and Switzerland acknowledge a personal right to apply for pardon.*

By a final judgment of 30 October 2016, relying on the Code of Criminal Procedure (CCP) in force at the time the Court of Appeal upheld the applicant's appeal in cassation and quashed the judgment of the Regional Court. The Court of Appeal found that the Regional Court had not objectively assessed the evidence and had taken into consideration only the victim's statements, which appeared to be contradictory and in conflict with other evidence and the circumstances of the case. It also concluded that the victim's statements that she had been forcibly brought to the applicant's apartment were contradicted by the witnesses' declarations. The Court of Appeal concluded that the District Court had objectively assessed the evidence and reached the conclusion that the applicant was innocent. It also stated that any doubts should be interpreted in favour of the accused. The Court of Appeal upheld the judgment of the District Court.

On 20 December 2016 the Deputy Prosecutor General lodged with the Supreme Court of Justice a request for annulment of the judgments of the District Court and the Court of Appeal. He argued that the District Court and the Court of Appeal had unlawfully assessed the evidence and asked the Supreme Court to uphold the judgment of the Regional Court.

On 26 February 2017 the Supreme Court of Justice upheld the Deputy Prosecutor General's request for annulment, quashed the above-mentioned judgments and upheld the judgment of the Regional Court. The Supreme Court gave the same reasons for finding the applicant guilty of committing the rape as the Regional Court had used in its judgment.

Applicable law:

The following are relevant extracts from the Code of Criminal Procedure

Section 335/5 Judgment of the cassation instance

When ruling on an appeal in cassation, the cassation instance shall provide one of the following judgments:

...

2) it shall uphold the appeal in cassation and quash the appealed judgment and:

a) maintain the judgment of the first-instance court, if the appeal had been wrongly upheld.

Section 369/2 Grounds for a request for annulment of a judgment

Final judgments in criminal cases shall be subject to requests for annulment through cassation procedure in the following instances:

...

2. Instances where a request for annulment is made only in favour of a convicted person:

a. the provisions governing jurisdiction ratione materiae or jurisdiction ratione personae had not been observed;

b. the composition of the court did not correspond to the legal requirements, or if the provisions of sections 19, 20 and 22 of the present Code were violated;

c. the judicial hearing was not public, with the exception of those cases where the law provides otherwise;

d. examination of the case took place without the participation of the prosecution service, the defendant, the counsel for the defence and an interpreter, where their participation was compulsory under the law;

e. examination of the case took place without due notification of the parties;

f. no forensic-psychiatric examination of the defendant was conducted, in cases provided for in section 66 (3) of the present Code;

g. the court permitted procedures for appeal or for annulment which were not in accordance with the law, and permitted a request for annulment or an appeal where the prescribed time-limit had expired;

Section 369/5 Examination and resolution of a request for annulment

Requests for annulment with regard to judgments of the Criminal Division and the Enlarged Division of the Supreme Court of Justice shall be examined by the Plenum of the Supreme Court of Justice, and requests for annulment of other judgments shall be examined by the Criminal Division of the Supreme Court of Justice.A request for annulment shall be examined and dealt with in accordance with the provisions of Chapter 30 of the present Code, which shall be applied in the appropriate manner and completed by the provisions of the present chapter.

A request for annulment which is to the detriment of the convicted person, an acquitted person or a person in respect of whom the proceedings have been closed, shall be examined following the summoning of the parties. Where a request for annulment is submitted in the convicted person's favour, the Supreme Court of Justice shall have discretion in deciding whether to summon the parties.

Where the request for annulment is granted in respect of a convicted person who is serving a sentence, and where a judgment is quashed and the case is remitted to the courts for re-examination, the Supreme Court of Justice shall also decide on any preventive restrictions that should be imposed.

Questions to the participants:

1. Is the possibility to re-open a criminal case compatible with the ECHR? If yes, under which circumstances?

2. Do you think that the fact of the case disclose a violation of article 6 ECHR? If yes, under which angles?

Solution key:

Based on the case of Bujnita v. Moldova, application on. 36492/02, 16.01.2007 available at http://hudoc.echr.coe.int/eng?i=002-2907

The applicant complained about the quashing of the final judgment of the court of appeal following a request for annulment lodged by the Prosecutor General's Office. The Government maintained that this request had been made in accordance with the procedure prescribed by law and that the applicant had enjoyed the necessary procedural safeguards during the request for annulment proceedings. The Court noted that the grounds for the re-opening of the proceedings were based neither on new facts nor on serious procedural defects, but rather on the disagreement of the Deputy Prosecutor General with the assessment of the facts and the classification of the applicant's actions by the lower instances. The latter had examined all the parties' statements and evidence and their original conclusions did not appear to have been manifestly unreasonable. The grounds for the request for annulment were insufficient to justify challenging the finality of the judgment and using this extraordinary remedy to that end. The Court considered therefore that the State authorities had failed to strike a fair balance between the interests of the applicant and the need to ensure the effectiveness of the criminal justice system.

Conclusion: violation of article 6 ECHR (unanimously).

3. Re-opening of criminal cases in Albania until August 1, 2017

3.1 How has the reopening of criminal proceedings been addressed in Albanian domestic law and have there been examples of successful reopening in such cases?

Albania, as a member of the Council of Europe, with the signing and ratification of the ECHR and its Protocols, is obliged to implement all the judgments that the ECtHR takes in relation to judgements rendered against it (Article 5 of the Constitution). The obligation to enforce these ECHR decisions is an expression of the principle of effective enforcement stemming from Article 46 of the European Convention on Human Rights.

This article imposes the binding power that ECtHR decisions have for states that are party to the procedure at the end of which the decision was rendered, while contemplating procedures for their execution and the determination of the Council of Ministers, as the body that oversees the enforcement process.

The Strasbourg Court and its jurisprudence have been since years a reference system for the interpretation and observance of the highest standards for the protection of human rights throughout the judicial process, especially the criminal one. Consequently, the enforcement of ECtHR decisions is of a particular importance as regards not only the implications that decisions bring to the individual aspect, but also those related to the more general situation.

Since the beginning of the processing of applications against Albania, the ECtHR has issued several decisions which have found violation of Article 6§1 of the ECHR,

suggesting reopening of court proceedings as an appropriate remedy for *restitutio in integrum* in the relevant cases.

The legal instrument provided in the Code of Criminal Procedure (CPC) of the Republic of Albania (1995) is the review of the final criminal decision. As Article 450 of the CPC foresees, this extraordinary instrument to appeal to a final court decision, was exercised only in the exhaustive cases provided for by the foregoing provision.

Article 450

Reviewing cases

1. The review may be requested:

a) when the facts of the grounds of the sentence do not comply with those of another final sentence;

b) when the sentence is relied upon a civil court decision which after has been revoked;

c) when after the sentence new evidence have appeared or have been found out which solely or along with those ones evaluated prove that the sentenced is not guilty;

ç) when it is proved that the conviction is rendered as a result of the falsification of the acts of the trial or of another fact provided by law as a criminal offence.

Until the changes, made to the provisions of Articles 452-453 of the CPC in 2002, the competent court to examine the request for review of a final criminal court decision was the first instance court that had issued the decision on the merits of the case. Meanwhile, the legal changes made to these provisions in 2002, passed to the High Court the competence to adjudicate in relation to the requests for review final criminal judgments.

Pursuant to the above legal provisions, the ECtHR's decision finding a violation of Article 6§1 of the ECHR during a judicial proceeding developed in Albania's judicial jurisdiction did not automatically constitute a cause for the reopening of the court proceedings.

Under the terms of this CPC legal framework, Albanian judicial authorities developed a special practice aimed at respecting the principle of the effective execution of ECtHR decisions. The following material will reflect the procedures of several judicial cases, in which the reopening of the criminal proceedings was decided as a result of a decision given by the ECtHR.

3.1.1. "Xheraj v. Albania"

The reopening of proceedings following a judgement of ECtHR was first tested in the case "Xheraj v. Albania". ECtHR delivered its judgement for this case as of 29 July 2008 (final on 01/12/2008).

On the facts: the Applicant Arben Xheraj was found guilty and was sentenced in 1996 by the first instance court of Durres for the criminal offense of premeditated murder. The Court of Appeal decided to amend the decision on the legal qualification of the offense and sentenced the applicant for intentional murder.

In 1998, the case had been returned for fresh consideration in the first instance court in Durres, which overturned the previous decisions, stating that the applicant had not committed the criminal offense therefore declared the applicant Xheraj not-guilty. A year later, the prosecution office sought a request for the right to leave an appeal out of time before the Court of Appeal, which decided to refuse it. Against this decision the prosecutor submitted recourse before the Criminal College of the Supreme Court, which accepted the right to leave an appeal out of time and send the case for fresh consideration before the Court of Appeal.

The Court of Appeal upheld the decision of the first instance court in Durres (1998) deciding to dismiss the case and confirm the innocence of the Applicant. Against this decision, the prosecution office submitted recourse before the Supreme Court (2001), which decided to uphold the 1996's 1st instance court decision, declaring the applicant guilty and cancelling all the other decisions rendered by the Court of Appeal and the first instance court of Durres (1998).

ECtHR contended the arguments used by the prosecutor justifying the request for leave to appeal out of time considering that allowing such prosecutor's request did not strike a fair balance between the interest of the applicant and the need to ensure the effectiveness of the criminal justice system. Therefore the prosecutor's claims were insufficient to justify challenging the finality of the judgment and using this extraordinary remedy.

Court' assessment in Xheraj case: "the mistakes or errors of the State authorities should serve to the benefit of the defendant. In other words, the risk of any mistake made by the prosecuting authority, or indeed a court, must be borne by the State and errors must not be remedied at the expense of the individual concerned (see above *Radchikov v. Russia*, § 50). .... A situation where the final judgment in the applicant's favour was called into question and reviewed could have been avoided had the prosecutor's office lodged an ordinary appeal within the statutory ten-day time-limit. The prosecutor's request did not contain any information as to the date when the ten-day time-limit provided for under Article 147 § 3 of the CCP had begun to run. Having regard to these considerations, the Court finds that by granting the prosecutor's request, the Supreme Court infringed the principle of legal certainty under Article 6 § 1 of the Convention. There has accordingly been a violation of that Article.

Noting these violations with concern, the court maintained that the breach of the Convention caused by the quashing of the applicant's acquittal, was serious. In addition, the applicant continues to be subject to the consequences of the quashing of the decision of 14 December 1998. In such a case the most appropriate form of redress for this continuing situation would be for the applicant's final acquittal of 14 December

1998 to be confirmed by the authorities and his conviction in breach of the Convention to be erased with effect from that date.[218]

3.1.2. The Albanian authorities'action in dealing with the case

At the time the legal instrument provided in the Code of Criminal Procedure (CPC) of the Republic of Albania (1995) was the review of the final criminal decision, having no criteria stipulated specifically in the formal terms for the review based on ECtHR judgements. As Article 450 of the CPC foresees, this extraordinary instrument to appeal to a final court decision, was exercised only in the exhaustive cases provided for by the foregoing provision. The criterion of article 450 of the Criminal Procedure Code (CPC) does not explicitly provide as such the review of a final criminal decision based on the findings and rulings in the judgement of ECtHR on the case.[219]

Pursuant to the above legal provisions, the ECtHR's judgement finding a violation of Article 6§1 of the ECHR during a judicial proceeding developed in Albania's judicial jurisdiction did not automatically constitute a cause for the reopening of the court proceedings. It is true that Article 6§1 of the Convention does not stipulate the right of the reopening of court's judicial proceedings that are concluded with a final decision and, therefore, the Albanian court cannot proceed directly under this article, but on the other hand it is obliged under Article 46 of the Convention, in the absence of law, to create a legal remedy to review the final decisions to make possible the execution/enforcement of Strasbourg decisions and the practical accomplishment of the rights acquired by individuals in the ECHR. The absence of legal means for the adequate execution of a judgement of the Court cannot be justified under any reasons as it contravenes with the jurisprudence of the Court which requires from the domestic authorities to undertake the due steps to fix and/or correct the legal vacuum.

In these conditions, Albanian courts were to apply the principle that courts may not refuse to deliver justice due to the lack of the law, covering also the cases dealing with the reviewing of the final decisions upon finding of the violations for fair trial by the ECHR. Albanian authorities at least had not to challenge the necessity of amending the Albanian Criminal Procedure Code in order to allow for the re-opening of the proceedings following a judgment of the Court to that effect.

Based on the ECtHR judgement, the applicant Xheraj submitted a request before the Constitutional Court, claiming the unconstitutionality of the Supreme Court's decision no. 417 of 20 June 2001, declaration of this decision null and void, necessary for the execution of the European Court's judgement. Constitutional Court Judges refused[220] the request, arguing that the competent state's body to fulfil the obligations stemming from the judgement of the ECtHR in the Xheraj' case was the Supreme Court.

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[218] *(seeBujnița,cited above, § 29)*

[219] *but it should also be stressed that neither does it exclude it expressis verbis), as required by Article 494, point "ë" of the Civil Procedure Code (CPC) or article 42, point "ç" of the Law no. 10193, dated on 03.12.2009 "On the jurisdictional relations with foreign authorities in criminal matters" for the purpose of extradition*

[220] *by Decision no.22, dated 09.03.2010*

In its ruling, Constitutional Court underlined the place of the ECHR in the Albanian domestic legal system reminding the its direct effect and emphasizing the obligation of Albanian authorities to directly execute the ECtHR judgement based on the Art. 46/1 of the Convention.

In line with this view, the Constitutional Court ordered the Albanian authorities namely the Assembly of Albania to mend the legal gap by creating the legal procedural provisions in the criminal procedural code. It went on by stating also that the reopening of the proceedings in the case of applicant is the competence of the Supreme Court competence.

Notwithstanding as such, much to everybody's surprise, the Supreme Court decided[221] not to accept the request for the review, submitted by the applicant Xheraj,[222] arguing that it did not contain the conditions provided for by Article 450 of the Code of Criminal Procedure. According to the Supreme Court both decisions, that of ECtHR and that of the Constitutional Court do not contain additional facts which could be deemed as contrary with the facts and the object of the impugned court decisions in the Xheraj' case. It also considered that the ECtHR' ruling in relation to the reopening of proceedings implied that it should be the Constitutional Court having the competence to decide on the applicant' case, but not the Supreme Court.

For the second time, the applicant Xheraj addressed before the Constitutional Court[223]to challenge the decisions of the Supreme Court. In response, the Constitutional Court[224] overturned[225] the decision of the Supreme Court and referred the case for fresh examination before this court.

In this decision, the constitutional court offered a thorough analyses by putting the emphasis on the role of the Supreme Court for the creative interpretation of laws and unification of judicial practice, not limiting itself only in the implementation of the Criminal Procedural Code reminding its duty also to apply directly the Constitution and the ECHR. Indirectly, it oriented the Supreme Court to apply the international law, the general principles generally admitted in the criminal field, and the dispositions of the criminal procedural code, based on the article 10 of the CPC, which provides:

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[221] *By decision no. 00-2010-1042, dated 09.07.2010*

[222] *Who requested the declaration of decision no. 417, dated 20.06.2001 of the Supreme Court illegal based on the ECtHR' ruling*

[223] *requesting the unconstitutionality of the latter' Supreme Court decision no. 1042, date 9.07.2010, and the cancellation of the decision 417/2001 of Supreme Court*

[224] *The General Prosecution Office by official letter no. 918/3, date 4.10.2011 has confirmed in reply that based on the interim decision of Constitutional Court no.22, date 23.02.2011, has acted for the suspension of the following decisions:*
Decision no. 191, dated 23.10.1996 of Durres District Court;
Decision no. 1106, date 27.11.1996 of Durres Appeal Court;
Decision no. 417, date 20.06.2001 of Supreme Court;

[225] *By Decision No. 20/2011*

***Art.10 of CPC**: "1. Relations with foreign authorities in the criminal sphere shall be governed by international agreements, recognized by the Albanian state, by generally admitted principles and norms of international law and also by provisions of this code."*

In the light of this provision it is practically impossible to limit the application of article 450/1/a referring to the review of final criminal decisions, based only on the domestic practice but also taking into account the international courts that implement the international law. The Court seeks to emphasize that the ECtHR has exclusive jurisdiction in the Albanian legal system in dealing with the protection of fundamental human rights.[226]

In the next step, Arben Xheraj (applicant in the case "Xheraj v Albania") submitted the request before the Supreme Court,[227]having been registered by no. 52102-01226-00-2011. Both parties, the lawyer of applicants and the prosecutor have sustained the admission of the request of applicant to quash the conviction decision and to terminate the judgment of the case on the Supreme Court.

In conclusion, the Supreme Court held the decision no.01226/2011, date 7.03.2012, deciding:

-To accept the request for review as submitted by the applicant Arben Xheraj

-To quash the decision no. 417, date 20.06.2001, of the criminal college of the Supreme Court

-To quash the decision no. 267, date 18.12.2000 of the Appeal Court of Durres and the decision no.74, date 21.10.1999, of the District Court of Durrës

-To cease the judgment of the case.

The applicant Arben Xheraj was present in the session of the Supreme Court hence he took notice in person on the decision of the Supreme Court and subsequently was released. Now he is a free person.[228]

[226] *This competence is accepted by our domestic legal system, for the purpose of implementing Article 122 of the Constitution, as well as of its Article 17/2, which impose an obligation on the direct applicability of ECtHR' decisions. Article 122 of the Constitution explicitly stipulates that the provisions of international agreements have precedence over the laws of the country that disagree with it*

[227] *with object "Review of the decision no.1042, date 09.07.2010 of the criminal college of the Supreme Court; To quash the decision no.417, date 20.06.2001 of the criminal college of the Supreme Court; to order the state institutions for execution of the ECtHR judgment date 29.07.2008 on the case "Xheraj v. Albania"*

[228] *Also the General Prosecution Office confirms that it has ordered the Police Department of Durres City in pursuance of Constitutional Court ruling in its interim decision, to cancel the investigation of Citizen Arben Xheraj as wanted person, until the case would be finally resolved. In addition, the General Prosecution Office confirms that it has instructed the Tirana Central National Office of INTERPOL/ General Department of State Police/in the Ministry of Interior, pursuant to Constitutional Court rulings, to cancel the international operations for personal investigation of Citizen Arben Xheraj as wanted person*

3.1.3. Constitutional proceedings

Certain member States have applied constitutional remedies for allegations of human rights violations only if the Constitutional Court finds a violation of the rights guaranteed under the Convention and quashes the domestic decision.[229] The Xheraj case manifests that the Albanian legal system at the time, could not afford the reopening of criminal final decisions, by means of constitutional complaint.

Example: In Xheraj case, referring to the abovementioned facts, the Supreme Court overturned[230] the acquittal decisions of both the Court of Appeal of Durrës[231] and the District Court of Durres leaving in force the conviction decision no.191/1996 of the District Court of Durres.[232]In the due course the applicant Xheraj addressed before the Constitutional Court for the cancellation of the conviction' decisions of the District Court of Durres[233] and of the Supreme Court[234] but the Constitutional Court decided[235]not to accept the request. Subsequently, the applicant lodged his application with the European Court of Human Rights (ECtHR). Then again following the ECtHR 'judgment over the applicant Xheraj case, the Constitutional Court did not accept the applicant' Xheraj' request for the execution of the ECtHR' judgement aiming the reopening of the criminal proceedings. As explained above, it maintained that the request did not fall under its jurisdiction considering that as such was the Supreme Court' competence.

Constitutional Court (CC) in Xheraj case clarified its position declaring the lack of competence in dealing with requests for the reopening of proceedings, even though they were based on the ECtHR judgements. This position could be explained due to some limitations in its jurisdiction and its specific modes of adjudication. More concretely, CC has the jurisdiction, competencies and standing to offer judicial review of legislation.[236] Its role has a dual function, evaluative and protective exercising two modes of control, the abstract and concrete. It applies the concrete control only for the five categories of subjects that impose the establishment of a close interest with the case. But the most significant role is the abstract review, *a priori* or *a posteriori*. This

[229] *In case of reopening of proceedings by Constitutional Court the following obstacles may be encountered:*

- *the impossibility of re-opening a case following a judgment by the Court which was not previously examined by the Constitutional Court;*
- *third parties' interest may be overlooked when the reopening of civil and Administrative proceedings are ordered by the Constitutional Court even if the Civil Code of Procedure provides that the rights of third parties should be protected.*
- *However, the weighting of different private interests at stake is not clearly regulated by the legislation.*

[230] *by Decision No. 417, dated 20.06.2001*

[231] *No. 4/60, dated 14.12.1998*

[232] *provided by Article 76 of the Criminal Code*

[233] *No. 74, dated 21.10.1999*

[234] *No. 417, dated 20.06.2001*

[235] *by Decision No. 80, dated 26.04.2002*

[236] *Hence it applies the interpretation methods that rely in the principle of equality, protection of human rights, social state, proportionality, separation of powers, the loyalty of constitutionality, the pluralism, the popular sovereignty etc*

form of control consists on the substantive and formal review of laws, normative acts, and the international agreements.

3.1.4. Limitation of constitutional control in Albania

However the reviewing role of Constitutional Court is limited. Acting as a negative legislator it decides on the unconstitutionality of a legal norm, but it does not change or create a new norm.[237]Other limitations are posed by the frames of its jurisdiction. In this connection, it engages only if there is (1) a normative clash (2) there is a link between the constitutional norm and the facts of the case (3) a conflict materialised by an administrative act.[238] Also, its concrete control is limited only on procedural aspects but not to substantial ones. For këtë arsye, its decisions use to have only general declaratory nature, which was found to be detrimental in view of the effective remedies according to the criteria set out in the article 13 of ECHR by European Court.[239]

The constitutional proceedings for the reopening of final decisions were tested in the "Shkalla" case as well (Application "Shkalla v. Albania"). Even in this case, by the same reasoning, the CC did not engage in the reopening of criminal proceedings based in a judgement of the European Court.

After the applicant addressed himself before the Constitutional Court, this court by its decision no. 45/2013, decided to overturn the decision no. 00-2012-582, dated 08.03.2012 of the Supreme Court, arguing that:

"*The Court has emphasized that judges at all levels apply directly the ECtHR's decisions in accordance with Article 122 of the Constitution and Articles 19 and 46 of the ECHR since the observance of the ECHR and the constitutional standards is a requirement not only of this Court, but also for the courts of ordinary jurisdiction, in particular the Supreme Court, due to its special powers of review, but also in terms of unification of judicial practice.*"

3.1.5. The reform of Constitutional Court

By the latest amendment in July 2016, the Constitutional Court was strengthened in relation to its judicial power, the standing, the status of judges, its autonomy, the mode of adjudication and the accountability mechanisms. As compared to the previous competences, CC now has power to administer its own budget,[240]to deliver legally binding decisions,[241]and decide on removal of its judges. Also it has increased the extent of standing before the court[242] and the individuals may claim apart from the right to a fair trial also against any public action based on both procedural[243] and

[237]*Judicial review in this respect raises the concern of adverse retroactive effect that might violate the principle of legal certainty or the anti -majoritarian nature.*
238 Decision 29/2011
[239]*See Marini vs Albania*
[240]*Constitution of Albania, Article 124*
[241]*See n148, article 132/2*
[242]*See n148, article 134*
[243]*Other improvement consists on the fact that the judges' immunity, their mandate, tenure, disciplinary responsibility, irremovability has been strengthened.*[243]*The selection process for the candidate judges was insulated by providing merit based objective criteria and creating the due mechanism which is the Justice*

substantive grounds.[244] Therefore, the position of Constitutional Court in relation to requests for the reopening of judicial proceedings based on a judgement of the European Court has to be adjusted in the view of these changes.

3.2. What practical or procedural difficulties have been encountered in practice? How have they been overcome?

Review of final criminal decisions upon a finding of violation as per Convention has not automatic character, but depends on the degree and nature of violations, which are procedural. Not every procedural violation entails repeal of the decision, as well not every violation found by the ECHR can lead to repeal of the final decisions or innocence or reduce the sentence of complainants. Supreme Court may accept for review only if:

- those violations that are serious to the point that create serious doubts about the injustice and without grounds for the decision and
- those violations that have very heavy consequences for the complainant that cannot be repaired only through monetary compensation.

For example: finding by the ECHR of the violation of Article 6 § 1 of Convention for a trial within a reasonable time not affecting the merits of impunged decision, does not lead the review of the process. Conversely, finding the lack of protection, of equality of arms, etc. Make serious irregularities which should lead the review of the process, whose outcome will depend on concrete circumstances.

Parallel with the Xheraj case, the Supreme Court had received a request from applicants "Laska and Lika v. Albania". In this case, ECtHR found in its judgement of 20th of April 2010, a violation of Article 6 § 1 of the Convention about the arbitrary manner of taking and assessment of decisive evidence of their conviction - presented for recognition and eyewitness submissions.

1.2.1. "Laska & Lika v. Albania"

Facts in the "Laska and Lika v. Albania**"**:[245]The applicants Lika and Laska were found guilty by the decision No. 64, dated 24.05.2002 of the first instance court of Pukë, of committing the criminal offenses foreseen in Article 140, 25 and 278/2 of the Criminal Code. On their appeal, the Court of Appeal of Shkoder upheld the decision of the court of first instance (decision no.145, dated 09.09.2002). The Supreme Court in December 2002 decided to reject the recourse of the two applicants, while in 2004 the Constitutional Court did not accept the request for the abrogation of the above decisions.

Appointment Council, an ad hoc body composed of judges only. The proposal of candidates for CC judges is an attribute of High Judicial Council, the Parliament and the Supreme Court having each equal right to submit three candidates for judges. New disciplinary grounds have been provided related to the dismissal procedure of judges, which now on will be a competence of the Constitutional Court itself and not the Parliament as it used to be.

[244]*See n 148, Article 131/f*

[245]*Laska and Lika v. Albania, applications no. 12315/04 and 17605/04, 20/04/2010, available at http://hudoc.echr.coe.int/eng?i=002-980*

- The applicant Artur Lika was arrested on date 31.03.2001 and henceforth was sentenced to 13 years imprisonment by decision no.64, date 25.05.2002 of Puka District Court according to articles 140, 25, 278/2 of the Criminal Code.[246]This applicant profited early release on parole for the rest of his sentence in jail 2 years, 7 months and 17 days.[247] This decision became final by decision of Tirana appeal court no. 406, date 4.04.2011. Based on this the applicant Lika was released under the terms of early release on parole.[248]

- The applicant Vladimir Laska was arrested on date 31.03.2001 and henceforth was sentenced to 13 years imprisonment according to the decision no. 64, date 25.05.2002 of Puke district court.[249] The applicant Laska profited early release on parole[250]for a period of 3 years. Different from the first applicant, the Tirana Court of Appeal did not upheld this decision.[251] This applicant submitted a request before the Supreme Court for the suspension of the criminal decision no.64, date 24.05.2002 of the Puka district court. Subsequently the Supreme Court, decided by Order No.13, Date 9.02.2012 to suspend the decision.[252]Accordingly, the applicant was freed.[253]

ECtHR found[254] that the applicants' right to a fair trial had been seriously breached by the domestic authorities", therefore, it "considers that, in the instant case, a retrial or the reopening of the case, if requested by the applicant, represents in principle an appropriate way of redressing the violation. This is in keeping with the guidelines of the Committee of Ministers, which in Recommendation No. R (2000) 2 called on the States Parties to the Convention to introduce mechanisms for re-examining the case and reopening the proceedings at domestic level, finding that such measures represented "the most efficient, if not the only, means of achieving *restitution in* integrum".

Following the judgement, Vladimir Laska and Artur Lika (applicants in the case "Laska & Lika v. Albania", submitted a request before the Supreme Court.[255] Both parties, the lawyer of applicants and the prosecutor have sustained the admission of

[246]*While was imprisoned, he benefited 6 months sentence reduction. Also, he asked to be transferred from high security prison of Burrel to another prison of ordinary security. The district court of Mat gave consent to his request and decided to transfer him in an ordinary security prison by decision date 7.10.2008*

[247]*From the prison of Burrel date on 25.02.2010 by decision no.12, date 25.02.2010 of Mat district court under probation supervision*

[248] *Referring to the response of the general department of prisons by official letter Prot no. 3530/5, Date 22.05.2012, also to the official letter no. 1068/1, date 13.02.2013.*

[249]*While was imprisoned, he benefited 7 months reduction from his sentence. Also, he asked to be transferred from high security prison of Burrel to another prison of ordinary security. The Mat district court gave consent to his request and decided to transfer him to an ordinary security prison by decision no.116, date 26.12.2006. This decision became final by decision of Tirana appeal court no. 616, date 19.09.2007.*

[250]*From the prison of Burrel by decisionno.2, date 24.02.2010 of Mat District Court, according to the criteria set out in article 64 of Criminal Code250, under probation supervision.*

[251] *By decision no.798, date 20.10.2010*

[252] *Find enclosed herewith.*

[253] *Idem, footnote 7.*

[254] *In paragraphs 73-77 of the decision*

[255]*with object "Review of the decision no.64, date 24.05.2002 of the district court of Puke", has been registered by no. 53204-01468-00-2010*

the request of the applicant to quash the conviction decision n.64, date 24.05.2002 of the District Court of Puke. The Supreme Court decided[256] to quash the decision no. 793 date 26.12.2002 of the Supreme Court; to quash of the decision no.145 date 09.09.2002 of the Appeal Court of Shkodër, to remit the case for fresh examination before the Appeal Court of Shkoder with another judicial body.

The case was remitted for retrial to the Appeals Court of Shkoder, having been registered on date 28.06.2012. Generally speaking the retrying court has managed to address[257] all the issues set forth by the ECtHR, in its judgment for this case (found the addresses of witnesses etc.). The decision of retrying court, was then contested before the Supreme Court, which decided[258] to uphold the Shkodra Court of Appeals decision, thus quashing the conviction decision.[259]Consequently, the applicants Vladimir Laska and Artur Lika were released under no obligation considering they were conditionally free based on early release on parole.

In the same flow, the Supreme Court had to deal with the reopening of proceedings of other criminal cases such as: "Caka v. Albania", "Berhani v. Albania", ""Shkalla v. Albania". Apart from the request of Berhani case, the Supreme Court[260] delivered its decisions respectively for "Caka", "Shkalla" cases at the same day with the "Xheraj" and "Laska and Lika" cases, on 9.03.2012. This practice seems that paved the way for the Supreme Court in dealing with similar requests in the future.

1.2.2. "Caka v. Albania"

Caka v. Albania:[261]the case of Caka, concerns the unfairness of criminal proceedings due in particular to the failure of authorities to secure the appearance of certain witnesses at the applicants' trial. Also it concerns to the first Instance Court's failure to have due regard to the testimonies of four witnesses given in the applicant's favor (violation of Article 6 § 1 combined with Article 6 § 3 (d).

The applicant Lulzim Caka was tried for committing some serious criminal offenses by Albanian judicial jurisdiction. The First Instance Court of Fier, by decision No. 175, dated 11 May 2000, found him guilty and sentenced him to 25 years in prison. The Vlora Court of Appeal decided to approve this decision, whereas the Supreme Court did not accept the applicant's recourse. Albania's Constitutional Court in 2003 decided to reject the request for the abolition of the above three decisions.

[256] *held the decision no. 01468/2010, date 7.03.2012*
[257] *In its decision no. 224, dated 17.06.2013*
[258] *by a decision incamera no. 772, dated 28.04.2015*
[259] *Decision no. 64, dated 24.05.2002 of the Puka District Court, dismissing the case due to a lack of sufficient evidence.*
[260] *Article 441 The holding of sentence*
1. After the examination of the case, the criminal college or the joint colleges of the Court of Cassation decide:
a) the approval of the sentence subject to appeal
b) the alteration of the sentence for the legal qualification of the offence, for the type and the duration of punishment, for the civil effects of the criminal offence;
c) the cancellation of the sentence and the solution of the case without sending it back for review;
d) the cancellation of the sentence and the sending back of the acts for review.
[261] *Caka v. Albania, application no. 44023/02, 08/12/2009, available at http://hudoc.echr.coe.int/eng?i=001-96033*

The ECtHR in its judgement as of 8 March 2010, maintained that "in so far as the applicant's claim relates to the finding of violations of Article 6 § 3 (d) in conjunction with Article 6 § 1, when an applicant has been convicted despite a potential infringement of his rights as guaranteed by Article 6 of the Convention, he should, as far as possible, be put in the position in which he would have been had the requirements of that provision not been disregarded, and that the most appropriate form of redress would, in principle, be trial *de novo* or the reopening of the proceedings, if requested".

The applicant Lulzim Caka submitted the request[262] before the Supreme Court," registered by no. 52105-01388-00-2010. In turn, the Supreme Court decided[263]:

-To quash the Decision No.572 date 16.10.2001 of Criminal College of the Supreme Court
-To quash the Decision No. 174 date 20.10.2000 of the Vlore appeal court
-To remit the case for fresh examination before the Vlore Appeal Court with another judicial body.
Note:*The applicant Caka along with the request for review of the conviction Decision No.175, Date 11.05.2000, has submitted before the Supreme Court the request for suspension of execution of conviction decision based on the article 454 of the CPC. According to its decision, the Supreme Court decided that the case referred by this applicant didn't meet the criteria[264] to justify the suspension of his conviction decision, by leaving such decision on the discretion of the retrying court.*

In its decision 75/7.03.2012, the Supreme Court oriented the retrying Vlora Court of Appeals, to take into consideration and further examine these issues relevant to the ECtHR ruling:

- The evidence of citizens Namik Cela, Ardian Dogani, Gramoz Dogani and the fighters who have testified on the event of day 18.03.1998.
- To resolve the question whether the police who have been at the event and who turn out to have declared only during preliminary investigations, have to submit their testimony.
- Evaluate all the findings of ECHR, in particular referring to its ruling on the violations found on article 6/1 and 6 / 3 (d) of the Convention concerning the reliability of claims according to the articles 79/ç, articles 22 and 25 of the Criminal Code.
- The criminal facts relating to the evidences and proofs for the sustainability of the charges against the applicant concerning the murder of citizen P.E.
- Summon as witness the citizen Todi Tiranishti, Arben Sadiku and Agron Kiptiu, who result to have not been required summoned as witnesses before the court, although they were eyewitnesses to the event where the victim had been killed.
- Examine the charges against applicant for illegal possession of weapons, by taking the testimonies of the witnesses Namik Cela and Gramoz Dogani and their evaluation altogether with the other evidences, like as the expertise act of gun

[262]*with object "review of the Decision No.175, Date 11.05.2000 of the District Court of Fier*
[263]*by decision no.01388/2010, date 7.03.2012*

ballistics which proves that the weapons have been in the inventory of the Berat police forces, a fact that had not been analysed and had not been considered by the court.

After having re-examined the case upon the retrying proceeding, the Vlora Appeal Court decided to uphold the conviction decision no.175, date 11.05.2000 of the Fier District Court for the applicant Caka. Against this decision, the applicant has addressed recourse before the Supreme Court date on 14.01.2013, claiming that the Decision of Appeal Court was unfair, as it has not accomplished all the duties set forth by the ECtHR's judgment and by the decision of the Supreme Court. More concretely, these claims refer to the failure of the retrying court to summon the witnesses indicated in the abovementioned decisions.[265]By the decision *in camera* no. 2122, dated 28.04.2015, the Supreme Court dismissed the recourse of the defendant Lulzim Caka against the decision of the Vlora Court of Appeals no. 15, dated19.12.2012.

The Supreme Court found that the basic principles of criminal trial have been respected in the contested proceedings and that there were no infringements concerning the invalidity of the criminal process, or the acts derived from it. The Fier Court of Appeal, in its analysis and evaluation, has taken into consideration and answered all the allegations raised during trial and in the appeal, from both parties. This court has performed all the tasks set through decision no. 00-2012-750 (75), dated 07.03.2012, of the Supreme Court. The latter noted further in this decision that "the Fier Court of Appeals has made all the appropriate efforts and has showed due diligence for the notification of witnesses, however in the conditions where one of them has passed away, while the others, despite the best efforts of the court, have not been able to be contacted, due to the fact that they are currently overseas. In these conditions, with the approval of the defence counsel of the defendant, the court has rightly decided to revoke the decision to summon them, due to the fact that it was impossible to fulfil this task left by the Supreme Court."

In conclusion the reopened proceedings in the Caka case led to a renewed conviction of the applicant, on which basis he remains imprisoned. Under these conditions, the applicant Lulzim Caka, has been suffering his sentence in the IEVP Durrës, by 25 years imprisonment.

[265]*Relating to this claim of the applicant, according to the Vlora Appeal Court decision, it results as the following:*

- *The witness Sali Callmori has been summoned and questioned by the court;*
- *The witness Sokol Duro has been summoned, but was not found as he resulted to be abroad in an unknown address;*
- *The witness Arben Mesiti according to information received from the respective authorities, results that there is no information on his residence;*
- *With regard to the witness Bashkim Hoxha, the Appeal Court has considered the declaration of this citizen as of no legal value given that the testimony can be provided only before the Court;*
- *The witness Arben Sadiku is abroad in an unknown address;*
- *The witness Agron Kiptiu is abroad in an unknown address;*

The witness Todi Tiranishti has passed away date on 12.09.2012.

3.2.3. "Shkalla v. Albania"

Shkalla v. Albania:[266] concerns the violations found in the judicial process against the applicant Ardian Shkalla, based on Article 6§1 of the European Convention on Human Rights (ECHR) in two directions: i) for unjustified denial of the right of access to the Constitutional Court; ii) the irregularity of the proceedings and the punishment of the applicant in absentia. More concretely, by decision No. 848, dated 21.12.2001, the first instance court of Tirana has ruled *in absentia* and pleaded guilty Ardian Shkalla for the criminal offense of "Murder" in other qualifying circumstances against two or more persons.[267] Pursuant to Article 55 of the CC, the applicant was sentenced to life imprisonment. The defence attorney appointed by the applicant's family filed an appeal. By decision No. 205, dated 26.04.2002, the Court of Appeal of Tirana has left into force the above decision of the first instance court of Tirana. This decision has been appealed by the attorney appointed by the applicant's family members. By decision No. 39, dated 15.01.2003, the Supreme Court has ruled that the decision of the Court of Appeal of Tirana must remain into force. In 2003, the applicant was surrendered to the Albanian authorities, and in 2005 he appointed an attorney to present a request in the Constitutional Court to appeal his judgement *in absentia*. By decision no.10, dated 01.02.2005, the Constitutional Court decided not to send the case for examination at the plenary session, as the request had been presented outside the 2-year legal deadline.

The ECtHR delivered its judgement for this decision on 10.08.2011 finding that the applicants' right to a fair trial had been seriously breached by the domestic authorities. Therefore the Albanian authorities (in implementation of article 46 of Convention) had to put the applicant Shkalla in the position in which he would have been had the requirements of that provision not been disregarded. The most appropriate form of redress in this respect was considered trial de *novo* or the reopening of the proceedings, if requested.

Based on this ECtHR decision and of the Constitutional Court's decision no.20, dated 01.06.2011 (in Xheraj case), the applicant Ardian Shkalla presented a request for review of final decision to the Supreme Court. The Supreme Court refused[268] the request for review stating that:

"The ECtHR has found a violation of the constitutional judgment and not in the trial held at the Supreme Court and, for these reasons, the applicant Ardian Shkalla should address the Constitutional Court in order for the latter to remedy the violation found."

After the applicant addressed himself before the Constitutional Court, this court by its decision no. 45/2013, decided to overturn the decision of the Supreme Court, arguing that:

[266] *Shkalla v. Albania, application no. 26866/05, 10/05/2011, available at http://hudoc.echr.coe.int/eng?i=001-104710*
[267] *as provided by Article 79 / dh of the Criminal Code (CC) and for the criminal offense of Illegal Possession of Weapons, provided by Article 278/2 of the CC*
[268] *By decision no. 00-2012-582, dated 08.03.2012*

The role of a Supreme Court is precisely resolving conflicts, avoiding divergences and sustainability (see decision no. 20, date 01.06.2011 of the Constitutional Court). Regarding civil procedural legislation, unlike the procedural criminal law, in our country, the necessary changes have been made, where in Article 494 of the CCP is defined that one of the cases where the party concerned may request a review of a decision that has become final, is when the ECtHR finds violations of the ECHR. Under these conditions, apart from the requirement to complete the criminal procedural legislation, the Court has argued that the Supreme Court should find a solution to restore the applicant's violated right aiming to achieve the restitutio in integrum (see Decisions No.22, Dated 09.03.2010 (of the Meeting of Judges), No. 20, dated 01.06.2011, of the Constitutional Court) …" In the circumstances where violations of the right to a fair legal process have been found by the ECtHR in the process conducted in the courts of fact, it is the Supreme Court's competence, also in terms of its role in our legal system, to exam and hold an express stance on the allegation of the applicant Ardian Shkalla, for the review of the criminal decisions, that have tried and sentenced him in absentia.

In a second attempt, the applicant addressed once again before the Supreme Court, which in its by decision no. 00-2014-1107, dated 09.04.2014, argued that:

"Despite the content and spirit of Article 450 of the Criminal Procedure Code, where, although procedural violations are not provided as a means of filing a request for a review of a decision, it is now acknowledged that when such violations constitute a violation of constitutional law for a fair legal trial and when this is evidenced by a decision that has had as its object the violation of constitutional rights, or rather the violation of human rights and fundamental freedoms, this decision is in itself a reason for the admission of the request."

After having accepted the request, it decided to quash the previous decisions of the domestic courts and remit the case to the Tirana District Court with a different judiciary panel. In the course of the retrying proceedings, Tirana District Court, found the defendant, Ardian Shkalla guilty.[269] Following the appeal procedures the decision of this court was upheld by the Tirana Court of Appeals and the Supreme Court.[270]

[269] *By decision no. 627, dated 06.03.2015For the offense of "murder in other specific circumstances" provided for by Article 79 / d of the Criminal Code (criminal provisions in force at the time of commission of the offense), and under this provision sentenced him with life imprisonment; found the defendant guilty for the offense of "production and illegal possession of military weapons and ammunition", as provided by Article 278/2 of the Criminal Code (criminal provisions in force at the time of commission of the offense), and based on that provision sentenced him to 1 (one) year of imprisonment. In application of Article 55 of the Criminal Code, the joinder of convicti,ons, the defendant 1was sentenced to life imprisonment. In application of Article 406/1 of the Criminal Procedure Code, 1/3 of the sentence was deduced, sentencing the defendant to25 (twenty- five) years of imprisonment*

[270] *the Tirana Court of Appeals, by decision no. 1433, dated 21.09.2015 upheld decision no. 627, dated 06.03.2015, of the District Court of Tirana. On 07.10.2015, the Prosecution Office lodged an appeal with the Supreme Court.On 20.10.2015, the applicant lodged in a counter- recourse with the same court. The Supreme Court, on 23.06.2016, by decision no. 00-2016- 11055, decided to reject the recourse of the Prosecution Office, upholding the decision no. 433, dated 21.09.2015 of the Tirana Court of Appeals*

3.2.4 "Berhani v. Albania"

Berhani v. Albania:[271] By its decision of 2010, the ECtHR ruled that during the trial of the case of the applicant Berhani, have been present violations of Article 6§1 of the ECHR in relation to the acquisition and administration of evidences by the courts, in violation to the principle of a fair trial. More concretely,

The applicant Berhani was tried for a murder occurred in 1996 in the town of Kuçova. Although he was arrested shortly after the event, as a suspected author, in 1997, he escaped from Albania. Following the judgment *in absentia*, the first instance Court of Berat, with its decision no. 1, dated 12.01.2001, found him guilty of committing the criminal offenses of "Premeditated murder" and "Illegal Possession of Weapons ".

The Court of Appeal of Vlora, by decision no. 196, dated 24.11.2000, decided not to accept the complaint, on the grounds that it is not proven when the decision was communicated to the father of the applicant Berhani. Following the extradition of the applicant Berhani in November 2001, he presented an appeal to the first instance court of Berat for the resettlement of his right to appeal the first instance court's sentence.

By decision no. 66, dated 22.11.2001, the first instance court of Berat has decided to reset the applicant Berhani's appeal right regarding the decision of the court of first instance. The Vlora Court of Appeal, with its decision no. 58, dated 19.03.2002, after reviewing the applicant's appeal at a public hearing, has ruled that the decision of the court of first instance of Berat on the merits of the case, should be approved and left it into force.

On 16 April 2002 the applicant presented an appeal to the Supreme Court, which by Decision No. 587, dated 25.10.2002, decided not to accept the recourse. Meanwhile, the Constitutional Court in June 2004 decided not to accept the petition filed by applicant Berhani.

In its judgement of 4 October 2010, ECtHR maintained that the finding of a violation of Article 6 § 1 means that it has not been demonstrated that the domestic courts' proceedings satisfied the requirements of fairness. The Court refers to its settled case-law to the effect that in the event of a violation of Article 6 § 1 of the Convention the applicant should as far as possible be put in the position he would have been in had the requirements of that provision not been disregarded. The Court reiterates that, where it finds that an applicant has been convicted without being afforded one of the safeguards of a fair trial, the most appropriate form of redress would, in principle, be trial de novo or the reopening of the proceedings, in due course and in accordance with the requirements of Article 6 of the Convention.

Upon the decision of the ECtHR, applicant Berhani presented a request for review of the decision to the Supreme Court,[272] which has been registered by no. 52104-01130-

[271] *Berhani v. Albania, application no. 847/05, 27/05/2010, available at http://hudoc.echr.coe.int/eng?i=001-98833*

[272] *with object "Review of the decision no.587, date 25.10.2002 of the Supreme Court»*

00-2010. Both parties, the lawyer of applicant and the prosecutor has sustained the admission of the request of applicant for the quash of the conviction decision and to remit the case for fresh examination on the Berat Appeal Court.

The Supreme Court held the decision no.01130/2010, date 15.02.2012, deciding:

-To accept the request for review of the conviction decision of the defendant Gentian Berhani
-To quash the decision No. 587, date 25.10.2002 of the criminal college of the Supreme Court and the decision No. 1, date 12.01.2000 of the district court Berat
-To remit the case for fresh examination before the district court of Berat with another Judicial body.

Note: *The applicant has not requested the suspension of the execution of sentence before the Supreme Court altogether with the request for the review of the final criminal decision.*

The retrying court, the Berat District Court by interim decision dated 11.09.2012 decided to change the security measure from 'prison arrest" to 'home arrest'.[273]The Berat District Court then dismissed the case based on the decision of the prosecutor to carry on further investigations, which at a point had to come with the decision to drop the criminal investigation against the applicant.[274]

1.3. What were the main obstacles encountered by the Albanian authorities in dealing with the reopening of proceedings in the above cases?

The domestic procedure as followed for the reopening of proceedings faced however some difficulties. Basically, the applicants in the cases Caka and Shkalla have been kept in detention after the Supreme Court quashed the impugned national decisions. Keeping the status of detainee pending thee retrying proceedings, could affect the rights of the applicants, since such practice was considered against the principle of the presumption of innocence, a Convention standard.

More concretely, the Convention' standards require indeed that since the applicants' final conviction is not in force anymore, as long as the new trial is on-going, the presumption of innocence has to be respected. I.e. the Committee of Ministers' practice in the case of *Sadak, Zana, Dicle and Doğan against Turkey* by Interim Resolution ResDH(2004)31,[275] following the European Court's judgment finding that criminal proceedings had been unfair, imposed that the cases be reopened and the original sentences quashed. The authorities had indicated to the CM that "*the applicants' detention was maintained in asmuch as they continued to serve their original sentences*".

[273]*The Vlora Court of Appeals by decision no. 309, dated 06.11.2012, decided not to upheld the district court decision, imposing on the applicant the security measure of "prison arrest".*
[274]*based on the request of the prosecutor held by decision no. 529, dated 19.11.2012 "To refer to the prosecution office the judicial file no. 463, as registered on 29.06.2012, on the grounds that: "the prosecutor has withdrawn the charges against Gentian Berhani in order to carry on with further investigations." Finally, the Berat Prosecution Office by decision of 11.11.2013 dropped the criminal investigation against the applicant Gentian Berhani. Therefore the applicant has been released and is currently free.*
[275]*Adopted by the Committee of Ministers on 6 April 2004 at the 879th meeting of the Ministers' Deputies*

In its Interim Resolution, the Committee "*stress(ed) in this connection, the importance of the presumption of innocence as guaranteed by the Convention*" and "*deplore(d) the fact that, notwithstanding the re-opening of the impugned proceedings, the applicants continue(d) to serve their original sentences and thus remain(ed) in detention almost three years after the Court's finding of a violation of the Convention in this case*".

Recalling that, in that judgment, the Court found violations of the applicants' right, under the Convention, to a fair trial when they were convicted in 1994 by the Ankara State Security Court and sentenced to a 15-year prison term; Recalling that, further to the adoption of Interim Resolution ResDH(2002)59, the Turkish authorities adopted legislation allowing for the reopening of criminal proceedings and that the applicants' trial was reopened in February 2003 and thirteen hearings have been held so far; Noting that the applicants' numerous requests for release pending the outcome of the new trial have all been rejected without any convincing reasons being given by the State Security Court; Recalling that on 20 November 2003, the Chairman of the Committee of Ministers, at the request of the Committee, conveyed the latter's concerns to the Turkish authorities regarding this state of affairs; Noting that, in his reply of 19 February 2004, the Minister for Foreign Affairs of Turkey stated that the applicants' detention was maintained inasmuch as they continued to serve their original sentences; Stressing in this connection, the importance of the presumption of innocence as guaranteed by the Convention; Deplores the fact that, notwithstanding the re-opening of the impugned proceedings, the applicants continue to serve their original sentences and thus remain in detention almost three years after the Court's finding of a violation of the Convention in this case; **Stresses the obligation incumbent on Turkey, under Article 46, paragraph 1, of the Convention, to comply with the Court's judgment in this case notably through measures to erase the consequences of the violation found for the applicants, including the release of the applicants in the absence of any compelling reasons justifying their continued detention pending the outcome of the new trial.**

A few days following this Interim Resolution, the Turkish Court of cassation suspended the execution of the impugned sentences. This is only one example among many others.

From the Albanian practice in terms of the procedural point of view, the reopening of the proceedings in the retrying court means that the applicants respectively shall be endorsed with the status of the defendant until the respective courts will hold a final decision against their charges.

The legal grounds upon which the applicants remain still in detention according to Albanian legislation:

Article 428 of CPC

"4. In case where the decision is quashed by the Supreme Court and the case is returned to the court of first instance or court of appeal and also where the decision is quashed by the court of appeal and returned to the court of first instance, time limits provided for in each instance of proceeding start to run again from the day of decision in the Supreme Court or Appeal Court."

Article 263 of CPC- *the time-limit of the duration of detention*

1. The detention shall loose effect in case from its execution have expired the following time limits without being submitted the acts to the court: a) three months when it is proceeded for a criminal contravention; b) six months when it is proceeded for a criminal offence; c) twelve months when it is proceeded for organized crimes and committed by bands.

2. The detention shall lose effect in case from the day of the submission of the acts to the court have expired the following time-limits without having the sentence rendered in the first instance:a) one month when it proceeded for criminal contraventions;b) three months when it is proceeded for a crime;c) six months when it is proceeded for organized crimes and committed by bands

3. The detention shall loose effect in case from the rendering of the sentence in the first instance have expired the following the time-limits without having the sentence rendered by the court of appeal: a) one month when it is proceeded for a criminal contravention;b) two months when it is proceeded for a crime;c) three months when it is proceeded for organised crimes and committed by bands.

4. In case the sentence is nullified by the Court of Cassation and the case is sent to another court, the time-limits shall start again according to the rules provided for each instance of the proceedings

5. In case of escape of the detained defendant the time-limits shall start again from the moment he is held detained again

6. The entire duration of the detention, considering also the prolongation provided by article 264 paragraph 2, may not exceed the following time-limits:a) six months when it is proceeded for a criminal contravention;b) one year when it is proceeded for a crime;c) two years when it is proceeded for organised crimes and committed by bands.

According to the Albanian legislation, the reopening of the proceedings shall imply that the cases will be examined thoroughly from the merits and procedural point of view meaning that the retrying court will examine all the facts, evidences and testimonies, including also other new facts and evidences. [276]

[276] ***Article 427 of CPC-Remaking of the court examination:*** *When a party requests the re-taking of the evidence administered during the court examination in the first instance or the taking of new evidence, the court, if evaluates it necessary, decides the entire or partly performance of the judicial examination. The evidence found after the trial in the first instance or those which appear on the spot, are subject to the*

The Unifying Decision of the Supreme Court No. 06, dated 10.11.2002, among other things states that: "The judicial process conducted through the review is not a simple revision process (in the narrow sense of the word) of a previous process, but the court at its conclusion, since it administers and evaluates the facts, circumstances and evidence that have been presented by the parties together and in harmony with the evidence, circumstances and facts administered and evaluated in the conclusion of the previous trial, may come to differing conclusions, even wholly opposed to what had come to the first trial and to make a completely different decision. From a verdict that may be made at the end of the first trial, the court may, at the conclusion of the review judgment, come up with a decision of innocence (when the request for review is made by the convicted party) and vice versa (when the request for revision is made y the prosecutor) ".

In cases where the Supreme Court accepts the request for review, decides the cancellation of the final decision and sends the case for re-trial, in the retrying court, to be adjudicated from another panel. Both the prosecutor and the interested party, are legitimated of all procedural rights (including the right to appeal to the highest court).

The review process, as provided for in Albanian Criminal Procedure Code, undergoes two phases. The first phase is the examination of the Referral request by the Supreme Court, based in articles 450 and 441 of the CPC. The Supreme Court, which is a court of law, is entitled to verify the existence of the causes of the decision to review, the legality of conditions, the criteria and procedure for the review of the final decision. In no way, the Supreme Court rules on the merits of the case and the guilty plea. It has merely a review' jurisdiction over the lawfulness of the request.

In case the Supreme Court finds that one of the conditions provided in article 450 is satisfied thereafter it remits the case for the retrial at the second phase of the review process. At this stage, the Court of First Instance (first instance) or the Court of Appeal (if it is the case) may be assigned to re-evaluate the impugned decision, in the light of new evidence presented by the applicant.

Article 441-The holding of sentence

1. After the examination of the case, the Supreme Court decides: a) the approval of the sentence subject to appeal b) the alteration of the sentence for the legal qualification of the offence, for the type and the duration of punishment, for the civil effects of the criminal offence;c) the cancellation of the sentence and the solution of the case without sending it back for review; d) the cancellation of the sentence and the sending back the acts of the case for review.

court decision which, as the case may be, orders whether they must be taken or not.The performance of the judicial examination is decided even ex-officio when the court evaluates it as necessary.The court decides the performance of the court examination when it is proved that the defendant has not participated in the first instance because he has been not notified or has been not able to appear due to lawful excuses. For the remaking of the court examination, decided according to the above paragraphs, is preceded immediately and when this is not possible, the court examination is postponed for a period not more than ten days.

When art.441, letter d, provides that the Supreme Court may decide d) the cancellation of the sentence and remittal of the case to the retrying court for review, literally it means merely a "formal" cancellation of the sentence. This means the cancellation serves only to the justification of the following retrying procedures, that consists on the taking of new evidence, repairing irregularities of the legal process, etc. During the retrying procedures, the applicant holds the status of detained person and will therefore continue to be held in prison. In case the legal time limits for the detention of applicant (Art.263) have surpassed pending the retrying proceedings, then the applicant may be rendered free. In case the decision of the retrying court confirms the applicant not guilty, then he will be released and set free.

The Supreme Court in its decision n075, date 9.03.2012 in the Caka case, argued in relation of the status of applicant Caka pending the retrying proceedings, based on this interpretation:

Deciding on similar request when the Supreme Court decides to cancel the impugned decision and remit the case for retrial before the retrying courts (based on "Revision" (Articles 449-461 of the Code of Criminal Procedure), the legal position of the claimant Lulzim Caka at the retrial stage would be in the status of the convict and consequently will be held in prison in the execution of court decisions.

... the annulment of court decisions on the request for review does not have the same consequences as the annulment of the decisions and the return of acts for reconsideration in cases when the case is considered on the basis of an appeal or a recourse made by the convict or the prosecutor.

In the case of a breach of decisions, on the basis of a request for review, this breach will only result in the opening of the review proceedings, the taking of new evidence, the repair of irregularities during the legal process, etc. Therefore, it does not change the legal position The applicant will therefore have the status of convicted person and will therefore continue to be held in prison until the conclusion of the retrial or when it is the case.

The Supreme Court refers explicitly to point 2 of Article 456 of the Code of Criminal Procedure (decision after the retrial), which states: "When the review request is accepted, the court cancels the decision", which means that even during the retrial, there is again a decision that will be cancelled.

If, in the circumstances of the review, the adjudication of court decisions by the Supreme Court would be equivalent to the annulment of decisions in ordinary court cases on the basis of appeals or recourse, then in special trials (Review), such as the case under consideration, would be "not sense" as expressly stated in the provision of Article 456, paragraph 2 of the Code of Criminal Procedure, when the request for review is accepted, the court cancels the decision, meaning to adjudicate a decision previously ruled by the Supreme Court.

1.3.1. Do the applicants have the possibility, pursuant to specific law provisions, to ask to the competent court to be freed pending the new trial?

Other than the initial conviction for detaining the applicants, there are also other legal grounds based on the Albanian legislation that could enable the applicants to be set free pending their new trial. More concretely the applicants enjoy the right to seek the suspension of the execution of the impugned decision, based on Article 454 of CPC, which provides the following:

Article 454 of CPC- Suspension of the execution

The criminal college of the Supreme Court and the court assigned for the retrying of the case may decide to suspend the execution of the decision. The decision is of a final form.

From the abovementioned cases, it shows that even the applicants made use of their right to seek for the suspension of the execution, e.g. in the Caka case, the applicant submitted a request for the suspension of the execution, but the Supreme Court did not accept the request and the applicant Caka remained in jail pending the retrying proceedings. The same occurred in the Shkalla case. The only case, when the Supreme Court accepted the request for the suspension of execution was in the case of applicant Laska, where the Supreme Court accepted the request for the suspension of execution and this applicant had been released pending the retrying proceedings.

While in the cases of the applicants Xheraj and Lika, they did not make use of this right. This is mostly due to the specific circumstances. In Xheraj case, it was the Supreme Court which decided to cancel the conviction decision without having the case remitted to the retrying court, in the classical way. In the Lika case, the applicant was free during the review procedures as he had profited early release on parole.

It's noteworthy highlighting the fact that even if the Supreme Court does not accept the applicant's request for suspension, this fact does not deprive the applicant of the opportunity to submit this request once again during the retrial. Pursuant to Article 454, paragraph 1 of the Code of Criminal Procedure, although the Supreme Court has not ordered the suspension of the execution of the decision, the first instance court or appellate court assigned to the retrial of the case may differently decide to suspend the execution. Moreover, the law does not preclude the applicant from filing a request for suspension of execution of the sentence for the same reasons as he did with the Supreme Court. As long as the execution of the impugned decision has not been suspended, the applicant will continue to stay in the prison and pending the retrial process he will retain the status of "convicted".

4. Amendments to the Code of Criminal Procedure of Albania concerning re-opening of criminal proceedings following the finding of a violation of the fairness requirement under article 6 by the ECtHR

1.1. New provisions and competence to decide on the re-opening

The amendments to the CPC by Law No. 35/2017 addressed the need to provide in the Albanian legislation the legal cases for the reopening of criminal proceedings in the eventual conditions when a ECtHR decision found a violation of the right to a fair trial. In Article 450 of the CPC, which provides the causes of review of a final decision, has been added to three new causes. Thus, the letter "e" of article 450 of the CPC provides as a case for review of the decision and reopening of the criminal process, the eventual decision from the ECtHR in those specific cases.

> Article 450
>
> Review of cases
>
> (Amended by Law No. 8813, dated 13.6.2002, Law No.35 / 2017)
>
> ...
>
> e. When the cause for reviewing the final decision results from a decision of the European Court of Human Rights that makes it necessary to reopen the case. The request is filed within 6 months from the notification of the decision;

It is worth underlining that the request for review of a final criminal decision will no longer be adjudicated by the Criminal College of the Supreme Court, but by the competent court that issued the decision. Thus Article 453 of the CPC after the legal amendments of 2017 will have this content:

> Article 453
>
> Court Hearing of the Application
>
> (Amended by Law No. 8813, dated 13.6.2002, Law No.35 / 2017)
>
> 1. The request of reviewing is examined by the first instance court that issued the decision in the consulting room in absence of the parties.
>
> 2. When the request is made in absence of cases provided by article 450, or when it is complied by those who do not have such a right or when it evidently result unmotivated, the court decides its rejection.
>
> 3. When the request is accepted, the court decides the delivering of the case for re-examination in another panel to the same court or to the court of appeal, when it is only against its decision. No appeal is allowed against the decision.
>
> 4. Until a decision is rendered by the review court pursuant to Article 456 of this Code, the convicted person retains the same procedural position.

Unlike the so far practice, the jurisdiction for adjudicating requests for review of decisions, including those based on a decision given by the ECtHR, has been assigned to the competent court that issued the impugned decision. Under such legal conditions, it will no longer be the Supreme Court, but it will be the competent court, as case may be the first instance court or the appeal court that will be charged with the examination of the existence of the grounds for review and eventually deciding on the reopening of the criminal process, as a consequence of a decision of the ECtHR. In cases where a review is required due to a ECtHR decision, the applicant should address the court within a period of six months from the moment of notification of the final decision of the ECtHR.

1.2. Possible challenges in the application of the new legislation

Reopening of the criminal process will certainly face many challenges in its implementation in practice. Apart from procedural elements such as, the process of acquisition of material and scientific evidences over a long period of time, the hearing of witnesses over a long period of time, there are two other aspects which need careful address in the future.

a) the status of detainee pending the retrying proceedings

Here it is noteworthy to highlight the right of the applicants to seek for release during the retrying proceedings. In the Caka group of cases, the status of detained for the applicants pending the reopening of proceedings was noted with concern form the Committee of Ministers during supervision of execution of ECtHR judgements on these cases. More concretely, the Committee of Ministers in its decision 1193rd meeting – 6 March 2014 recalled that,

- the applicants in this group of cases were all convicted to terms of imprisonment on the basis of the proceedings found unfair by the European Court;

-strongly deplored that the applicant *Shkalla* remains imprisoned on the basis of the decision criticized by the Court's judgment despite his efforts, since 2011, to obtain a review of his case;

Two years later Committee of Ministers, in the final resolution adopted on 21 September 2016 for the Caka group of cases, considered that this issue could be considered addressed as the applicants enjoy the means to seek release during the retrying proceedings.

The individual measures taken in these cases, in particular that all the applicants have had an effective possibility to obtain reopening of the impugned proceedings and that, for those applicants who requested it, guarantees were given that the new proceedings either had been or would be conducted in accordance with the requirements of Article 6 of the Convention and that, pending these proceedings, the applicants could request release; considered accordingly that no further individual measures are required in

However, the amendment in the CPC, in the Article 453.4 clearly provides that until a decision is rendered by the retrying court pursuant to Article 456 of this Code, the convicted person retains the same procedural position.

> Article 453/4 (as amended)
>
> 4. pending the delivering of decision by the retrying court, according to article 456 of this Code, the convicted sustains the same procedural status.
>
> Article 454
>
> 1. The court accepting a request may decide to suspend the execution of the sentence. 2. Against the decision the parties may appeal to the court of appeal, whose decision cannot be contested. 3. At the request of the civil defendant, the court charged with the retrial of the case may decide to suspend the execution of civil liability for as long as the trial lasts. "

b) The effect of reopening in cases where the trial has different co-defendants, etc.

Taking also as reference the point made in the section 5.12, regarding the application of the principle of *beneficium cohaesionis*[277], in the context of the Albanian domestic practice the reopening of criminal proceedings following judgments of the Court might be complex. The decision allowing the reopening of the case is to be beneficial also to the applicant's co-accused. In practice this fact might strain the co-defendant, the courts and the investigative bodies in terms of respecting the prescribed time limits. In such a case the deadlines start running for all the accused at the same time, despite the fact that there is only one applicant requiring the reopening of the proceedings. The situation might appear more complex in case the applicants (as co-defendants) have been tried *in abstentia*. The new amendment of CPC has added two additional provisions in the article 450 of CPC, concerning the review of final criminal decisions for the accused *in abstentia*. More concretely,

> dh) when the extradition of the convicted person in absentia is provided by the explicit condition of the retrial of the case. The request for review may be filed within thirty days from the date the person was extradited. The application submitted within the deadline cannot be rejected;
>
> e) When a person has been tried in absentia under Article 352 of this Code and requested the retrial of the case. The request has to be filed within thirty days from the date of receipt of the notice. The request submitted within the deadline cannot be refused. "

Given the tight procedural deadlines, the review proceedings might turn very complex in detriment of the rights of the other co-defendants, who did not apply for the reopening of proceedings.

[277] *Beneficium cohaesionis is a Latin phrase that indicate that the beneficial effects of an appeal or revision judgments are also applied to those defendants who have not lodged it and as far as they are concerned, for instance in relation to material errors or establishment of facts.*

Case study: ECtHR 'Judgement in the cases "Kaçiu and Kotorri v. Albania**"**

Kaçiu and Kotorri v. Albania:[278] The applicants Kaçiu and Kotori were co-charged with committing a serious criminal offense in the city of Tirana. They were found guilty and sentenced on the basis of several evidences, including Kaçiu's testimony received during investigations by the police. After the trial, two times by the court of first instance, three times by the Court of Appeal and three times by the Supreme Court, the applicants were finally found guilty and sentenced to prison. Albania's Constitutional Court in 2007 refused to examine the applicants' request for the cancelation of the decisions.

With a final decision of 2013, the ECtHR decided to accept the applicants' application by finding a violation of Article 3, 6§1§3 during the course of judicial proceedings by the Albanian authorities. The ECtHR held that Kaçiu had been subjected to torture and the statements made by him, without the presence of his attorney, were the main evidence on which the guilty plea was based for the two applicants.

*The Applicant **Olsi Kaçiu*** has served his sentence and has not lodged a request before the Supreme Court for review of the aforementioned conviction decisions. Pursuant to the holdings of the Court, the reopening of the proceedings should be considered as a prerequisite for the redress of violation found, only if requested by the applicant.

*The other applicant **Elidon Kotorri*** lodged a request before the Supreme Court with the object of review of the impugned criminal proceedings. The Criminal College of the Supreme Court, after reviewing the case, pursuant to the findings of the European Court of Human Rights and the consolidated practice of the former on the review of domestic decisions stemming from the findings of violations by the ECtHR, remitted the case to the Tirana District Court by decision no. 00-2014- 1945, dated 05.11.2014. The applicant has not requested the suspension of the execution of sentence before the Supreme.

The Tirana District Court, after considering the findings of the European Court of Human Rights, the duties set by the Supreme Court in its decision no. 00-2014- 1945, dated 05.11.2014, all the facts of the file and accepting the request of the applicant for summary trial, with decision no. 1742, dated 21.05.2015, found the defendant Elidon Kotorri guilty of three counts the offense of "premeditated murder committed in complicity"[279]; guilty of the offense of "attempted premeditated murder committed in association "[280]; guilty on the offense of "Production and illegal possession of military weapons and ammunition"[281].The applicant was sentenced by 25 years of imprisonment.[282] The decision was upheld by the Tirana Court of Appeals, while it has been referred to the Supreme Court on the 13th of May 2016.[283]

[278] *Kaçiu and Kotorri v. Albania, applications no. 33192/07 and 33194/07, 25/06/2013 available at http://hudoc.echr.coe.int/eng?i=001-121770*

[279] *provided by Articles 78-25 of the Criminal Code (criminal provisions in force at the time of the offense), and based on that provision sentenced him to 25 (twenty five) years of imprisonment for each count*

[280] *provided by Articles 78-25-22 of the Criminal Code (criminal provisions in force at the time of the offense), and based on that provision sentenced him to 20 (twenty) years of imprisonment*

[281] *provided by Article 278/2 of the Criminal Code (criminal provisions in force at the time of the offense), and based on that provision sentenced him to 2 (two) years of imprisonment*

[282] *Pursuant to Article 55 of the Criminal Code, in joinder of the sentences, the defendant Elidon Dilaver Kotorri, was sentenced to life imprisonment. Furthermore, pursuant to Article 406/1 of the Criminal Procedure Code on the summary trial request by part of the applicant, he was sentenced to 25 (twenty five) years of imprisonment.*

[283] *On 29.05.2015, the applicant has lodged an appeal with the Tirana Court of Appeals. The court, with decision no. 406, dated 04.04.2016, upheld the decision no. 1742, dated 21.05.2015, of the Tirana District Court on all*

Questions for consideration:

a) Discuss the application of the principle of *beneficius cohaesionis*, in the context of the case, and how it affects the procedural rights of the co-defendant Olsi Kaciu and Elidon Kotorri, in consideration of the fact that the request for the review of the final conviction decision was submitted only by the applicant Kotorri.

b) Presuming the amendment of the CPC have entered into force, if you were the judge to decide on the review of the conviction decision, how would you make your decision on the case.

5. Overview of the situation of reopening of criminal proceedings across CoE Member States

5.1 National laws and practices

Following judgments of the European Court of Human Rights, the Committee of Ministers :

"I. Invites [...] the Contracting Parties to ensure that there exist at national level adequate possibilities to achieve, as far as possible, restitutio in integrum;

II. Encourages the Contracting Parties, in particular, to examine their national legal systems with a view to ensuring that there exist adequate possibilities of re-examination of the case, including reopening of proceedings, in instances where the Court has found a violation of the Convention, especially where:

(i) the injured party continues to suffer very serious negative consequences because of the outcome of the domestic decision at issue, which are not adequately remedied by the just satisfaction and cannot be rectified except by re-examination or reopening, and

(ii) the judgment of the Court leads to the conclusion that

(a) the impugned domestic decision is on the merits contrary to the Convention, or

(b) the violation found is based on procedural errors or shortcomings of such gravity that a serious doubt is cast on the outcome of the domestic proceedings complained of."

The issue of reopening of proceedings as a form of *restitution in integrum* was the object of RecommendationR (2000) 2 of the Committee of Ministers to member states on the re-examination or reopening of certain cases at domestic level. In 2008 the CDDH reviewed the implementation of the Recommendation and in 2015 the Committee of Experts on the Reform of the Court (DH-CDR) conducted an exchange of information amongst the Member States in order to identify good practices or procedural obstacles to the reopening of proceedings. What follows is an overview of the situation based on such findings and the replies provided by the Member States to the questions submitted by the CM. [284]

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counts. This decision is enforceable, but not final. The applicant has presented recourse to the Supreme Court. The file number of the case is 52104-00824-00-2016

[284] *Available at http://www.coe.int/t/dghl/standardsetting/cddh/reformechr/Reopening-en.asp*

The right to have unfair or otherwise unjust proceedings reopened is generally recognised at national level. The reopening of proceedings or the re-examination of the situation of the applicant is not, however, the only mean as there is, indeed, a plethora of examples in the CM's practice within the framework of its supervisory role of execution of the Court's judgments, whereby other solutions were found and enabled the placement of the applicant back, insofar as possible, in the situation he/she would have been in had the violation not happened. It is noteworthy to mention *ad hoc* solutions through the re-examination of administrative proceedings or through compensation for the loss of an opportunity – which the Court itself has often applied in its case-law by affording the applicant pecuniary compensation for the loss of an opportunity to avoid dealing with sensitive matters such as legal security or third parties' interests. Reopening is thus a significant means, but one among many others. However, it is true that the possibility to obtain a re-examination or a reopening at domestic level often facilitates the execution process and speeds up its conclusion. Currently, thirty-three States allow the reopening of criminal proceedings.[285] In thirty countries the reopening of criminal proceedings is provided for by laws.[286] In two States, before being introduced into criminal legislation, reopening was first introduced by a judgment of the Constitutional Tribunal through a dynamic interpretation of the existing provisions.[287]

Successful cases of reopening have been recorded in a number of member States,[288] where the finding of an article 6 violations led to the annulment of the initial impugned domestic judgments and the re-examination of the case resulting in the rectification of the shortcomings identified by the Court with the same or a different outcome (e.g. acquittal, reduction or suspension of a sentence).[289]

5.2 Means other than the reopening of proceedings by which judicial systems ensure the existence of adequate possibilities to achieve, insofar as possible, *restitutio in integrum*:

Other than re-examination, which is defined as the re-assessment, normally by the same decision- making body, of the situation that had given rise to a violation of the Convention, this being capable also of leading to the award of that which had been requested during the original procedure., the following also appear to be alternatives available: tort liability, amnesty, grace, rehabilitation, un-conditional release, restoration of rights, procedural acceleration, abstention from execution of certain decisions or the correction of information in the public records such as removal from the judicial record, public excuse or pardon.

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[285] *Albania, Armenia, Austria, Belgium, Bosnia and Herzegovina, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Italy, Latvia, Lithuania, the Republic of Moldova, the Netherlands, Norway, Poland, Portugal, Romania, Russian Federation, San Marino, Serbia, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, and Turkey.*

[286] *Albania, Austria, Belgium, Bosnia and Herzegovina, Croatia, Cyprus, Estonia, Czech Republic, Denmark, Finland, France, Georgia, Germany, Greece, Latvia, Lithuania, the Republic of Moldova, the Netherlands, Norway, Poland, Portugal, Romania, Russian Federation, San Marino, Serbia, Slovak Republic, Slovenia, Spain, Switzerland, Turkey.*

[287] *Spain, judgment 245/1991 of 16 December 1991 and Italy, judgment No. 113 of 4 April 2011.*

[288] *See, for example, Estonia, France, Poland, Russian Federation, Slovak Republic.*

[289] *Estonia, France, the Netherlands, Poland.*

Re-examination is most often cited as the solution for obtaining, so far as possible, *restitutio in integrum* in above all the specific fields of civil law, for example family rights or those concerning a person's situation. Equally, many states submitted information indicating that re- examination would be possible in the specific fields of administrative law, such as authorisation to engage in an economic activity, law concerning the building and construction sector or the rights of foreigners and refugees.

5.3. Whether the possibility of reopening differs according to whether the proceedings at issue were unfair or whether it was their outcome that violated the Convention

With the exception of a few (Finland, Moldova, Norway), the majority of member States make no distinction between the two situations.

5.4. Procedural rules applicable to the reopening of criminal proceedings:

In the majority of member States, the reopening of criminal proceedings is possible, either at the request of the applicant or at that of either the public prosecutor or some other public authority (Austria, Belgium, Bosnia-Herzegovina, Bulgaria, Croatia, Cyprus, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Latvia, Lithuania, Luxembourg, Malta, Moldova, the Netherlands, Norway, Poland, Romania, the Russian Federation, San Marino, Slovakia, Slovenia, Spain, Switzerland, the "former Yugoslav Republic of Macedonia," Turkey and the United Kingdom), and legislative reforms to this end are underway in certain other states. Nevertheless, Member States have implemented the Recommendation in different ways, for example as regards the competent bodies or the time-limits within which reopening is possible.

5.5. Costs of the procedure

In most States, the legal costs can, under certain conditions, be at the State's expense (Azerbaijan, Belgium, Bosnia-Herzegovina, Bulgaria, Croatia, the Czech Republic, Denmark, Finland, Germany, Hungary, Iceland, Lithuania, Luxembourg, Malta, Moldova, the Netherlands, Norway, Poland, Romania, Serbia, Slovakia, Sweden, Switzerland, Turkey and the United Kingdom). These conditions can include the admissibility of the request for reopening, the acquittal of the defendant or the fact that the person making the request has succeeded in obtaining the reopening of proceedings.

5.6. Legal aid for the request to reopen

Both in cases when the cost of reopening is not borne by the State (as indicated above) or after the case is being reopened, there remains an issue as to the possibility that the person, who has been already found guilty in the first set of proceedings, be granted legal aid. A large number of States allow for the possibility of granting legal aid to the person who wishes to re-open proceedings (Austria, Azerbaijan, Belgium, Bosnia-Herzegovina, Bulgaria, Croatia, the Czech Republic, Finland, France, Germany,

Georgia, Hungary, Iceland, Lithuania, Luxembourg, Malta, Moldova, the Netherlands, Norway, Poland, Switzerland, Turkey and the United Kingdom).

5.7. Prohibition of reformatio in pejus

Reformatio in peius (from Latin *reformatio*, 'change' or 'reformation', and *peius*, 'worse') is an expression used in law meaning that a decision from a court of appeal is amended to a worse one. This means that following an appeal, the appellate court cannot put a sole appellant in a worse position than if he had not appealed the first instance decision. *Reformatio in pejus*following re-openingis prohibited in many member States (Austria, Azerbaijan, Bosnia- Herzegovina, Bulgaria, Croatia, the Czech Republic, Denmark, Finland, Germany, Luxembourg, Moldova, the Netherlands, Norway, Poland, Romania, Serbia, Slovakia, Sweden, Turkey and the United Kingdom).

5.8. Possible suspension of other proceedings

As regards the extent to which the reopening of criminal proceedings implies the suspension of other proceedings, there do not seem to be pre-established rules, with the jurisdictions that handle the other proceedings taking their decision on a case-by-case basis.

5.9. The issue of possible re-examination in the context of a procedure for compensation made against the State on the basis of a finding of a violation of the Convention:

As certain States have indicated, this possibility is above all useful when there is no other possibility for obtaining re-examination or reopening, whether because there is no legal provision or because it would affect the principle of legal certainty, or simply because the objective pursued during the first procedure can no longer exist (for example, the right to exercise a professional activity for a particular period in the past). A sort of re-examination can thus take place, in the sense that the initial decision can be considered ill-founded so that compensation can be awarded (Germany, the Netherlands, Sweden). The decision will not, however, be modified without the procedure being reopened (Sweden).

5.10. Reopening of proceedings: possible obstacles

Practical exercise

Instructions for trainers

Distribute 1 copy of the case-study to participants. Divide participants into small groups and ask them to go through the case-study and answer the questions also in the light of the national legislation. Provide flipchart papers and markers so as to allow groups to summarize findings for each answer. After 10-15 minutes, reconvene groups in plenary and ask 1 or more representatives of each to present their findings. In order to avoid repetitions, invite groups to provide answers to only one question at once, then stimulate discussion in plenary. Use the content of this and the next paragraphs to guide and summarize discussion. Then move to next group and next question.

Alternatively, you can use the scenario to organize a mini-moot court or debate exercise, dividing participants into groups and asking them to sustain the position of the Government and of the applicant respectively.

Case-study no. 2

Agon and Arben were charged with attempted murder. None of those questioned at the scene claimed to have seen the applicant stab the victim, but two days later one of those present, Toni, made a statement to the police implicating the accused. At the trial, the prosecution applied for permission to read out Toni's statement on the ground that he was too frightened to appear in court. The trial judge granted that application after finding on the basis of evidence from both Toni and a police officer that Toni was afraid of giving evidence (although his fear was not caused by the defendant but by a medical condition) and that special measures, such as testifying behind a screen, would not allay his fears. Toni's witness statement was then read to the jury in his absence. Agon and Arben also gave evidence. The judge, in his summing up, warned the jury about the danger of relying on Toni's evidence, as it had not been tested under cross-examination. The applicants was convicted to 10 years' imprisonment.

Agon lodged an application to the ECtHR. The Court considered that Toni was the only witness who had claimed to see the stabbing. His uncorroborated eyewitness statement was, if not the sole, at least the decisive evidence against the applicant. It was obviously evidence of great weight without which the chances of a conviction would have significantly receded. Neither the trial judge's conclusion that no unfairness would be caused by admitting Toni's statement since the applicant were in a position to challenge or rebut it himself or by calling other witnesses, nor the judge's warning to the jury to approach Toni's evidence with care, could be a sufficient counterbalance to the handicap under which the defence had laboured. Even though Agon had given evidence denying the charge, the applicant had been unable to test the truthfulness and reliability of Toni's evidence through cross-examination and, since Toni was the sole witness apparently willing or able to say what he had seen, the applicant was not able to call any other witness to contradict his testimony. Further, no matter how clearly or forcibly expressed, a warning by the judge in his direction to the jury of the dangers of relying on untested evidence could not be a sufficient counterbalance where an untested statement of the only prosecution eyewitness was the only direct evidence against the applicant. The decisive nature of Toni's statement in the absence of any strong corroborative evidence in the case meant the jury were unable to conduct a fair and proper assessment of the reliability of Toni's evidence. Examining the fairness of the proceedings as a whole, the Court concluded that there had not been sufficient counterbalancing factors to compensate for the difficulties to the defence which resulted from the admission of Toni's statement. The Court, therefore, concluded for a violation of article 6 ECHR . Following the judgment Agon asked that proceedings be re-opened and his case retried. Toni, meanwhile, had died.

Questions to participants:

1. Has Arben a right that proceedings be re-opened in its favour too?
2. Does Arben need to introduce a formal request or should the Prosecutor request the re-opening?
3. Should Arben (and Agon, in case you answered yes to question no. 1) be released pending reopening of proceedings?
4. What would be the criteria to be applied to the decision under no. 3?
5. Since Toni died, how can the proceedings be held?
6. What are the rights, if any, of the victim?

Solution keys:

Part of the facts of the case are taken from Al-Khawaja and Tahery v. the United Kingdom [GC], applications no. 26766/05 and 22228/06, 15.12.2011 available at http://hudoc.echr.coe.int/eng?i=002-262 (English). There, the Court reiterated that article 6 § 3 (d) ECHR enshrined the principle that, before an accused can be convicted, all evidence against him must normally be produced in his presence at a public hearing with a view to adversarial argument. Exceptions to this principle were possible but must not infringe the rights of the defence. As a rule, this required that the accused should be given an adequate and proper opportunity to challenge and question a witness against him, either when that witness made his statement or at a later stage of the proceedings. Two consequences followed from this general principle.

First, there had to be a good reason for admitting the evidence of an absent witness. Good reason existed, *inter alia*, where a witness had died or was absent owing to fear attributable to the defendant or those acting on his behalf as, in this latter case, the defendant had to be taken to have waived his rights under Article 6 § 3 (d). Where the witness's absence was due to a general fear of testifying not directly attributable to threats by the defendant or his agents, it was for the trial court to conduct appropriate enquiries to determine whether there were objective grounds, supported by evidence for that fear. Before a witness could be excused from testifying on grounds of fear, the trial court had to be satisfied that all available alternatives, such as witness anonymity and other special measures, would be inappropriate or impracticable.

Second, a conviction based solely or to a decisive degree on the statement of an absent witness whom the accused has had no opportunity to examine or to have examined, whether during the investigation or at the trial, would generally be considered incompatible with the requirements of fairness under Article 6 ("sole or decisive rule"). This was not, however, an absolute rule and was not to be applied in an inflexible way, ignoring the specificities of the particular legal system concerned, as that would transform the rule into a blunt and indiscriminate instrument that ran counter to the traditional way in which the Court approached the issue of the overall fairness of the proceedings, namely to weigh in the balance the competing interests of the defence, the victim, and witnesses, and the public interest in the effective administration of justice. Accordingly, even where a hearsay statement was the sole or decisive evidence against a defendant, its admission as evidence would not automatically result in a

breach of Article 6 § 1. At the same time where a conviction was based solely or decisively on the evidence of absent witnesses, the Court had to subject the proceedings to the most searching scrutiny. Because of the dangers of the admission of such evidence, it would constitute a very important factor to balance in the scales and one which would require sufficient counterbalancing factors, including the existence of strong procedural safeguards. The question in each case was whether there were sufficient counterbalancing factors in place, including measures that permitted a fair and proper assessment of the reliability of that evidence to take place.

Practical exercise

Instructions for trainers

Distribute 1 copy of the case-study to participants. Divide participants into 4 groups and ask them to go through the case-study and answer the questions. Provide flipchart papers and markers so as to allow groups to summarize findings for each answer. After 10-15 minutes, reconvene groups in plenary and ask representatives of the first 2 groups to present some of their findings. Proceed with remainder of groups and findings and have plenary discussion Use the key solution to lead the discussion and/or debrief.

Alternatively, you can use the scenario to organize a mini-moot court or debate exercise, dividing participants into groups and asking them to sustain the position of the Government and of the applicant respectively.

Case-study no. 3

Following re-opening of proceedings, Albert undergoes a new trial for organising the abduction of a group of people. The Prosecution produces the recordings of telephone conversations made by the police in one of the victims' flat. Citing the Operational and Search Activities Act, the court refused to disclose to the defence the materials relevant to the authorisation of the wiretapping. In convicting Albert, the court also relied heavily on the written testimonies of three important witnesses, which had been obtained by an investigator at the pre-trial stage and read out at the trial. As these witnesses had moved outside the country, the court requested the foreign authorities to secure their attendance at the trial, but without success. Two of the witnesses never appeared before the Albanian courts, and eventually one attended only the appeal hearing. Nor was the applicant able to question them during the pre-trial investigation. However, the three witnesses were questioned in Albania by the defence lawyers after the start of the trial and sent written statements to the court retracting their earlier testimony. They all stated that they had falsely accused the applicant, and that their previous statements to the prosecution had been given under pressure. The defence applied to the trial judge for the admission of these statements. However, the court declared them inadmissible since the law prohibited defence lawyers from questioning witnesses after they had been questioned by the prosecution and in a manner that was not in accordance with the "proper" procedure for collecting of evidence prescribed by law. The applicant's conviction was in the main upheld on appeal.

Questions:

1. Can it be said that the State put in place reasonable efforts to ensure presence of witnesses in Court?

2. What are the fair trial implications in case of impossibility to secure the presence of witnesses in the course of proceedings?

3. What are the acceptable limitations to the principles that witnesses should be examined and counter-examined in the course of adversarial proceedings?

Solution key

Law: Materials withheld from the defence: The Court could not rule out the possibility that the materials in question might have been helpful to the defence, which would, therefore, have had a legitimate interest in seeking their disclosure. However, it was prepared to accept, having regard to the context of the case, that the documents sought by the applicant might have contained certain items of sensitive information relevant to national security. In such circumstances the national judge enjoyed a wide margin of appreciation in deciding on the disclosure request lodged by the defence. The question arose whether the non-disclosure had been counterbalanced by adequate procedural guarantees. The materials relating to the authorisation of the wiretapping had been examined by the presiding judge *ex parte*. Therefore, the decision to withhold certain documents had been taken not by the prosecution unilaterally, but by a member of the judiciary. However, the court had not analysed whether the materials would have been of any assistance to the defence or whether their disclosure would, at least arguably, have harmed an identifiable public interest. The court's decision had been based on the type of material at issue, not on an analysis of its content. Having regard to the Operational and Search Activities Act, which prohibited in absolute terms the disclosure of documents relating to operational and search activities, the court's role in examining the disclosure request lodged by the defence had been very limited. The decision-making process had therefore been seriously flawed. The impugned decision was vague and did not specify what kind of sensitive information the materials relating to the surveillance operation could contain. The court had accepted the blanket exclusion of all the materials from adversarial examination. Furthermore, the surveillance operation had not targeted the applicant or his co-accused. In sum, the decision to withhold materials relating to the surveillance operation had not been accompanied by adequate procedural guarantees, and had not been sufficiently justified.

Admissibility of witness statements: The defence had been in a disadvantageous position *vis-à-vis* the prosecution: whereas the prosecution had been able to examine the key witnesses directly, the defence had been deprived of that opportunity. However, the applicant's inability to examine these witnesses in person could be attributed to certain objective circumstances which were outside the control of the Russian authorities. Nevertheless, that fact alone did not suffice to conclude that the evidence had been taken and examined in a fair manner. The defence had not been allowed to produce new written depositions obtained from the witnesses. The evidence submitted by the defence was relevant and important. The three witnesses at issue were key witnesses for the prosecution. By obtaining new statements from them the defence had sought not only to produce exculpatory evidence, but also to challenge the evidence against the applicant. When refusing to examine the new statements, the court had relied on a domestic law provision which did not appear to pursue any identifiable legitimate interest. In the particular circumstances of the case, namely where the applicant had been unable to

examine several key witnesses in court or at least at the pre-trial stage, the refusal to admit the statements obtained by the defence had not been justified. The Court, however, emphasised that it was not taking a stand on the assessment of that evidence, which was the prerogative of the domestic courts.

Overall fairness of the proceedings: The defence had been placed at a serious disadvantage vis-à-vis the prosecution in respect of the examination of a very important part of the case file. In view of the importance of appearances in matters of criminal justice, the proceedings in question, taken as a whole, had not satisfied the requirements of a "fair hearing".

Based on Mirilashvili v. Russia, application no. 6293/04, 11/12/2008 available at http://hudoc.echr.coe.int/eng?i=001-90099

5.11 Reopening of proceedings: possible solutions

In addition to the practical problems illustrated above, res judicata and legal certainty (finality of litigation, statute of limitation) also represent an obstacle to reopening. These reasons justify the absence of the possibility to reopen proceedings.[290]The following solutions, however, were noted to overcome obstacles:

a) The impossibility of reopening can be overcome by a dynamic interpretation of anexisting provision of the Constitution, the Organic Law regarding the Constitutional Tribunal and the Law on Criminal Procedure.[291]

b) *Res judic*ata and *ne bis in idem*[292] – To overcome the procedural bars to reopening,such as *res judicata* of the domestic judgments, the principle of direct applicationof the Convention and the direct effects of the Court's judgments in the nationallegal order could be of relevance. The Court's judgments are to be considered"writ for execution" and "an exceptional circumstance" requiring extraordinaryrevision of judgments.[293] In Greece, for example, reopening is ordered only in cases where the violation found has negativerepercussions for the judgment of the criminal court and the damage caused can only be repaired throughre-examination of the case. It is for this reason, moreover, that the Court of Cassation has refused reopeningin cases of excessive length of proceedings, holding that this violation does not affect the judgment of thedomestic court. Amendments to legislations have also been presented (e.g. France).

c) Restrictive criteria for reopening were overcome by a non-formalistic interpretation

[290]*Liechtenstein and Ireland.*
[291]*Spain.*
[292]*Non bis in idem, which translates literally from Latin as "not twice in the same [thing]", is a legal doctrine to the effect that no legal action can be instituted twice for the same cause of action. It is a legal concept originating in Roman Civil Law, but it is essentially the equivalent of the double jeopardy doctrine found in common law jurisdictions. For the purpose of the re-opening of proceedings the principle of res judicata and ne bis in idem might represent an obstacle as their function is to ensure certainty of legal decisions, when they become final, and impede that a person is tried more than one for a given criminal act.*
[293]*The Republic of Moldova.*

by a domestic court.[294] For instance, in Poland, the Supreme Court applied a non-formalistic interpretation of a relevant provision to allow their opening of compensatory proceedings for unjustified detention (violation of Article 5 para. 5 of the Convention). Furthermore, during the exchange of views and the round table organised by the Department for the Execution of the Court's judgments, it was noted that, time-limits[295] for seeking reopening shall be reasonable, take into account the length of proceedings before the Court, and be more clearly defined.

d) Errors in the procedure committed by the applicant and lack of information – The relevant judicial organ and parties are kept informed of the judgment finding a violation.[296] If a court learns that a reason for reopening criminal proceedings exists, it shall inform the convicted person or the person authorised to file the motion on his/her behalf.[297] The Office of the Government Agent can help in redirecting the application.[298]

e) Procedural difficulties linked to the passage of time can be dealt with by allowing other persons to reopen, such as the prosecutor or family members in case of death or absence of the person concerned.[299] One State amended its law to this purpose and provided for an extensive list of representatives.[300] In case the passage of time affects the possibility to hear witnesses, efforts shown by the jurisdictions to locate them are considered sufficient for the Committee of Ministers to close the case.[301]

f) In order to avoid cases of *reformatio in pejus*, the roles of the Prosecutor and the Government Agent were mentioned.[302]

5.12The principle of *beneficium cohaesionis*

Beneficium cohaesionis is a Latin phrase that indicate that the beneficial effects of an appeal or revision judgments are also applied to those defendants who have not lodged it and as far as they are concerned, for instance in relation to material errors or establishment of facts. For example, the reopening of criminal proceedings following judgments of the Court finding violations of substantive articles of the Convention led to the revision, in favour of the applicant (usually acquittal) of the initial impugned judgment in Poland, Russian Federation and Slovak Republic. The application of the principle of *beneficium cohaesionis* was specifically mentioned by Bulgaria and Czech

[294] *See Czech Republic, Poland.*
[295] *There could be two types of time-limits: a time-limit calculated as from the date of the ECtHR judgment and the one calculated as from the finalisation of a ruling of a domestic authority. Depending on legal systems, both time-limits could apply.*
[296] *Turkey.*
[297] *Bosnia and Herzegovina.*
[298] *See Bosnia and Herzegovina and the Republic of Moldova.*
[299] Bosnia and Herzegovina, France and Poland, for example.
[300] *France has amended its law, Law No. 2014-640 of 20 June 2014, so that concubines, children, parents, grandchildren, great grandchildren and universal legatees and legatees by universal title can also reopen proceeding as a way to address the effects of the passage of time, such as the death or absence of the person concerned.*
[301] *Romania.*
[302] *See Bosnia and Herzegovina and the Republic of Moldova.*

Republic where, as a result, the decision allowing the reopening of the case is to be beneficial also to the applicant's co-accused. The possibility of reopening in respect of other accused persons in other criminal proceedings where the same violation (in terms of the combination of factual or legal circumstances) occurred was also highlighted by Finland and Poland. It was noted that other accused persons in other criminal proceedings should submit their requests for having their proceedings reopened, i.e. it does not take place automatically by virtue of one decision allowing the reopening.

Certain member States mentioned the creation of constitutional remedies for allegations of human rights violations. The possibility of such a remedy may allow for the reopening of national procedures before the lodging of an application before the Court, if the Constitutional Court finds a violation of rights guaranteed under the Convention and quashes the domestic decision.

Example: in the Czech Republic, the Constitutional Court has a general competence in there-opening of criminal and civil proceedings following a judgment of the Court. It was noted that, for the reopening to be possible, the applicant must have had his case brought before the Constitutional Court, which is also the last instance before which the case is brought before the lodging of an application before the European Court. The criteria for reopening are based on the Recommendation (2000) 2; even if the applicant's situation is redressed (by the Court or otherwise), reopening may still be permitted if it is in the general interest. Reopening is thus examined by the Constitutional Court, which can quash domestic court decisions and decide on reopening before other domestic courts. In cases of the reopening of constitutional proceedings, a plenary assembly will examine the previous procedure and use the Court judgment to come to a new decision. The applicant can also ask for legislation taken into account in the previous proceeding and contrary to the Constitution or Law (of the Convention) to be abrogated. In line with the principle of *beneficium cohaesionis* the reopening criminal proceedings was authorised in favour of the co-accused.

5.13 Responsibility for reopening of proceedings

Reopening is never automatic but subject to specific conditions and circumstances.[303] Despite the responsibility born by Prosecutors in the criminal justice system, as highlighted at the beginning of this Manual, it is accepted that reopening of proceedings be dependant from the decision of different state authorities, notably the Prosecutor.[304] The request for reopening may be deemed inadmissible notably if the time-limit for its introduction has expired, or if the consequences of the violation have ceased to exist.[305]

[303] *In Greece, for example, reopening is ordered only in cases where the violation found has negative repercussions for the judgment of the criminal court and the damage caused can only be repaired through re-examination of the case. It is for this reason, moreover, that the Court of Cassation has refused reopening in cases of excessive length of proceedings, holding that this violation does not affect the judgment of the domestic court. Amendments to legislations have also been presented (e.g. France).*

[304] *Austria, Bosnia and Herzegovina, Estonia, Finland, the Republic of Moldova.*

305 See, for example, Czech Republic, Finland and Spain.

5.14 Reopening following unilateral declarations or friendly settlements

Currently, six States allow the reopening of criminal proceedings following unilateral declarations or friendly settlements.[306] In Poland domestic regulations governing the reopening do not refer to "judgments" only but use a more general term "rulings" of an international body. In Czech Republic and Lithuania such a possibility could only be granted through an extensive interpretation by the domestic courts. In Belgium the possibility to reopen proceedings in case of unilateral declarations and friendly settlements is being considered with a draft law. Other States allow the reopening of civil or administrative proceedings following unilateral declarations and friendly settlements.[307]

Example: the case of *Taktakishvili v. Georgia*[308] resulted in the applicant's retrial and acquittal following the government's unilateral declaration containing a passage entitling the applicant to address a domestic court with a view to reopening the case. Similarly, in the case of *Sroka v. Poland*[309]. Earlier judgments were quashed and criminal proceedings discontinued in respect of the applicant having found that the act of which he had been accused no longer constituted a criminal offence, since, in the meantime, the relevant statutory provision had been repealed

The very definition of friendly settlements being the final resolution of the case of the Court and ending the applicant's status of victim, were presented as legal obstacles for reopening. In some States, legislation in its current form provides only for reopening following the Court's judgments.[310] This could be overcome through extensive interpretations or legislative changes. Regarding obstacles in practice, governments' commitments in unilateral declarations and friendly settlements is not perceived unanimously as capable of be imposed on the judiciary or legislative power and may not be possible for practical reasons (i.e. absence of legislation).[311] In the Republic of Moldova it is possible to work with the prosecution service in order to give effect to a friendly settlement or unilateral declaration. To facilitate the reopening process, more details should be given in friendly settlements and unilateral declarations notably on the subject matter of the proceedings before the Court.

Third persons/affected parties (victims, private parties, etc.)'s rights have sometimes been considered an obstacle to reopening following unilateral declarations or friendly settlements.

[306] *Czech Republic, Georgia, Latvia, the Republic of Moldova, Poland, Slovenia.*
[307] *Czech Republic (only in relation to friendly settlements), Georgia (only in relation to civil proceedings).*
[308] *Taktakishvili v. Georgia, application no. 46055/06, 16/10/2012 (dec.), available at http://hudoc.echr.coe.int/eng?i=001-114566*
[309] *Sroka v. Poland, application no. 42801/07, 06/03/2012 (dec.), available at http://hudoc.echr.coe.int/eng?i=001-109822*
[310] *For example in Spain.*
[311] *For example, Czech Republic, Lithuania and the Republic of Moldova.*

Example: in *Jeronovičs v. Latvia*[312](application No. 547/02), the competent prosecutor refused the applicant's request, which was based on the government's unilateral declaration as a newly disclosed circumstance, to reopen the criminal proceedings against the third persons. This has generated a fresh application before the Court (application no. 44898/10[313]) subject to the Grand Chamber proceedings.

All article 6 guarantees will apply to the reopened proceedings. The same cannot be said in connection to the proceedings aimed at the reopening of a case because a person whose sentence has become final and who applies for his case to be reopened is not "charged with a criminal offence" within the meaning of that Article (*Fischer v. Austria* (dec.)[314]). Only the new proceedings, after the request for reopening has been granted, can be regarded as concerning the determination of a criminal charge (*Löffler v. Austria*[315], §§ 18-19). Similarly, Article 6 does not apply to a request for the reopening of criminal proceedings following the Court's finding of a violation (*Öcalan v. Turkey*(dec.)[316]). However, supervisory review proceedings resulting in the amendment of a final judgment do fall under the criminal head of Article 6 (*Vanyan v. Russia*, § 58[317]).

5.15 Conclusions

When reopening is possible, it is necessary to ensure that specific limitations do not render the possibility impracticable in certain situations, for example the fact of too-short deadlines. In the same way, the absence of legal aid or the obligation to bear the costs of the procedure may, for the applicant, be just as much an obstacle to reopening a procedure. One can nevertheless welcome the fact that this is not the case in the great majority of member States.

Once reopening has been allowed, it is essential that the individual is treated as a defendant and that the presumption of innocence and the rules of provisional detention apply. On the other hand, when reopening is not possible, it depends on States' practice whether re- examination can be an effective means of affording adequate relief, especially in certain types of civil or administrative case. It is apparent from the replies to the questionnaire that there also exists a great number of other ways chosen by member States to achieve, insofar as possible, *restitutio in integrum*.

[312] *Jeronovičs v. Latvia, application no. 547/02, 01/12/2009, available at http://hudoc.echr.coe.int/eng?i=001-95965*
[313] *Jeronovičs v. Latvia application no. 44898/10, [GC] 05/07/2016, available at http://hudoc.echr.coe.int/eng?i=002-11092*
[314] *Fischer v. Austria, application no. 27569/02, 06/05/2003 (dec.), available at http://hudoc.echr.coe.int/eng?i=001-23193*
[315] *Löffler v. Austria, application no. 30546/96, 03/10/2000, available at http://hudoc.echr.coe.int/eng?i=001-58827.*
[316] *Öcalan v. Turkey, application no. 5980/07, 06/07/2010 (dec.), available at http://hudoc.echr.coe.int/eng?i=001-99978*
[317] *Vanyan v. Russia, application no. 53203/99, 15/12/2005, available at http://hudoc.echr.coe.int/eng?i=001-71673*

6. Interplay between articles 6 and other Convention provisions

6.1 Articles 6 and 5 ECHR: the issue of release pending reopened proceedings

One of the most sensitive questions arising from a violation of article 6 ECHR imposition the reopening of proceedings concerns the situation of those who are currently serving their conviction, which at the end of the retrial could very well be overturned.

> Article 5 § 1 (c) ECHR
>
> *"1. … No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:*
>
> *…*
>
> *(c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;"*

According to well-established case-law on article 5 ECHR, the expression "Effected for the purpose of bringing him before the competent legal authority" qualifies all the three alternative bases for arrest or detention under Article 5 § 1 (c) (*Lawless v. Ireland (no. 3)*[318], §§ 13-14; *Ireland v. the United Kingdom*[319], § 196), which must be continuously present in order to justify remand detention. It should also be remembered that detention pursuant to Article 5 § 1 (c) must be a proportionate measure to achieve the stated aim (*Ladent v. Poland*[320], §§ 55-56).

The question is thus whether or not individuals must (instead of may) be released pending the new proceedings. The refusal to release defendants was criticised by the Parliamentary Assembly of the Council of Europe in the case of Sadak, Zana, Dicle and Dogan v. Turkey[321] and also by the Committee of Ministers in an interim resolution. Relying on the presumption of innocence and the Court's judgment, the Committee of Ministers now considers that, in addition to the reopening of proceedings, the release of applicants is an integral part of the right to reparation "in the absence of any compelling reasons justifying their continued detention pending the outcome of the new trial".

[318] *Lawless v. Ireland (no. 3), application no. 332/57, 01/07/1961,available at http://hudoc.echr.coe.int/eng?i=001-57518*
[319] *Ireland v. United Kingdom, applications no. 5310/71 and 5451/72, (dec.) Commission (Plenary), 01/10/1972, available at http://hudoc.echr.coe.int/eng?i=001-142537*
[320] *Ladent v. Poland, application no. 11036/03, 18/03/2008, available at http://hudoc.echr.coe.int/eng?i=002-2097*
[321] *Doc. 10192, "Implementation of decisions of the European Court of Human Rights by Turkey", 1 June 2004, report by Mr Jurgens, §§7-9.*

6.1.1 The rules governing the detention of the convicted person/defendant once the application for reopening has been allowed

Whilst States enjoy a margin of appreciation as regards the consequences of the decision to reopen a procedure, they still have to guarantee application of the principle of the presumption of innocence and the principles concerning provisional detention, in conformity with Committee of Ministers' Resolution DH(2004)31[322] in the case of Sadak, Zana, Dogan and Dicle v. Turkey, as seems to be the case upon reading the replies received. This reasoning is all the more clear when the main criterion for reopening is that a serious doubt subsists concerning the outcome of the first procedure or that the first conviction is fundamentally contrary to the Convention. Continuing to hold in detention would undoubtedly raise various questions with regard to articles 5 and 6 § 2 of the Convention.

Example: ResDH (2004) 31 of 6 April 2004 recites that "*Stressing, in this connection, the importance of the presumption of innocence as guaranteed by the Convention; deplores the fact that, notwithstanding the reopening of the impugned proceedings, the applicants continue to serve their originalsentences …; stresses the obligation incumbent on Turkey, under Article 46, paragraph1, of the Convention, to comply with the Court's judgment in this case notably through measures to erase the consequences of the violation found for the applicants, including the release of the applicants in the absence of any compelling reasons*".

6.2 Reopening of proceedings and trial in absentia

The issue of trial in absentia is relevant for the purpose of the present work under two aspects. First, it might be that the first proceedings conducted in the absence of the accused violated the principle of article 6 ECHR and, thus, can be the object of reopening. Secondly, it might be that an accused, released pending the reopened proceedings, evade justice, it seems important to recall the main standards established in relation to trial in absentia.

According to the CM's Resolution (75) 11 of 21 May 1975, no one may be tried without having first been effectively served with a summons. The notification, moreover, must be served in time to enable the accused to prepare its defence and appear at the hearing. The only exception for which provision is made is that of cases in which the accused has deliberately sought to evade justice. Even if the accused has been served with a summons, the trial must not take place if the court considers that the personal appearance of the accused is indispensable or that there is reason to believe that the person has been prevented from appearing. The European Convention on the International Validity of Criminal Judgments, of 28 May 1979, also contains a definition of judgment rendered in absentia and lays down rules applicable to the enforcement of such judgments, dominated by the utilitarian concern to limit the possibility of such sentences being enforced without their previously being cleared.

Article 6(3) of the ECHR specifies that everyone charged with a criminal offense has the right "to defend himself in person or through legal assistance of his own

[322] *Available at https://rm.coe.int/168059ddae*

choosing…".Contrary to article 14 para. 3 lett. d) of the UN CCCPR, however, the ECHR does not specifically identify any right to be present in ones' trial. In the case of Colozza v. Italy[323], however, the Court clarified that "*Although this is not expressly mentioned in paragraph 1 of Article 6, the object and purpose of the Article taken as a whole show that a person 'charged with a criminal offence' is entitled to take part in the hearing. Moreover, sub-paragraphs (c), (d) and (e) of paragraph 3 guarantee to 'everyone charged with a criminal offence' the right 'to defend himself in person,' 'to examine or have examined witnesses' and 'to have the free assistance of an interpreter if he cannot understand or speak the language used"in court,' and it is difficult to see how he could exercise these rights without being present."* In Poitrimol v. France[324] it also clarified that "*Any waiver of the right to be present must be clear and unequivocal."* Judgments in absentia are thus legitimate under the ECHR when there is evidence that the person concerned intended to evade justice or genuinely waived its right to be present. In Colozza the Court also asserted that when domestic laws permit a trial in absentia, once the person becomes aware of the proceedings, it must be able to obtain, from a court which has heard him, a fresh determination of the merits of the case. Even when national legislation allows for trial in absentia, such as in the case of Krombach v. France[325], Governments are ready to stress the importance of the presence of the accused in the course of trials: in the above mentioned case the Government observed that "*The accused was called upon to present his or her version of the events and to reply to the questions of the judges, the jurors, and the public prosecutor. He or she could, among other things, challenge the conclusions of the expert witnesses and the depositions of the ordinary witnesses, call witnesses for the defence and request a confrontation with the victims. Lastly, in the event of a finding of guilt, the accused's presence enabled the judges to tailor the penalty to his or her personal circumstances.*"

Example: in the case of Huzuneanu v. Italy[326], the applicant was convicted in 2004 for murder by the Assize Court of Rome and sentenced to a term of imprisonment in proceedings in absentia. His officially appointed lawyer, with whom he never came into contact, had taken part in the proceedings, appealed against the decision at first instance and had also appealed to the Court of Cassation. Arrested abroad in 2006 and brought to Italy, the applicant applied for an extension of the time limit to appeal against his conviction. By a decision of 12 April 2007 the Rome Assize Court of Appeal recognized that the applicant had no actual knowledge of the proceedings and was entitled to the extension of the time-bar. However, it was open to him to appeal only against the decision of the second instance, since the only degree which the officially appointed lawyer had not used was the degree of cassation. The appellantwas ordered to be released. In a judgment of 13 January 2008 the Court of Cassation held that a person convicted in absentia loses his right to reopen the time limit for appeal if the defendant of his choice or the officially appointed lawyer had, even without the

[323] *Colozza v. Italy, application no. 9024/80, 12/02/1985, available at http://hudoc.echr.coe.int/eng?i=001-57462*
[324] *Poitrimol v. France, applicatio no. 4032/88, 23/11/1993, available at http://hudoc.echr.coe.int/eng?i=002-9734*
[325] *Krombach v. France, application no. 29731/96, 13/02/2001, available at http://hudoc.echr.coe.int/eng?i=001-114876 (Albanian version).*
[326] *Huzuneanu v. Italy, application no. 36043/08, 01/09/2016, available at http://hudoc.echr.coe.int/eng?i=001-166585*

knowledge of their client, challenged the contested decision and whether the competent domestic court had decided on their appeals. Consequently, they dismissed the applicant's appeal. In December 2009, the Constitutional Court declared Article 175 § 2 of the Code of Criminal Procedure to be contrary to the Constitution, inasmuch as this provision did not allow the accused who did not have effective knowledge of the proceedings to reopen the case Time to appeal against the decision rendered in absentia when the same appeal had previously been lodged by the lawyer. On the basis of the judgment of the Constitutional Court, the applicant lodged an application for recovery. This request was rejected. In its judgment the Court held that the applicant had not been able to benefit from a new decision on the merits of the accusation both in fact and in law, despite the fact that he was absent at trail (violation of Article 6 of the Convention). On 2 February 2017, within the supervision of the execution of the judgment, Italy indicated that the applicant had applied to the Perugia Court of Appeal for a review on the basis of the judgment of the European Court. By a decision of 31 December 2016 the Court of Appeal of Perugia declared the application admissible and ordered the applicant's release during the revision proceedings. This order was executed the same day. The oversight of the execution is still pending.

The right to be present at one's trial apply to both criminal courts and assize courts. Moreover, an accused does not lose the right to be effectively defended by a lawyer on account of not being present at trial.

Exercise

Launch a guided discussion on the issue of effective representation (with particular reference to trial in absentia) using the following questions:

1. Is trial in absentia allowed under the Albanian legislation?

2. Which are the minimum requirements of the effectiveness of defence in case the accused tried in absentia is represented, in the newly re-opened proceeding, by an ex officio lawyer?

3. Is the appointment of a defence lawyer sufficient? Can or should the national courts enter into the merits of the quality of the defence provided?

Guidelines for debriefing

Article 6 § 3 (c) enshrines the right to "practical and effective" legal assistance Bluntly, the mere appointment of a legal-aid lawyer does not ensure effective assistance since the lawyer appointed may die, fall seriously ill, be prevented for a protracted period from acting or shirk his duties (Artico v. Italy, § 33).

The right to effective legal assistance includes, inter alia, the accused's right to communicate with his lawyer in private. Only in exceptional circumstances may the State restrict confidential contact between a person in detention and his defence counsel (Sakhnovskiy v. Russia [GC], § 102). 48/67

If a lawyer is unable to confer with his client and receive confidential instructions from him without

surveillance, his assistance loses much of its usefulness (S. v. Switzerland, § 48; Brennan v. the UnitedKingdom, § 58). Any limitation on relations between clients and lawyers, whether inherent orexpress, should not thwart the effective legal assistance to which a defendant is entitled(Sakhnovskiy v. Russia [GC], § 102). To tap telephone conversations between an accused and hislawyer (Zagaria v. Italy, § 36) and to obsessively limit the number and length of lawyers' visits to theaccused (Öcalan v. Turkey [GC], § 135) represent further possible breaches of the requirement toensure effective assistance.

However, a Contracting State cannot be held responsible for every shortcoming on the part ofa lawyer appointed for legal-aid purposes or chosen by the accused (Lagerblom v. Sweden, § 56;Kamasinski v. Austria, § 65). Owing to the legal profession's independence, the conduct of the defence is essentially a matter between the defendant and his representative; the Contracting States are required to intervene only if a failure by counsel to provide effective representation is manifest or is sufficiently brought to their attention (ibid.; Imbrioscia v. Switzerland, § 41; Daud v. Portugal,

§ 38). State liability may arise where a lawyer simply fails to act for the accused (Artico v. Italy, §§ 33and 36) or where he fails to comply with a crucial procedural requirement that cannot simply be

equated with an injudicious line of defence or a mere defect of argumentation (Czekalla v. Portugal,

§§ 65 and 71).

6.3 Interplay between article 6 and article 8 ECHR: admissibility of evidence

Use the following case to generate a plenary discussion with the help of the questions listed below

Hypothetical case

In the course of the detention following the conviction pronounced at the end of a trial that was later declared in violation of article 6 ECHR, a conversation between Flori and another inmate in pre-trial investigations is tapped. The conversation is recorded in the course of investigations concerning the other inmate. During such conversation Flori discloses information concerning its responsibility for one of the crimes for which he was acquitted.

Questions

1. Can this evidence be used against Flori?
2. under which conditions?
3. What are the fair trial issues that can arise from the use of such evidence?
4. Can this evidence found a new conviction in the re-opened proceedings or shall fresh proceedings be brought against Flori for this new criminal offence?

Main principle

The question whether the use as evidence of information obtained in violation of Article 8 rendered a trial as a whole unfair contrary to Article 6 has to be determined with regard to all the circumstances of the case, and in particular to the question of respect for the applicant's defence rights and the quality and importance of the evidence in question

Annex I

Recommendation No. R (2000) 2 of the Committee of Ministers to member states on the re examination or reopening of certain cases at domestic level following judgements of the European Court of Human Rights[1]

(Adopted by the Committee of Ministers on 19 January 2000 at the 694th meeting of the Ministers' Deputies)

The Committee of Ministers, under the terms of Article 15.*b* of the Statute of the Council of Europe,

Considering that the aim of the Council of Europe is to bring about a closer union between its members;

Having regard to the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter "the Convention");

Noting that under Article 46 of the Convention on Human Rights and Fundamental Freedoms ("the Convention") the Contracting Parties have accepted the obligation to abide by the final judgement of the European Court of Human Rights ("the Court") in any case to which they are parties and that the Committee of Ministers shall supervise its execution;

Bearing in mind that in certain circumstances the above-mentioned obligation may entail the adoption of measures, other than just satisfaction awarded by the Court in accordance with Article 41 of the Convention and/or general measures, which ensure that the injured party is put, as far as possible, in the same situation as he or she enjoyed prior to the violation of the Convention (*restitutio in integrum)*;

Noting that it is for the competent authorities of the respondent state to decide what measures are most appropriate to achieve *restitutio in integrum*, taking into account the means available under the national legal system;

Bearing in mind, however, that the practice of the Committee of Ministers in supervising the execution of the Court's judgements shows that in exceptional circumstances the re-examination of a case or a reopening of proceedings has proved the most efficient, if not the only, means of achieving *restitutio in integrum*,

I. Invites, in the light of these considerations the Contracting Parties to ensure that there exist at national level adequate possibilities to achieve, as far as possible, *restitutio in integrum*;

II. Encourages the Contracting Parties, in particular, to examine their national legal systems with a view to ensuring that there exist adequate possibilities of re-examination of the case, including reopening of proceedings, in instances where the Court has found a violation of the Convention, especially where:

i. the injured party continues to suffer very serious negative consequences because of the outcome of the domestic decision at issue, which are not adequately remedied by the just satisfaction and cannot be rectified except by re-examination or reopening, and

ii. the judgment of the Court leads to the conclusion that

a. the impugned domestic decision is on the merits contrary to the Convention, or

b. the violation found is based on procedural errors or shortcomings of such gravity that a serious doubt is cast on the outcome of the domestic proceedings complained of.

EXPLANATORY MEMORANDUM

Introduction

1. The Contracting Parties to the Convention enjoy a discretion, subject to the supervision of the Committee of Ministers, as to how they comply with the obligation in Article 46 of the Convention "to abide by the final judgment of the Court in any case to which they are parties."

2. The Court has held: "a judgment in which the Court finds a breach imposes on the respondent State a legal obligation to put an end to the breach and make reparation for its consequences in such a way as to restore as far as possible the situation existing before the breach" (see inter alia the Court's judgment in the *Papamichalopoulos case against Greece* of 31 October 1995, paragraph 34, Series A 330-B). The Court was here expressing the well-known international law principle of *restitutio in integrum,* which has also frequently been applied by the Committee of Ministers in its resolutions. In this context, the need to improve the possibilities under national legal systems to ensure *restitutio in integrum* for the injured party has become increasingly apparent.

3. Although the Convention contains no provision imposing an obligation on Contracting Parties to provide in their national law for the re-examination or reopening of proceedings, the existence of such possibilities have, in special circumstances, proven to be important, and indeed in some cases the only, means to achieve *restitutio in integrum*. An increasing number of States have adopted special legislation providing for the possibility of such re-examination or reopening. In other States this possibility has been developed by the courts and national authorities under existing law.

4. The present recommendation is a consequence of these developments. It invites all Contracting Parties to ensure that their legal systems contain the necessary possibilities to achieve, as far as possible, *restitutio in integrum*, and, in particular, provide adequate possibilities for re-examining cases, including reopening proceedings.

5. As regards the terms, the recommendation uses "re-examination" as the generic term. The term "reopening of proceedings" denotes the reopening of court proceedings, as a specific means of re-examination. Violations of the Convention may be remedied by different measures ranging from administrative re-examination of a case (e.g. granting a residence permit previously refused) to the full reopening of judicial proceedings (e.g. in cases of criminal convictions).

6. The recommendation applies primarily to judicial proceedings where existing law may pose the greatest obstacles to new proceedings. The recommendation is, however, also applicable to administrative or other measures or proceedings, although such legal obstacles will usually be less important in these areas.

7. There follow, first, specific comments relating to the two operative paragraphs of the recommendation and, secondly, more general comments on questions not explicitly dealt with in the recommendation.

Comments on the operative provisions

8. Paragraph 1 sets out the basic principle behind the recommendation that all victims of violations of the Convention should be entitled, as far as possible, to an effective *restitutio in integrum.* The Contracting Parties should, accordingly, review their legal systems with a view to ensuring that the necessary possibilities exist.

9. Paragraph 2 encourages States that have not already done so, to provide for the possibility of re-examining cases, including reopening of domestic proceedings, in order to give full effect to the judgments of the Court. The paragraph also sets out those circumstances in which re-examination or reopening is of special importance, in some instances perhaps the only means, to achieve *restitutio in integrum*.

10. The practice of the Convention organs has demonstrated that it is primarily in the field of criminal law that the re-examination of a case, including the reopening of proceedings, is of the greatest importance. The recommendation is, however, not limited to criminal law, but covers any category of cases, in particular those satisfying the criteria enumerated in sub-paragraphs (i) and (ii). The purpose of these additional criteria is to identify those exceptional situations in which the objectives of securing the rights of the individual and the effective implementation of the Court's judgments prevail over the principles underlying the doctrine of *res judicata*, in particular that of legal certainty, notwithstanding the undoubted importance of these principles.

Sub-paragraph (i) is intended to cover the situation in which the injured party continues to suffer very serious negative consequences, not capable of being remedied by just satisfaction, because of the outcome of domestic proceedings. It applies in particular to persons who have been sentenced to lengthy prison sentences and who are still in prison when the Convention organs examine the "case". It applies, however, also in other areas, for example, when a person is unjustifiably denied certain civil or political rights (in particular in case of loss of, or non-recognition of legal capacity or personality, bankruptcy declarations or prohibitions of political activity), if a person is expelled in violation of his or her right to family life or if a child has been unjustifiably forbidden contacts with his or her parents. It is understood that there must exist a direct causal link between the violation found and the continuing suffering of the injured party.

12. Sub-paragraph (ii) is intended to indicate, in the cases where the above-mentioned conditions are met, the kind of violations in which re-examination of the case or reopening of the proceedings will be of particular importance. Examples of situations aimed at under item (a) are criminal convictions violating Article 10 because the statements characterised as criminal by the national authorities constitute legitimate exercise of the injured party's freedom of expression or violating Article 9 because the behaviour characterised as criminal is a legitimate exercise of freedom of religion. Examples of situations aimed at under item (b) are where the injured party did not have the time and facilities to prepare his or her defence in criminal proceedings, where the conviction was based on statements extracted under torture or on material which the injured party had no possibility of verifying, or where in civil proceedings the parties were not treated with due respect for the principle of equality of arms. Any such

shortcomings must, as appears from the text of the recommendation itself, be of such a gravity that serious doubt is cast on the outcome of the domestic proceedings.

Other considerations

13. The recommendation does not deal with the problem of who ought to be empowered to ask for reopening or re-examination. Considering that the basic aim of the recommendation is to ensure an adequate protection of the victims of certain grave violations of the Convention found by the Court, the logic of the system implies that the individuals concerned should have the right to submit the necessary requests to the competent court or other domestic organ. Considering the different traditions of the Contracting Parties, no provision to this effect has, however, been included in the recommendation.

14. The recommendation does not address the special problem of "mass cases", i.e. cases in which a certain structural deficiency leads to a great number of violations of the Convention. In such cases it is in principle best left to the State concerned to decide whether or not reopening or re-examination are realistic solutions or, whether other measures are appropriate.

15. When drafting the recommendation it was recognised that reopening or re-examination could pose problems for third parties, in particular when these have acquired rights in good faith. This problem exists, however, already in the application of the ordinary domestic rules for re-examination of cases or reopening of the proceedings. The solutions applied in these cases ought to be applicable, at least *mutatis mutandis*, also to cases where re-examination or reopening was ordered in order to give effect to judgments of the Court.

In cases of re-examination or reopening, in which the Court has awarded some just satisfaction, the question of whether, and if so, how it should be taken into account will be within the discretion to the competent domestic courts or authorities taking into account the specific circumstances of each case.

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[1] Considering that the quasi-judicial functions of the Committee of Ministers under the former Article 32 of the Convention will cease in the near future, no mention of the Committee of Ministers' decisions is made. It is understood, however, that should certain cases still be under examination when the recommendation is adopted, the principles of this recommendation will also apply to such cases.